

**Linder v Jackson**

2007 NY Slip Op 33738(U)

November 14, 2007

Supreme Court, Nassau County

Docket Number: 0808-06/

Judge: Daniel R. Palmieri

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Sum

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----x  
**LUZ LINDER and ANTONIO ARIAS,**

**TRIAL TERM PART 50**

**Plaintiff,**

**-against-**

**INDEX NO.: 000808/06**

**MOTION DATE: 9-4-07  
SUBMIT DATE: 10-23-07  
SEQ. NUMBER - 002 &  
003**

**DEXTER V. JACKSON, JR. and JOSEPH G.  
DAMIS,**

**Defendant**

-----x

**The following papers have been read on this motion:**

- Notice of Motion, dated 8-2-07.....1**
- Notice of Cross Motion, dated 8-27-07.....2**
- Affirmation in Opposition, dated 10-9-07.....3**

The motion by Linder as defendant on the counterclaim pursuant to CPLR§ 3212 for summary judgment dismissing the complaint of plaintiff Arias on the ground that Arias failed to sustain a serious injury within the parameters of Insurance Law § 5102(d) is granted and the Arias complaint is dismissed.

The motion of defendants pursuant to CPLR§ 3212 (incorrectly denominated as a cross motion, (See CPLR §2215) is granted as to both plaintiff Arias and plaintiff Linder.

The movants seek summary judgment dismissing the complaints in this lawsuit predicated on the contention that plaintiffs did not sustain serious injury as a result of the underlying accident, which occurred on September 13, 2005, in Nassau County. Arias was a passenger in the Linder vehicle which was involved in an accident at an intersection in Elmont, New York, with a vehicle owned by defendant Damis and driven by defendant Jackson.

Insurance Law § 5102(d) defines "serious injury" as a personal injury which results in, among other things,

"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 her Bill of Particulars plaintiff Linder alleges injuries which include disc herniations at C3-4, C6-7, L5-S1 and bulge at C5-6 with related sequelae.

Plaintiff Arias alleges herniations at L5-S1, C5-6 and a bulge at C4-5 again with related sequelae.

It is well settled that 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.*, 98 NY2d 345,350 (2002); *Scheer v Doubek*, 70 NY2d 678,

679 (1987); *Tuna v Babendererde*, 32 AD3d 574, 575 (3<sup>rd</sup> Dept. 2006). 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. *Browdame v Candura*, 25 AD3d 747, 748 (2<sup>nd</sup> Dept. 2006).

By submitting deposition transcripts, and the Bills of Particulars, movants have satisfied their initial burden of establishing that plaintiffs have not sustained a serious injury under the 90/180 category of the Insurance Law. Neither plaintiff has submitted any competent medical evidence that he or she was unable to perform substantially all of his or her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident. *Albano v Onolfo, supra*; *Duran v Sequino*, 17 AD3d 626 (2<sup>nd</sup> Dept. 2005); *Sainte-Aime v Ho*, 274 AD2d 569 (2<sup>nd</sup> Dept. 2000).

With respect to the other categories claimed, the movants have submitted affirmed medical reports of physicians who conducted independent medical examinations of the plaintiffs.

As to plaintiff Arias, Dr. Cohen an orthopedist reviewed plaintiff's records, conducted specific tests with quantified results and found no active or objective disability or permanency related to the accident. Dr. Entin a neurologist reviewed plaintiff's medical records, conducted tests with identifiable results and found no objective neurological defects or disability referable to the accident and no radiculopathy.

Dr. Entin also clearly determined that plaintiff Arias has normal functional capacity in his cervical and lumbrosacral spine areas, and that the presence if any of any disc

herniations or a bulge are not interfering with the normal function and use of the spinal system.

Dr. Cohn, a radiologist, reviewed plaintiff's cervical and lumbar MRIs and find mild disc bulge at C4-5, circumferential disc bulge at C5-6 and herniation at L5-S1 which she states are degenerative and unrelated to the trauma.

Based on the foregoing, the Court finds that the movants have made out a *prima facie* showing that the plaintiff Arias has not sustained a "serious injury" that would satisfy any of the other categories alleged in his complaint, Bill of Particulars or deposition, thus shifting the burden to the plaintiff to come forward with admissible evidence demonstrating the existence of triable issues of fact. *Toure v. Avis Rent a Car Systems Inc., Supra; Junco v. Ranzi*, 288 AD2d 440 (2d Dept. 2001) .

In opposition to this motion, plaintiff Arias submits his own affidavit, the affidavits and reports of radiologist Dr. Shapiro and the affirmation, with reports, of Dr. Khanan.

Dr. Shapiro finds disc herniations at C5-6, L5-S1 and a mild disc bulge at C 4-5. He makes no findings as to causation and finds no other abnormalities.

Dr. Khanan treated plaintiff for four months and does not indicate having seen him since January 2006, more than 19 months ago. Dr. Khanan's final report in January 2006, fails to quantify objective test results, fails to compare test results to what would be normal, shows normal cervical and shoulder ranges of motion and no range of motion results for the lumbar spine.

Although the affirmation of Dr. Khanan states that treatment was discontinued because plaintiff reached maximum medical improvement, this conclusion is belied by the

doctor's last examination report which does not contain such a reference and provides for additional treatment, continued medication and physician reevaluation. This conclusion appears to be tailored to meet statutory standards. *Barnes v. Cisneros*, 15 AD3d 514 (2d Dept. 2005); *See Pommells v. Perez*, 4 NY3d 566, 574 (2005).

Medical proof which indicates limitations in the lumbar or cervical spine is sometimes sufficient to raise a triable issue of fact. *See, e.g., Rosario v Universal Truck & Trailer Service, Inc.*, 7 AD3d 306 (1<sup>st</sup> Dept. 2004). However, certain factors may override a plaintiff's objective medical proof of limitations and allow dismissal of the complaint. *Pommells v Perez, Supra*. Specifically, the Court held in *Pommells* that additional contributing factors, such as a gap in treatment, which would interrupt the chain of causation between the claimed accident and the claimed injury would render plaintiff's case subject to dismissal. *Id* at 566, citing *Franchini v Palmieri*, 1 NY3d 536 (2003); *see also Mohamed v Siffraïn*, 19 AD3d 56 (2<sup>nd</sup> Dept. 2005).

Further, "the existence of a herniated or bulging disc is not evidence of serious injury in the absence of objective medical evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration." *Albano v Onolfo*, 36 AD3d 728 (2<sup>nd</sup> Dept. 2007); *Yakubov v CG Trans Corp.*, 30 AD3d 509 (2<sup>nd</sup> Dept. 2006); *Kearse v New York City Tr. Auth.*, 16 AD3d 45 (2<sup>nd</sup> Dept. 2005). Despite the existence of MRIs indicating disc herniations and a bulge, plaintiff has failed to rebut defendant's *prima facie* showing that he did not sustain a serious injury as defined by of Insurance Law § 5102(d) because there is no objective demonstration of a significant impairment related thereto. *Kearse v NYCTA, supra.*

Plaintiff has not presented sufficient medical proof of significant range of motion restrictions at the time he ceased treatment. *Bell v Rameau*, 29 AD3d 839 (2<sup>nd</sup> Dept. 2006); *Li v Yun*, 27 AD3d 173 (2<sup>nd</sup> Dept. 2006); *Suk Ching Yeung v Rojas*, 18 AD3d 863 (2<sup>nd</sup> Dept. 2005); *Rodriguez v Cesar*, 40 AD3d 731 (2<sup>nd</sup> Dept. 2007).

As to plaintiff Linder, movants have submitted reports of independent medical examinations performed by Dr. DeJesus, a neurologist, Dr. Weiss, an orthopedist and a report of Dr. Cohn, a radiologist, who reviewed her cervical and lumbosacral MRIs.

Dr. DeJesus conducted tests and compared the results with what is normal and concluded with a diagnosis of resolved sprains and a normal neurological examination.

Dr. Weiss also conducted objective tests, reported quantified results that were compared to normal and concluded that plaintiff Linder suffered cervical and lumbar sprains from which she has completely recovered.

Dr. Cohn reviewed plaintiff's MRIs and reports herniations at C3-4, C6-7 and a mild bulge at C5-6, none of which she contends were caused by the accident. Dr. Cohn finds degenerative changes at L5-S1 which were not caused by the accident.

In opposition, plaintiff Linder has submitted her own affidavit, an affirmation of Dr. Khanan who treated her from September 2005 until February 2006 and who reexamined her after this motion was made, together with an affirmation of Dr. Shapiro, a radiologist, with respect to cervical and lumbar MRIs. Dr. Shapiro found disc herniations at C3-4, C6-7, bulge at C5-6 and degenerative disc disease at L5-S1.

Dr. Khanan treated plaintiff Linder from September 2005, shortly after the accident. In his initial examination he found moderate cervical limitations.

In his report of October 28, 2005, cervical range of motion was within normal limits, although there were subjective complaints of pain. In that same report, the doctor concedes that plaintiff's lumbar condition is degenerative.

The examination of December 2005 shows cervical condition to be normal. The examinations of January and February 2006, do not address plaintiff's cervical spine at all.

The next examination after February 2006 was in September 2007, after this motion and more than 18 months after her last treatment. Except for mention of physical therapy and unsupervised home exercise, Dr. Khanan does not describe any treatment for the cervical condition claimed to have been caused by the accident. While mention is made of chiropractic treatment, there are neither reports nor affidavits from any chiropractor and no description of treatment.

Plaintiff Linder has not demonstrated the existence of triable issues of fact sufficient to warrant denial of the motion for summary judgment. The mere existence of a bulging or herniated disc is not evidence of serious injury unless there is objective evidence of the extent of the physical limitation resulting therefrom and its duration *Yakubov v CG Trans Corp.*, *Supra*, and here plaintiff Linder has not proffered medical evidence contemporaneous with the accident which show any range of motion limitations in her cervical spine. The existence of the claimed cervical herniations and single bulge do not alone establish a serious injury. *Nannarone v. Ott*, 41 AD3d 441 (2d Dept. 2007).

Further, the conclusory statement that plaintiff has reached maximum recovery is lacking in documentary support that explains any treatment, *Ortega v. Maldonado*, 38 AD3d 388 (1<sup>st</sup> Dept. 2007). Thus, there is no competent explanation for lack of treatment cessation


of treatment or gap in treatment. *Pommels v. Perez, Supra* 574.

Based on the foregoing both motions are granted and the complaints of both plaintiffs are dismissed. CPLR §3212.

This shall constitute the Decision and Order of this Court.

DATED: November 14, 2007

ENTER

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

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**ENTERED**

NOV 19 2007

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COUNTY CLERK'S OFFICE