

**Ayhan v Radman**

2007 NY Slip Op 31892(U)

June 25, 2007

Supreme Court, Suffolk County

Docket Number: 0013280/2005

Judge: Robert W. Doyle

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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 5-3-07  
ADJ. DATE 5-17-07  
Mot. Seq. # 001 - MG; CASEDISP

-----X			
IBRAHIM AYHAN,	:	LITE & RUSSELL	
	:	Attorneys for Plaintiff	
Plaintiff,	:	212 Higbie Lane	
	:	West Islip, New York 11795	
- against -	:		
	:	RICHARD T. LAU & ASSOCIATES	
JOSEPH RADMAN,	:	Attorneys for Defendant	
	:	P.O. Box 9040	
Defendant.	:	Jericho, New York 11753-9040	
-----X			

Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 17 - 28; Replying Affidavits and supporting papers 29 - 31; Other    ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is.

**ORDERED** that this motion by defendant 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 Route 347 at its intersection with Moriches Road, Town of Smithtown, New York on October 15, 2003. The accident allegedly happened when the vehicle owned and operated by defendant Joseph Radman Jr., who has been sued herein as Joseph Radman, rear-ended the vehicle operated by plaintiff. Defendant now moves for an order pursuant to CPLR 3212 granting him 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 defendant has 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, defendant submits, inter alia, the pleadings; plaintiff's bill of particulars; plaintiff's Good Samaritan Hospital emergency room and x-ray records; the unaffirmed report of plaintiff's treating neurologist, Nicolas El-Khoury, M.D. the sworn report of plaintiff's no-fault examining chiropractor, Steven Iscowitz, D.C.; the affirmed report of defendant's examining radiologist, Stephen W. Lastig, M.D.; the affirmed report of defendant's examining neurologist, Richard A. Pearl, M.D.; the affirmed report of defendant's examining orthopedist, Jay Nathan, M.D.; and plaintiff's deposition testimony.

Plaintiff claims in his bill of particulars that he sustained, among other things, paravertebral myofascitis with neuritis; enthesopathy of his shoulder and sacroiliac joints; a cervical disc herniation; a lumbar disc bulge; and post-traumatic stress disorder. Plaintiff also claims that he sustained a permanent restriction and limitation of motion of all affected body parts interfering with the course of his daily living. Additionally, plaintiff claims that he was confined to his bed/home for approximately three months and that he was incapacitated from his employment for approximately four months. Plaintiff further claims that he sustained a serious injury in the categories of a fracture; a significant disfigurement, a permanent loss of use, a permanent consequential limitation, a significant limitation, and a non-permanent injury.

Plaintiff's emergency room records the day after the accident show that he complained of chest, back and shoulder pain. These records make no mention of any lacerations or sutures to plaintiff's body. X-rays of plaintiff's cervical spine taken at the hospital show that there was no evidence of fracture, dislocation or prevertebral soft tissue swelling. Also, X-rays of plaintiff's right finger, third digit, show no evidence of fractures or dislocations.

In his report dated December 13, 2003, Dr. El-Khoury states that he performed EMG/NCV studies of plaintiff's upper extremities on that date, and his findings include F-wave latencies that were within the normal limits for all nerves tested and no signs of electrical instability. Dr. El-Khoury opined that these studies showed no evidence of lumbar or cervical radiculopathy.

In his sworn report dated January 6, 2004, Dr. Iscowitz states that he performed a no-fault chiropractic examination of plaintiff on that date and his findings include a normal motor examination; reflexes of all extremities that were normal at "2+"; and a negative foraminal compression test. He also observed that plaintiff had a full range of motion of the cervical and thoracic spine with no palpable muscle spasm. Dr. Iscowitz opined that plaintiff had sustained cervical and lumbar sprains/strains which had resolved and that he was capable of working at his usual occupation on a full duty basis.

In his affirmed report dated September 6, 2006, Dr. Lastig states that he performed an independent radiological review of the MRI studies of plaintiff's lumbar spine dated December 16, 2003, and his findings include no evidence of fracture; disc dessication at the L5-S1 level; and no focal disc herniations. While he observed minimal annular bulging at the L5-S1 level, he also noted that the remaining lumbar disc spaces were unremarkable and that there were no soft tissue masses. Dr. Lastig opined that these studies showed degenerative disc disease of the cervical spine, but that this condition was unrelated to the accident. In this report, Dr. Lastig also states that he performed an independent radiological review of the MRI studies of plaintiff's cervical spine dated November 14, 2003, and his findings include no evidence of fracture; disc dessication at the C5-6 level; mild spondylosis with marginal end-plate spurring at the C5-6 level; and posterior osteophytic ridging/annular bulging at the C5-6 level. Additionally, he found that there were no focal disc herniations and no soft tissue masses of the cervical spine. Dr. Lastig opined that these studies showed degenerative disc disease/spondylosis of the lumbar spine, but that this condition was unrelated to the accident.

In his report dated September 19, 2006, Dr. Pearl states that he performed an independent neurological examination of plaintiff on that date, and his findings include intact cranial nerve functions; motor strength that was "5/5" in all muscle groups; an intact sensory system; DTRs that were "2+"; and a normal gait. He also found that there was a normal range of motion of the cervical and lumbar spine with no atrophy or fasciculations. Dr. Pearl opined that plaintiff had sustained sprains of the cervical and lumbosacral spine, but that there were no objective findings to indicate a neurological injury.

In his report dated October 9, 2006, Dr. Nathan states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include a normal range of motion of the cervical and thoracolumbar spine; a normal range of motion of the shoulders, elbows, wrists and hands; and a normal range of motion of the lower extremities. He opined that plaintiff had sustained sprains of the cervical and lumbar spine, but that he was able to perform the activities of his daily living without restriction.

Ayhan v Radman  
Index No. 05-13280  
Page No. 4

Plaintiff testified to the effect that he drove himself from the accident scene. The next day, he was treated in the emergency room at Good Samaritan Hospital and then released. Plaintiff did not seek any additional medical treatment until seven to ten days later, when he saw Dr. Tuncel. He continued to receive treatment at Bayside physical therapy for about six months, stopping when his no-fault benefits were terminated. Plaintiff also testified that, about ten days prior to the accident, he had started working as a plumber's assistant, but then was out of work due to his injuries and never returned to this job. Approximately two weeks later, however, he began working at a Coastal gas station and he continued working there for about three or four months. He then worked for Sleepy's for about one and one-half months, and, for sometime thereafter, as a gas station attendant at many different locations. He also worked as a house painter on an occasional basis. At the time of his deposition, he was again working as a gas station attendant. Plaintiff further testified that, since the accident, he has traveled to Turkey on two occasions to visit family members and that he has stayed there for about one month.

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]; *Edwards v DeHaven*, 155 AD2d 757, 547 NYS2d 462 [3d Dept 1989]). Defendant's examining radiologist opined, based upon his review of plaintiff's MRI studies, that plaintiff had a significant preexisting degenerative condition of the cervical and lumbar spine, and that there was no evidence of any causally related injuries (see, *Pommels v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). Furthermore, plaintiff's examining no-fault chiropractor and defendant's examining physicians each found that plaintiff had a normal range of motion of the cervical and lumbar spine with no palpable muscle spasm. Moreover, defendant's examining physicians opined that plaintiff had no disability as a result of the accident and that he merely had sustained sprains/sprains of the cervical and lumbar spine which had resolved. The defendant's remaining evidence, including plaintiff's deposition testimony, also supports a finding that he 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 unaffirmed reports of plaintiff's treating radiologist, Sidney D. Bogart; the unaffirmed report of plaintiff's other treating radiologist, Eric Lubin, M.D.; the sworn report of plaintiff's treating chiropractor, Nadine Beach-Addiego, D.C.; and the plaintiff's personal affidavit. Initially, the unsworn reports of doctors Bogart and Lubin, that were discussed in detail by defendant's examining orthopedist, have been considered as they are admissible (see, *Flores v Stankiewicz*, 35 AD3d 804, 827 NYS2d 281 [2d Dept 2006]; *Kearse v NY City Transit Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]). Further, the Court notes that the report of Dr. Beach-Addiego is deficient to the extent that she attempts to rely on the unsworn and inadmissible reports of plaintiff's other health care providers (see, *Olson v Russell*, 35 AD3d 684, 828 NYS2d 417 [2d Dept 2006]; *Dominguez-Gionta v Smith*, 306 AD2d 432, 761 NYS2d 310 [2d Dept 2003]), and to the extent that she attempts to render a medical diagnosis or prognosis which is beyond the scope of chiropractic practice (see, Education Law § 6551; *McGuirk v Vedder*, 271 NYS2d 731, 706 NYS2d 485 [3d Dept 2000]; *Crozier v Lesniewski*, 195 AD2d 657, 599 NYS2d 729 [3d Dept 1993]). To the extent, however, that Dr. Beach-

Addiego relies on her own testing and observations, her opinion has been considered.

In his report dated November 13, 2003, Dr. Bogart states that he performed MRI studies of plaintiff's cervical spine on that date and his findings include a partial loss of the C5-6 disc signal compatible with disc dessication as well as an intervertebral disc herniation at C5-6 with anterior thecal sac compression. In his report dated November 14, 2003, Dr. Bogart states that he performed MRI studies of plaintiff's lumbar spine on that date and his findings include a central posterior intervertebral disc bulge at L5-S1 with anterior central epidural fat compression. In his report dated December 16, 2003, Dr. Lubin states that he performed MRI studies of plaintiff's lumbar spine with contrast on that date, and his findings include a prominent S1 nerve root. He opined that this likely represented co-joined nerve roots at L5-S1.

In her report dated April 9, 2007, Dr. Beach-Addiego states that she performed an initial chiropractic examination of plaintiff on that date, and her findings include motor strength that was "4/5" throughout; DTR's that were slightly decreased; a restricted range of motion of the lumbar spine with moderate spasms and spasms of the bilateral upper trapezius muscles. She opined that plaintiff sustained a causally related intervertebral disc disorder of the cervical and lumbar spine with a 40% permanent impairment of his ability to perform his usual and customary activities, including, household duties. According to Dr. Beach-Addiego, her records reflect that plaintiff stopped his chiropractic treatment in April 2004 because he was without health insurance coverage.

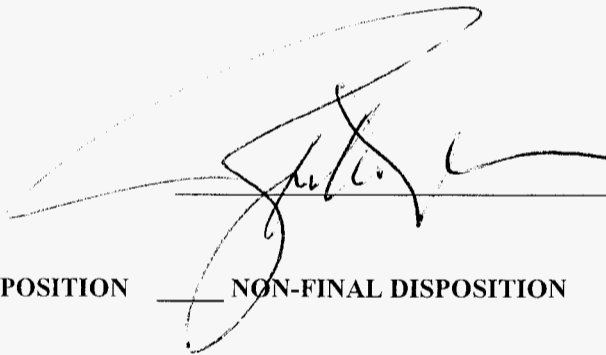
Plaintiff has provided insufficient medical proof to raise an issue of fact that he sustained a serious injury under the no-fault law (*see, Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; *Taranto v McCaffrey*, 2007 NY Slip Op 3908 [2d Dept, May 1, 2007]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). Initially, Dr. Beach-Addiego has entirely failed to address the pre-existing degenerative condition of plaintiff's cervical spine, as she did not provide any foundation or objective medical basis supporting the conclusions which she 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]). While Dr. Beach-Addiego records plaintiff's complaints of pain, she has failed to present admissible 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]). She has also failed to set forth any significant, objectively measured limitations in the functioning and use of plaintiff's cervical spine or shoulders in her report (*see, Porto v Blum*, 39 AD3d 614, 833 NYS2d 245 [2d Dept 2007]; *Springer v Arthurs*, 22 AD3d 829, 803 NYS2d 170 [2d Dept 2005]). Instead, the affidavit of Dr. Beach-Addiego 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 requirements (*see, Khan v Hamid*, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Further, the findings of muscle spasms by Dr. Beach-Addiego, 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 bulge/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 bulge and herniation (*see, Collins v Stone*, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]), and do not establish the duration of his alleged injuries (*see, Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). Moreover, plaintiff's subjective complaints of pain to his 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 three year gap in treatment was, in essence, a cessation of treatment which is not adequately explained by the report of Dr. Beach-Addiego or his other submissions (*see, Philips v Zilinsky*, \_\_\_AD3d\_\_\_, 834 NYS2d 299 [2d Dept 2007]).

Additionally, the proof submitted by the plaintiff is insufficient to raise a triable issue of fact that he sustained a medically-determined injury or impairment rendering him unable to substantially perform all of his 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]). While plaintiff testified that he was curtailed in his activities, he did not testify in sufficient detail as to what his "customary daily activities" consisted of, or the period of time he was allegedly curtailed (*see, Insurance Law § 5102 [d]*), nor did he submit an affidavit detailing the same (*see, Jean-Mehu v Berbec*, 215 AD2d 440, 626 NYS2d 274 [2d Dept 1995]). Further, plaintiff's claim that he was confined to his home for three months and that he was unable to work for four months after the accident is not supported by any competent medical evidence (*see, Grant v Fofana*, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]), or by plaintiff's deposition testimony (*see, Sougstad v Meyer*, 2007 NY Slip Op 4280 [2d Dept, May 15, 2007]).

Moreover, since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, his 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.

Dated:     JUN 25 2007    

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

  X   FINAL DISPOSITION             NON-FINAL DISPOSITION