

**Luna v Argueta**

2007 NY Slip Op 32173(U)

July 17, 2007

Supreme Court, Suffolk County

Docket Number: 0002117/2006

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 5-30-07  
Mot. Seq. # 001 - MD

-----X		
SHEILA LUNA,	:	ANDREW HIRSCHHORN, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	One Cross Island Plaza, Suite 116
	:	Rosedale, New York 11422
- against -	:	
	:	JOHN P. HUMPHREYS, ESQ.
JOSE ARGUETA and MARIA ORTIZ,	:	Attorney for Defendants
	:	3 Huntington Quadrangle, Suite 102S
Defendants.	:	P.O. Box 9028
-----X		Melville, New York 11747

Upon the following papers numbered 1 to 11 read on these motions 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 10-11; Replying Affidavits and supporting papers   ; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (001) by defendants Jose Argueta and Maria Ortiz pursuant to CPLR 3212 and Insurance Law §5102(d) for an order granting summary judgment dismissing the complaint, asserting plaintiff's injuries do not meet the serious injury threshold, opposed by plaintiff Sheila Luna, is denied.

This is an action sounding in negligence arising out of a two-vehicle accident which occurred on September 28, 2003 on Fifth Avenue approximately one hundred feet south of Connecticut Avenue, Town of Islip, State of New York, when plaintiff's vehicle and defendants' vehicle came into contact.

Defendants claim entitlement to an order granting summary judgment dismissing the complaint, asserting plaintiff did not sustain serious injury sufficient to meet the threshold pursuant to Insurance Law of the State of New York §5102(d).

Plaintiff has set forth in her bill of particulars that she sustained injury to her cervical and lumbar spines consisting of the following injuries, inter alia: straightening of the upper and mid cervical curvature consistent with muscle spasm; posterior bulging disc at L5-S1 extending into the epidural fat deforming

the right S1 nerve root and abutting the thecal sac and proximal left S1 nerve root; cervical spine derangement; posttraumatic severe lumbar fibromyalgia with muscle spasm and radiating pain to the left lower extremity; L5-S1 radiculopathy on the left; and lumbosacral spine derangement.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Pursuant to Insurance Law §5102(d), “ ‘[s]erious injury’ means a personal injury which results in 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.”

The term “significant” as it appears in the statute has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]).

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 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* (supra)).

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 [1st 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 Eyles*, 79 NY2d 955, 582 NYS2d 990 [1992]).

In support of motion (001) defendants have submitted, *inter alia*, a copy of the summons and complaint; defendant’s verified answer; a copy of the bill of particulars; several incomplete insurance forms with attachments missing from the exhibit; copy of a sworn letter of defendants’ examining physicians: orthopedist S. Farkas, M.D., dated November 7, 2006; and neurologist Naunihal Sachdev Singh, M.D. dated November 28, 2006; and the affidavit of defendants’ attorney.

Dr. Farkas reviewed the bill of particulars, reports of Ocean Medical Rehabilitation, report of electrodiagnostic studies of October 3, 2003, multiple physical therapy notes, reports of the MRI of the cervical spine of November 14, 2003 and MRI scan of November 24, 2003.

Dr. Farkas indicated plaintiff is a 32 year old female involved in a motor vehicle accident. She was the seatbelted driver whose car was struck on the left. After the accident, she was seen at Southside Hospital emergency room, treated and released. She then came under the care of a chiropractor and received acupuncture treatment as well, although Dr. Farkas does not address the duration of the physical therapy, the type of treatment administered, or how many acupuncture treatments plaintiff had, or the duration of the treatment. She presented to Dr. Farkas with complaints of back and neck pain.

Upon examination of plaintiff’s lumbar spine, Dr. Farkas states she had no spasm or crepitus to palpation; can forward flex to 90 degrees (90 degrees normal), lateral bending 30 degrees (30 degrees normal). He stated that deep tendon reflexes were normal at both the Achilles tendon and patellar tendon regions. Motor exam was 5+, and straight leg raising negative. Examination of her cervical revealed no spasm or crepitus to palpation, right and left rotation was 80 degrees (70-80 degrees normal), 50 degrees flexion and extension (30-50 degrees normal). Deep tendon reflexes were 2+ and motor examination 5+. Tinel’s sign was negative at the elbow and wrist.

Although Dr. Farkas does not set forth in his report the results of the cervical and lumbar MRIs or electrodiagnostic studies, he concludes without basis, that plaintiff’s diagnosis is a resolved lumbar sprain and a resolved cervical sprain, and finds a causal relationship between the injuries and the reported accident. He states conclusively that physical therapy and orthopedic treatment is not reasonable, related or necessary. He states he finds no orthopedic disability based on the physical examination.

The report of neurologist Singh, M.D. indicates that immediately after the accident plaintiff was seen at Southside Hospital for complaints of trauma to her neck, back and left knee at the time of the impact. A few days after the accident, she was evaluated in a medical center and started on a course of physical therapy, chiropractic treatment and acupuncture treatments. He states this treatment was 3-4

times a week for three months, and that her symptoms are better at this time. He indicates she was evaluated by a neurologist and underwent MRI scans of her neck and back as well as EMG and NCV studies. He sets forth that the report of the EMG and NCV study of the lower extremities performed on October 30, 2003 were compatible with L5-S1 radiculopathy on the left side. He further stated that the MRI scan of the cervical spine performed on November 12, 2003 showed straightening of the upper and mid cervical curvature consistent with muscle spasm, and the MRI scan of her lumbosacral spine performed on November 20, 2003 showed a posterior disc bulge at L5-S1 and slight loss of the normal disc signal intensity and height at L4-5 disc space levels. Dr. Singh performed examination of plaintiff's cervical, lumbar and thoracic spine and shoulders with normal results quantified as to range of motion. He found motor testing, muscle testing, sensory examination and reflexes all normal. The remainder of his examination did not reveal any abnormal findings, according to his report. His impression and diagnosis were cervical and lumbar spine sprain, resolved. He stated she has no neurological disability related to the accident, but sets forth that the injuries sustained were causally related to the accident.

Based upon the foregoing, it is determined that defendants have not demonstrated entitlement to summary judgment on the issue of serious injury. Defendants's examining physicians did not examine plaintiff until nearly three years after the accident and not during the statutory period of 180 days following the accident, thus rendering defendant physicians' affidavits insufficient to demonstrate entitlement to an order granting summary judgment on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (*Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]). Dr. Singh has indicated that plaintiff was undergoing physical therapy, chiropractic care and acupuncture treatment 3-4 times a week for three months following the accident, thus raising a factual issue as to whether plaintiff was able to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident.

Defendants have also submitted evidence via the report of Dr. Singh which sets forth that plaintiff's lumbar MRI showed a bulging disc at L5-S1 and that EMG and NCV study of the lower extremities performed on October 30, 2003 were compatible with L5-S1 radiculopathy on the left side. Neither Dr. Singh nor Dr. Farkas, who both stated they reviewed these reports, dispute these findings. In that a disc bulge may constitute a serious injury within the meaning of Insurance Law §5102 (*Hussein, et al. v Harry Littman, et al.*, 287 AD2d 543, 731 NYS 2d 477 [2<sup>nd</sup> Dept 2001]), this Court concludes defendants have not demonstrated prima facie entitlement to summary judgment on the issue of whether plaintiff has sustained a serious injury within the meaning of Insurance Law §5102(d).

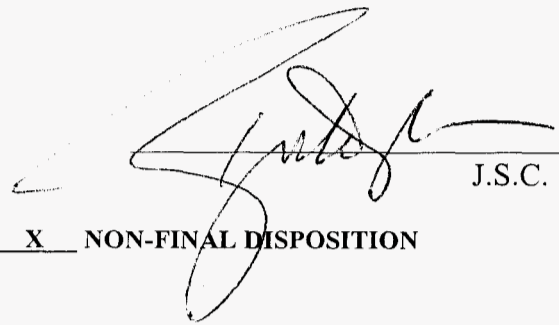
To prevail on their motion for summary judgment dismissing the complaint, the defendant was required to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (*see, Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197; *Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 99-0, 591 NE 1176). Here, defendant failed to satisfy his burden of establishing, prima facie, that plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see, Agathe v Tun Chen Wang*, \_\_\_ NYS2d \_\_\_, 2006 WL 2965205, 2006 NY Slip Op 07434 [NYAD 2 Dept Oct 17, 2006]; *see also, Walters v Papanastassiou*, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]).

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Since defendants failed to establish their entitlement to judgment as a matter of law as set forth above, the burden has not shifted to plaintiff to establish that there are issues of fact to preclude an order granting summary judgment (CPLR 3212[b]; *Zuckerman v City of New York*, supra), and it is unnecessary to reach the question of whether or not plaintiff has raised a triable issue of fact (*Krayn v Torella*, 833 NYS2d 406, NY Slip Op 03885 [2<sup>nd</sup> Dept 2007]).

Accordingly, defendant's motion for an order granting summary judgment on the issue of serious injury is denied.

Dated:       JUL 17 2007      

  
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J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION