

**Wepsiec v Palmer**

2007 NY Slip Op 30367(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0015007

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 11/6/06  
ADJ. DATE 12/18/06  
Mot. Seq. # 001 - MG; CASEDISP

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EDYTA WEPSIEC,	:	SULLIVAN & BRILL, LLP	
	:	Attorneys for Plaintiff	
Plaintiff,	:	115 Broadway, 17 <sup>th</sup> Floor	
	:	New York, New York 10006	
- against -	:		
	:	JAMES P. NUNEMAKER, JR. & ASSOC.	
VIRGINIA PALMER and DRU LEMIN,	:	Attorneys for Defendants	
	:	P.O. Box 9347	
Defendants.	:	Uniondale, New York 11553-9347	
-----X			

Upon the following papers numbered 1 to 27 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 - 24; Replying Affidavits and supporting papers 25 - 27; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that defendants’ motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on Speonk Riverhead Road, Town of Southampton, New York on January 31, 2005. The accident allegedly happened when the vehicle owned by defendant Virginia Palmer and operated by defendant Dru Lemin impacted the plaintiff’s vehicle. The complaint alleges that plaintiff sustained a “serious injury” as defined in Insurance Law § 5102 (d), and economic loss in excess of basic economic loss within the meaning of Article 51 of the Insurance Law. Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). Plaintiff opposes this motion, and defendants have filed a reply.

Insurance Law § 5102 (d) defines “serious injury” as “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.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1<sup>st</sup> Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990 [1992]). 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 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of their motion, defendants submit, inter alia, the pleadings; plaintiff’s verified bill of particulars; plaintiff’s Central Suffolk Hospital emergency room, x-ray and MRI records; the affirmed report of plaintiff’s no-fault examining physician, Magda Fahmy, M.D.; the affirmed report of defendants’ examining orthopedist, S. Farkas, M.D.; the affirmed report of defendants’ examining dentist, Donald R. Tanenbaum, D.D.S.; and the plaintiff’s deposition transcript.

Plaintiff claims in her bill of particulars that she sustained, among other things, fractures of two teeth, cervical and lumbar radiculopathy, and a segmental dysfunction of the cervical, dorsal, and lumbosacral spine. Plaintiff also claims that she was confined to a hospital for one day, to her home for two and one half weeks, and to her bed for one and one half weeks. Moreover, plaintiff claims the serious injury categories of a fracture, a permanent consequential limitation, a significant limitation, and a non-permanent injury.

Plaintiff’s hospital emergency room records on the date of the accident show that she was complaining of pain in her mid chest and back. The attending physician examined the plaintiff and noted that she had no facial trauma, bleeding or bruising, and that her neck was not tender. This physician also noted that plaintiff had a dental injury which involved the “loss of left upper veneer” (*emphasis added*). X-rays of the plaintiff’s cervical spine taken at the hospital show that there were no fractures, dislocations or prevertebral soft tissue swelling. Similarly, MRI studies of the plaintiff’s cervical spine taken at the hospital show that vertebral body alignment, vertebral body height, and bone marrow signal were normal.

In her report dated April 19, 2005, Dr. Fahmy states that she performed an independent no-fault examination of the plaintiff and her findings include normal motor strength; a negative straight leg raising test; and no tenderness to palpation over the cervical and lumbar spine. She also found that plaintiff had normal ranges of motion of the cervical spine, lumbar spine, upper extremities, and lower extremities. Dr. Fahmy opined that plaintiff had sustained cervical and lumbar sprains/strains which had resolved and that she was

not disabled.

In his report dated April 11, 2006, Dr. Farkas states that he performed an independent orthopedic examination of the plaintiff on April 11, 2006, and his findings include normal ranges of motion of the cervical and lumbar spine with no spasm or crepitus; a motor examination that was “5+”; deep tendon reflexes that were normal at “2+”; and a negative straight leg raising test. Dr. Farkas opined that plaintiff had sustained cervical and lumbar sprains which had resolved, and he further concluded that she may carry out her daily living activities without restriction.

In his report dated April 3, 2006, Dr. Tanenbaum states that he performed an independent dental examination of the plaintiff on March 28, 2006, and his findings include no occlusal trauma; a temporomandibular area that functioned within normal limits; and a normal range of jaw opening. He also found that there were well contoured crown restorations on teeth numbered 8 and 9, but that the remainder of the dentition were stable. Dr. Tanenbaum opined that plaintiff had sustained dental trauma as a result of the accident to teeth numbered 8 and 9 which needed restoration, but that there was no permanent or temporary impairment sustained. Further, Dr. Tanenbaum concluded that plaintiff’s dental environment was stable and that her prognosis was excellent. He also concluded that no additional treatment was necessary.

Plaintiff testified at her deposition that she was taken by ambulance to the emergency room at Central Suffolk Hospital where she was treated and released the same day. A few days later, she went to see Dr. Alex Boukos, a dentist, who placed caps on her two front teeth. She admitted, however, that sometime prior to the accident she had veneers put on her teeth by a dentist in Poland. Plaintiff also admitted that she does not have any problems with her teeth or mouth as a result of the accident. In addition, she testified that she received chiropractic treatments and physical therapy after the accident, but that she discontinued all treatment about three months later because she felt better. Plaintiff had no future doctor appointments, although she still gets some back pain for which she takes Motrin. She did not miss any time from her schooling and she was not limited in any of her activities as a result of the accident. She is also able to work if she decides to seek employment. Lastly, plaintiff testified that she limits herself from lifting heavy objects out of fear that it will cause her pain, however, no doctors have told her to limit her activities.

By their submissions, defendants made a prima facie showing that plaintiff did not sustain a serious injury (*see, Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teodoro v Conway Transp. Serv.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Gousgoulas v Melendez*, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]; *Spevak v Spevak*, 213 AD2d 622, 624 NYS2d 232 [2d Dept 1995]). Plaintiff’s examining no-fault physician and defendants’ examining orthopedist each found that plaintiff had a normal range of motion of the cervical and lumbar spine with no palpable muscle spasm. In addition, defendants’ examining physicians opined that plaintiff had no disability as a result of the accident and that he had merely sustained sprains/sprains which had resolved. Furthermore, the defendants’ remaining evidence, including plaintiff’s deposition testimony, also supports a finding that she did not sustain a serious injury. As defendants have met their burden as to all categories of serious injury alleged by plaintiff, the Court turns to plaintiff’s proffer (*see, Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to this motion, plaintiff submits, inter alia, the personal affidavit and sworn office records of plaintiff’s treating dentist, Alex Boukas, D.D.S. In his personal affidavit, Dr. Boukas avers that he first treated the plaintiff on February 1, 2005 in connection with her motor vehicle accident the prior day, and his

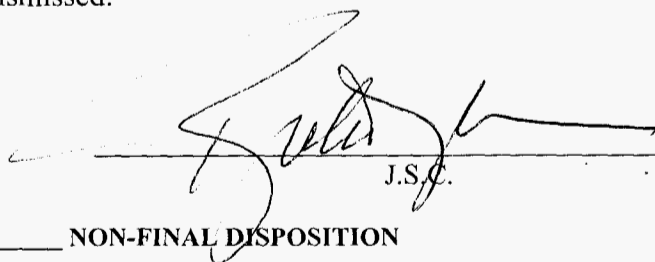
findings include a fracture of the number 8 tooth at about the mid-point, and a cracked veneer of the number 9 tooth. After two initial appointments on March 2, and 23, 2006, he fitted her with permanent crowns on March 29, 2006. Plaintiff saw him one additional time on April 13, 2005, at which time he filed and smoothed out the number 8 crown. Dr. Boukas opines that plaintiff sustained a fractured number 8 tooth and a cracked number 9 tooth as a result of the accident. He also concluded that since crowns typically last 10-15 years, she will require new porcelain crowns every 10-15 years for the remainder of her life. Dr. Boukas' office record for February 1, 2005, however, states in relevant part that the "[number] 9 veneer is cracked and [the number] [ ] 8 is off" (*emphasis added*).

At the outset, Dr. Boukas has failed to address the pre-existing condition of plaintiff's teeth as he did not provide any foundation or objective medical basis supporting the conclusion which he reached, namely, that the alleged fracture and/or cracked veneer was causally related to the accident in light of plaintiff's admission and his own finding that plaintiff had dental veneers fitted prior to the accident (*see, Knoll v Seafood Express*, 5 NY3d 817, 803 NYS2d 25 [2005]; *Flores v Leslie*, 27 AD3d 220, 810 NYS2d 464 [1<sup>st</sup> Dept 2006]; *Schwartzman v Friedler*, 279 AD2d 512, 718 NYS2d 882 [2d Dept 2000]). In any event, Dr. Boukas' affidavit, which is inconsistent with his own treatment records and obviously tailored to meet the statutory requirements, is insufficient to raise a triable issue of fact as to the category of a fracture (*see, Powell v Williams*, 214 AD2d 720, 625 NYS2d 634 [2d Dept 1995]; *Spevak v Spevak*, 213 AD2d 622, 624 NYS2d 232 [2d Dept 1995]; *Wood v Hein Trucking Corp.*, 115 AD2d 181, 495 NYS2d 251 [3d Dept 1985]). Additionally, plaintiff has not proffered any medical evidence to raise a triable issue with respect to the "serious injury" categories of a permanent consequential limitation or a significant limitation under the no-fault law (*see, Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]; *McConnell v Ouedraogo*, 24 AD3d 423, 805 NYS2d 418 [2d Dept 2005]).

Moreover, the proof submitted by the plaintiff is insufficient to raise a triable issue of fact that she sustained a medically determined injury or impairment rendering her unable to substantially perform all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see, Magarin v Kropf*, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; *Hernandez v DIVA Cab Corp.*, 22 AD3d 722, 804 NYS2d 396 [2d Dept 2005]; *Mercado v Garbacz*, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]). Although plaintiff testified that she is afraid to lift heavy objects, she admitted during her deposition that she was not substantially limited in her daily activities after the accident (*see, Nelson v Distant*, 308 AD2d 338, 764 NYS2d 258 [1<sup>st</sup> Dept 2003]; *Keena v Trappen*, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]).

Since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, her claim in this regard must also be dismissed (*see, CPLR 3212 [b]*; *see, Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, this motion for summary judgment is granted and the complaint is dismissed.

Dated:           MAR 05 2007          

  
\_\_\_\_\_  
J.S.C.

FINAL DISPOSITION       NON-FINAL DISPOSITION