

**Milowsky v Vargas**

2007 NY Slip Op 31208(U)

May 4, 2007

Supreme Court, Queens County

Docket Number: 0023848/2004

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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| STACEY MILOWSKY,       | No. 23848/04           |
| Plaintiff,             | Motion                 |
| -against-              | Date February 20, 2007 |
| MARTHA J. VARGAS AND   | Motion                 |
| MANUEL ANTONIO FLORES, | Cal. No. 26            |
| Defendants.            | Motion                 |
| -----                  | Seq. No.3              |

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Plaintiff commenced this action seeking to recover damages for personal injuries alleged to have been sustained due to a motor vehicle accident which occurred on July 5, 2002 on the Taconic State Parkway, northbound at the intersection of Pudding Street, Putnam Valley, New York.

Defendants move for an order pursuant to CPLR 3212 granting summary judgment based upon plaintiff's failure to meet the threshold limits of Insurance Law §§ 5102 and 5104.

Contentions of the Parties

Defendants assert that the plaintiff's bill of particulars sets forth the following injuries: tear in left medial meniscus; retropatellar and suprapatellar effusions, left knee; internal derangement left knee; lumbar sprain/strain; and lumbar derangement. Defendants submit the affirmed medical report of Dr. Edward A. Torriello who examined plaintiff. He states that plaintiff revealed evidence of resolved knee contusions and low back strain. There was no evidence of disability from any orthopedic injury sustained in the accident and no further orthopedic treatment was indicated. She did not require any further physical therapy and was able to perform the duties of her

occupation. The injury to her knees and lower back are an acute exacerbation of a pre-existing condition.

Plaintiff was also examined by Dr. Kulip K. Sachdev. His affirmed medical report sets forth that plaintiff has no neurological disability and is not disabled from working or from activities of daily living. He found that plaintiff had resolved cervical and lumbar spine sprain and post traumatic headaches. There was also pre-existing long standing migraine headaches. The status of a post-right knee arthroscopic surgery in 2003 was deferred to an orthopedic surgeon. He found that she has no neurological disability related to the subject accident.

Dr. Harvey L. Lefkowitz examined the MRI films of plaintiff's lumbar spine, right knee and left knee. He concludes, in his affirmed medical report that, as to plaintiff's lumbar spine, no herniation was identified. There was no distal cord or phylum terminate abnormally seen. It was an unremarkable MRI with no evidence of post traumatic change. The MRI's of the right and left knees were unremarkable with no tears or displacement and no evidence of post traumatic change. Portions of plaintiff's deposition testimony transcript is submitted. Defendants argue that based upon the medical evidence and plaintiff's testimony, plaintiff did not sustain a serious injury.

Plaintiff submits the affirmation of her treating physician Dr. Struan Coleman. He states that he began treating plaintiff in April, 2003 following injuries sustained in two motor vehicle accidents in 2002. She had previously treated with another orthopedist closer to her home. He states that, as a result of the subject accident, plaintiff sustained a tear in the posterior horn of the medial meniscus of her left knee along with internal derangement thereof. She has a permanent consequential limitation in the use of her left knee. Her prior accident resulted in injury to her right knee upon which he performed surgery. MRI's were taken of the right knee only after the prior accident. He reviewed the films and reports of the different sets of the MRI's. He concluded that the August 30, 2002 MRI showed a tear in the left knee which was the result of the motor vehicle accident on July 5, 2002. He examined her on August 30, 2006 and found her to be symptomatic for internal derangement of the left knee injury with limitations in the range of motion due to the miniscal tear. He sets forth that a recent examination showed her range of motion for extension was 0 degrees where normal is

0 degrees and flexion of 130 degrees where normal is 140 degrees due to the meniscal tear.

Plaintiff submits her own affidavit which states that she is not claiming injury to her right knee which occurred during the prior accident. She saw Dr. Coleman on and off for almost two years and on her last visit he recommended further physical therapy and an updated MRI of her left knee. Physical therapy has not relieved the pain. She stopped going to a physical therapist because she reached maximum medical improvement and no longer had health insurance benefits. She sets forth those activities which she can no longer perform.

In reply, defendants assert that Dr. Coleman's report fails to included numerical range of motion findings for the plaintiff's left knee and lumbar spine contemporaneous with the accident. He also relied upon unaffirmed or uncertified records of the emergency room. There was no competent medical evidence to support plaintiff's claim that she was unable to perform substantially all of her daily activities for 90 out of the 180 days immediately following 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 case, defendants have established their entitlement to judgment as a matter of law.

The burden then shifted to plaintiff to raise a material issue of triable fact which would warrant denial of the motion. This court finds that plaintiff has sustained her burden. The court notes that defendants object to the use of certain records by plaintiff's doctor. However, the affirmations by defendants' doctors show that such records were reviewed by them with respect to their examinations of plaintiff. Here, plaintiff's treating doctor sets forth

that he reviewed the MRI films taken after the subject accident and concurred with the radiologist that there was a tear in the left knee. Such statement contradicts defendants' doctors' findings that plaintiff's knee was normal. Plaintiff indicates that she stopped therapy because she had reached maximum medical improvement and no longer had health insurance benefits.

As the medical opinions with respect to the plaintiff's conditions in opposition to the motion are supported by objective medical testing and evidence, the motion is denied. Toure v. Avis Rent A Car Sys., 98 NY2d 345 at 353.

Dated: May 4, 2007

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HON. DAVID ELLIOT