

| |
|--|
| Fairchild v Mongiello |
| 2007 NY Slip Op 32385(U) |
| July 31, 2007 |
| Supreme Court, Suffolk County |
| Docket Number: 0001669/2005 |
| Judge: Arthur G. Pitts |
| 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 of the State of New York
IAS Part 43- County of Suffolk

PRESENT:

HON. ARTHUR G. PITTS
JUSTICE OF THE SUPREME COURT

ORIG. RETURN DATE: 12/27/06
FINAL SUBMIT DATE: 5/3/07
MOTION SEQ. NO.: 002-MD

DINA M. FAIRCHILD,

Plaintiff,

PLTF'S/PET'S ATTY:
ROSENBERG & GLUCK, LLP.
1176 Portion Road
Holtsville, New York 11742

-against-

ANGELA MONGIELLO,

Defendant.

DEFT'S/RESP'S ATTY:
McCABE, COLLINS, McGEOUGH & FOWLER, LLP.
By: David T. Fowler, Esq.
346 Westbury Avenue
P.O. Box 9000
Carle Place, New York 11514-9000

Upon the following papers numbered 1 to 28 read on this motion / summary judgment
Notice of Motion/OSC and supporting papers 1-12 ; Notice of Cross-Motion and supporting papers ____; Affirmation/affidavit in
opposition and supporting papers 13-25 ; Affirmation/affidavit in reply and supporting papers 26-28 Other ____; ~~(and after~~
~~hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that defendant Angela Mongiello's motion for summary judgment is denied under the circumstances presented herein. (CPLR 3212; Insurance Law 5102 (d))

This action arose out of a motor vehicle accident that occurred on July 1, 2003 on the Long Island Expressway between exits 55 and exit 56, Islip, Suffolk County, New York at or near its intersection with Kenmore Street, Suffolk County, New York in which plaintiff Dina M. Fairchild allegedly sustained a serious personal injury. As a basis of the instant motion, the defendant asserts that the plaintiff has not sustained such serious injury as defined by Insurance Law 5102 (d).

Said section provides in part that "serious injury means 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 and eighty days immediately following the occurrence of the injury or impairment." (Insurance Law 5102 (d)) In the context of the plaintiff's

claims, the term “consequential” means important or significant (*Kordana v. Pomellito*, 121 A.D.2d 783, 503 N.Y.S.2d 198 , 200 [3rd Dept. 1986] , App. Dis. 68 N.Y.2d 848, 508 N.Y.S.2d 425) 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. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 [1982])

On a motion for summary judgment to dismiss the complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law 5102 (d), 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 A.D.2d 396, 582 N.Y.S.2d 395, 396 [1st Dept. 1992]) Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists. (*DeAngelo v. Fidel Corp. Services, Inc.*, 171 A.D.2d 588, 567 N.Y.S.2d 454, 455 [1st Dept. 1991]) Such proof in order to be in a competent or admissible form, shall consist of affidavits or affirmations. (*Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 [2nd Dept. 1992]) The proof must be viewed in a light most favorable to the non-moving party. (*Cammarere v. Villanova*, 166 A.D.2d 760, 562 N.Y.S.2d 808, 810 [3rd Dept. 1990])

The plaintiff has alleged by way of her bill of particulars that she has sustained the following injuries: Disc herniation at C5-6; cervical radiculopathy; cervical sprain; decreased range of motion of the cervical spine; straightening of the cervical lordosis; cervical muscle spasm; tingling down bilateral upper extremities; decreased sensation in the digits of the right hand; paresthesia down the right arm; pain and tenderness in the neck; pain and fatigue in the arms; lumbar strain; lumbar radiculopathy; right carpal tunnel syndrome; all of the aforesaid injuries involve the surrounding soft tissues, nerve endings, blood vessels, muscles, tendons and ligaments all with resultant pain, deformity and disability.

The defendant in support of the instant motion has submitted the affirmed reports of Joseph J. Macy, M.D., a radiologist and Dwight C. Bloom, M.D., an orthopedist. Dr. Bloom conducted an examination of the plaintiff on October 17, 2006 which included various range of motion tests and he also had an opportunity to review relevant medical records. After such examination and review he diagnosed the plaintiff with a “cervical strain, resolved..... no objective evidence of causally related orthopedic disability in this claimant.....at the present time I see no indication for orthopedic care or physical therapy.” Dr. Macy performed a radiology review of a series of MRI images of the cervical spine taken of the plaintiff on August 31, 2003 and September 1, 2004. After such review he concluded that “ MRI of the cervical spine shows straightening of the curvature possibly related to positioning.....there is minimal posterior bulging of the C5-C6 disc with no evidence of any herniated cervical discs.” A further impression of Dr. Macy was that the “MRI of the lumbosacral spine shows degenerative changes involving the discs at L4-L5 and L5-S1 with no evidence of any bulging nor herniated lumbar discs.” Accordingly, based upon the foregoing, the movant has demonstrated, as a matter of law that the plaintiff has not sustained a serious injury. (see *Reeves v. Scopaz*, 227 A.D.2d

606, 643 N.Y.S.2d 620 [2nd Dept. 1996] ; *Horan v. Mirando*, 221 A.D.2d 506, 633 N.Y.S.2d 402 [2nd Dept. 1995])

In opposition thereto, the plaintiff has submitted the affirmed report of Mark J. Zuckerman, M.D. a neurologist and her treating physician dated May 1, 2007 and affirmed on May 7, 2007. It is well settled that “to successfully oppose the motion, plaintiffs ‘must set forth competent medical evidence based upon objective medical findings and diagnostic tests to support [their] claim * * * ’ of a serious injury (*Tankersley v. Szesnat*, 235 A.D.2d 1010, 1012, 653 N.Y.S.2d 184, quoting *Eisen v. Walter & Samuels*, 215 A.D.2d 149, 150, 626 N.Y.S.2d 109).” (*Trotter v. Hart*, 285 A.D.2d 772, 728 N.Y.S.2d 561, 562 [3rd Dept 2001]) However, Dr. Zuckerman’s report indicates that the plaintiff first sought treatment on August 25, 2003 which continued with eight subsequent visits ending on May 5, 2005. Thereafter, Dr. Zuckerman did not treat or examine the plaintiff until March 27, 2007. He diagnosed the plaintiff with “cervical sprain injury with C5-C6 disc herniation and right cervical radiculopathy. Symptoms are intermittent, but continuing. 2) Lumbar sprain injury with radicular symptoms in the left lower extremity” and that such injury is causally related to the motor vehicle accident of July 1, 2003. In explaining the nearly 2 year gap in treatment, he states that “the gap in Ms. Fairchild’s treatment is consistent with her type of injury. Ms. Fairchild’s injuries are chronic and permanent. Ms. Fairchild is prone to bouts of acute exacerbation of neck and low back pain and during such episodes, will require additional medical management including, but not limited to physical therapy. On occasions when the pain is not exacerbated, the physical therapy will be only palliative in nature.” Although it has consistently been held that failure to explain an extended gap between the termination of the plaintiff’s initial treatment and his present course of treatment, renders the medical proof insufficient to establish a serious injury (*Uber v. Heffron*, 286 A.D.2d 729, 730 N.Y.S.2d 174 [2nd Dept. 2001] ; *Medina v. Zalman Reis*, 239 A.D.2d 394, 658 N.Y.S.2d 37 [2nd Dept. 1997]) an explanation that the conservative treatment being rendered is proper during times of exacerbated pain and palliative during other time periods adequately explains such treatment gap. (*Brown v. Achy*, 9 A.D.3d 30, 776 N.Y.S.2d 56 [1st Dept 2004])

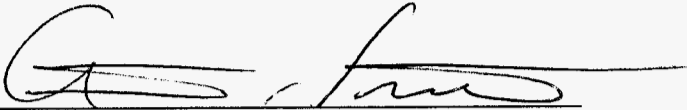
As to the plaintiff injuries, although it is well settled that “mere subjective complaints of pain alone, as well as medical opinions clearly based upon such complaints, are insufficient to raise a triable issue of fact.” (*Barrett v. Howland*, 202 A.D.2d 383, 608 N.Y.S.2d 681, 682 [2nd Dept.1994]) a finding by a medical expert that describes the qualitative nature of the plaintiff’s limitations (including specific designation of numeric percentages of the plaintiff’s loss of range of motion after testing) based on the normal function, purpose and use of the body part and attributing such limitations to the injuries sustained together with further medical evidence (MRI reports indicating disc herniations) are collectively sufficient to raise a triable issue of fact as to whether such serious injury was sustained as defined in Insurance Law 5102 (d). (*Toure v. Avis Rent a Car*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 [2002]) Herein, the plaintiff has set forth such competent medical evidence based upon objective medical findings and diagnostic tests (*Tankersley v. Szesnat*, supra) and accordingly, the defendant’s motion to dismiss is denied.

FAIRCHILD V MONGIELLO
INDEX NO. 1669/05
PAGE 4

This shall constitute the decision and order of the Court.

So ordered.

**Dated: Riverhead, New York
July 31, 2007**



J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION ___ DO NOT SCAN