

**Antunes v Forde**

2007 NY Slip Op 32343(U)

July 24, 2007

Supreme Court, Suffolk County

Docket Number: 0022129/2004

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

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 5/14/07  
ADJ. DATE 6/13/07  
Mot. Seq. #002 - MG; CASEDISP  
#003 - XMG

-----X  
VERONIQUE ANTUNES, :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 THOMAS C. FORDE, :  
 :  
 Defendant. :  
-----X

BORDA, KENNEDY, ALSEN & GOLD  
Attorney for Plaintiff  
1805 Fifth Avenue  
Bay Shore, New York 11706  
  
RICHARD T. LAU & ASSOCIATES  
Attorney for Defendant/Third-Party Plaintiff  
P.O. Box 9040  
Jericho, New York 11753-9040

-----X  
THOMAS C. FORDE, :  
 :  
 Third-Party Plaintiff, :  
 :  
 - against - :  
 :  
 NANCY CARRAPIERO, :  
 :  
 Third-Party Defendant. :  
-----X

ROBERT P. TUSA, ESQ.  
Attorney for Third-Party Defendant  
898 Veterans Memorial Hwy., Suite 320  
Hauppauge, New York 11788

Upon the following papers numbered 1 to 29 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers 17 - 22 ; Answering Affidavits and supporting papers 23 - 26 ; Replying Affidavits and supporting papers 27 - 29 ; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (002) by defendant and this cross motion (003) by third-party defendant for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) are 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 County Road 67 at its intersection with Express Drive North, Town of Islip, New York on October 5, 2002. Plaintiff claims in her complaint that she sustained "serious injuries" as defined in Section 5102 (d) of the Insurance Law and economic loss greater than basic economic loss, as defined in Section 5102 (a) of the Insurance Law. The Court's computerized records indicate that the note of issue in this action was filed on December 28, 2006. Defendant Thomas C. Forde now moves and third-party defendant Nancy Carrapiero cross moves for an order pursuant to

CPLR 3212 granting them 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 these motions and defendant Forde has filed a reply.

CPLR 3212 (a) requires that a motion for summary judgment be made within 120 days after the filing of a note of issue, except with leave of court on good cause shown (*see*, CPLR 3212 [a]). Third-party defendant made her cross motion on May 24, 2007, as indicated in her affidavit of service of the cross motion, which is nearly one month after April 27, 2007, the 120-day deadline following the filing of the note of issue thereby rendering the cross motion untimely (*see*, CPLR 3212[a]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Notably, third-party defendant did not seek leave to file a late motion for summary judgment in their notice of cross motion (*see e.g.*, ***Welch v City of Glen Cove***, 273 AD2d 302, 708 NYS2d 475 [2d Dept 2000]). In addition, counsel for third-party defendant has provided no explanation or “good cause” for serving the cross motion nearly one month late, and thus, the Court has no discretion to entertain it on the merits (*see*, ***Brill v City of New York***, *supra*; ***Rivers v City of New York***, 37 AD3d 804, 830 NYS2d 767 [2d Dept 2007]). Further, a delay of nearly one month is not minimal (*compare*, ***Miranda v Devlin***, 260 AD2d 451, 688 NYS2d 578 [2d Dept 1999][cross motion was made approximately five days after expiration of applicable 120-day period]). Moreover, assertions that no prejudice resulted from the delay since the action is not ready for trial and that the motion is meritorious are insufficient justifications to permit late filing (*see*, ***Gaines v Shell-Mar Foods, Inc.***, 21 AD3d 986, 801 NYS2d 376 [2d Dept 2005]). The Court notes, however, that this cross motion falls under the exception where a timely motion for summary judgment was made on nearly identical grounds and the issues are already properly before the Court (*see e.g.*, ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]; ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]; ***James v Jamie Towers Hous. Co.***, 294 AD2d 268, 743 NYS2d 85 [1<sup>st</sup> Dept 2002], *affd* 99 NY2d 639, 760 NYS2d 718 [2003]). Notably, the Court, in the course of deciding the timely motion, is, in any event, empowered to search the record and award summary judgment to a nonmoving party (*see*, CPLR 3212 [b]).

Turning to defendant’s motion, 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 verified bill of particulars; plaintiff’s Southside Hospital emergency department records, including x-ray reports of plaintiff’s right hand, wrist and clavicle; the unaffirmed report of plaintiff’s treating radiologist Robert Diamond, M.D.; the affirmed report of plaintiff’s no-fault examining orthopedist Frank D. Oliveto, M.D.; the affirmed report of defendant’s examining orthopedist, S. Farkas, M.D.; and plaintiff’s deposition testimony.

Plaintiff claims in his bill of particulars that she sustained, among other things, sprains/strains of the cervical and lumbar spine; disc bulges of the cervical and lumbar spine; sprains of the right wrist and several fingers of the right hand; a strain of the right shoulder; strains of both knees; and mental shock. Plaintiff also claims that she was confined to her house and totally disabled for approximately five months. Additionally, plaintiff claims that she is partially disabled to date and that she remains confined in the activities of her daily living, which the court construes to mean that plaintiff claims a serious injury in the category of a non-permanent injury. Moreover, plaintiff specifically claims that she sustained a serious injury in the categories of a permanent loss of use and a permanent consequential limitation.

Plaintiff’s Southside Hospital emergency department records dated October 5, 2002 show that she was treated and released the same day. The examining physician observed that plaintiff’s left hand appeared normal and that she had a full range of motion of both knees. X-rays taken of plaintiff’s right wrist and hand showed no fractures. While the attending radiologist observed that X-rays taken of plaintiff’s right clavicle showed no evidence of acromioclavicular separation or acute fractures, he also noted that there was some bulbous appearance to the distal third of the clavicle which he opined may indicate a past injury.

In his report dated November 21, 2002, Dr. Diamond states that he performed MRI studies of plaintiff’s right wrist on November 19, 2002, and his findings include radial and ulnar collateral ligaments that appeared unremarkable; no significant effusion, and focal mass or altered signal in the soft tissues. He opined that these studies showed no abnormalities.

In his report dated March 13, 2003, Dr. Oliveto states that he performed a no-fault orthopedic examination of plaintiff on that date, and his findings include a normal gait; equal/symmetrical reflexes of

the upper and lower extremities with no atrophy; no motor or sensory deficits; and a negative straight leg raising test. He also observed that there was a full range of motion of the neck, mid-back and lower back with no signs of palpable tenderness or swelling. Additionally, he noted that plaintiff had a normal range of motion of the knees and a full range of motion of the shoulders, elbows, wrists and digits of both hands. Dr. Oliveto opined that plaintiff had sustained strains of the cervical and thoracolumbar spine as well as contusions of the right shoulder, wrist, hand, knees and hips, all of which had objectively resolved. He also concluded that there was no evidence of any disability and that plaintiff was able to work without restrictions.

In his report dated September 6, 2005, Dr. Farkas states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include a normal sensory exam; DTRs that were normal; a normal motor exam; no skin lesions or masses; and a negative straight leg raising test. While he observed some bruising distal and medial to the left knee, he also noted that there was a full range of motion of the knees with no effusion or bogginess. Additionally, he found that there was a normal range of motion of the right hand and forearm with no soft tissue swelling or bruising. Moreover he noted that there was a normal range of motion of the cervical and lumbar spine with no spasm or crepitus. Dr. Farkas opined that plaintiff had sustained sprains of the cervical and lumbar spine as well as contusions of the right wrist, right clavicle and both knees which had resolved. He concluded that plaintiff was not disabled and that she may carry out the daily activities of living without restriction.

Plaintiff testified to the effect that she was taken by ambulance to Southside Hospital where she was examined and released. She did not lose consciousness at any time immediately after the accident. About one week later, she went to see a doctor on her own. At the time of the accident she was not working and she was not enrolled in school. Sometime after the accident, however, she had returned to school although she did not drive for about one month. She admitted that she had a prior injury to her neck in 1998 and a prior injury to her knees in 1996. Plaintiff further testified that she did not have to hire anyone to perform cooking or cleaning after the accident.

In support of the cross motion, third party defendant submits, among other things, the affirmation of counsel which adopts the factual and legal arguments set forth in the affirmation of counsel in support of the main motion. Counsel argues that third-party defendant should be granted summary judgment dismissing the third-party complaint on the grounds that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102.

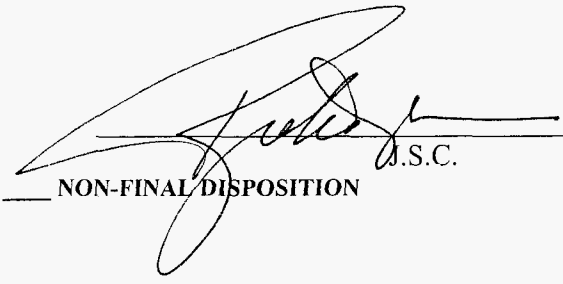
By their submissions, defendant and third party-defendant made a prima facie showing that plaintiff did not sustain a serious injury (*see, Butuzowa v Alisova*, 2007 NY Slip Op 4585 [2d Dept, May 29, 2007]; *Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teodoro v Conway Transp. Serv.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Gousgoulas v Melendez*, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]). Plaintiff's no-fault orthopedist found, upon an examination which was performed approximately five months after the accident, that plaintiff had a full range of motion of the neck, mid-back and low back with no palpable tenderness. He also found that plaintiff had a normal range of motion of the shoulders as well as a full range of motion of the shoulders, elbows, wrists and digits of both hands. Similarly, defendant's examining orthopedist observed that plaintiff had a normal range of motion of the cervical and lumbar spine with no palpable muscle spasm as well as a normal range of motion of plaintiff's

Antunes v Forde  
Index No. 04-22129  
Page No. 5

shoulders and right hand. Defendant's examining orthopedist also opined that plaintiff had merely sustained sprains of the cervical and lumbar spine as well as contusions of the right wrist, right clavicle and both knees which had resolved (*see, Moore v County of Suffolk*, 6 AD3d 408, 774 NYS2d 375 [2d Dept 2004]; *Puccio v Paziienza*, 289 AD2d 316, 734 NYS2d 100 [2d Dept 2001]). Defendant's remaining evidence, including plaintiff's deposition testimony, also supports a finding that she did not sustain a serious injury. As defendants met their burden as to all categories of serious injury alleged, 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 the motion and cross motion, plaintiff submits solely the affirmation of counsel, which is without probative value as to whether the plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see, Carplunk v Friedman*, 269 AD2d 349, 704 NYS2d 94 [2d Dept 1999]). As plaintiff has not submitted admissible medical evidence to raise a triable issue of fact as to any category of serious injury alleged by her (*see, Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]), or as to the issue of economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (*see, Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]), summary judgment is granted to the defendant and third-party defendant. Accordingly, the complaint and the third-party complaint are dismissed in their entirety.

Dated:           JUL 24 2007          

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

  X   FINAL DISPOSITION             NON-FINAL DISPOSITION