

**Riggs v Ciprian**

2007 NY Slip Op 30384(U)

March 27, 2007

Supreme Court, New York County

Docket Number: 0124224

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

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WINIFRED RIGGS,

Plaintiff,

Index No. 124224/02

-against-

Motion Seq. No. 004

FRANCISCO CIPRIAN,

Defendant.

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The following papers, numbered 1 to 6 were read on this motion to/for summary judgment:

<u>Papers</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits
Answering Affidavits - Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____
Interim Orders of this Court dated April 24, 2006 & June 14, 2006 _____

<u>Numbered</u>
1,2
3
4
5,6

Cross Motion:     Yes     No

**Doris Ling-Cohan, J.:**

In this personal injury action, defendant moves for an pursuant to CPLR 3212, granting summary judgment dismissing the complaint for failure to meet the serious injury threshold requirement as mandated by Insurance Law §§ 5102 and 5104.<sup>2</sup>

**FILED**  
MAR 28 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

This action arose from an incident which occurred on March 21, 2000 at approximately 7:15 p.m., at the intersection of 178<sup>th</sup> Street and Broadway, New York, New York, when plaintiff, a pedestrian, was struck by defendant's vehicle. Plaintiff alleges to have sustained the following injuries as set forth in plaintiff's verified bill of particulars:

<sup>1</sup> The Court notes that plaintiff's application to submit supplemental papers was granted by order dated June 14, 2006; plaintiff failed, however, to submit additional papers in opposition to the within motion.

<sup>2</sup> This case was transferred to this Part from Justice Shafer's inventory.

“serious, severe and permanent injuries, including, injury to her right side, shoulder, arms, hips and legs, and other injures and was rendered sick, sore, lame and disabled and was prevented from attending to her usual activities...[the] injury to Plaintiff caused her to suffer a permanent and detrimental loss of her ability to function in the fashion and manner she was able to function prior to this accident...Plaintiff’s injuries caused her to lose mobility which she has not regained and has resulted in permanent pain and sever discomfort to the affected areas of her body”.

[Notice of Motion, Exh B, ¶¶ 9 & 15].

In order to establish a basis for entitlement to summary judgment on the issue of serious injury, defendant has the initial burden of submitting competent evidentiary proof in admissible form demonstrating that plaintiff has not suffered serious injury as defined by Insurance Law §5102(d)<sup>3</sup>. *See Brown v Achy*, 9 AD3d 30, 31 (1<sup>st</sup> Dept 2004). Once defendant has satisfied such burden, the burden shifts to plaintiff to come forward with evidentiary proof in admissible form which is sufficient to raise a triable issue of fact relating to the serious injury claim. *Licari v Elliot*, 57 NY2d 230, 235 (1982).

### **Defendant’s Submissions in Support of Summary Judgment**

On August 17, 2005, plaintiff was examined by Dr. Leonid Topper, a neurologist, at the request of defendant. After a physical examination at which distraction and compression tests were performed, Dr. Topper, in his affirmed medical report concluded, inter alia, as follows:

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<sup>3</sup> Insurance Law § 5102 (d) defines “serious injury” as “a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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. Here, plaintiff alleges that she suffered a serious injury of the types listed in sections 7 and 9. [Affirmation in Opposition, ¶8].

“[t]horacic spine sprain/strain-resolved; lumbar spine sprain/strain resolved....[t]here is no indication of the permanent neurological disability. It is my professional opinion that this claimant can perform all of her usual daily activities without restriction or any neurological limitations resulting from this accident”.

[See Exh. C, Notice of Motion].

On August 23, 2005, plaintiff was examined by Dr. Michael J. Katz, an orthopedic surgeon, at the request of defendant. After such physical examination, at which tests including complete range of motion, straight leg raising, apprehension and impingement, were performed, Dr. Katz concluded in his affirmed medical report, *inter alia*, the following:

“[c]ervical strain resolved, lumbosacral strain resolved, right shoulder contusion now resolved...[t]he claimant is a 92-year old female who alleged an injury of 03/21/00 as a pedestrian...[c]urrently, she shows no signs or symptoms of permanence on a causally related basis relative to 03/21/00. She is currently not disabled. She is retired. She is capable of her activities of daily living”.

[See Exh. D, Notice of Motion].

In seeking summary judgment, in addition to the above referenced medical reports, defendant refers to various portions of plaintiff’s deposition transcript testimony, in which plaintiff stated, *inter alia*, as follows: (1) after the accident she was taken to Columbia Presbyterian Hospital where she was released after several hours; (2) she did not receive any stitches nor sutures, however, a bandaid was placed on her right knee; (3) plaintiff was not given any instructions or recommendations with respect to how to care for herself upon release but was given a follow-up appointment; (4) since the accident, there has been no difference in her physical activities; and (5) other than the initial hospital visit and one follow-up visit, plaintiff was only treated by Dr. Ramarju, her treating physician, with respect to the claimed injuries; and (5) plaintiff was not

referred by Dr. Ramaraju to any other doctors or therapists with respect to the claimed injuries.

Upon the moving papers, defendant has made a *prima facie* showing that plaintiff did not sustain a serious injury. The affirmed medical reports submitted that by Dr. Topper and Dr. Katz, along with plaintiff's deposition testimony, establish that plaintiff did not sustain a "serious injury" as defined by Insurance Law §5101, *et seq.*

### **Plaintiff's Opposition to the Motion for Summary Judgment**

In opposition, plaintiff submitted the following in support of her serious injury allegation: (1) an attorney affirmation; (2) an affidavit from herself; (3) an unaffirmed medical letter from Dr. Jay Cowan; and (4) an unaffirmed medical letter from Dr. T.R. Ramaraju. As detailed below, such submissions, however, are insufficient to raise a factual issue to warrant that this case proceed to trial.

Specifically, an attorney affirmation is insufficient in that it lacks the requisite personal knowledge. *See Bandoian v. Bernstein*, 254 AD2d 205 (1<sup>st</sup> Dept 1998). "Plaintiff's subjective complaints of pain [contained in her submitted affidavit,] are insufficient to meet the statutory burden to demonstrate a serious injury has been sustained". *Park v. Champagne*, 34 AD3d 274 (1<sup>st</sup> Dept 2006); *Olson v. Russell*, 35 AD3d 684 (2<sup>nd</sup> Dept 2006). The unsworn letters by Dr. Cowan and Dr. Ramaraju are not in admissible form, and therefore insufficient to defeat defendant's motion for summary judgment. *See Grasso v. Angerami*, 79 NY2d 813 (1991).

Further, the letter of Dr. Cowan appears to indicate that he performed a one-time examination of plaintiff on March 22, 2006, over six years post accident, with no explanation offered as to this time lapse; such letter is further rejected as conclusory and speculative. *See Arjona v. Calcano*, 7 A13d 279 (1<sup>st</sup> Dept 2004). Dr. Cowan's findings regarding plaintiff's alleged decrease in range of motion in the left and right shoulder and a decreased lumbar and cervical spine range of motion, is not supported by numeric findings, as required. *See Taylor v. Terrigno*, 27 A13d 316 (1<sup>st</sup> Dept 2006). Moreover, Dr. Cowan does not indicate any objective tests which were performed on plaintiff to reach his diagnosis. *Id.* The unaffirmed medical letter of Dr. Ramaraju, plaintiff's personal physician, also fails to contain any indication of objective or diagnostic tests performed on plaintiff and does not contain numerical ranges of motion. *Id.*

Accordingly, plaintiff's submissions fail to raise a triable issue of fact as to whether she sustained a serious injury, to warrant that this case proceed to trial.

In accordance with the above, it is

ORDERED that the defendant's motion for summary judgment is granted; it is further

ORDERED that, upon proof of service of a copy of this order with notice of entry, the Clerk of this Court shall enter judgment of dismissal of the complaint in favor of defendant; and it is further

ORDERED that within 30 days of entry of this decision/order, defendant shall serve a copy upon plaintiff, with notice of entry.

Dated: March 27, 2007

  
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Hon. Doris Ling-Cohan, J.S.C.

Check One:  FINAL DISPOSITION       NON-FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST

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