

**McCarthy v Nash**

2007 NY Slip Op 31288(U)

May 14, 2007

Supreme Court, Suffolk County

Docket Number: 0001167/2004

Judge: Robert W. Doyle

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

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 12-15-06  
ADJ. DATE 2-15-07  
Mot. Seq. # 001 - MG  
002 - XMD

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KRISTINA McCARTHY,	:		:	JOHN J. GUADAGNO, P.C.
	:		:	Attorney for Plaintiff
Plaintiff,	:		:	136 East Main Street
	:		:	East Islip, New York 11730
- against -	:		:	
	:		:	ROBERT P. TUSA, ESQ.
GEORGE W. NASH,	:		:	Attorneys for Defendant
	:		:	898 Veterans Memorial Highway, Suite 320
Defendant.	:		:	Hauppauge, New York 11788
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Upon the following papers numbered 1 to 21 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 12 - 21; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that defendant's motion (001) 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 granted and the complaint is dismissed; and it is further

**ORDERED** that plaintiff's cross motion (#002) for, inter alia, summary judgment on liability grounds is denied as untimely and academic.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on Lowell Avenue at or near its intersection with Oceanside Street, Town of Islip, County of Suffolk on November 4, 2003. The accident allegedly happened when the vehicle owned and operated by defendant impacted the driver's side passenger door of the vehicle operated by plaintiff. Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Initially, as the note of issue in this action was filed on July 31, 2006, any motion for summary judgment made after November 28, 2006 was untimely (*see*, CPLR 3212 [a]). As plaintiff's cross

motion was not made until December 26, 2006, the date that it was served, her motion that is for an order granting her summary judgment on liability grounds and on the ground that she sustained a “serious injury” as defined by section 5102 of the Insurance Law, is denied as untimely. Furthermore, plaintiff has not demonstrated good cause for the delay, and the court may not deem that good cause exists (*see, Miceli v State Farm Mut. Auto. Insur. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Rocky Point Drive-In, L.P. v Town of Brookhaven*, 2007 NY Slip Op 1717 [2d Dept 2007]; *Rivers v City of New York*, 37 AD3d 804, 830 NYS2d 767 [2d Dept 2007]). However, plaintiff’s claim that she sustained a “serious injury” as defined by section 5102 of the Insurance Law has been treated as opposition to defendant’s timely motion.

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 Inc.*, 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 Systems, Inc.*, 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 [2d Dept 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 [1<sup>st</sup> Dept 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 [2d Dept 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 [3d Dept 1990]).

In support of this motion defendants submit, inter alia, the pleadings; the plaintiff’s verified bill of particulars; a one-page except of plaintiff’s deposition testimony; plaintiff’s Stony Brook University Hospital emergency department records; and the affirmed report of defendant’s examining neurologist,

Dr. Edward M. Weiland, M.D.

Plaintiff claims in her bill of particulars that she sustained cervical and lumbar disc bulges and derangements with a loss of mobility; cervical radiculopathy; lumbar radiculitis; an internal derangement of the left shoulder; and a TMJ dysfunction. She also claims that her injuries have resulted in a limitation of motion and an impairment of the function of her injured body parts. She further claims that her injuries have aggravated her underlying degenerative conditions that were asymptomatic prior to the accident, increasing the likelihood of early arthritis. In addition, plaintiff claims that she was confined to her bed for approximately one week and intermittently to date and to her home for approximately three months and intermittently to date. Moreover, plaintiff claims that she sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation, and a non-permanent injury. While plaintiff claims that she was confined to her home for approximately three months, she testified during her deposition that she only missed one day from work after the accident.

Plaintiff's Stony Brook University Hospital emergency department records on the day of the accident show that she had complaints of neck and back pain. The attending physician noted that she had mild midline lumbar tenderness and mild bilateral trapezius tenderness, but that she was able to bend to 90 degrees. The attending physician opined that plaintiff sustained sprains of the neck and lumbar region. After her examination, plaintiff was released that day.

In his report dated January 31, 2006, Dr. Weiland states that he performed an independent neurological exam of plaintiff on that date, and his findings include a full range of motion of the neck, back and shoulders; DTRs that were normoactive bilaterally; intact sensation; full motor power at "5/5"; and a negative straight leg raising test at 90 degrees. He also noted that there was no evidence of scapular winging, and no vertebral body percussion tenderness or paraspinal muscle spasm. Dr. Weiland opined that plaintiff had sustained cervical and lumbar sprains/strains which had resolved, and that her neurological exam was normal. He also concluded that plaintiff was able to perform the activities of her daily living including employment without restrictions.

By his submissions, defendant made a prima facie showing that plaintiff did not sustain a serious injury (see, *Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Teodoru v Conway Transp. Svc.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Willis v New York City Trans. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]; *Grant v Heli Trucker, Inc.*, 294 AD2d 538, 742 NYS2d 874 [2d Dept 2002]). Defendant's examining neurologist found that plaintiff had a full range of motion of the neck, back and shoulders as well as a negative straight leg raising test. He also observed that there was no scapular winging or detectable paraspinal muscle spasm. Defendant's remaining evidence, including plaintiff's deposition testimony, also supports a finding that she did not sustain a serious injury. As defendant has met his burden as to all categories of serious injury alleged by plaintiff, the Court turns to plaintiff's proffer (see, *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to this motion, plaintiff submits, among other things, the two affirmed reports of plaintiff's treating radiologist, Mark Armstrong, M.D.; the three sworn reports of plaintiff's treating

chiropractor, Bernhard Sengstock, M.D.; and the plaintiff's personal affidavit. In one of his reports dated January 12, 2004, Dr. Armstrong states that he performed MRI studies of plaintiff's cervical spine on that date and his findings include straightening of the cervical spine; diffuse disc dehydration; end plate spurring of C5 and C6; disc bulges at C5-6 and C6-7; and unremarkable paraspinal tissues. In his other report dated January 12, 2004, Dr. Armstrong states that he performed MRI studies of plaintiff's lumbar spine on that date, and his findings include a disc bulge at L5-S1; decreased signal at L5-S1; and unremarkable paraspinal tissues. Dr. Armstrong opined that his lumbar MRI studies showed disc dehydration at L5-S1 along with a disc bulge.

In his report dated November 8, 2003, Dr. Sengstock states that he performed a chiropractic examination of plaintiff on that date in connection with her motor vehicle accident four days earlier. The findings of his exam include TMJ dysfunction and crepitus as well as tenderness and trigger points in the left rotator cuff, bilateral trapezius, and anterior cervical muscles bilaterally. He also noted that there was aberrant motion of plaintiff's various cervical spine vertebral segments and that her DTRs were abnormal at "+1." Dr. Sengstock opined that plaintiff had sustained cervical and lumbar intervertebral disc derangements with radiculopathy, an internal derangement of the left shoulder, and a TMJ dysfunction which were causally related to the accident. In his report dated April 14, 2004, Dr. Sengstock states that he performed a follow-up chiropractic examination of plaintiff on that date, and his findings include a positive Jackson's Foraminal Compression test; DTRs that were "+1" and sluggish in the left branchioradialis and biceps; and decreased muscle strength in the cervical flexors and hip extensor muscles. He also noted that there were various limitations in plaintiff's cervical and lumbar ranges of motion. Dr. Sengstock opined, based upon his findings, that plaintiff had sustained a permanent loss of cervical and lumbar range of motion, a permanent loss of cervical and lumbar muscle function, as well as cervical and lumbar radiculopathy. He also concluded that plaintiff was permanently, partially disabled and that there was a significant likelihood of accelerated degenerative changes due to her injuries. In his report dated November 29, 2006, Dr. Sengstock states that he reexamined plaintiff on that date, and his findings include various limitations in cervical and lumbar spine ranges of motion. He again opined that plaintiff was permanently, partially disabled due to the reduced range of motion of her spinal regions as well as weakness of the lower extremity musculature.

In her personal affirmation, plaintiff avers that she began to experience neck, lower back and left shoulder pain after the accident. She underwent regular medical, chiropractic and other treatment for approximately five months after the collision. Plaintiff stopped receiving treatment at this point because her no-fault benefits were denied and because she did not have health insurance. She also avers that she activities which require lifting and bending aggravate the condition of her neck and back, and that she can no longer lift heavy items. Plaintiff further avers desk work involving computer usage and household task also aggravate the condition of her neck

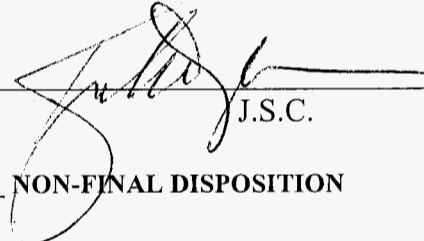
Plaintiff has provided insufficient medical proof to raise an issue of fact that she sustained a serious injury under the no-fault law (*see, Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). Initially, Dr. Sengstock has entirely failed to address the pre-existing degenerative condition of plaintiff's cervical and lumbosacral spine, as he did not provide any foundation or objective medical basis supporting the conclusions which he reached, namely, that the alleged conditions were

causally related to the accident (*see, Knoll v Seafood Express*, 5 NY3d 817, 803 NYS2d 25 [2005]; *Gomez v Epstein*, 29 AD3d 950, 818 NYS2d 101 [2d Dept, 2006]; *Flores v Leslie*, 27 AD3d 220, 810 NYS2d 464 [1<sup>st</sup> Dept 2006]). Further, the findings of muscle spasms by Dr. Sengstock, which were not objectively measured or compared with normal function, are insufficient to raise a triable issue of fact (*see, Clements v Lasher*, 15 AD3d 712, 788 NYS2d 707 [3d Dept 2005]). While a disc herniation may constitute a serious injury, the MRI reports by Dr. Armstrong are not probative for the purposes of demonstrating a serious injury because they contain no opinion as to causation (*see, Collins v Stone*, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]), and do not establish the duration of plaintiff's alleged injuries (*see, Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; *Nelson v Amicizia*, 21 AD3d 1015, 803 NYS2d 87 [2d Dept 2005]). In any event, plaintiff's two and one-half year gap in treatment was, in essence, a cessation of treatment which is not adequately explained by the reports of Dr. Sengstock or her other submissions (*see, Philips v Zilinsky*, 2007 NY Slip Op 3285 [2d Dept 2007]).

Additionally, the proof submitted by the plaintiff is insufficient to raise a triable issue of fact that she sustained a medically-determined injury or impairment rendering her unable to substantially perform all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see, Magarin v Kropf*, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; *Mercado v Garbacz*, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]). Although plaintiff alleges that she has difficulty lifting heavy objects and working at a computer/desk job, the record lacks objective proof of any substantial curtailment of her activities within the relevant time period after the accident (*see, Nelson v Distant*, 308 AD2d 338, 764 NYS2d 258 [1<sup>st</sup> Dept 2003]; *Keena v Trappen*, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]).

Moreover, since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, her claim in this regard must be dismissed (*see, CPLR 3212 [b]*; *see, Watford v Boolukos*, 5 AD3d 475, 772 NYS2d 566 [2d Dept 2004]; *Rutison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, defendant's motion for summary judgment is granted, and plaintiff's cross motion is denied as indicated above.

Dated:           MAY 14 2007          

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

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION