

<b>Ficic v City of New York</b>
2007 NY Slip Op 31941(U)
June 29, 2007
Supreme Court, Richmond County
Docket Number: 0012057/2004
Judge: Philip G. Minardo
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

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**MUHAREM FICIC and DIFE FICIC,**

**DCM PART 6**

**Plaintiffs,**

**Present:**

**- against -**

**HON. PHILIP G. MINARDO**

**DECISION AND ORDER**

**THE CITY OF NEW YORK, THE NEW YORK  
CITY TRANSIT AUTHORITY and JEREMY  
PHILHOWER,**

**Index No. 12057/04**

**Motion No. 248-002**

**Defendants.**

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The following papers numbered 1 to 3 used on this motion the 26<sup>th</sup> day of April, 2007:

Papers

Numbered

Notice of Motion to Dismiss by Defendant  
New York City Transit Authority, with  
Supporting Papers  
(dated January 19, 2007).....1

Affirmation in Opposition by Plaintiffs Muharem and  
Dife Ficic, with Exhibits  
(dated March 8, 2007).....2

Affirmation in Reply  
(dated April 24, 2007).....3

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Upon the foregoing papers, the motion is granted and the complaint dismissed.

Defendant New York City Transit Authority moves by notice of motion on behalf of itself and its driver (hereafter, collectively, the "NYCTA") for an order pursuant to CPLR 3211 and 3212 dismissing the complaint on the ground that plaintiff Muharem Ficic did not sust

a "serious injury" as that term is defined in Insurance Law § 5102(d). Plaintiffs Muharem Ficic and Dife Ficic oppose the application.

This litigation arises from a motor vehicle accident which occurred on March 3, 2004 between a NCYTA bus driven by Jeremy Philhower and a 1991 Dodge Spirit driven by Muharem Ficic. The accident occurred at the intersection of Victory Boulevard and Morani Street in Staten Island, New York. As a result of the accident, plaintiff Muharem Ficic claims to have sustained serious personal injuries and plaintiff Dife Ficic has asserted a derivative cause of action. Plaintiffs commenced this action by the filing and service of a summons and complaint on or about June 18, 2004. Issue was joined by the service of an answer with cross claims against the City of New York on or about August 12, 2004. By decision and order dated February 16, 2006, the complaint and all cross claims were dismissed as against the City. The Note of Issue was filed on November 21, 2006.

In his bill of particulars, Mr. Ficic (hereafter "plaintiff") is alleged to have sustained the following injuries: bilateral C5- C6 radiculopathy with denervation in the paraspinal muscles; pain radiating down the left leg; pain in the neck and lower back; lumbar strain; annular disc bulge and hypertrophic facet changes at L1-L2; mild annular disc bulge with posterior spurring at C4- C5; bilateral foraminal narrowing at L3-L4, L4-L5 and L5-S1; and knee contusion and bilateral knee pain. Plaintiff also claims that he was confined at St. Vincent's Hospital on March 3, 2004, and to bed and house for an unspecified period of time thereafter.

Summary judgment is a drastic remedy that should be granted only if no issues of fact exist and the movant is entitled to judgment as a matter of

Rotuba Extruders v Ceppos, 46 NY2d 223; Herrin v Airborne Freight Corp., 350. On a motion for summary judgment, the function of the court is issue determination (see Weiner v Ga-Ro Die Cutting, 104 AD2d 331, *affd* 65). In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion (see Glennon v. Mayo, 148 AD2d 100). In order to prevail, the moving party must present *prima facie* evidence of its entitlement to summary judgment as a matter of law (Alvarez v Prospect Hosp., 68 NY2d 320, 324). In the absence of a failure to do so, the motion will be denied. Once a *prima facie* showing has been made, however, the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (Zuckerman v City of New York, 49 NY2d 557, 562). In this regard, "mere conclusions, expressions of opinion, or unsubstantiated allegations or assertions are insufficient" to raise a triable issue (see Zuckerman v City of New York, 49 NY2d 557, 562). Thus, summary judgment, which operates to deprive a party of his or her right to a trial in Court, is only appropriate where the movant's initial burden of proof has been met and the opposing party has failed to adduce competent evidence demonstrating the presence of a genuine issue of material fact (see Persaud v Darbeau, 13 AD3d 100).

Insofar as is applicable, the Insurance Law provides that there shall be no recovery of damages for personal injuries sustained in a motor vehicle accident unless such injuries may be characterized as "serious" within the meaning of section 5104 of the Insurance Law (see Insurance Law §5104[a]). Accordingly, upon a *prima facie* showing by a moving defendant that plaintiff did not sustain a "serious injury", the plaintiff's failure to raise a triable issue as to the "seriousness" of his or her injury will justify the dismissal of the complaint (see Toure v Avis Rent A Car Sys., 98 NY2d 345).

In moving for summary judgment, the NYCTA contends that plaintiff did not sustain a "serious injury" within the meaning of § 5102(d) of the Insurance Law. In support of this position, it relies upon the affirmations of Drs. Robert Israel and Carciente, as well as plaintiff's own deposition testimony.

In his deposition testimony, plaintiff said that the bus hit him so hard it felt like a bomb (Ficic EBT p 29). While he never lost consciousness after the accident, plaintiff claims that he did not know what was going on for about twenty seconds (id. p 36). He was taken by ambulance to St. Vincent's Hospital, where he was treated and discharged after being given Ibuprofen (*id.* p 40). Plaintiff also stated that he subsequently returned to the hospital a few more times in connection with the accident but he could not remember when (*id.* pp 47-48). Four or five days after the accident, he went to see Dr. Gerald Sciascia, a chiropractor, where he received daily treatment consisting of massages to his back and neck (*id.* pp 49-51). According to plaintiff, as of the date of his deposition (*i.e.*, May 4, 2006) he was still seeing Dr. Sciascia once a week (*id.* p 51). He presently claims that his whole body hurts. He also claims that he can no longer do anything (*id.* p 66).

On January 24, 2006, Dr, Robert Israel, a diplomate of the American Board of Orthopedic Surgery, conducted a thorough orthopedic examination of the plaintiff, including his spine, left shoulder, leg and knees. At the examination, plaintiff was wearing a neck collar which was removed at the time of the examination. According to Dr. Israel, plaintiff's cervical spine revealed a normal lordosis, with no significant trapezius muscle spasm present upon palpation. Range of motion of the cervical spine was tested normal in flexion, extension and rotation when compared with the age-

norms. Plaintiff's muscle strength when tested also measured normal, with grasping power. In addition, there was normal proprioception, with no sensory deficit and no radiation of pain or paresthesia. As to his left shoulder, the doctor noted no deltoid atrophy or tenderness upon palpation. Plaintiff's range of motion was found to be normal in flexion, abduction, adduction, external and internal rotation and extension when compared to the accepted norms; no instability was detected. Drop arm, Yergason, apprehension and speed tests were all negative. An examination of the thoracic spine revealed no abnormalities, with normal curvature and no muscle spasm. Examination of the lumbar spine also revealed a normal lordotic curve with no spasms on palpation. Sitting Laseque and straight-leg tests were negative when compared to the stated norms in flexion and extension, both forward and laterally. In addition, muscle strength was also found to be normal. The examination of plaintiff's bilateral knees was unremarkable with normal strength detected in both flexion and extension, rotation, internally as well as externally. Based on the above findings and after reviewing plaintiff's medical history and records, Dr. Israel concluded that the orthopedic injury that plaintiff might have suffered as a result of the auto accident, sprains and contusions, had resolved. He also opined that plaintiff presented no objective evidence of disability from an orthopedic point of view.

On February 5, 2006, Dr. Michael Carciente conducted a thorough neurological examination of the plaintiff. Once again, plaintiff appeared for his examination wearing a soft cervical brace, which he took off during the examination. According to Dr. Carciente, plaintiff was mentally alert and fully orientated. Relative to the neurological examination, neither nystagmus or non-facial asymmetry was exhibited. Plaintiff's hand

strong bilaterally, with no spasticity, ankle clonus or Hoffman's sign. strength in all of the major muscle groups of the upper and lower extremities was normal. Plaintiff walked slowly, but without limping or favoring either leg. Plaintiff stated that barely touching the back of his neck with one finger caused tenderness, the doctor found no evidence of paraspinal spasm. The same was true of plaintiff's lower back; his straight leg maneuver was negative. Based upon these findings and his review of plaintiff's medical history and records, Dr. Sciascia pronounced plaintiff's neurological examination to be normal. In his opinion, although plaintiff presented some subjective complaints, there were no objective neurological findings to support either radiculopathy, spinal cord injury or any neurological disorder.

In view of this evidence, the Court finds that the NYCTA has demonstrated its entitlement to summary judgment by establishing prima facie that plaintiff suffered a "serious injury" within the meaning of the Insurance Law. Thus, in the absence of competent evidence raising a triable question of fact on this issue, the motion should be dismissed.

In attempting to satisfy this burden, plaintiff has submitted an affidavit of affirmation and the affidavit of Gerald Sciascia, D.C. In addition, plaintiff has submitted as exhibits uncertified hospital records and an unsworn copy of a EMG/nerve conduction study from Allan B. Perel, M.D. Because these reports were referred to by defendant's experts, they are properly before the Court (see Flores v Stan, 32 AD3d 804, 805; Navedo v Jaime, 32 AD3d 788).

In a narrative report dated February 21, 2007, Dr. Sciascia states that plaintiff entered the office for the purposes of examination and treatment on March 1, 2007.

following an automobile accident<sup>1</sup>. The report contains certain objective findings that were made relative to plaintiff's care and treatment, but there is no reference on which any of these findings may have been made. Visual examination and palpation of the cervical and lumbar paraspinal region were said to reveal evidence of edema and myospasms of the paravertebral musculature, while a series of orthopedic tests were found to be "positive". These included foraminal compression, cervical distraction, Jackson compression, Goldwaites, Kemps, shoulder compression, Soto Hall, Bakody's and Laseques testing, as well as bilateral leg-raising. Plaintiff's cervical and lumbar ranges of motion were quantified and recorded, but none of these findings were related or compared to the stated norms. Based upon the findings, Dr. Sciascia rendered a diagnosis of cervical, thoracic and lumbar subluxations; cervical brachial syndrome; sciatic neuritis; and cervical flexion injury. The doctor also concluded that plaintiff's symptoms were causally related to the automobile accident of March 3, 2004. According to Dr. Sciascia, an MRI of plaintiff's cervical spine dated April 19, 2004, reveals minimal and mild disc bulges at C4-C5 and C5-C6, with degenerative changes, while an MRI of plaintiff's lumbar spine taken on the same day shows a minimal annular disc bulge at L4-L5. It was also stated that an EMG/Nerve conduction study done on January 5, 2005, demonstrated (1) right median neuropathy at plaintiff's wrist; and (2) bilateral lumbosacral radiculopathy with denervation in plaintiff's paraspinal muscles.

In the opinion of this Court, these evidentiary offerings fail to raise a question that plaintiff's injuries are "serious" within the meaning of §5102(d) of the Insurance Law. *see Toure v Avis Rent a Car Sys.*, 98 NY2d 345; *Dufel v Green*, 84 NY2d 795,

The report of Dr. Sciascia, while quantifying plaintiff's ranges of motion them to accepted standards (see Manceri v Bowe, 19 AD3d 462), thereby leave Court to speculate as to their significance. In addition, the failure of reference or take into account the injury that plaintiff sustained to his 1992 renders his opinion on causation speculative (see Bell v Rameau, 29 839). Equally troubling is the unexplained gap in treatment from December 2006 to May 2006 (Pommells v Perez, 4 NY3d 566) caused by the inconsistency between doctor's record of plaintiff's last treatment and plaintiff's deposition testimony. Dr. Sciascia fails to address the impression of degenerative changes associated with the disc bulge noted in the report of plaintiff's April 19, 2004 MRI (see Kombos, 29 AD3d 845). Clearly, disc bulges and radiculopathy, whether standing alone or resulting from degenerative changes, do not rise to the level of a statutorily defined "injury" (cf. Quigg v Murphy, 37 AD3d 1191, 1193; Mejia v DeRose, 35 AD3d 400). Nor has plaintiff demonstrated that he was medically unable to perform his customary duties for 90 out of the 180 days immediately following the accident (see Uddin v Cooper, 32 AD3d 270, *app denied* \_\_\_\_ NY3d \_\_\_\_, 834 NYS2d 89).

Accordingly, it is

**ORDERED** the motion for summary judgment is granted and the complaint is dismissed; and it is further

**ORDERED** that the Clerk enter judgment accordingly.

ENTER,

s/ Philip G. Minardo  
J.S.C.

Dated: June 29, 2007

<sup>1</sup>Although not contained within the body of his affidavit, Dr. Sciascia attaches billing reports which indicate that Mr. Ficic received treatment from March 10, 2004 until December 30, 2004.