| **Velasquez v Skelly** |
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| 2007 NY Slip Op 31362(U) |
| May 22, 2007 |
| Supreme Court, Suffolk County |
| Docket Number: 0002420/2005 |
| Judge: Robert W. Doyle |
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[* 1 ]

SHORT FORM ORDER

INDEX No. 05-2420
CAL. No. 06-02304-MV

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

***PRESENT:***

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-18-06
ADJ. DATE 2-20-07
Mot. Seq. # 001 - MD

---------------------------------------------------------------X
HEBER NOE VELASQUEZ,

Plaintiff,

- against -

MAGDELINA SKELLY,

Defendant.
---------------------------------------------------------------X

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Upon the following papers numbered 1 to 14 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 10 - 14 ; Replying Affidavits and supporting papers ___; Other___~~; and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the defendant's motion for summary judgment dismissing the complaint is denied.

This action arose from a vehicular accident, occurring on September 14, 2003 in which the plaintiff allegedly sustained serious personal injuries. The defendant moves for summary judgment dismissing the complaint pursuant to Insurance Law §5102(d). The plaintiff opposes the motion.

Under the Insurance Law "'[s]erious injury' means 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" (Insurance Law §5102[d]).

In the context of the plaintiff's claims, the term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use" (***Licari v Elliott,*** 57 NY2d 230, 455 NYS2d

570 [1982]). For this purpose, the plaintiff must demonstrate not only the extent or degree of the limitation but also its duration (***Beckett v Conte,*** 176 AD2d 774, 575 NYS2d 102 [1991], app. den. 79 NY2d 753, 581 NYS2d 281). The duration of the injury must be more than "fleeting" (***Partlow v Meehan,*** 155 AD2d 647, 548 NYS2d 239 [1989]). The term "consequential" means important or significant (***Kordana v Pomellito,*** 121 AD2d 783, 503 NYS2d 198 [1986], app. dis. 68 NY2d 848, 508 NYS2d 425). A "permanent loss" of use of a body organ, member, function or system must be total (***Oberly v Bangs Ambulance, Inc.,*** 96 NY2d 295, 727 NYS2d 378 [2001]). In order to prove the extent or degree of physical limitation, an expert can designate a numeric percentage of a plaintiff's loss of range of motion or give a "qualitative assessment of a plaintiff's condition...provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (***Toure v Avis Rent A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865, 868 [2002]; rearg. den. ***Manzano v O'Neil,*** 98 NY2d 728, 749 NYS2d 478).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law §5102(d), 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 the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.,*** 171 AD2d 588, 567 NYS2d 454, 455 [1991]). 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 non-moving party, here the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808, 810 [1990]).

The defendant submits in support of her motion, inter alia, the affirmation of her attorney, the complaint and the verified answer, the bill of particulars, the plaintiff's deposition testimony of June 2, 2006, and the sworn reports of defendant's experts, Doctors Arthur M. Bernhang (Dr. Bernhang) and Mark J. Zuckerman (Dr. Zuckerman), dated July 25, 2006 and July 17, 2006, respectively. The plaintiff alleges in his complaint that the subject accident occurred on September 14, 2003. He further alleges that he sustained serious injuries and economic loss greater than basic economic loss as a result of the accident.

The plaintiff avers in the bill of particulars that he sustained, as a result of the accident, cervical spine strain, cervical radiculopathy, cervical myofascitis and left shoulder sprain and that these are permanent injuries which are accompanied by, inter alia, pain, swelling, limitation of movement and loss of use of the injured portions of the plaintiff's body. The plaintiff further avers that he received emergency room treatment on the day of the accident, he was confined to his bed and home and totally disabled from September 14, 2003 to September 16, 2003 and he remains partially disabled to date. As a result of the accident he was incapacitated from his employment for one and one half weeks and lost earnings of $300. The plaintiff also avers that as a result of the accident he missed one day of high school. The Court construes these allegations to mean that he is claiming the serious injury categories of permanent loss, permanent consequential limitation and significant limitation.

The plaintiff testified in his deposition that at the time of the accident he was employed at Denmark Electronic Components (Denmark). He worked there during the week after school for six to seven hours each day. During the summer he worked there Monday through Friday from 9AM to 5PM. At the time

of the accident he was also a student at Brentwood High School. The accident occurred on September 14, 2003 which he believed was a Saturday. When the accident occurred his left shoulder hit the door of the car he was driving and his neck snapped to the side. Immediately after the accident he had pain in those areas. Although he declined to be taken to the hospital by ambulance, later in the day his mother took him to the emergency room. He was released from the emergency room that day without any medical collars or braces. A day or two after the accident he was treated by his pediatrician for neck, shoulder and back pain. A couple of days after that he was treated by a specialist, Dr. Rodriguez, at J & R Medical and Pain Management (J &R). He was also treated by Ramon Ortiz (Dr. Ortiz), a chiropractor at J & R. His chiropractic treatment was three times each week and lasted until the end of January 2004. Dr. Ortiz performed nerve testing during this time. No MRIs were done but he believed that x-rays were done at the emergency room. He stopped treatment at J & R because he had no transportation. Prior to September 2003 he had not injured his neck, back or left shoulder and had not been treated by chiropractor. Since September 2003 he has not re-injured any part of his body which he has claimed was injured in the subject accident.

The plaintiff also testified that he currently has pain in his back, left shoulder and neck. As a result of these injuries he is unable to lift objects over 25 pounds, he has trouble sleeping, he has trouble sitting for more than ten minutes and cannot use a computer for too long a period of time. He takes Ibuprofen twice a day for pain relief. Since the accident he can no longer play soccer or baseball. He lost one and one half week's of time at Denmark, but upon returning to work was able to resume his previous duties. He did not miss any time from school and, although he was not confined to bed after the accident, he was confined to home during the week and one half period after the accident. Finally, the plaintiff testified that he had no out of pocket expenses except for cab fare.

Dr Bernhang, an orthopedist, averred in his report dated July 25, 2006 that he examined the plaintiff on July 19, 2006. The plaintiff complained to him that he still had pain in his neck which made uncomfortable when trying to sleep and that he cannot participate in sports or walk or jog for long distances. The plaintiff informed him that he takes Ibuprofen twice a day and had taken it prior to this examination. The plaintiff also informed him that he does not wear a neck brace.

Upon conducting his physical examination of the plaintiff Dr. Bernhang noted that his actual findings for cervical range of motion testing were compared with the American Academy of Orthopedic Surgeon's "AVERAGE RANGE OF JOINT MOTION" (ARJM). Dr. Bernhang, using a goniometer, found the plaintiff's cervical flexion to be 20 compared with an ARJM of 38, cervical extension of 50 compared with an ARJM of 38, lateral flexion of "20/25" compared with an ARJM of 43 and cervical rotation of "30/35" compared with an ARJM of 45. He also observed that Spurling's test for cervical radiculopathy was negative and the muscles about the neck were soft to palpation with no palpable fibromyalgia, trigger point, or spasm noted.

He found the plaintiff's active shoulder abduction to be "115/130" compared with an ARJM of 170, active shoulder forward flexion of "105/130" compared with an ARJM of 158, external rotation of "95/95" compared with an ARJM of 90 and internal rotation of "40/40" compared with an ARJM of 70. Dr. Bernhang noted that while the plaintiff actively resisted shoulder abduction and forward flexion above 100 degrees, he was, when he removed his tee shirt, able to raise his arms straight above his head. Dr. Bernhang found this behavior to be "inconsistent" (Motion, Exhibit D). He found no pain on adduction of the shoulders and Hawkin's test, Napoleon's test, Hornblower's test, O'Brien's test and

Yergason's test were negative. Dr. Bernhang also found that there was no crepitation on passive motion of the left shoulder and isometric and isotonic contractures of the abducted arms did not elicit complaints of pain.

Dr. Bernhang opined that while "the examinee presents with extensive subjective complaints and restrictions on examination today pertaining to his cervical spine and to his shoulders, it is my opinion that these complaints and restrictions are not substantiated by, and do not correlate with, objective findings and I find no objective basis for causally related restrictions preventing this examinee from performing his normal daily activities" (Motion, Exhibit D). He further opined that any soft tissue injuries the plaintiff may have sustained as a result of the subject accident were resolved without any residual effects. Dr. Bernhang concluded that there were no known pre-existing conditions which would affect the plaintiff's recovery.

Dr. Zuckerman, a neurologist, averred in his report dated July 17, 2006 that he examined the plaintiff on the same date. The plaintiff complained of cervical stiffness, difficulty doing heavy lifting and difficulty playing sports. Dr. Zuckerman's cervical range of motion testing indicated "at least 70° out of 80° to the left and 70° out of 80° to the right" (Motion, Exhibit E). He also found for cervical range of motion that flexion was 40 out of 45 degrees, lateral flexion was 40 out of 40 degrees and extension was 40 out of 40 degrees. Dr. Zuckerman described these ranges of motion as normal. He also found mild tenderness and spasms in the left trapezius area. He opined that there was no clinical evidence of cervical radiculopathy and that, except for cervical sprain with minimal subjective symptoms, there was a normal neurological examination. Dr. Zuckerman concluded that the plaintiff had no disability and that there was a causal relationship between the plaintiff's cervical sprain injury and the subject accident.

Turning to consideration of the serious injury categories of permanent consequential limitation and significant limitation, Dr. Bernhang's report is deficient in several respects. Initially, it is unclear what his cervical spine findings of "20/25" for lateral flexion and "30/35" for cervical rotation represent. Even if it is assumed, ad arguendo, that these are bilateral ranges of motion, they evince apparent limitations when compared to one another (*see,* ***McLaughlin v Rizzo,*** 38 AD3d 856, 832 NYS2d 666 [2007]). Dr. Bernhang then compares all of his cervical range of motion findings with the ARJM. However, Dr. Bernhang fails to cite the specific work of the American Academy of Orthopedic Surgeons on which he relies or to affirm that this method of measurement is generally accepted in the orthopedic community (*see,* ***Falco v Jackson,*** 12 Misc3d 1174[A], 820 NYS2d 842 [2006]). Moreover his statement that the ARJM numbers are only estimates serving as a guide and are not intended to be used as standard does not comply with the requirement that there be a comparison of findings with "the normal range of motion one would expect of a healthy person of the same age, weight and height (***Powell v Alade,*** 31 AD3d 523, 818 NYS2d 600 [2006]). This speculative proof neither rules out a limitation of range of motion (***Sullivan v Johnson,*** AD3d , 2007 N.Y. Slip Op. 03907, 2007 WL 1289568 [App. Div., Second Dept.) nor demonstrates that any limitation of range of motion is so mild, minor or slight as to be considered insignificant pursuant to the no-fault statute (***McLaughlin v Rizzo,*** supra; ***Manceri v Bowe,*** 19 AD3d 462, 798 NYS2d 441 [2005]). Moreover, even if this court were to accept the ARJM as constituting a "normal" range, it appears that Dr. Bernhang's findings show significant limitations of range of motion for cervical flexion, lateral flexion and cervical rotation (***Quinones v E & L Transp., Inc.,*** 35 AD3d 577, 826 NYS2d 422 [2006]). Dr. Bernhang's opinion that the plaintiff's ability to remove his tee shirt demonstrated his ability to use his shoulder for abduction or

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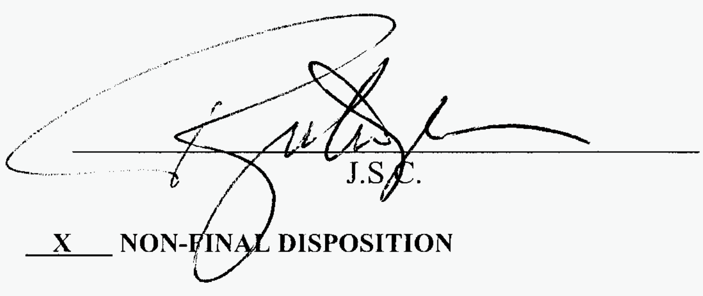
forward flexion was mere conjecture and speculative (*see,* ***Serrano v Canton***, 299 AD2d 703, 749 NYS 2d 591 [2002]).[1]

Dr. Zuckerman's report is also deficient in that he does not identify all of the objective tests performed (***Gamberg v Romeo,*** 289 AD2d 525, 736 NYS2d 64 [2001]). In any event, even if his findings of 10 degree deficiencies in cervical ranges of motion were based on objective tests, these findings raise a triable issue of fact as to whether the plaintiff sustained a serious injury (***Spezia v De Marco,*** 173 AD2d 462, 570 NYS2d 87 [1991]). Moreover, his findings, as a whole, belie his opinion that the plaintiff had a normal neurological examination and that there was no clinical evidence of cervical radiculopathy (***Thomas v Smith,*** 25 AD3d 786, 808 NYS2d 745 [2006]). Dr. Zuckerman also noted that there was a causal connection between the plaintiff's injuries and the subject accident. This report, considered with the plaintiff's comment to Dr. Bernhang that he has difficulty walking or jogging for long distances and with the plaintiff's testimony that he can no longer play soccer or baseball and that he has difficulty sleeping, lifting and sitting, raises a triable issue of fact as to whether the plaintiff sustained a permanent consequential limitation and/or a significant limitation (*see,* ***Toure v Avis Rent A Car Sys.,*** supra; ***Cummings v Riedy,*** 4 AD3d 811, 771 NYS2d 629 [2004]).

Since the defendant failed to meet her prima facie burden with respect to the serious injury categories of permanent consequential limitation and significant limitation, the Court need not consider whether the defendant met her burden as to the serious injury category of permanent loss (***Cesar v Felix,*** 181 AD2d 852, 581 NYS2d 411 [1992]) or the sufficiency of the plaintiff's opposition (***D'Onofrio v Arsenault,*** 35 AD3d 646, 828 NYS2d 117 [2006]). Accordingly, the defendant's motion for summary judgment dismissing the complaint is denied.

Dated: MAY 2 1 2007



J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

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[1] The Court did not address the sufficiency of Dr. Bernhang's range of motion findings with respect to the plaintiff's shoulders since the plaintiff alleged in the bill of particulars that the injury to his left shoulder was limited to a sprain which is not considered as being a serious injury pursuant to the no-fault statute (***Gaddy v Eyler,*** 79 NY2d 955, 582 NYS2d 990 [1992]; ***Shepley v Helmerson,*** 306 AD2d 267, 760 NYS2d 228 [2003]). However, even if the Court had considered these findings, it would have determined that they were vague and speculative (***Sullivan v Johnson,*** supra; ***McLaughlin v Rizzo,*** supra).