

**Valeriano v Murre Cab Corp.**

2007 NY Slip Op 33889(U)

November 14, 2007

Supreme Court, New York County

Docket Number: 0104054/2004

Judge: Deborah A. Kaplan

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN  
*Justice*

PART 22

LUIS A. VALERIANO, ELMA A. MARTINEZ and  
YOCIRDE M. MARTINEZ

INDEX NO. 104054/04

MOTION DATE 8-01-07

- v -

MOTION SEQ. NO. 005-004

MURRE CAB CORP. et al.

MOTION CAL. NO. 91

The following papers, numbered 1 to 6, were read on these motions by the defendants for (1) summary judgment on the issue of whether plaintiffs sustained a "serious injury" within the meaning of Insurance Law §5102(d), (2) preclusion of plaintiff Elma A. Martinez and (3) summary judgment on the issue of liability.

Notice of Motion— Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo) \_

Cross-Motion:  Yes  No

**FILED**  
NOV 30 2007  
NEW YORK COUNTY CLERK'S OFFICE  
PAPERS NUMBERED  
1, 2, 3  
4, 5, 6

I. Factual and Procedural Background

On April 8, 2003, plaintiffs were passengers in a vehicle owned by defendant Miguel Cerda and operated by defendant Joel Diaz, which was involved in a three vehicle collision while traveling on Columbus Avenue near its intersection with West 66<sup>th</sup> Street in Manhattan. The other two vehicles involved were operated by defendant Stephanie A. Karamanogly and owned by defendant M. Karamanogly and operated by defendant Mohammed SK Rahman and owned by defendant Murre Cab Corp..

The plaintiffs commenced the instant action, seeking damages for injuries they allegedly sustained in the accident. Defendants now move for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendants also seek to preclude Elma A. Martinez from offering any medical evidence for failure to appear for an independent medical examination. It appears from the motion papers that Elma A. Martinez has now appeared for said medical examination,

consequently that portion of the motion will be denied as moot. Defendants M. Karamanogly and Stephanie A. Karamanogly cross-move for summary judgment on the issue of liability.

## II. The Motions for Summary Judgment on "Serious Injury"

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Where, as here, defendants seeks summary judgment on the threshold "serious injury" issue under "No-Fault threshold" issue (Insurance Law § 5102(d)), they bear the initial burden of establishing the absence of a "serious injury" as a matter of law. This is because, in enacting Insurance Law §5102(d), the Legislature intended to weed out frivolous claims and limit recovery to significant injuries arising from motor vehicle accidents. See Pommells v Perez, 4 NY3d 566 (2005); Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Licari v Elliot, 57 NY2d 230 (1982).

If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, *supra*; Alvarez v Prospect Hospital, *supra*; Winegrad v New York Univ. Med Ctr., *supra*; Zuckerman v City of New York, *supra*. The party opposing a motion for summary judgment on the threshold "serious injury" issue must come forward with objective proof of their injury to raise a triable issue. See Toure v Avis Rent A Car Systems, *supra*; Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyler, 79 NY2d 955 (1992).

Additionally, where the plaintiffs claim serious injury under the "90/180" category of Insurance Law §5102(d), they must (1) demonstrate that their usual activities were curtailed during the requisite time period and (2) submit competent credible evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in their daily activities. Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyler, *supra*.

In this case, the defendants have produced evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. Specifically, they produced the pleadings, the affirmed reports of Dr. Michael P. Rafiy, a board certified orthopedic surgeon, Dr. Iqbal Merchant, a board certified neurologist, Dr. S. W. Bleifer, a board certified

\* 3 ]  
orthopedist, Dr. Edward M. Weiland, a board certified neurologist and Dr. Andrew N. Bazos, a board certified orthopedic surgeon.

### III. Defendants Medical Examinations of Luis A. Valeriano

Dr. Rafiy performed an orthopedic examination of Valeriano on December 14, 2006 and reviewed his prior medical records. Dr. Rafiy performed a number of objective tests of plaintiff's shoulders, right knee cervical and lumbar spine, all of which are described in his report and all of which revealed a normal range of motion as compared to the stated norm. He concludes that plaintiff suffers from right knee, bilateral shoulder, cervical and lumbar sprains/strains which are all resolved. He adds that plaintiff has no disability, residuals or permanency from an orthopedic perspective.

Dr. Merchant performed a neurological examination of Valeriano on December 14, 2006 after reviewing his prior medical records. In his report, Dr. Merchant concludes plaintiff's neurologic examination was normal, and that he suffered cervical and lumbar sprains/strains which have been resolved. He concludes that the plaintiff does not need any treatment from a neurologic perspective, there is no disability and he is able to function in his normal capacity. However, Dr. Merchant did find restrictions in the cervical spine, flexion decreased from 50 degrees to 45 degrees, extension decreased from 60 degrees to 45 degrees and right and left rotation decreased from 80 degrees to 70 degrees. Dr. Merchant states in his report that these restrictions are subjective. Valeriano's deposition testimony establishes that he only missed two days of work following the accident.

### IV. Defendants Medical Examinations of Yocirde Martinez

Dr. Bleifer examined Yocirde Martinez on April 4, 2006. He reviewed her medical records, prior to conducting a physical and orthopedic examination. In his report, Dr. Bleifer concludes that she showed normal ranges of motion in her legs, spine and upper limbs. He diagnoses her with a bilateral shoulder, lumbosacral and cervical sprains and a right knee contusion, which are all resolved. He concludes that there is no orthopedic disability or any need for further treatment.

Dr. Weiland examined Yocirde Martinez on March 15, 2007. He noted that no authenticated medical records were provided for his review. After performing objective tests which are described in his report, he found normal ranges of motion in her shoulders, legs, cervical and lumbar spine. Dr. Weiland concludes that her examination reveals no disability, permanency or residuals.

Yocirde Martinez's deposition testimony establishes that she was unemployed at the time of the accident, was confined to bed for two weeks and confined to her home for one month following the accident. No other limitations to her daily activities is presented.

#### IV. Defendants Medical Examinations of Elma Martinez

Dr. Weiland examined Elma Martinez on March 15, 2007 where he performed a number of objective tests, all of which are described in his report and all of which revealed a normal range of motion as compared to the stated norm. He concludes that she has cervical and thoracic sprains/strains which are all resolved and a normal neurological examination. He opines that she is not disabled from a neurological perspective and there is no disability, permanency or residuals.

Dr. Bazos performed an orthopedic examination on Elma Martinez on March 15, 2007. He noted that no authenticated medical records were provided for his review. He performed objective tests which are described in his report and revealed normal range of motion in her cervical spine, lumbar spine and upper extremities. His impression was cervical and thoracic sprains/strains and no orthopedic disability, permanency or residuals.

Elma Martinez's deposition testimony establishes that she was unemployed at the time of the accident and was confined to her home for approximately a week following the accident. No other limitations to her daily activities is presented.

Accordingly, defendants have met their burden on a motion for summary judgment thereby shifting the burden to the plaintiffs.

#### V. Plaintiffs' Medical Evidence in Opposition

In opposition, plaintiffs submit, the affirmation of Dr. Humphrey A. Iroku and the unaffirmed report of Dr. Rafael Garcia, Dr. Ayoub Khodadadi and various other unaffirmed medical records and reports. Unaffirmed medical reports are normally inadmissible (Grasso v. Angerami, 79 N.Y.2d 813 (1991); Pagano v. Kinsbury, 182 A.D.2d 268 (2<sup>nd</sup> Dep't 1992); CPLR 2106), however, if a defendant's doctor refers to unaffirmed reports in their reports, the unaffirmed reports are properly before the Court. Bent v. Jackson, 15 A.D.3d 46 (1<sup>st</sup> Dept. 2005); Brown v. Achy, 9 A.D.3d 30 (1<sup>st</sup> Dept. 2004). Since defendants' doctors referred to Dr. Rafael Garcia's reports they are properly before the Court. However, the MRI reports submitted by plaintiffs are unaffirmed and were not referred to by defendants' doctors. Thus they are inadmissible.

#### VI. Plaintiffs' Medical Evidence of Luis A. Valeriano

Dr. Garcia examined plaintiff Luis Valeriano on April 17, 2003 where he conducted range of motion tests of his cervical, lumbar and thoracic spine in addition to hip joints, right knee, left shoulder, wrists, hands, ankle and feet. He found restrictions in his cervical spine, as extension was decreased from 45 to 20 degrees, lateral bending was decreased from 45 to 20 degrees, lateral rotation was decreased from 80 to 40 degrees and cervical flexion was decreased from 60 to 40 degrees. His lumbar spine extension was decreased from 30 to 15 degrees, lateral bending was decreased from 40 to 20 degrees, lateral rotation was decreased from 30 to 15 degrees and flexion was decreased from 90 to 50 degrees. He also found restrictions in his right knee, flexion was decreased from 130 degrees to 110 degrees and left shoulder, flexion was decreased from 170 to 120 degrees, extension was decreased from 30 to 15 degrees, internal rotation was decreased from 60 to 40 degrees and external rotation was decreased from 90 to 45 degrees. His diagnoses was cervical, lumbosacral, left shoulder and right knee sprains/strains.

Dr. Iroku submits an undated affirmation restating Dr. Garcia's initial findings. He concludes based on Dr. Garcia's findings that plaintiff's injuries will result in permanent pain and limitation of motion. Dr. Iroku notes that plaintiff underwent MRI's of the left shoulder, right knee, lumbar and cervical spine, which revealed, *inter alia*, joint effusion of the left shoulder, a grade 1 meniscal separation of the right knee and disc herniations at L5-S1 and C7-T1. However, his affirmation does not explain whether he personally reviewed the MRI films or is simply restating the findings contained in the inadmissible MRI reports. Nevertheless, "proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury." See Pommels v Perez, *supra* at 574; Park v Champagne, 34 AD3d 274, 276 (1st Dept. 2006).

#### VII. Plaintiffs' Medical Evidence of Yocirde Martinez

Dr. Garcia writes in his report that he examined plaintiff Yocirde Martinez on April 21, 2003, however his report dated April 21, 2008 appears to be an error. Dr. Iroku has prepared another undated affirmation restating Dr. Garcia's initial findings, however, he states that the plaintiff was originally treated on April 17, 2003 not April 21, 2003. This is most likely another error. During the exam Dr. Garcia conducted range of motion tests of her cervical, lumbar and thoracic spine in

addition to hip joints, right knee, left shoulder, wrists, hands and ankle/feet. He found restrictions in her cervical spine, as extension was decreased from 45 to 20 degrees, lateral bending was decreased from 45 to 20 degrees, lateral rotation was decreased from 80 to 40 degrees and cervical flexion was decreased from 60 to 40 degrees. Her lumbar spine extension was decreased from 30 to 15 degrees, lateral bending was decreased from 40 to 20 degrees, lateral rotation was decreased from 30 to 15 degrees and flexion was decreased from 90 to 45 degrees. He also found restrictions in her bilateral knees, flexion was decreased from 130 degrees to 110/100 degrees and bilateral shoulders, flexion was decreased from 170 to 100 degrees, extension was decreased from 30 to 15 degrees, internal rotation was decreased from 60 to 30 degrees and external rotation was decreased from 90 to 45 degrees. His diagnoses was cervical, lumbosacral and bilateral shoulder sprains/strains.

Dr. Iroku notes that plaintiff underwent MRI's of the left and right shoulders, lumbar and cervical spine, which revealed, *inter alia*, joint effusion of the left and right shoulders, a disc herniation at L5-S1 and a disc bulge at C5-C6. Dr. Iroku states that based on his physical examination and the records in his possession the injuries are causally related to the subject accident. However, as discussed above his affirmation does not explain the basis for his diagnosis.

#### VIII. Plaintiffs' Medical Evidence of Elma Martinez

In his report, Dr. Iroku states that he examined plaintiff Elma Martinez on April 17, 2003 where he conducted range of motion tests of her cervical, lumbar and thoracic spine in addition to hip joints, bilateral knees, bilateral shoulder, wrists, hands and ankle/feet. He found restrictions in her cervical spine, as extension was decreased from 45 to 20 degrees, lateral bending was decreased from 45 to 20 degrees, lateral rotation was decreased from 80 to 35 degrees and cervical flexion was decreased from 60 to 30 degrees. Her lumbar spine extension was decreased from 30 to 15 degrees, lateral bending was decreased from 40 to 20 degrees, lateral rotation was decreased from 30 to 20 degrees and flexion was decreased from 90 to 50 degrees. He also found restrictions in her bilateral knees, flexion was decreased from 130 degrees to 110/100 degrees and bilateral shoulders, flexion was decreased from 170 to 100 degrees, extension was decreased from 30 to 15 degrees, internal rotation was decreased from 60 to 25 degrees and external rotation was decreased from 90 to 30 degrees. His diagnoses was cervical, lumbosacral, bilateral shoulder and bilateral knee sprains/strains. He concludes that the injuries are causally related to the subject accident

In his affirmation dated May 10, 2007, Dr. Iroku notes that the plaintiff underwent MRI's of her left shoulder, cervical and lumbar spine which revealed,

*inter alia*, herniated discs at C4-C5, C5-C6 and disc bulges at L4-L5. However, as discussed above Dr. Iroku does not explain whether the basis for these findings was independent of the inadmissible MRI reports.

### IX. Conclusion

Each plaintiff has failed to submit any recent proof that their claimed restrictions still exist or that their injuries are permanent. Thus, Dr. Garcia's reports and Dr. Iroku's affirmations and reports made some four years ago, do not reflect any recent evaluation of the plaintiffs, and as such, are insufficient to sustain plaintiffs' burden. See Milazzo v Gesner, 33 AD3d 317 (1<sup>st</sup> Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1<sup>st</sup> Dept. 2006).

With regard their "90/180" claim, the plaintiffs fail to submit credible medical evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in their daily activities. Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyler, *supra*. Plaintiffs' affidavits all state that they had numerous restrictions of movement due to pain in various areas including their neck and back, which affected their daily activities. However, the only evidence to substantiate these claims are Dr. Garcia and Dr. Iroku's vague statements instructing the plaintiffs about certain limitations to their activities. Each plaintiff was able to resume normal activities after a brief hiatus following the accident.

Additionally, according to their own proof, plaintiffs never sought any treatment after 2003. This gap or complete cessation of treatment further undermines the plaintiffs' claim of serious injury under Insurance Law §5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Milazzo v Gesner, *supra*; Berete v Ford Motor Credit Co., 29 AD3d 452 (1<sup>st</sup> Dept. 2006); Rubenscastro v Alfaro, 29 AD3d 436 (1<sup>st</sup> Dept. 2006); Vasquez v Reluzco, *supra*; Perez v Rodriguez, 25 AD3d 506 (1<sup>st</sup> Dept. 2006); Baez v Rahamatalli, 24 AD3d 256 (1<sup>st</sup> Dept. 2005); Agramonte v Marvin, 22 AD3d 322 (1<sup>st</sup> Dept. 2005). Plaintiffs' allege in their affidavits that their doctors advised them that they had reached the maximum benefit of treatment, however, these statements are unsubstantiated by any of the medical submissions.

Accordingly, defendants' motions for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted.

X. Defendants' Cross-Motion for Summary Judgment on Liability

In light of the disposition of the motions, defendants' cross-motion for summary judgment on the issue of liability is moot. Thus, the Court need not reach the merits of that motion.

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the defendants dismissing the complaint in its entirety, with costs and disbursements to defendants as taxed by the Clerk, and it is further,

ORDERED that the defendants' motion for summary judgment on the issue of liability is denied as moot, and it is further,

ORDERED that the defendants' motion for preclusion is denied as moot.

This constitutes the Decision and Order of the Court.

Dated: November 14, 2007

**FILED**  
NOV 30 2007  
NEW YORK  
COUNTY CLERK'S OFFICE



Deborah A. Kaplan  
**DEBORAH A. KAPLAN**

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