

**Arriaza-Vasquez v Town of Huntington**

2007 NY Slip Op 31894(U)

June 25, 2007

Supreme Court, Suffolk County

Docket Number: 0016703/2005

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 2-27-07  
ADJ. DATE 4-30-07  
Mot. Seq. # 001 - MD

|                                       |   |                                    |  |
|---------------------------------------|---|------------------------------------|--|
| -----X                                |   |                                    |  |
| FRANCISCO ARRIAZA-VASQUEZ,            | : | GACOVINO, LAKE & ASSOCIATES, P.C.  |  |
|                                       | : | Attorneys for Plaintiff            |  |
| Plaintiff,                            | : | 270 West Main Street               |  |
|                                       | : | Sayville, New York 11782           |  |
| - against -                           | : |                                    |  |
|                                       | : | CANNON & ACOSTA, LLP               |  |
| TOWN OF HUNTINGTON and JOSE A. RAMOS, | : | Attorneys for Defendants           |  |
|                                       | : | 1923 New York Avenue               |  |
| Defendants.                           | : | Huntington Station, New York 11746 |  |
| -----X                                |   |                                    |  |

Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 14 - 19; Replying Affidavits and supporting papers     ; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing plaintiff's complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on January 6, 2005 when his vehicle was struck by a vehicle owned by defendant Town of Huntington and operated by defendant Jose A. Ramos on Route 111 at or near its intersection with Ralph Avenue in Islip, New York. By his bill of particulars, plaintiff alleges that as a result of the subject accident he sustained serious injuries, disc herniation at L5-S1; disc bulges at L3-4, L4-5, C4-5, C5-6; cervical and lumbar radiculopathy, sprain of the left knee and left shoulder; and tendonitis of the left shoulder. In addition, plaintiff alleges that following the accident he was treated at Good Samaritan Hospital, was confined to bed for approximately one week and confined to home for approximately four months.

Defendants now move for summary judgment in their favor dismissing plaintiff's complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of their motion, defendants submit, among other things, the summons and complaint; defendants' answer; plaintiff's bill of particulars; the affirmed report dated July 17, 2006 of defendants' examining

orthopedic surgeon, Arthur M. Bernhang, M.D. (Dr. Bernhang); plaintiff's General Municipal Law § 50-h hearing transcript; plaintiff's examination before trial transcript; reports dated February 15, 2005 and February 21, 2005 of plaintiff's treating physicians; a New York Motor Vehicle No-Fault Insurance Law Employer's Wage Verification Report; and plaintiff's payroll ledger card.

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 (*see, 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 Eycler*, 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]).

Initially, the Court construes plaintiff's allegations in his bill of particulars to mean that he is claiming the serious injury categories of permanent loss of use, permanent consequential limitation of use, significant limitation of use and a medically determined non-permanent injury that prevented plaintiff from performing substantially all of the material acts of his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident.

At his General Municipal Law § 50-h hearing on April 5, 2005, plaintiff testified that following the accident, he was bleeding from his forehead and nose and complained that his neck, back, lower back and left knee hurt; he was treated at and released from the emergency room of Good Samaritan Hospital and two days later he began going to Village Medical and Rehab located in Brentwood. There, he received treatment involving the application of machines that provide heat and massages and hot packs to

his knee, five days a week for the first month right after the accident, then four days a week for the next month, and then three days a week, which was continuing at the time of the hearing. Plaintiff explained that he received a back brace from Village Medical and Rehab which he uses for four hours in the mornings and that he underwent MRI's in Islandia. He described his current complaints as continuous pain in his lower back that prevents him from working and occasional neck pain. Plaintiff testified that at the time of the accident, he was employed at Corwood Laboratories and did packing work five days per week from 7:30 am to 4 pm. According to plaintiff, he could no longer do anything strenuous such as lifting heavy objects and that he could now lift at most up to one hundred pounds but it hurts him and he requires a back brace to do so.

During his examination before trial on May 10, 2006, plaintiff testified that he had been doing packing work for a company for eight months, working forty hours per week, that he moved boxes that weighed 100 or 50 pounds, and that he was still receiving treatment once per month from Village Medical and Rehab. In addition, plaintiff testified that at the present time he was taking acetaminophen for pain in his neck and back that he felt every other day. Plaintiff also testified that he was without a car for three months after the accident, that when he got a car he did start driving again but could only do so for about half an hour because after that time his back would start bothering him, and that he did return to his job at Corwood Laboratories but that he did not get his job back due to his four month absence and was terminated. When questioned about his limitations, plaintiff testified that he used to play soccer two times a week and now could only play for five minutes and that he used to be able to lift 200 pounds and that now he needed help at work lifting boxes that were 100 pounds and needed to wear his back brace at work. He added that he has trouble sleeping due to pain.

Defendants relied on the affirmed report of Dr. Bernhang who performed an orthopedic examination of plaintiff on July 10, 2006, a year and a half after the accident, and recorded plaintiff's active ranges of motion observed and measured by goniometer as compared to average ranges of joint motion (ARJM) in accordance with the American Academy of Orthopaedic Surgeons. Plaintiff related his current complaints to Dr. Bernhang as having a painful neck, almost daily, and pain on the left side of his neck radiating into his shoulder about once every two weeks while playing soccer; daily pain in his left shoulder that went across his back when playing soccer and lifting; and occasional pain or an ache in his left knee when walking or lifting heavy objects. Dr. Bernhang found plaintiff's cervical flexion to be 50 as compared to an ARJM of 38, cervical extension to be 45 as compared to an ARJM of 38, lateral flexion to be 30/20 compared to an ARJM of 43, and cervical rotation of 50/20 compared to an ARJM of 45. He noted that when plaintiff spoke to him or to his interpreter in the consultation and examining rooms, plaintiff turned his head to a greater degree and appeared to have normal range of motion of the cervical spine. In addition, Dr. Bernhang indicated that plaintiff's active shoulder abduction was 60/75 as compared to an ARJM of 170, active shoulder forward flexion of 105/105 as compared to an ARJM of 158, external rotation of 100/100 compared to an ARJM of 90 and internal rotation of 50/50 compared to an ARJM of 70. Dr. Bernhang also noted that plaintiff's passive range of motion was complete despite what he characterized as a "click" in both shoulders and concluded that plaintiff's active range of motion appeared to be noncomplying.

The results of various tests by Dr. Bernhang were as follows: Napoleon's test for internal rotators of the shoulders was negative, bilaterally; Hornblower's test for external rotators of the shoulders was negative, bilaterally; O'Brien's test for labral tear was negative, bilaterally; and Hawkin's test for

shoulder impingement bilaterally did not cause any pain. He noted aberrations with respect to the results of the Yergason's test for bicipital tendinitis and the vertebral vertex compression test and concluded that the results appeared to be inconsistent. Dr. Bernhang noted that although plaintiff reported tenderness on palpation of the trapezius muscle on the left, there was no palpable fibromyalgia, trigger point or spasm and added that on palpation of the muscle and structures about the neck, interscapular area, there also was no evidence of fibromyalgia, trigger point or spasm.

With respect to his examination of plaintiff's lumbar spine, Dr. Bernhang indicated that dorsal lumbar expansion with the knees extended was 8½ inches (normal being 4 inches and above) and that lateral flexion was to the distal femur. In addition, Dr. Bernhang reported that lying supine, plaintiff's straight-leg raising was 70/70 (normal being 55 degrees and above) and that plaintiff was able to maintain both extended legs off of the examining table, thereby essentially ruling out active lumbar discogenic disorder. Dr. Bernhang also reported that plaintiff's pelvic roll was negative to above 100 degrees; knee jerks and ankle jerks were symmetrical; and lying prone plaintiff did not indicate any pain on percussion of the lumbar spine and there was no paraspinal spasm.

As for examination of plaintiff's knees, Dr. Bernhang found that plaintiff's knee extension was 0/0 as compared to an ARJM of 0; knee flexion was 130/130 as compared to an ARJM of 134; and that there was no fluid palpable in either knee and no crepitation on motion of the patella in the patellofemoral joint. He added that there was no ligamentous instability, varus or valgus stress or anterior drawer sign and meniscal signs are negative.

Dr. Bernhang concluded his report by opining that he found no objective orthopaedic evidence of any residual of injuries said to have occurred to plaintiff's cervical neck, lumbar spine, left knee or left shoulder and that whatever soft tissue injuries plaintiff had sustained as a result of the subject accident appeared to have resolved without any residual effects. He added that the extensive subjective complaints and restrictions were not substantiated by, and did not correlate with, objective findings such that he found no objective basis for causally related restrictions preventing plaintiff from performing his normal daily activities.

A review of Dr. Bernhang's report, particularly with respect to consideration of the serious injury categories of permanent consequential limitation of use and significant limitation of use, reveals that the report has deficiencies. Some of his bilateral findings such as, lateral flexion 30/20, cervical rotation 50/20, and active shoulder abduction 60/75 show apparent limitations when compared to one another. Without a comparative quantification of those findings as to what is normal, it cannot be concluded that the ranges of motion in plaintiff's cervical spine and left shoulder were normal, or that any limitations were mild, minor, or slight so as to be considered insignificant within the meaning of the no-fault statute (*see, McLaughlin v Rizzo*, 38 AD3d 856, 832 NYS2d 666 [2d Dept 2007]). In addition, the standard of comparison used, ARJM, does not comport with the required comparison to the normal range of motion one would expect of a healthy person of the same age, weight, and height (*see, Frey v Fedorciuc*, 36 AD3d 587, 828 NYS2d 454 [2d Dept 2007]; *Powell v Alade*, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]; *see also, Somers v Macpherson*, \_\_\_ NYS2d \_\_\_, 2007 WL 1365358, 2007 NY Slip Op 04106 [NYAD 2 Dept May 08, 2007]).

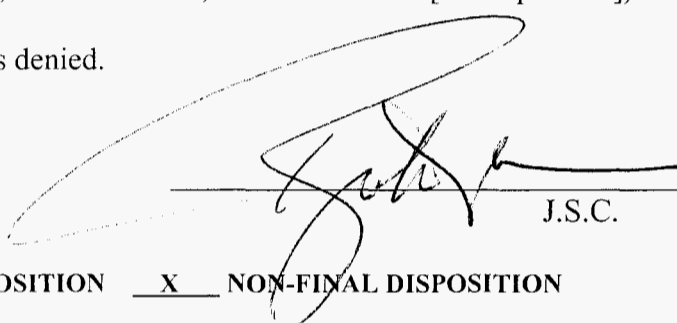
Defendants also submitted a report dated February 15, 2005 by plaintiff's treating physician

specializing in physical medicine and rehabilitation at Village Medical and Rehab, Sima Anand, M.D., to show that by said date plaintiff had returned to work as a packer. However, said report indicated that plaintiff's lumbar spine range of motion was restricted, straight leg raise on the left was positive at 30 degrees, and that plaintiff had lumbar paravertebral muscle spasm. Another report dated February 21, 2005 by plaintiff's treating physician Joseph Perez, M.D. at Village Medical and Rehab, which defendants submitted, revealed that plaintiff had moderate pain on lumbar range of motion, particularly on flexion as well as lumbosacral paraspinal muscle tenderness upon palpation with spasm. Said medical reports of plaintiff's treating physicians, submitted in support of the motion, noted limitations in certain aspects of plaintiff's lumbar spine range of motion that were not adequately quantified or qualified to establish the absence of a significant limitation of motion (*see, McNulty v Buglino*, \_\_\_ NYS2d \_\_\_, 2007 WL 1289924, 2007 NY Slip Op 03889 [NYAD 2 Dept May 01, 2007]). Thus, defendants failed to establish, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see, Cruz v Williams*, 34 AD3d 719, 825 NYS2d 510 [2d Dept 2006]).

Inasmuch as defendants failed to establish their prima facie entitlement to judgment as a matter of law based on whether plaintiff sustained a serious injury, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact on that matter (*see, Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]; *McDowall v Abreu*, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; *Coscia v 938 Trading Corp.*, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]).

Accordingly, the instant motion is denied.

Dated:         JUN 25 2007        

  
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 J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION