

<b>Lundwall v Ozhahveci</b>
2007 NY Slip Op 31365(U)
May 21, 2007
Supreme Court, Suffolk County
Docket Number: 0008658/2005
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 3-29-07  
Mot. Seq. # 001 - MG; CASEDISP  
002 - XMG

-----X  
CORRINE LUNDWALL, :  
 :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 SILVIA Z. OZHAVECI, HAKAN KOCALAN :  
 and MELANIE C. DAWSON, :  
 :  
 Defendants. :  
-----X

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Upon the following papers numbered 1 to 22 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 15; Answering Affidavits and supporting papers 16 - 20; Replying Affidavits and supporting papers 21 - 22; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by defendants Silvia Z. Ozkahveci s/h/a Silvia Z. Ozkahveci and Hakan Kocalan for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them on the grounds that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is granted; and it is further

**ORDERED** that this cross motion by defendant Melanie C. Dawson for an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing the complaint as against her 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 injuries allegedly sustained by the then 20 year old plaintiff pedestrian on January 29, 2005 at approximately 8:40 p.m. when she was struck by a vehicle owned by defendant Silvia Z. Ozkahveci s/h/a Silvia Z. Ozkahveci (Ozkahveci) and operated by

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defendant Hakan Kocalan (Kocalan) as a result of a collision between said vehicle and a vehicle operated by defendant Melanie C. Dawson (Dawson) on Route 110 at or near its intersection with Sterling Place, in Amityville, New York. By her bill of particulars, plaintiff alleges that as a result of the subject accident she sustained the following injuries, cervical spine sprain and strain; lumbar spine sprain and strain; and 2 x 2 centimeter contusion on the lower part of the left outer thigh. Following the accident, plaintiff was treated at the emergency room of Brunswick Hospital Center and discharged the same day. Plaintiff also seeks to recover economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Defendants Ozkahveci and Kocalan now move for summary judgment dismissing the complaint as against them on the grounds that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). In the alternative, defendants Ozkahveci and Kocalan seek summary judgment dismissing the complaint as against them based on the absence of any liability on their part. In support of their motion, they submit plaintiff’s verified complaint; the verified answer of defendants Ozkahveci and Kocalan; plaintiff’s bill of particulars; the deposition transcripts of plaintiff, defendant Ozkahveci, defendant Kocalan, and defendant Dawson; and the affirmed report of defendant’s examining orthopedist, Isaac Cohen, MD.

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 “significant limitation of use of a body function or system” categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (see, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (see, *Tippling-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 Eyler*, 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*

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*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]).

Here, the evidence of defendants Ozkahveci and Kocalan consisting of the affirmed medical report of their examining orthopedist, plaintiff's bill of particulars, and the deposition transcripts of all of the parties, was sufficient to establish, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see, Porto v Blum*, \_\_\_ NYS2d \_\_\_, 2007 WL 1080429, 2007 NY Slip Op 03114 [NYAD 2 Dept Apr 10, 2007]). In his affirmed report dated November 2, 2006, defendants' examining orthopedist, Dr. Cohen, indicated that he performed an orthopedic evaluation of plaintiff on said date; reviewed records that included plaintiff's bill of particulars, emergency records from Brunswick Hospital and progress notes from Suffolk County Department of Health Services; and noted plaintiff's current complaints of lower back, neck and mid back pain. Defendants' examining orthopedist also indicated the results of his examination of plaintiff including, range of motion testing of the cervical spine that was within normal limits with flexion, extension, and right and left lateral tilting to 45 degrees respectively (up to 45 degrees being normal) and right and left-sided rotations normal to 80 degrees (up to 80 degrees being normal). He found no tenderness, muscle spasms or trigger points on palpation. In addition, defendants' examining orthopedist provided range of motion testing results for plaintiff's thoracolumbar spine that were within normal limits with forward flexion to 90 degrees (up to 90 degrees normal) and hyperextension, right and left lateral bending and right and left sided rotation also within normal limits performed to 30 degrees respectively (up to 30 degrees normal). Also, the results of plaintiff's straight leg raising test was negative. In conclusion, defendants' examining orthopedist diagnosed resolved cervical and thoracolumbar spine strain and opined that the soft tissue injuries sustained by plaintiff at the time of the subject accident had resolved and that plaintiff was capable of working and performing her daily living activities without restrictions. Thus, defendants Ozkahveci and Kocalan demonstrated prima facie that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) since the report of their examining orthopedist supported the conclusion that plaintiff experienced only various sprains and strains which had since resolved (*see, Hasner v Budnik*, 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]).

Moreover, the testimonial admission of plaintiff during her deposition on February 28, 2006 that following the accident she did not return to her work at a market and was fired a week and a half after the subject accident, that she was confined to bed for three weeks and to her home for one month, then looked for other jobs "maybe" one or two months after she lost her job at the market and was offered positions but did not work because she could not find a baby-sitter for her infant undermined her claim that her injuries prevented her from performing substantially all of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (*see, Hasner v Budnik, supra*).

Plaintiff was thus required to come forward with objective medical evidence, based upon a recent examination, to verify her subjective complaints of pain and limitation of motion (*see, Ali v Vasquez*, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; *Batista v Olivo*, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]).

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In opposition to the motion, plaintiff contends that she did sustain a “serious injury” as defined in Insurance Law § 5102 (d). In support of her opposition plaintiff submits the police motor vehicle accident reports, her emergency room records and related forms and a copy of plaintiff’s examination under oath by the no-fault carrier on March 30, 2005.

Plaintiff’s sole medical proof, her emergency room records and related forms, was without any probative value in opposing the defendants’ motion since the records were uncertified (*see*, CPLR 4518; *Iusmen v Konopka*, 38 AD3d 608, 831 NYS2d 530 [2d Dept 2007]; *Mejia v DeRose, supra*). In any event, even if the Court were to consider the unsworn medical records, the diagnoses by the emergency room physician of cervical strain, low back pain and left thigh contusion constitute injuries which do not rise to the level of “serious injury” pursuant to the statutory definition (*see, Harrison v City of New York*, 2 AD3d 682, 770 NYS2d 90 [2d Dept 2003]; *Keena v Trappen*, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]; *Maenza v Letkajornsook*, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). In addition, plaintiff submitted no medical proof based on a recent examination (*see, Marziotto v Striano*, 38 AD3d 623, 831 NYS2d 551 [2d Dept 2007]).

Moreover, plaintiff failed to proffer competent medical evidence that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the accident (*see, Albano v Onolfo*, 36 AD3d 728, 830 NYS2d 205 [2d Dept 2007]; *McConnell v Ouedraogo*, 24 AD3d 423, 805 NYS2d 418 [2d Dept 2005]; *Gousgoulas v Melendez*, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]; *Grant v Fofana*, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]).

Finally, plaintiff submitted no evidence that her alleged economic loss exceeded the statutory amount of basic economic loss (*see, Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Therefore, the motion by defendants Ozkahveci and Kocalan for summary judgment in their favor dismissing the complaint against them on the grounds that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is granted.

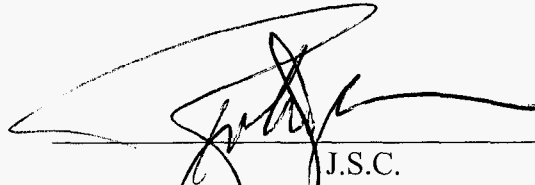
Defendant Dawson cross-moves for summary judgment dismissing the complaint as against her on the grounds that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) or, in the alternative, on the grounds that she was not liable for the subject accident. Defendant Dawson’s attorney states in his affirmation that he adopts all arguments relating to the issues of liability and damages made by defendants Ozkahveci and Kocalan and incorporates by reference and adopts all of their evidentiary submissions on the motion. However, defendant Dawson’s cross motion must be denied as procedurally defective for failure to submit a complete copy of the pleadings, that is, the complaint and the answers of all of the defendants (*see*, CPLR 3212 [b]; *Wider v Heller*, 24 AD3d 433, 805 NYS2d 130 [2d Dept 2005]; *Gallagher v TDS Telecom*, 280 AD2d 991, 720 NYS2d 422 [4th Dept 2001]; *Mathiesen v Mead*, 168 AD2d 736, 563 NYS2d 887 [3d Dept 1990]). The pleadings submitted with another party’s motion or cross motion cannot be incorporated by reference (*see*, CPLR 3212 [b]). In any event, defendant Dawson could not rely on the pleadings submitted by her co-defendants since her answer was not submitted with the motion papers. Nevertheless, the Court searches the record pursuant to CPLR 3212 (b) and grants defendant Dawson summary judgment dismissing the complaint insofar as asserted against her on the ground that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see, Moore v Sarwar*, 29 AD3d 752, 816 NYS2d 503 [2d Dept 2006]).

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Inasmuch as the motion and cross motion are granted with respect to the issue of damages, the alternate requests for summary judgment dismissing the complaint based on the absence of liability are denied as academic (*see, Pagano v Vunness*, 1 AD3d 419, 766 NYS2d 908 [2d Dept 2003]).

Accordingly, the instant motion and cross motion are granted and the complaint is dismissed in its entirety.

Dated:     MAY 21 2007    

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

  X   FINAL DISPOSITION             NON-FINAL DISPOSITION