

**Dialto v Lynch**

2007 NY Slip Op 31298(U)

May 14, 2007

Supreme Court, Suffolk County

Docket Number: 0018211/2005

Judge: Robert W. Doyle

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

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 12-15-06  
ADJ. DATE 2-8-07  
Mot. Seq. # 002 - MG; CASEDISP

-----X  
REGINA DIALTO, :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 CHRISTOPHER LYNCH and LONG ISLAND :  
 COOLING & HEATING, INC., :  
 :  
 Defendants. :  
-----X

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Upon the following papers numbered 1 to 28 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 - 24; Replying Affidavits and supporting papers 25 - 28; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendants for summary judgment pursuant to CPLR 3212 dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is granted.

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 Central Avenue at the intersection of Central Avenue South, in the Town of Oyster Bay and County of Nassau, New York on July 28, 2004. The accident allegedly happened when plaintiff's vehicle, which had been stopped at a red light, was struck in the rear by the vehicle owned by defendant Long Island Cooling and Heating, Inc. and operated by defendant Christopher Lynch. By order dated October 23, 2006 (Werner, J.), plaintiff was awarded summary judgment on liability grounds. Defendants now move for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiff opposes this motion, and defendants have filed a reply.

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 Kilhenny*, 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; plaintiff's verified bill of particulars; the five affirmed reports of defendants' examining radiologist, Alan B. Greenfield, M.D.; the affirmed report of defendants' examining orthopedist, John C. Killian, M.D.; the affirmed report of defendants' examining neurologist, S. Murthy Vishnubhakat, M.D.; and plaintiff's deposition testimony.

Plaintiff claims in her bill of particulars that she sustained, among other things, cervical disc herniations; a permanent chronic cervical strain; a permanent significant limitation in the mobility of her neck; and a limitation and restriction of motion of her shoulders. Plaintiff also claims that she was substantially prevented from pursuing her regular duties and activities. The Court construes these allegations to mean that plaintiff claims that she sustained a serious injury in the categories of a permanent consequential limitation, a significant limitation and a non-permanent injury.

In his first report dated July 26, 2006, Dr. Greenfield states that he performed an independent radiological review of the MRI studies of plaintiff's cervical spine dated September 24, 2004, and his findings include a normal cervical lordosis; disc dessication at all levels; degenerative bony osteophytes at C5 to C7; central disc herniations; minimal degenerative disc bulging; and no fractures or subluxations. He opined that these studies showed diffuse degenerative disc disease which was longstanding in origin and unrelated to the accident. He also opined that plaintiff's cervical disc herniations were not attributable to the accident, but instead were likely degenerative in origin. In his second report July 26, 2006, Dr. Greenfield states that he

performed an independent radiological review of the MRI studies of plaintiff's cervical spine dated January 7, 2005, and his findings include disc dessication and dehydration; degenerative bony osteophytes at C5 through C7; hypertrophic facet arthropathy; and generalized annular disc bulging. He opined that these studies showed a continuing disc degeneration which was unrelated to the accident. In his third report dated July 25, 2006, Dr. Greenfield states that he performed an independent radiological review of the MRI studies of plaintiff's cervical spine dated June 24, 2005, and his findings include a bulging disc at C4-5 with minimal flattening of the dural sac; central disc herniations at C5-6 and C6-7 with hypertrophic facet arthropathy; and diffuse disc dessication at all levels. He opined that the disc bulging at C4-5, which was degenerative in nature and unchanged from prior studies. In his fourth report dated January 18, 2005, Dr. Greenfield states that he performed an independent radiological review of the CT scans of plaintiff's cervical spine dated January 18, 2005, and his findings include degenerative anterior spondylosis at C5-6 and C6-7; central disc herniations; and generalized degenerative annular disc bulging at C4-5. He opined that the degenerative changes which he observed required years to develop and likely predated the accident. He also opined that the central disc herniations were degenerative due to spondylosis. In his fifth report dated July 25, 2006, Dr. Greenfield states that he performed an independent radiological review of the x-rays of plaintiff's cervical spine on January 18, 2005, and his findings include degenerative bony osteophytes at C5-6 and C6-7 anteriorly; and a 1mm posterior subluxation of C4 over C5 during extension, which reduces to normal positioning during flexion. He opined that the posterior subluxation was negligible and could not be contributed to the accident with a reasonable medical certainty. He further opined that the spondylosis was longstanding in origin and unrelated to the accident.

In his report dated August 8, 2006, Dr. Killian states that he performed an independent orthopedic examination of plaintiff on August 2, 2006, and his findings include a normal cervical lordosis without evidence of atrophy; and no palpable muscle spasm about the cervical spine. He also observed that plaintiff's cervical flexion, extension, right/left rotation and right/left lateral flexion were full at 45, 45, 90/90 and 45/45 degrees, when compared to the normal ranges of 45, 45, 90/90 and 45/45 degrees. He noted that while plaintiff complained of tenderness in the neck and left trapezial region as well as pain with full right lateral flexion, there was no restriction of motion or muscle spasm. Dr. Killian opined that there were no objective findings of any impairments or disability from the accident and that plaintiff's upper extremity neurological exam was normal. He also concluded that plaintiff was capable of working at her normal capacity and performing her usual activities of daily living without limitations.

In his report dated August 19, 2006, Dr. Vishnubhakat states that he performed an independent neurological examination of plaintiff on August 16, 2006, and his findings include an intact sensory system; symmetrical reflexes at "2+"; a supple neck with no tenderness or paravertebral muscle spasm; all major muscle groups that were "5/5" in strength with no atrophy or fasciculations; and a negative straight leg raising test. He also observed that there was a normal range of shoulder motion with no palpable crepitus. Dr. Vishnubhakat opined that plaintiff had sustained a causally related cervical sprain and strain type injury without definite evidence of radiculopathy or myelopathy. He also concluded that her neurological exam was normal and that she was not disabled.

Plaintiff testified that she was not confined to her home after the accident, however, she lost about three days from work. She has not played golf or bowled since the accident, and she has to exercise caution while lifting anything. She has to support her neck while watching television. Plaintiff further testified that her last medical appointment was in March 2006.

By their submissions, defendants 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]; *Faroze v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teodoro v Conway Transp. Serv.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Gousgoulas v Melendez*, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]). Defendants' examining orthopedist found that plaintiff had a full range of motion of the cervical spine with no detectable spasm. Similarly, defendants' examining neurologist found that plaintiff had a full range of motion of the shoulders with no crepitus or muscle weakness. Furthermore, defendants' examining radiologist opined that there were preexisting degenerative changes to plaintiff's cervical spine which were long-standing in nature and unrelated to trauma (see, *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). Defendants' remaining evidence, including plaintiff's deposition testimony, also supports a finding that she did not sustain a serious injury. As defendants have met their 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 affirmed report of plaintiff's treating radiologist, George J. Cavaliere, M.D.; the two affirmed reports of plaintiff's second treating radiologist, Sydney S. Yoon, M.D.; the affirmed report of plaintiff's third treating radiologist, David J. Panasci, M.D.; the three affirmed reports of plaintiff's treating neurologist, Adam Schneider, M.D.; and the plaintiff's personal affidavit.

In his report dated September 24, 2004, Dr. Cavaliere states that he performed MRI studies of plaintiff's cervical spine on that date, and his findings include a midline osteophyte formation at C4-5; a C6-7 central disc herniation abutting the anterior margin of the cervical cord; and an area of low signal T1 and high signal on T2 weighed images consistent with a focal area of myelomalacia<sup>1</sup>. He opined that these studies showed degenerative changes as well as myelomalacia which was likely post-traumatic in etiology.

In his report dated January 7, 2005, Dr. Yoon states that he performed MRI studies of plaintiff's cervical spine on that date, and his findings include a central disc herniation with cord impingement at C5-6; a 5 mm region of myelomalacia within the central cord at the C5-6 level; and a central disc herniation at C6-7 with cord impingement. He also observed that the paraspinal and prevertebral muscles appeared within normal limits on the axial images. In his other report dated February 1, 2006, Dr. Yoon states that he performed MRI studies of plaintiff's cervical spine with and without contrast on that date, and his findings include disc herniations at C4-5, C5-6, and C6-7; a 6mm intramedullary cystic lesion on the spinal cord at C5. He opined that plaintiff's cystic lesion was consistent with syringohydromelia<sup>2</sup>.

In his report dated October 21, 2006, Dr. Panasci states, inter alia, that he performed a review of the plaintiff's MRI studies dated September 24, 2004, January 7 and June 24, 2005, as well as February 1, 2006,

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<sup>1</sup> Myelomalacia is defined as softening of the spinal cord (Stedman's Medical Dictionary 1171 [27<sup>th</sup> ed 2000]).

<sup>2</sup> Syringomyelia, which is synonymous with syringohydromelia, is defined as "the presence in the spinal cord of longitudinal cavities lined by dense, gliogenous tissue, which are not caused by vascular insufficiency" (Stedman's Medical Dictionary 1775 [27<sup>th</sup> ed 2000]).

and his findings include disc herniations at C4-5 through C6-7 that result in spinal cord and left C6 nerve root compression. He also opined that these studies showed gliosis<sup>3</sup>/myelomalacia of the spinal cord behind the body of C5.

In his report dated September 15, 2004, Dr. Schneider states that performed an initial neurological examination of plaintiff on that date, and his findings include a good range of motion of the cervical spine without stiffness; full motor power of the upper extremities without spasticity or rigidity; reflexes that were “2+”; and some spasm of the left trapezius. In his report dated February 18, 2005, Dr. Schneider states that he performed a follow-up examination of plaintiff on that date, and his findings include persistent spasm in the trapezius area; and full movement of the upper and lower extremities. In his report dated June 9, 2006, Dr. Schneider states that he performed trigger point injections of plaintiff on October 24, 2004, April 1, May 11 and October 15, 2005, as well as on January 5, 2006. On January 5, 2006, he observed that there was spasm in plaintiff’s trapezius area bilaterally, but less so than on prior visits. On February 1, 2006, he reviewed plaintiff’s cervical MRI results performed that day by Dr. Yoon, and advised plaintiff to follow-up cervical imaging in six months. He opined that plaintiff’s symptoms were causally related to the accident and that she was likely to be plagued by intermittent symptoms for a prolonged period of time.

Plaintiff avers in her affidavit that she underwent a weekly course of physical therapy for about fourteen months after the accident and then started a course of trigger point injections on October 25, 2004. As a result of her injuries, plaintiff is unable to vacuum, or perform activities such as cleaning or gardening where bending is required. She also has difficulty performing laundry tasks, and no longer weight trains, plays golf, or bow s. Plaintiff further avers that her physical activity level has declined since the accident.

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. Schneider has entirely failed to address the pre-existing degenerative condition of plaintiff’s cervical spine, as he did not provide any foundation or objective medical basis supporting the conclusions which he reached, namely, that plaintiff’s “symptoms” 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]). While Dr. Schneider records plaintiff’s complaints of pain, she has failed to present medical proof that was contemporaneous with the accident showing any initial range of motion restrictions for the affected body parts (*see, Ramirez v Parache*, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]; *Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]). He has also failed to set forth any significant, objectively measured limitations in the functioning and use of plaintiff’s cervical spine or shoulders in his most recent report (*see, Porto v Blum*, 2007 NY Slip Op 3114 [2d Dept 2007]; *Springer v Arthurs*, 22 AD3d 829, 803 NYS2d 170 [2d Dept 2005]). Instead, the affidavit of Dr. Schneider largely consists of unsubstantiated speculation concerning the causal relationship between the accident and plaintiff’s condition several years afterwards (*see, Damstetter v Martin*, 247 AD2d 893, 668 NYS2d 863 [4<sup>th</sup> Dept 1998]), as well as conclusory assertions tailored to meet the statutory

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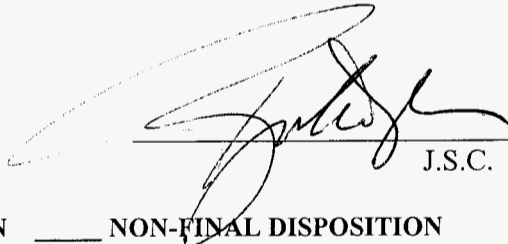
<sup>3</sup> Gliosis is defined as the overgrowth of the astrocytes in an area of damage in the brain or spinal cord (Stedman’s Medical Dictionary 750 [27<sup>th</sup> ed 2000]). An astrocyte is defined as one of the large neuroglia cells of nervous tissue (Stedman’s Medical Dictionary 159 [27<sup>th</sup> ed 2000]).

requirements (*see, Khan v Hamid*, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Further, the findings of muscle spasms by Dr. Schneider, 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 plaintiff's radiologists are not probative for the purposes of demonstrating a serious injury because they contain no opinion as to causation as to the disc herniations (*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]). Additionally, while Dr. Cavaliere opined that plaintiff's MRI studies performed on September 24, 2004 showed myelomalacia which was likely post-traumatic, he did not specifically relate it to the accident, and its significance is not explained either by him or by plaintiff's other physicians (*see generally, Collins v Stone, supra; Cerisier v Thibiu, supra*). Moreover, plaintiff's subjective complaints of pain to her health care providers do not constitute a significant injury within the meaning of the statute (*see, Ali v Vasquez*, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]). In any event, plaintiff's nine month gap in treatment was, in essence, a cessation of treatment which is not adequately explained by the reports of Dr. Schneider or her other submissions (*see, Pommells v Perez, supra; 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, among other things, that she no longer engages in certain household and sporting activities, 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]; *Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, this motion for summary judgment is granted and the complaint is dismissed.

Date:           MAY 14 2007          

  
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J.S.C.

FINAL DISPOSITION       NON-FINAL DISPOSITION