

**Socha v Waterbury**

2007 NY Slip Op 30132(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0012734

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 9/26/06  
ADJ. DATE 12/29/06  
Mot. Seq. # 003 - MD

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BARBARA SOCHA and MARIA HAJKIEWICZ,	:	HAROLD A. SHAPIRO, P.C.
	:	Attorney for Plaintiffs
Plaintiffs,	:	325 Middle Country Road
	:	Selden, New York 11784-2545
- against -	:	
	:	SARETSKY KATZ DRANOFF & GLASS
MICHAEL A. WATERBURY	:	Attorneys for Defendant
	:	475 Park Avenue South
Defendant.	:	New York, New York 10016
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Upon the following papers numbered 1 to 45 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 40; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 41 - 43; Replying Affidavits and supporting papers 44 - 45; Other \_\_\_\_\_: (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (#003) by defendant, Michael A. Waterbury, for summary judgment pursuant to CPLR 3212 dismissing the action as against him is denied.

In this negligence action, plaintiffs, Barbara Socha and Maria Hajkiewicz, seek to recover damages for allegedly sustaining serious injuries in a motor vehicle accident which occurred on February 15, 2001. It is alleged that the vehicle owned and operated by plaintiff Socha and carrying plaintiff Hajkiewicz as a passenger was struck in the rear by a vehicle owned and operated by defendant, Michael A. Waterbury, at Syca more Avenue at its intersection with the North Service Road of Route 27 in the Town of Islip, New York. Before the court is a motion for summary judgment dismissing the action by defendant.

In the bill of particulars plaintiff Socha alleges that she sustained the following injuries: C5/6 herniation which required surgical intervention; C3/4 and C4/5 herniations; left shoulder injury; exacerbation of prior injuries to the low back and cervical spine. Plaintiff alleges that she was confined to the hospital for one day for surgery and was confined to bed and home for seven days following the

accident. She further alleges that she sustained injuries the following serious injury categories pursuant to NY Insurance Law §5102(d): permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Plaintiff Hajkiewicz alleges in the bill of particulars that she sustained a C5/6 herniated disc with radiculopathy which required surgical intervention; herniated disc at L3/4 with radiculopathy; decreased sensation to the right side of the body; and exacerbation of prior injuries to the cervical and lumbar spines. Plaintiff alleges that she was confined to the hospital for three days after surgery and was confined to bed and home for fourteen days after the accident. She also alleges that she sustained injuries in the following serious injury categories pursuant to NY Insurance Law §5102(d): permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Under the Insurance Law “[s]erious injury’ means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment” (Insurance Law 5102(d)). In the context of the plaintiff’s claims, the term “consequential” means important or significant (*Kordana v Pomellito*, 121 AD2d 783, 503 NYS2d 198, 200 [1986], *app dis*, 68 NY2d 848). The term, “significant,” as it appears in the statute, has been defined to “mean something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person had been curtailed from performing his usual activities to a great extent rather than some slight curtailment” (*Licari v Elliott*, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a *prima facie* case of serious injury as defined by Insurance Law 5102(d), the initial burden is on defendant “to present evidence, in competent form, showing that plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 396, 582 NYS2d 395 [1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1991]). Such proof in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). The proof must be viewed in a light most favorable to the non-moving party (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810

[1990]).

In support of the motion to dismiss plaintiff Socha's causes of action, defendant submits, among other things, the pleadings; bill of particulars; a sworn report by Craig B. Ordway, M.D., an orthopedic surgeon; a sworn report by Howard B. Reiser, M.D., a neurologist; and a sworn report by Sondra Pfeffer, M.D., a radiologist.

Dr. Ordway avers that he examined plaintiff Socha on June 30, 2004. He states that plaintiff discussed previous motor vehicle accidents with him, the first of which occurred in 1998 when plaintiff claimed to have injured her right heel. Dr. Ordway states that the second accident occurred in 1999 when plaintiff claimed to have injured the lower back. At the examination, Dr. Ordway observed that plaintiff severely limited her cervical motion and tightened the neck muscles. There was no limitation of movement of the upper extremities. He noted that plaintiff complained of pain when bending forward. Plaintiff also complained of numbness and weakness in the entire right leg, but Dr. Ordway noted no limitation of motion of any joint. He observed plaintiff to willfully contract the paravertebral musculature. He concludes that plaintiff's complaints are not causally related to the accident of February 15, 2001.

Dr. Reiser avers that he performed an examination of plaintiff Socha on December 6, 2004. He observed negative Tinel's and Phalen's signs in the cervical spine. He also observed negative bilateral straight leg raising. He notes that there is no objective deficit which could be considered causally related to the events of February 15, 2001.

Dr. Pfeffer states that she reviewed magnetic resonance imaging ("MRI") films taken of plaintiff's Socha's cervical and lumbar spines. She avers that each MRI reveals degenerative disease, osteophyte development and disc bulging but no herniations. Dr. Pfeffer states that osteophyte complexes cannot possibly develop within just 4 - 5 weeks. She opines that there was pre-existing significant degenerative disc pathology at the time of the accident and that there is no evidence of acute pathology.

In support of the motion for summary judgment dismissing the allegations of plaintiff Hajkiewicz, defendant submits among other things, the bill of particulars; sworn reports by Craig B. Ordway, M.D., Howard B. Reiser, M.D. and Sondra Pfeffer, M.D. Dr. Ordway avers that he examined plaintiff on June 30, 2004. He noted that plaintiff would permit only 10 degrees of upward gaze and 15 degrees of downward gaze with complaints of pain, however no spasm was noted. Examination of the mid and lower back revealed an observation that plaintiff would not bend forward or permit backward or sideways motion during the examination. However, plaintiff was able to sit with her hips flexed at 90 degrees with knees fully extended. He concludes that plaintiff had extensive degenerative changes in the cervical and lumbar spines. He relates a history of a prior accident in 1998 while in the company of her daughter, plaintiff Socha and causally relates prior cervical spine surgery performed in 2002 to that accident. He also notes that plaintiff underwent surgery in the lower lumbar area in 2000 but there is no evidence that it was in any way affected by the accident of February 15, 2001. He states that her moderate degree of impairment is not related in any way to the instant accident.

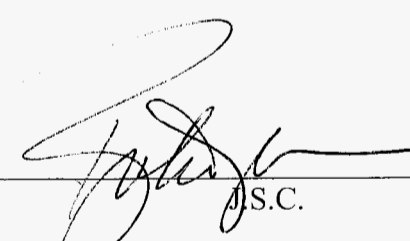
Dr. Reiser avers that he examined plaintiff on December 6, 2004. He observed complaints of

moderate discomfort when cervical or lumbar regions were palpated. Straight leg raising on the left side elicited a complaint of lower back pain at approximately a 60-degree angle, and on the right side elicited no complaints. He concludes that his neurological examination did not reveal any objective deficit to suggest ongoing radiculopathy in either the cervical or lumbar region. The mildly positive left straight leg raising sign which he relates to the prior history of a lumbar spine disorder for which previous surgery had been done. He further states that he did not find evidence of any objective ongoing neurological disorder causally related to the incident of February 15, 2001.

Dr. Pfeffer avers that she reviewed four cervical MRI examinations and a cervical CT-myelogram of plaintiff Hajkiewicz on August 23, 2006. She opines that there is no question as to the pre-existing nature of disc pathology at C5/6 and osteophyte formation at all other levels, relative to the instant accident. There is no evidence of acute pathology. With regard to her review of several MRI's of the lumbar spine, Dr. Pfeffer states that there is a posterior annular tear is noted at L3/4 on the MRI dated July 9, 2000 (prior to the instant accident). On a subsequent MRI dated March 5, 2001, at which time plaintiff underwent a laminectomy at L3/4, L4/5 and L5/S1, and the disc herniation previously seen on the earlier MRI was no longer noted due to surgical resection. She opines that the MRI's performed 2 - 3 years prior to the instant accident reveal degenerative disc disease with spondylosis at virtually all levels which are compatible with plaintiff's age (78) with mild disc bulging and dessication. In addition the MRI performed 7 - 8 months prior to the instant accident shows disc herniations which are pre-existing to the subject accident

The Court finds that defendant has failed to establish that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law §5102(d) (see, *Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]). The experts' reports, written two years prior to defendant's motion, failed to address plaintiff Socha's alleged shoulder condition and further medical treatment she received in the interim (*Guevara v Baginski*, 2007 NY AppDiv LEXIS 1583, 2007 NY Slip Op 1078 [February 6, 2007]). In addition, the experts failed to identify which objective tests were performed to determine that the plaintiffs had not sustained serious injuries (*Kennedy v Brown*, 23 AD3d 625, 805 NYS2d 408 [2005]). Moreover, defendant has failed to demonstrate that either plaintiff was not prevented from performing substantially all of their usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of the insurance law (see, *Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2005]). Thus, it is not necessary to consider whether plaintiffs' opposition papers raise a triable issue of fact (*Facci v Kaminsky*, 18 AD3d 806, 795 NYS2d 457 [2005]). Accordingly, the motion is denied.

Dated:     MAR 05 2007    

  
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J.S.C.

     FINAL DISPOSITION      X   NON-FINAL DISPOSITION