

**Falletti v Michaels**

2007 NY Slip Op 30137(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0015001

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 12/5/06  
ADJ. DATE 1/24/07  
Mot. Seq. # 001 - MD

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MARIANNE FALLETTI,	:		:	NEIL H. GREENBERG & ASSOCIATES
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	:	- against -	:	
	:		:	EPSTEIN & GRAMMATICO
MARTIN MICHAELS,	:		:	Attorneys for Defendant
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	:	Defendant.	:	Hauppauge, New York 11788
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Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 13 - 15; Replying Affidavits and supporting papers 16 - 17; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (#001) by defendant, Martin Michaels, for summary judgment dismissing the action pursuant to CPLR 3212 is denied.

In this negligence action, plaintiff, Marianne Falletti, seeks to recover damages for allegedly sustaining a serious injury in a motor vehicle accident on September 24, 2003. Plaintiff alleges that her vehicle was struck by a vehicle operated by defendant, Martin Michaels, at the intersection of Route 25A and Condor Road in the Town of Brookhaven, New York. Before the Court is a motion for summary judgment by defendant.

In the bill of particulars, plaintiff alleges that she sustained the following injuries: disc herniations at C5/6; L4/56 and L5S1; cervical and lumbar radiculopathy; cervical strain/sprain; lumbar strain/sprain; and myofascial pain syndrome. She alleges that she was incapacitated from her employment for one week. Plaintiff further alleges that she sustained injuries in the following serious injury categories: a 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]).

The term, “significant,” as it appears in the statute, has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment” (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). In order to prove the extent or degree of physical limitation, an expert can designate a numeric percentage of a plaintiff’s loss of range of motion or give a “qualitative assessment of a plaintiff’s condition...provided that the evaluation has an objective basis and compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system” (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *rearg den Manzano v O’Neil*, 98 NY2d 728).

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 the defendants “to present evidence, in competent form, showing that plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 397, 582 NYS2d 395, 396 [1992]). Once defendants have 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, defendant submits, among other things, the pleadings; bill of particulars; the office records of Ali E. Guy, M.D.; magnetic resonance imaging (“MRI”) reports of the brain, cervical spine and lumbar spine; an affirmed report by Joseph P. Stubel, M.D., an orthopedic surgeon; and affirmed reports by Martin LoCascio, an acupuncturist, and Gerald M. Silverman, D.C., a chiropractor. Initially, the Court rejects the unsworn reports of Mr. LoCascio and Dr. Silverman as inadmissible (*Pagano v Kingsbury, supra*).

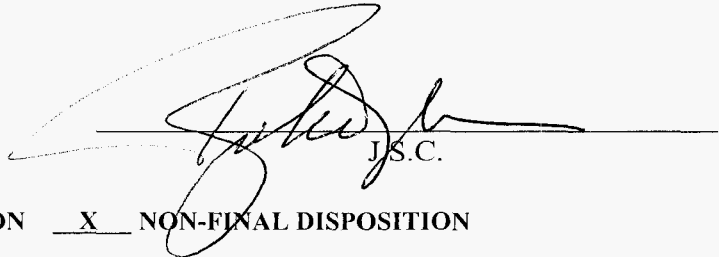
Dr. Guy’s records reveal that he began treating plaintiff on October 2, 2003 and prescribed physical therapy treatments through October, 2004. In a report dated October 28, 2003, Dr. Guy reports that an electromyogram (“EMG”) of the upper extremities revealed C5/6 radiculopathy and bilateral carpal tunnel syndrome. Upon examination, he noted muscle spasms of the neck and lower back and straight leg raising to 75 degrees. A report dated November 11, 2003 revealed that he performed an

EMG of the lower extremities and noted mild L5/S1 radiculopathy. The MRI of the brain performed on October 1, 2003 revealed a normal study. The MRI of the cervical spine performed on October 16, 2003 revealed foraminal narrowing at C5/6 with disc osteophytes. The MRI of the lumbar spine performed on November 6, 2003 revealed degenerative changes at L5/S1 with a disc herniation; and herniation at L4/5.

Dr. Stubel avers that he examined plaintiff on November 26, 2003 and observed plaintiff's ranges of motion in the cervical and lumbar spines. This report is deficient inasmuch as Dr. Stubel provided specific range of motion measurements for the plaintiff without comparing those findings with normal ranges of motion (*see, Agathe v Tun Chen Wang*, 33 AD3d 737, 822 NYS2d 766 [2006]). He noted that Tinel's sign was positive in the left wrist. In the low back, Dr. Stubel noted that plaintiff could forward bend to 90 degrees and laterally rotate to 60 degrees. He also observed straight leg raising to 90 degrees. He concluded that the back and neck sprains were causally related to the motor vehicle accident, however he stated that plaintiff was not disabled or in need of further treatment. The Court finds that defendant failed to meet his burden of establishing that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d) (*Hubert v Tripaldi*, 307 AD2d 692, 763 NYS2d 165 [2003]). Under these circumstances, it is not necessary to consider whether plaintiff's papers in opposition to defendant's motion were sufficient to raise a triable issue of fact (*see, Chaplin v Taylor*, 273 AD2d 188, 708 NYS2d 465 [2000]; *Mariaca-Olmos v Mizrhy*, 226 AD2d 437, 640 NYS2d 604 [1996]).

Accordingly, defendant's motion for summary judgment is denied.

Dated: MAR 05 2007

  
J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION