

**Minett v Galan**

2007 NY Slip Op 33055(U)

September 24, 2007

Supreme Court, Suffolk County

Docket Number: 0025025/2005

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.



did not sustain serious injury sufficient to meet the threshold pursuant to Insurance Law of the State of New York §5102(d).

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]).

On a motion for summary judgment to dismiss a 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 plaintiff has no cause of action” (*Rodriquez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1<sup>st</sup> Dept 1992]). Once 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 AD2d 588, 567 NYS2d 454, 455 [1<sup>st</sup> Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2<sup>nd</sup> Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [3<sup>rd</sup> Dept 1990]).

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; a copy of plaintiff’s deposition transcript; uncertified copies of various medical records; unsworn copies of a medical reports of Dr. James Penna and Dr. Alan Zimmerman; and sworn copies of letters/reports of Dr. Chandra Sharma, and David Fisher, M.D.

The unsworn copy of the medical report Dr. Alan Zimmerman is not in admissible form and is accordingly not considered in support of this motion (*Pagano v Kingsbury*, supra).

Plaintiff testified that at the time of impact, her neck snapped back and forth and her whole body was jolted around in the car. She was taken by ambulance to Brookhaven Memorial Hospital where she complained of pain in her neck and left shoulder which was x-rayed. The next day she followed up with her private medical doctor who ordered x-rays of her neck. She then treated with Dr. Barry Rubin, a neurologist/psychologist, for numbness and tingling in her arms radiating to her fingers, and pain in her lower back radiating into both hips. She started physical therapy with electrical stimulation, ultrasound, heat, ice packs, massage and range of motion exercises for her neck and lower back. After about four or five months of treatment, she was referred to a neurologist for discomfort, numbness and tingling of her

arms, hands and fingers, and limited mobility and stiffness in her neck. She was then referred to a neurosurgeon, Dr. Shady, who advised she required surgery on her cervical spine, but she states she is too terrified to have it done. She started treating with a chiropractor, Dr. Kaufman, once to twice a week, for ultrasound and treatment with an activator for her neck and back. He does not perform manipulation. She has also had four injections into her lumbar spine with some relief of the pain in her lower back and hips.

Plaintiff testified that the pain affects everything she does in all aspects of her life, whether she is working, home, sleeping or awake. She has difficulty lifting things. She has difficulty holding the phone because her arms go numb. She has difficulty reading because she cannot keep her neck down to read because her shoulders go numb. She cannot keep her head turned to one direction as she cannot sustain a position, so this interferes with her driving. She cannot exercise or lift weights and can no longer go to the gym as she used to twice a week. She can no longer go cycling which she used to do a couple times a week. She must use pillows and heat packs to her lower back and neck for positioning when she is sleeping, and ice packs when she is working. She also has difficulty sitting, standing and walking. She used to walk two, three or four times a week. Plaintiff testified she is a neonatal nurse practitioner at Stony Brook University Hospital and also provides an on-call service for Brookhaven Memorial Hospital for high risk deliveries and infants if they have problems. As a result of this accident she missed two weeks of work and then an additional four or five days.

Plaintiff also testified that she sustained prior injuries from car accidents in 1986 wherein she sustained a concussion to her head and a laceration on her forehead; in 1992 wherein she injured her right arm and upper back between her shoulder blades; and in 2003 wherein she developed pain in her lower back. She also skid on ice while stopping her car in 2001, but states she sustained no injury. She did not commence any lawsuits concerning these accidents. She also had a Worker's Compensation claim in 1996 when a heat lamp fell and hit her shoulder and she felt pain in her shoulder and upper back. She never received disability on this claim.

Plaintiff was seen by Dr. James Penna, a treating physician, whose report of August 11, 2004, indicates Ms. Minett has had persistent pain in both her knees initially more so on the right, but now more on the left, since July 3, 2004, but has had chronic knee pain for a "long period of time." His reports opines that the MRI of her right knee indicates chondromalacia of the patella with grade II signal changes of the medial meniscus with a suggestion of a medial collateral ligament sprain. He recommended a rheumatological work up, physical therapy and antiinflammatories. Dr. Penna's report does not indicate he treated her for any injuries claimed to have been sustained in this accident.

Dr. Fisher, a radiologist, provided a report dated December 19, 2006, which indicates the cervical MRI of October 5, 2005 demonstrates degenerative changes at C3-4, C5-6, and C6-7 with resultant mild spinal stenosis at C3-4 and C5-6. He states that there is disc space narrowing and disc dehydration at the C3-4, C5-6, and C6-7 levels. He states conclusively, without setting forth a basis for his opinion, that the disc bulge at C5-6 is compatible with the amount of degenerative change present and that the degenerative changes are unlikely to have developed in the interval between the accident and the study. He does not note whether the degenerative changes at C3-4 and C6-7 are also disc bulges, but only states there is disc space narrowing and disc dehydration at these levels, but does not opine as to causation.

The MRI report of February 5, 2005, submitted by defendants, indicates that at the C3-4 level there is effacement of the ventral subarachnoid space and moderate right neural foraminal stenosis which has increased since the prior study dated October 5, 2005. Dr. Fisher, however, did not address the effacement of the ventral subarachnoid space in his review of the February 5, 2005 films in his report. There are therefore factual issues concerning Dr. Fisher's interpretation of the MRI films and the basis for his opinion in the MRI report submitted by defendants.

Dr. Fisher also provided a report concerning plaintiff's MRI of her lumbar spine of July 20, 2005 wherein he indicates there are degenerative changes at the L4-5 level manifested by disc dehydration, disc space narrowing, and endplate spurring. He opines without basis that these changes are unlikely to have developed in the short interval between the accident and the study, and in his opinion, represents a pre-existing condition. He also notes an accompanying small posterior central disc protrusion at L4-5 that effaces the ventral thecal sac with mild spinal stenosis at the L4-5 level and further states the disc protrusion at L4-5 is compatible with the amount of degenerative change present. He does not set forth a basis for this opinion and does not state causation of the disc herniation at L4-5. Accordingly, there are factual issues in this regard.

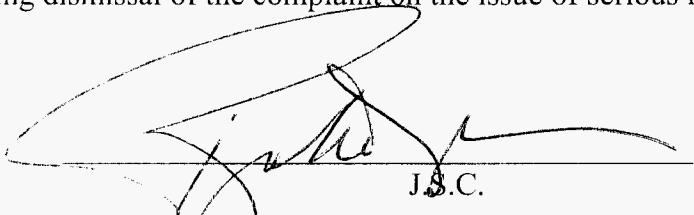
Dr. Sharma, whose specialty is psychiatry and neurology, examined plaintiff Pamela Minett on defendant's behalf on January 17, 2007 and made a diagnosis of subjective cervical and lumbar pain with a normal neurological examinations and stated that based upon the information provided, that the symptoms of pain are causally related. Dr. Sharma states the range of motion of plaintiff's cervical spine is normal during bending and transfer activities, however, she does not quantify the range of motion or how the range of motion was determined. In examining plaintiff's lumbar spine, Dr. Sharma merely states plaintiff can bend forward and bring her hands down to her knees, however, she does not quantify the degree of plaintiff's range of motion. She states the movements of plaintiff's neck and shoulders are normal in all directions with report of pain on both sides, but she does not state the degrees of range of motion or what motions plaintiff was put through. It is Dr. Sharma's opinion that plaintiff does not suffer a neurological disability and there are no neurological limitations, and plaintiff may continue her usual work and activities of daily living. She opines that claimant has reached pre-accident status with no need for neurological testing or treatment, and no need for physical therapy, massage therapy, household help, special supplies or special transportation. Dr. Sharma indicates plaintiff did receive physical therapy with heat and massage and stimulation for about nine months after the accident, and that she is currently receiving chiropractic treatment once or twice a week. She had a series of injections into the lumbar spine for approximately a year. She states that plaintiff advised her of her need for surgery on her cervical spine, but she is going for a second opinion. Although Dr. Sharma indicates she reviewed the MRI reports of plaintiff's lumbar and cervical spine, she does not comment on the findings set forth in the reports and does not indicate whether or the films indicate radiculopathy at any level, disc bulges, herniations, stenosis, degenerative changes, or any other findings, or how she considered the MRI findings in her evaluation of plaintiff. This therefore raises factual issues concerning Dr. Sharma's conclusory opinions. Further, plaintiff testified as to her limitations in activities of daily living and Dr. Sharma indicated plaintiff may continue with her usual work and activities of daily living. There are therefore factual issues which preclude summary judgment on this issue and concerning the issue of whether plaintiff sustained a serious injury within the meaning of Insurance Law §5102.

Minett v Galan  
Index No. 05-25025  
Page No. 5

Furthermore, disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (*Jankowsky v Smith*, 294 AD2d 540; 742 NYS2d 876). Dr. Sharma failed to set forth the degrees of range of motion found at the time of her examination of plaintiff's lumbar and cervical spines, therefore, whether there are objective findings is a factual issue which precludes summary judgment on the issue of whether plaintiff sustained serious injury.

Accordingly, motion (002) seeking dismissal of the complaint on the issue of serious injury is denied.

Dated: SEP 24 2017

  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION