

<b>Cavallaro v Ben Wei Hung Liu</b>
2007 NY Slip Op 30930(U)
April 18, 2007
Supreme Court, Queens County
Docket Number: 0005252/2005
Judge: Duane A. Hart
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **DUANE A. HART** IAS PART 18  
Justice

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FRANK CAVALLARO and LOIS CAVALLARO,

Index No: 5252/05

Plaintiff,

Motion Date:  
January 31, 2007

-against-

Cal. No.: 2

BEN WEI HUNG LIU,

Defendants.  
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The following papers numbered 1 to 12 read on this motion.

Notice of Motion-Affidavits-Exhibits .....	1 - 4
Answering Affidavits-Exhibits.....	5 - 8
Cross-Motion.....	9 - 10
Replying Affidavits.....	11 - 12

On October 23, 2004, plaintiffs and defendant were involved in an automobile accident on the Belt Parkway, near its intersection with Flatbush Avenue, Kings County. Thereafter, plaintiffs commenced an action alleging that they suffered serious physical injuries caused by defendant's negligence when his automobile struck the vehicle in the rear.

Issue was joined, discovery proceeded, EBT's were held and Note of Issue filed.

Citing Insurance Law, Section 5102(d), defendant seeks summary judgment, dismissing the action. Defendant asserts that plaintiffs have not met the standards for serious injuries defined by the section. He alleges that the injuries of which plaintiffs complain are not serious injuries within the meaning of the section.

According to defendant, plaintiffs' injuries are among others: Lois Cavallaro: posterior herniated disc at L5/S1; straightening of the curvature of the lumbar spine; posterior disc bulge at C3-C4; herniation at C4-C5, C5-6 and C6-C7 and

cervical sprain, pain and pain with loss of range of motion. Frank Cavallaro: posterior disc herniation at C3-C4 through C6-C7; posterior disc bulge at C2-C3; grade 1 anterior spondylolisthesis at C7 upon T1, broad based posterior disc herniations at L1-L2 through L5-S1 and lumbar myofascial derangement. Finally, says defendant, doctors designated by him have examined plaintiffs and expressed their medical opinion that plaintiffs do not suffer from any disability as a result of the accident.

Specifically, defendant argues that plaintiff has not shown that their injuries prevented them from performing substantially all of their usual and customary daily activities for at least ninety (90) days of the first one-hundred eighty (180) days immediately after the injuries. He adds that plaintiffs have not sustained a permanent total loss of use of a body organ, member function or system; nor is there a claim that plaintiffs have suffered a permanent consequential limitation of the use of a body function or system or significant limitation of the use of a body organ or member. He emphasizes that none of the injuries claimed by plaintiffs are serious.

He points to the nature, kind and length of treatment that plaintiff received as demonstrating that the injuries are not serious. They turn to the results of their doctors' examination of plaintiffs. These reports found that as to Frank Cavallaro, he was neurologically sound and without any, neurological disabilities or impairment; that his range of motion was within normal range and that there is no need for treatment for neurological defects.

The report from the orthopedic surgeon also concluded that although there was some cause and effect relationship between his original injuries and his complaints, Mr. Cavallaro does not need any follow up care because the injuries that he may have suffered from the accident have left no "residuals or permanency."

Lois Cavallaro, say defendant's neurologist, falls in the normal range of all objective tests used to determine her range of motion and muscular strength. She needs no neurological treatment, he concludes. The orthopedist also arrived at a similar conclusion: objective tests puts her in the normal range and she needs no follow up-treatment.

In a cross motion, plaintiff on the counter claim, Lois Cavallaro, also seeks summary judgment dismissing the action. In

doing so she adopts the arguments made by defendant only to the extent that they apply to the dismissal of Frank Cavallaro's complaint.

Plaintiffs oppose the summary judgment motion. Contrary to the positions taken by defendant, they assert that they suffered serious injuries as a result of defendant's negligence and that those injuries have continued to adversely affect them since the accident.

Plaintiffs contend that they have sustained injuries which have caused permanent consequential limitation of a use of a body organ or member and significant limitation of use of a body function or system. In support of their contention they point to reports from their doctors, which they say, contradict the finding of defendant's doctors.

They say that the results of tests conducted by their doctor's show that there has been marked reduction in their range of motion. These findings, they say, support their assertion of serious injuries.

Upon review, defendant's summary judgment motion, is denied. Plaintiffs have overcome defendant's prima facie showing that they did not meet the standards outlined by the statute. See Toure v. Avis Rent a Car Systems, Inc., 98 NY2d 345; Krease v. NYC Transit Authority, 789 NYS2d 281; Howard v. King, 307 AD2d 278.

Further, a question of fact is raised by the conflicting claims of the doctors for each side. Rotuba Extruders v. Ceppos, 46 NY2d 228, mandates denial of a summary judgment motion where there is a question of fact.

Dated: April 18, 2007

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J.S.C.