

**Catania v Orlando**

2007 NY Slip Op 34096(U)

December 14, 2007

Supreme Court, Suffolk County

Docket Number: 0003244/2005

Judge: Denise F. Molia

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA**,  
Justice

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LEONARD CATANIA,

Plaintiff,

- against -

JOSEPH W. ORLANDO and KERRY M.  
HANDELSON,

Defendants.

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CASE DISPOSED: NO  
MOTION R/D: 5/2/07  
SUBMISSION DATE: 9/28/07  
MOTION SEQUENCE NO.: 001 MD  
002 XMG

ATTORNEY FOR PLAINTIFF  
Steven D. Dollinger & Associates  
5 Threepence Drive  
Melville, New York 11747

ATTORNEYS FOR DEFENDANT  
Law Office of John P. Humphreys  
3 Huntington Quadrangle, Suite 102S  
Melville, New York 11747

Law Offices of Epstein & Grammatico  
1393 Veterans Mem. Hwy., Suite 414  
Hauppauge, New York 11788

Upon the following papers filed and considered relative to this matter:

Notice of Motion dated March 28, 2007; Affirmation in Support dated March 28, 2007; Exhibits A through G annexed thereto; Notice of Cross Motion dated June 1, 2007; Affirmation dated June 1, 2007; Exhibits A through G annexed thereto; Affirmation in Opposition dated July 27, 2007; Exhibits A through F annexed thereto; Affirmation in Opposition dated August 6, 2007; Reply Affirmation dated August 28, 2007; Reply Affirmation dated September 13, 2007; Exhibits A through C annexed thereto; Sur Reply Affirmation dated September 20, 2007; and upon due deliberation; it is

**ORDERED**, that the motion by defendant Joseph W. Orlando, pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of moving defendant and against the plaintiff, dismissing the Complaint on the ground that the injuries claimed do not satisfy the

“serious injury” threshold requirement of Section 5102(d) of the Insurance Law, is denied; and it is further

ORDERED that the cross motion by defendant Kerry M. Handelson, pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of moving defendant and against the plaintiff, dismissing the Complaint and all cross claims on the ground that no triable issue of fact exists as to the negligence on the part of the cross moving defendant, is granted.

The underlying action is one to recover damages for the personal injuries alleged to have been sustained by the plaintiff as a result of a motor vehicle accident that allegedly occurred on July 3, 2004 on Woodvale Lane at or near its intersection with Sunken Meadow Road, Smithtown, New York. In his Verified Bill of Particulars, the plaintiff alleges that he has sustained the following injuries as a result of the subject accident: insult to the muscular skeletal system/neuroperipheral system of the cervical and lumbar spine; post-concussion syndrome; headaches; radiculitis throughout the entire spine; aggravation of any prior injuries.

It appears that the plaintiff was also involved in a prior motor vehicle accident in 1992 wherein he sustained trauma to his spine. Plaintiff was also involved in another prior motor vehicle accident on April 13, 1995 wherein he allegedly sustained the following injuries: bulging disc at C6-7; insult to the muscular skeletal/neuroperipheral system of both the cervical and lumbar spine; cervical and lumbar radiculopathy; post traumatic syndrome; uncompromising headaches; subluxation; aggravation at disc bulge C6-7; radiculitis of the cervical and lumbar spine; post concussion syndrome headaches; psychological damage.

Each of the defendants has separately moved for summary judgment alleging that the plaintiff has not sustained a serious injury as defined by Insurance Law §5102(d) and is therefore barred under §5104(a) of the Insurance Law from prosecuting his claim for non-economic loss. Defendant Handelson has also moved for summary judgment on the grounds that there is no triable issue of fact to demonstrate that she was negligent.

In support of the motion, Orlando has submitted the Independent Medical Examinations of S. Farkas, M.D. dated December 6, 2005 and Edward M. Weiland, M.D. dated December 6, 2005. After performing an orthopedic examination of the plaintiff, Dr. Farkas reached a diagnosis of (1) resolved cervical sprain; (2) resolved lumbar sprain; and (3) no orthopedic disability. Dr. Weiland performed a neurological examination of the plaintiff and reached a diagnosis of (1) cervical strain/sprain - resolved; (2) lumbosacral sprain/strain - resolved; and (3) normal neurological exam.

In opposition to the motion, the plaintiff has noted that he has been treating with Village Medical and Rehab since the accident, a period of more than three years without a gap in treatment. The plaintiff has also submitted the affirmations of Michele Rubin, M.D., dated July 20, 2007 and Dr. Socorro Vincente, M.D., dated August 1, 2007.

The affirmation of Michele Rubin, M.D., a neuroradiologist, states as follows:

Leonard Catania had an M.R.I. of the cervical spine on August 2, 2004. After interpreting the films, the patient has left paracentral

disc herniation at C5-6 which deforms the ventral thecal sac, central disc herniation at C6-7 which results in a) mass effect on the ventral thecal sac and b) acquired central spinal stenosis (mild), incidental vertebral hemangioma of C7 and cervical scoliosis and loss of the normal cervical lordosis likely related to muscle spasm/pain.

Dr. Vincente opined in his report that based upon three years of treatment, a review of the MRI, the results of range of motion tests conducted in 2007, the fact that the plaintiff was a-symptomatic prior to the accident and continues to complain of neck pain, and the lack of additional accidents, the plaintiff's herniated discs are causally related to the subject accident. This report stated the tests that were administered to plaintiff and discussed the degree differentials regarding the plaintiff's range of motion restrictions. Specifically, Vincente reached the following diagnosis:

Due to the fact that the patient was a-symptomatic for ten (10) years prior to the within accident and that the disc bulge at C6-C7 is now herniated, I can state with a reasonable degree of medical certainty that the patient's current neck, back and associated herniation are causally related to the accident of July 3, 2004.

I can state with reasonable degree of medical certainty that the patient suffers from radiculopathy in the neck and back, that the patient has two (2) herniated discs which I relate to this accident, that the range of motion studies and deficits thereon are causally related to the accident and that the patient has a permanent disability.

This patient has been under our care with no interruption of treatment for the past three (3) years since the date of this accident.

A review of the medical reports on the motion demonstrate that there are widely divergent conclusions reached with regard to the extent and causality of the plaintiff's injuries. The results of the range of motion studies as set forth in the Weiland report are in direct contravention to those contained within the Vincente report. Such questions of fact are best determined by a jury rendering summary judgment on the issue of serious injury inappropriate at this juncture.

With regard to the issue of defendant Handelson's alleged negligence, the plaintiff, Leonard Catania, was deposed on November 10, 2005. He testified as follows: He was the passenger in a motor vehicle operated by Handelson, which vehicle was involved in an accident on July 3, 2004 at the intersection of Woodvale Lane and Sunken Meadow Road (p. 8, 11-13; 24-25; p. 9, 2-5; p. 10, 4-10). He did not, at any point see the Orlando vehicle (p.14, 14-20) and first became aware that he was in a motor vehicle accident after he arrived at the hospital (p. 14, 21-23).

The defendant, Joseph W. Orlando, was deposed on November 8, 2006 and testified as follows: As he was traveling along the subject roadway, he acknowledged that he would eventually pass the Handelson vehicle (p. 20, 9-16). As Handelson stopped at a stop sign at an intersection, Orlando panicked and hit his brakes, causing him to lose control of his truck, veer to the right, strike the Handelson vehicle, go over a curb and strike the stop sign (p. 20, 23-25; p. 21, 2-8; p. 21, 14-15; p. 24, 15-24; ). Although Orlando's drivers license requires him to wear eyeglasses, he was not wearing either glasses or corrective lenses at the time of the accident. (p. 12, 5-10, 19-24 ). Orlando also testified that at the time of the accident he was drunk, was arrested at the scene of the accident and later convicted for driving under the influence (p. 27, 6-11, 17-18; p. 30, 4-12).

The defendant, Kerry Handelson was deposed on November 10, 2005. A copy of her transcript had not been received by her attorney at the time of the instant application. In its place, Handelson submitted an affidavit stating that on the date of the accident, she had made a full and complete stop at the stop sign at the subject intersection. She then noticed that the Orlando vehicle had gone out of control and was about to go over a curb. Approximately five seconds later, the Orlando vehicle struck her vehicle. Handelson concluded by stating that her vehicle was completely stopped when the impact occurred, the Orlando vehicle did not sound the horn or provide any other warning of the impending impact, and that she was unable to avoid the collision due to the close proximity of the vehicles at the time Orlando lost control of his vehicle. Neither plaintiff or the co-defendant has submitted an affidavit to contradict the facts as set forth by Handelson in her affidavit.

Based upon the undisputed facts, it has been demonstrated that the Orlando vehicle crossed over the double yellow line before striking the Handelson vehicle. "Crossing over a double yellow line constitutes negligence as a matter of law," Browne v. Castillo, 288 A.D.2d 415. Moreover, Orlando admitted that he was both arrested and convicted for driving under the influence at the time of his collision with a properly stopped vehicle. No evidence or issues of fact have been adduced to demonstrate any negligence on the part of the moving defendant. Rather, it was the actions of Orlando which constituted the sole proximate cause of the accident. Summary judgment is appropriate where "the facts clearly point to the negligence of one party without any fault or culpable conduct by the other party." Williams v. Econ, 221 A.D.2d 429 citing Morowitz v. Naughton, 150 A.D.2d 536, 537, citing Viegas v. Esposito, 135 A.D.2d 708. Accordingly, the moving defendant is entitled to summary judgment dismissing the complaint and all cross claims asserted against Kerry Handelson.

The foregoing constitutes the Order of this Court.

Dated: December 14, 2007

**DENISE F. MOLIA**

HON. DENISE F. MOLIA  
J.S.C.