

**Mastahinic v Triolo**

2007 NY Slip Op 33702(U)

November 7, 2007

Supreme Court, Nassau County

Docket Number: 7359-05/

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 19**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

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**ROBERT MASTAHINIC,  
  
Plaintiff,**

**Motion Sequence # 2  
Submitted August 15, 2007**

**-against-**

**INDEX NO: 17359/05**

**DOMINICO TRIOLO and PETER TRIOLO,  
  
Defendants.**

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**The following papers were read on this motion:**

<b>Notice of Motion.....</b>	<b>1</b>
<b>Affirmation In Opposition.....</b>	<b>2</b>
<b>Reply Affirmation.....</b>	<b>3</b>

Defendants, DOMINICO TRIOLO and PETER TRIOLO, move 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 within the meaning of Insurance Law § 5102(d) and §5104. Plaintiff, ROBERT MASTAHINIC, opposes the motion, which is determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in a motor vehicle accident, on June 29, 2003, at the intersection of Franklin Avenue and Woodcliff Drive, Franklin Square, New York. Plaintiff alleges that, on said date, the bicycle that plaintiff was operating was struck by a motor vehicle owned by

PETER TRIOLO and operated by DOMINICO TRIOLO, the defendants herein. In his bill of particulars, plaintiff alleges that he sustained the following injuries:

- central herniation at L3-4, creating a ventral extradural defect and central stenosis;
- broad-based disc bulge at L4-5;
- straightening of the lumbar lordosis;
- right S1 radiculopathy;
- lumbar strain/sprain;
- lumbago;
- lumbar spine dysrhythmia;
- plaintiff received two lumbar trigger points—the level of L1 was individually prepared and injected with lidocaine, narcaine and Kenalog, \* \* \*
- cervalgia;
- cervical sprain;
- cervical herniated nucleus pulposus;
- cervical spine dysrhythmia, \* \* \*
- posterior disc bulges at T9-10, T10-11 and at T11-12 impinging on the anterior aspect of the spinal canal;
- thoracic sprain;
- thoracic spine dysrhythmia;
- an A-shaped ecchymosis over the left neck;
- upper extremities two-inch resolving contusion hematoma over the right triceps;
- bruising of the left neck;
- mid-dorsal chest area shows mild tenderness ecchymosis;
- right knee internal derangement. . .

In order to satisfy the statutory “serious injury” threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as a serious injury within the meaning of Insurance Law § 5102(d). (See, *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 [C.A.2002]; *Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788, 512 NE2d 309 [1987]; *Munoz v Hollingsworth*, 18 AD3d 278, 795 NYS2d 20 [1<sup>st</sup> Dept. 2005]).

On a motion for summary judgment where the issue is whether a plaintiff has sustained a serious injury under the no-fault law, the movant bears the initial burden of

presenting competent evidence that there is no cause of action (*Hughes v Cai*, 31 AD3d 385, 818 NYS2d 538 [2<sup>nd</sup> Dept. 2006]; *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2<sup>nd</sup> Dept. 2006]). The proof must be viewed in a light most favorable to the non-movants, here the plaintiff (*Perez v Exel Logistics, Inc.*, 278 AD2d 213, 717 NYS2d 278 [2<sup>nd</sup> Dept. 2000]). If the movant satisfies that burden, the burden shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she sustained a serious injury or that there are questions of fact as to whether the purported injury, in fact, is serious (*Flores v Leslie*, 27 AD3d 220, 810 NYS2d 464 [1<sup>st</sup> Dept. 2006]).

In support of the motion to dismiss, defendants have submitted the affirmed medical reports of Edward M. Weiland, M.D., a neurologist, Frank M. Hudak, M.D., an orthopedist and Joseph J. Macy, M.D., a radiologist.

On February 22, 2007, Dr. Weiland performed a detailed neurological examination of plaintiff. In his report, Dr. Weiland concluded as follows: "There was full range of motion of the neck, both shoulders as well as lower torso. Range of motion of the neck, flexion 40-45 degrees, normal; extension 40-45 degrees, normal; right and left rotation 70 degrees, normal; and right and left lateral flexion 40 degrees, normal; range of motion of the shoulders, anterior flexion 170 degrees, normal; external rotation 45 degrees, normal; internal rotation 45 degrees, normal; and posterior extension 45 degrees, normal. Range of motion of the lumbar spine flexion 90 degrees, normal; extension 30 degrees, normal; and lateral flexion 30 degrees, normal. There was no associated muscle spasm or soft tissue swelling noted at this site, no joint crepitus or effusions noted with range of motion

of either shoulder. Straight leg raising maneuver was unlimited at 90 degrees, with no sciatic notch tenderness, no focal atrophic changes or other atypical motion movements were identified". Dr. Weiland further concluded that there was no evidence of any lateralizing neurological deficits at the time of his examination, and there was no need for any further neurological treatment or testing. Dr. Weiland stated that plaintiff was able to perform activities of daily living and seek gainful employment from a neurological perspective.

On December 26, 2006, Dr. Hudak performed an independent orthopedic examination of plaintiff. In his report, Dr. Hudak concluded that: "Examination of the cervical spine revealed no tenderness to palpation in the cervical spine area, forward flexion was 45 degrees, normal; extension of the head and neck was 60 degrees, normal; right and left rotation was to 45 degrees (60 is normal); right and left tilt was to 45 degrees, normal. No spasm was palpated in either right or left paraspinous or trapezius muscle groups of the cervical spine. Examination of the lumbosacral spine reveals no tenderness in the area of the dorsal spine, with mild tenderness from L3-L5. Forward flexion was 45 degrees (90 is normal); right and left lateral tilt was to 45 degrees, normal. No spasm was palpated in the right or left paraspinous muscle groups of the dorsal or lumbosacral spine. Examination of both upper extremities revealed no tenderness to either shoulder, with no redness deformity or swelling. Range of motion revealed abduction and flexion to 160 degrees, normal; extension of both shoulders was equal at 45 degrees, normal; internal and external rotation of both shoulders was 60 degrees, normal. Examination of the knees revealed normal range of motion with no redness, swelling or deformity. No tenderness was palpated in either knee, and both knees were stable to stress testing with no pain

noted, no crepitus or effusion present in either knee, with negative McMurray's signs in both knees". Dr. Hudak further found that plaintiff had no objective evidence to confirm any disability or permanency regarding the accident of June 29, 2003, and no orthopedic care, physical therapy or further diagnostic testing was required.

Dr. Macy performed an independent radiology review of a series of MRI images of the plaintiff's lumbar, cervical and lumbosacral spines. Dr. Macy found the MRI of the lumbosacral spine showed no evidence of bulging nor herniated discs causing pressure upon the thecal sac or nerve roots. He found evidence of degenerative changes involving the discs at L3-4 and L4-5 and no bulging or herniated discs. Dr. Macy found the MRI of the cervical spine was completely within normal limits, with no bulging nor herniated cervical discs. Dr. Macy found the MRI of the thoracic spine was completely within normal limits, with no bulging nor herniated discs.

Defendants have established a *prima facie* showing that plaintiff has not sustained a serious injury within the purview of Insurance Law § 5102(d). (See, *Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Garces v Yip*, 16 AD3d 375, 7990 NYS2d 712 [2<sup>nd</sup> Dept. 2005]). Consequently, the burden shifts to plaintiff to establish a triable issue of fact sufficient to defeat the motion.

In opposition to the motion, plaintiff submits various documentation including the affirmation of Adranik Khatchatrian, M.D. Dr. Khatchatrian states, *inter alia*, that it is his medical opinion that Mr. Mastahinic's June 29, 2003 motor vehicle accident was and is the competent producing cause of the plaintiff's central disc protrusion at the C4-5 level effacing the ventral subarachnoid space, disc bulge at the L4-5 level, posterior disc bulges

at T9-T10, T10-T11 and T11-T12 impinging on the anterior aspect of the spinal canal and acute S1 radiculopathy on the right. When examined in his office on June 29, 2007, Dr. Khatchatrian found that plaintiff had decreased range of motion in the cervical spine, as follows:

plaintiff's maximum range of cervical forward flexion was measured to be 50 degrees (normal being 60 degrees) with a 16% deficit;

plaintiff's maximum range of cervical extension was measured to be 40 degrees (normal being 50 degrees) with a 20% deficit;

plaintiff's maximum range of cervical lateral flexion to the right was measured to be 30 degrees (normal being 40 degrees) with a 25% deficit;

plaintiff's maximum range of cervical lateral flexion to the left was measured to be 30 degrees (normal being 40 degrees) with a 25% deficit; and

plaintiff's maximum range of cervical rotation was measured to be 60 degrees (normal being 80 degrees) with a 25% deficit.

Dr. Khatchatrian further states that plaintiff's central disc protrusion at the C4-5 level effacing the ventral subarachnoid space is the cause of the plaintiff's neck pain as well as the reason why the range of motion of his cervical spine has been diminished.

Moreover, Dr. Khatchatrian's range of motion tests for the plaintiff's lumbar spine, also conducted on June 29, 2007, revealed the following:

plaintiff's maximum range of lumbar flexion was measured to be 30 degrees (normal being 90 degrees) with a 66% deficit;

plaintiff's maximum range of lumbar extension was measured to be 20 degrees (normal being 30 degrees) with a 33% deficit;

plaintiff's maximum range of lumbar lateral flexion was measured to be 10 degrees (normal being 20 degrees) with a 50% deficit; and

plaintiff's maximum range of lumbar rotation was measured to be 20 degrees (normal being 30 degrees) with a 33% deficit.

Dr. Khatchatrian states that Mr. Mastahinic's disc bulge at the L4-5 level and posterior disc bulges at T9-T10, T10-T11 and T11-T12 impinging on the anterior aspect of the spinal canal are the cause of the plaintiff's lower back pain as well as the reason why the range of motion of his lumbar spine has diminished.

Dr. Khatchatrian also concludes that the chronic pain, irritation and limitations of motion experienced by plaintiff constitutes a permanent consequential limitation of the cervical spine and lumbar spine. Dr. Khatchatrian further indicates that inasmuch as plaintiff is not improving from physical therapy, his recommendation is for plaintiff to consult with a pain management specialist for possible epidural injections.

After a careful reading of the submission herein, it is the Court's judgment that plaintiff has presented competent medical evidence that he sustained a serious injury sufficient to raise a question of fact and defeat the motion for summary judgment. The differences of opinion among the medical experts as to the nature, cause and extent of plaintiff's injuries raise issues of credibility that must be resolved by a jury. *Kaplan v Gak*, 259 AD2d 736, 685 NYS2d 634 (2<sup>nd</sup> Dept. 1999). Plaintiff, however, has not submitted competent medical evidence that he was unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*Albano v Onolfo*, 36 AD3d 728, 830 NYS2d 205 [2<sup>nd</sup> Dept. 2007]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2<sup>nd</sup> Dept. 2007]; *Doran v Sequino*, 17 AD3d 626, 795 NYS2d 245 [2<sup>nd</sup> Dept. 2005]; *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 [2<sup>nd</sup> Dept. 2000]).

Finally, plaintiff's request for sanctions contained in the affirmation is denied (see, CPLR §2215). Contrary to plaintiff's contention, defendant's conduct in making the motion for summary judgment was not frivolous within the meaning of NYCRR 130-1.1[c][1]. (*Cf.*, *Navin v Mosquera*, 30 AD3d 883, 817 NYS2d 705 [3<sup>rd</sup> Dept. 2006]).

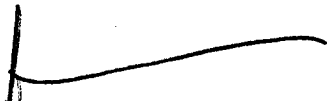
In view of the foregoing, it is therefore

**ORDERED**, that defendant's motion for summary judgment dismissing the complaint is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: November 7, 2007

  
WILLIAM R. LaMARCA, J.S.C.

TO: Bergman, Bergman, Goldberg & Lamonsoff, Esqs.  
Attorneys for Plaintiff  
108-18 Queens Boulevard  
Forest Hills, NY 11375

McCabe, Collins, McGeough & Fowler, LLP  
Attorneys for Defendants  
346 Westbury Avenue  
Carle Place, NY 11514

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