

<b>Pergament v Campbell</b>
2007 NY Slip Op 30792(U)
March 26, 2007
Supreme Court, Suffolk County
Docket Number: 0030367/2003
Judge: Robert W. Doyle
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 12/22/06

ADJ. DATE 1/22/07

Mot. Seq. # 001 - MD

-----X		
MARC A. PERGAMENT, as trustee of the	:	ZEMSKY & SALOMON, P.C.
Estate of LAURA J. O'BRIEN,	:	Attorneys for Plaintiff
	:	95 Front Street, 2 <sup>nd</sup> Floor
Plaintiff,	:	Hempstead, New York 11550
	:	
- against -	:	MARTIN, FALLON & MULLÉ
	:	Attorneys for Defendants
MANDY M. CAMPBELL and ANDRES VILLINAS,:	:	100 East Carver Street
	:	Huntington, New York 11743
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 12 - 22; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by defendants for summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Laura O'Brien, when her vehicle was rear-ended by a vehicle owned by defendant Mandy Campbell and operated by defendant Andres Villinas on Woodside Avenue in Medford, New York, on December 15, 2002.

By her bill of particulars, plaintiff alleges that, as a result of the subject accident, plaintiff sustained serious injuries including herniated discs at C4-C5 and L5-S1; a bulging disc at C5-C6; loss of normal cervical lordosis; cervical and lumbar myofascial derangement; and cervical and lumbar radiculopathy. In addition, plaintiff claims that, following the subject accident, she was confined to home for approximately one month.

Defendants now move for summary judgment in their favor dismissing the complaint against them on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendants submit, *inter alia*, the pleadings; a bill of particulars; the sworn MRI report dated September 11, 2004 of their examining physician, Dr. Michael Winn, concerning plaintiff's cervical and lumbar spine, taken on March 5, 2003 and March 2, 2003 respectively; the affirmed report dated June 29, 2006 of their examining neurologist, Dr. Richard Pearl, based on an examination of plaintiff on June 28, 2006; the affirmed report dated July 10, 2006 of their examining orthopedist, Dr. Joseph Stubel, based on an examination of plaintiff on June 28, 2006; and the report of plaintiff's cervical spine, taken on December 15, 2002 by Dr. Ira Langer.

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*, 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 Sys.*, 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 Killhenny*, 174 AD2d 663, 571 NYS2d 525 [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 [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 Eyley*, 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 [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 [1990]).

Here, defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed reports of their examining physicians and plaintiff's bill of particulars (*see, Thompson v Abbasi*, 15 AD3d 95, 788 NYS2d 48 [2005]). Dr. Winn's MRI report of plaintiff's cervical and lumbar spine, taken on March 5, 2003 and March 2, 2003

respectively, revealed that plaintiff had a bulging disc at C5-C6, a straightening of the cervical lordosis and degenerative lumbar spondylosis. For a bulging disc to constitute a serious injury, there must be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration (*see, Guzman v Paul Michael Mgt.*, 266 AD2d 508, 698 NYS2d 719 [1999]). On June 28, 2006, approximately three years and six months after the subject accident, defendants' examining neurologist, Dr. Pearl, examined plaintiff, using certain orthopedic and neurological tests including Babinski sign, Romberg test, Tinel's sign and Straight Leg Raising test. All the test results were negative. Dr. Pearl reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and compared those findings to the normal ranges of motion. Dr. Pearl opined that plaintiff had no disability related to the subject accident at the time of the examination and that there was no need for further treatment (*see, Willis v New York City Tr. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2005]; *compare, Christman v Cueva*, 6 AD3d 375, 773 NYS2d 903 [2004]). On June 28, 2006, defendants' examining orthopedist, Dr. Stubel, also examined plaintiff, using certain orthopedic and neurological tests including Tinel's sign and Straight Leg Raising test. Dr. Stubel found that all the test results were negative and that there was no spasm or tenderness around plaintiff's cervical and lumbar spine. Dr. Stubel reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and left knee and compared those findings to the normal ranges of motion. Dr. Stubel opined that plaintiff had no disability or restrictions related to the subject accident at the time of the examination and that she was capable of performing her normal activities of daily living (*see, Willis v New York City Tr. Auth.*, *supra*).

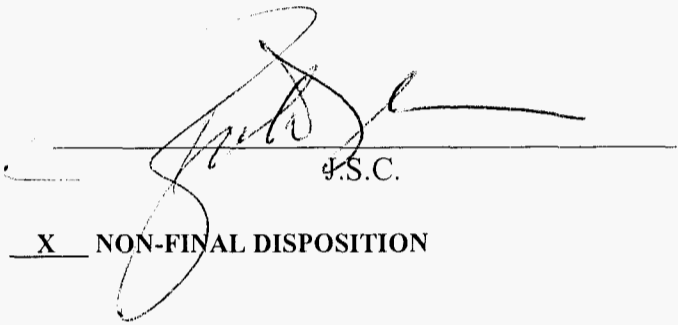
In opposition, plaintiff contends that she did sustain a serious injury within the meaning of Insurance Law § 5102 (d). In support, plaintiff submits, *inter alia*, her own affidavit; the sworn affirmation dated January 10, 2007 of her treating physician, Dr. Joseph Perez, based on an examination of plaintiff on December 20, 2002, January 8, 2003, August 18, 2003 and December 15, 2006; the medical record of Patchogue Medical & Rehab, including numerous reports, notes and test results; the medical record of Brookhaven Memorial Hospital; and the sworn affirmation dated December 29, 2006 of Dr. Michele Rubin with the attached MRI reports of plaintiff's lumbar and cervical spine, taken on March 2, 2003 and March 5, 2003 respectively.

On December 29, 2006, Dr. Rubin affirmed plaintiff's MRI reports, taken on March 2, 2003 and March 5, 2003. The MRI reports revealed that plaintiff had cervical and lumbar scoliosis, herniated discs at C4-C5, L5-S1 and T12-L1 through L2-L3 and a bulging disc at C5-C6. For a herniated or bulging disc to constitute a serious injury, there must be objective evidence of the extent or degree of the alleged physical limitations resulting from the injury and its duration (*see, Nelson v Amicizia*, 21 AD3d 1015, 803 NYS2d 87 [2005]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2005]; *Guzman v Paul Michael Mgt.*, 266 AD2d 508, 698 NYS2d 719 [1999]). Dr. Perez had treated plaintiff for approximately 12 months after the subject accident. During the treatment, Dr. Perez administered certain orthopedic and neurological tests including Foraminal Compression test, Distraction test, Lindner's test, Bechterew's test and Straight Leg Raising test on December 20, 2002. All the test results were negative. On January 8, 2003, approximately three weeks after the subject accident, Dr. Perez performed a range of motion test of plaintiff's cervical and lumbar spine, using a computerized inclinometer, which is the proper and approved method to test an alleged restriction of motion to the cervical and lumbar spine (*see, Kraemer v Henning*, 237 AD2d 492, 655 NYS2d 96 [1997]; *Taher v*

*Valerio-Mena*, 195 Misc2d 687, 759 NYS2d 646 [2003]). On August 18, 2003 and December 15, 2006, approximately eight months and four years respectively after the subject accident, Dr. Perez re-examined plaintiff and performed a range of motion test of her cervical and lumbar spine, using a computerized inclinometer. Based on the positive orthopedic tests and the comparison of plaintiff's limitations of motions with normal function, Dr. Perez concluded that plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d). Furthermore, Dr. Perez satisfactorily explained in his affirmation the approximately three year gap between the end of the medical treatment to plaintiff on December of 2003 and the re-examination on December 15, 2006 (see, *Williams v New York City Tr. Auth.*, 12 AD3d 365, 786 NYS2d 183 [2004]; *Black v Robinson*, 305 AD2d 438, 759 NYS2d 741 [2003]). As an explanation for the cessation of treatment, Dr. Perez stated that plaintiff "had been denied by her No-Fault Insurance carrier who deemed that she had reached maximum medical improvement."

Thus, plaintiff has raised a triable issue of fact as to whether she sustained a significant limitation of use of a body function or system constituting a serious injury as defined by Insurance Law § 5102 (d) (see, *Kraemer v Henning*, 237 AD2d 492, 655 NYS2d 96 [1997]). Accordingly, 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 denied.

Dated:           MAR 26 2007          

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

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION