

**Pai v Singh**

2007 NY Slip Op 30592(U)

March 30, 2007

Supreme Court, Queens County

Docket Number: 0005836/2005

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14  
**Justice**

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 MADELINE PAI, No. 5836/05

Plaintiff, Motion  
 -against- Date January 30, 2007

JOGA SINGH AND Motion  
 PARGAT SINGH, Cal. No. 17

Defendants. Motion  
 ----- Seq. No. 1

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Plaintiff commenced this action seeking to recover damages for personal injuries alleged to have been sustained as the result of a motor vehicle accident which occurred on May 14, 2004 on the southbound side of the FDR Drive at or near its intersection with East 6<sup>th</sup> Street, in the County, City and State of New York.

Defendants move for an order granting summary judgment dismissing the complaint on the ground that plaintiff's injuries fail to meet the serious injury threshold requirement of Insurance Law § 5102(d).

Contentions of the Parties

Defendants submit plaintiff's bill of particulars which they claim asserts the following injuries: disc herniation at L5-S1; disc bulge at L4-L5; and lumbar and

cervical spine sprain/strain. Defendants also submit an affirmation by Dr. Edward M. Weiland, M.D., a neurologist, who examined plaintiff on March 30, 2006. Examination of plaintiff's cervical and lumbar spine and right and left shoulder revealed ranges of motion within normal limits with specific findings set forth. The straight leg raising was unlimited to 90 degrees and Fabere-Patrick sign and Adson's Maneuver were negative. There was no vertebral body percussion tenderness or paraspinal muscle spasm. He concluded that there was no evidence of any lateralizing neurological deficits and that plaintiff would be able to perform activities of daily living and continue gainful employment without restrictions. Based upon Dr. Weiland's medical report, plaintiff's bill of particulars and her own testimony, defendants argue that she did not sustain a serious injury. As to the 90/180 day requirement, plaintiff's bill of particulars states that she was confined to her bed for two days and to her home intermittently. It states that she lost only two days of work but she testified that she missed one day of work.

Plaintiff opposes the motion and asserts that her bill of particulars asserts the following injuries: posterior disc herniation at L5-S1 impinging on the thecal sac; posterior disc bulge at L4-L5; bilateral lumbosacral radiculopathy at L5-S1 per EMG test; left peroneal motor neuropathy per EMG test; lumbar sprain/strain; lumbar myofascitis; right cervical radiculopathy at C5-C6 per EMG test; right cervical radiculopathy at C6-C7 per EMG test; cervical sprain/strain; cervical myofascitis. The affidavit of plaintiff's treating chiropractor, Shimon Metz, sets forth that on initial examination on May 16, 2004 plaintiff suffered from specified limitations of range of motion in her cervical and lumbar spines. She began a course of treatment two to three times per week for about three months and than one to two times a week through the end of 2004. Her benefits were denied at that time due to the no-fault doctor making a determination that she had reached maximum medical improvement.

He further avers that in May, 2005, plaintiff was involved in a minor motor vehicle accident which slightly exacerbated her condition. She was treated on 13 visits until September 11, 2005. He saw her on May 28, 2006 and

sporadically thereafter including her last visit of October 5, 2006. He examined her on October 5, 2006 to ascertain her present condition and limitations. Several tests resulted in positive findings and continued loss of range of motion in the cervical and lumbar spines. His current diagnosis is as follows: that, as a result of the subject accident, plaintiff sustained post traumatic disc herniation at L5-S1 impinging upon the thecal sac; bulging disc L4-L5; chronic permanent internal derangement and radiculitis cervical and lumbar spine with residual neurological defecits; cervical strain/sprain; lumbar strain/sprain.

An affirmation by Dr. Dennis R. Rossi, a radiologist, sets forth that an MRI was taken of plaintiff's lumbar spine on July 12, 2004 which showed: "Mild Superior Compression of the L1 Vertabral Body of Undetermined Age No Marrow Adema Seen; Small Central Posterior Disc Herniation Impinging on the Thecal Sac L5-S1. Mild Posterior Disc Bulge L4-L5. Mild Scoliosis."

An affirmation by Dr. David Steiner, a neurologist, sets forth that plaintiff sustained decreased range of motion of flexion, extension and lateral rotation. Spasm and loss of the normal lordotic curve was noted. Upper EMG/NCV studies were performed resulting in findings of radiculopathy and neuropathy which are causally related to the accident.

#### Decision of the Court

The motion by defendants is denied.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

In the instant matter, defendants have established their entitlement to judgment as a matter of law.

Defendants' proof included the affirmation of their examining doctor, a neurologist, who concluded, based upon a recent examination and the results of objective tests with quantified findings, that plaintiff did not sustain a serious injury in the motor vehicle accident.

However, in opposition to the motion, plaintiff submitted sufficient evidence in admissible form to warrant denial of the motion. The affidavit of plaintiff's treating chiropractor quantified persistent range of motion limitations shortly after the subject accident and at the time of his recent evaluation. Said limitations were quantified and numerous objective tests resulted in positive findings. An MRI taken July 12, 2004, as stated in the radiologist's affirmation, objectively revealed a herniation and disc bulge. The gap in treatment was explained as due to continued No Fault benefits being denied as plaintiff had reached maximum medical improvement. Plaintiff's chiropractor specifically connected the subject accident to the cause of plaintiff's injuries. He also distinguished her condition prior to the accident as having no relation to the injuries caused by the accident.

Accordingly, the motion by defendants is denied.

Dated: March 30, 2007

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HON. DAVID ELLIOT