

**Bittrolff v Crain**

2008 NY Slip Op 30074(U)

January 2, 2008

Supreme Court, Suffolk County

Docket Number: 0029234/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 8-22-07  
ADJ. DATE 10-22-07  
Mot. Seq. # 001 - MotD

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	:		:	
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Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers       ; Answering Affidavits and supporting papers 13 - 22; Replying Affidavits and supporting papers 23 - 25; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendants for summary judgment pursuant to CPLR 3212 dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is determined to the extent indicated below.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on Mastic Beach Boulevard at or near its intersection with Mastic Road, Mastic Beach, New York on May 9, 2005. The accident allegedly happened when the vehicle owned by defendant Suffolk Coach, Inc., and operated by defendant Lloyd A. Crain, Jr., came into contact with the vehicle operated by the plaintiff. Defendants now move for an order granting them summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; 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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of this motion, defendant submits, inter alia, the pleadings; plaintiff's bill of particulars; plaintiff's Central Suffolk Hospital Emergency Nursing Record relating to her prior work related injuries; the affirmed report of defendants' examining neurologist, Warren Cohen, M.D.; the affirmed report of defendants' examining orthopedist, Michael J. Katz, M.D.; and plaintiff's deposition testimony. Plaintiff claims, in her bill of particulars, that she sustained a right hand and wrist sprain with carpal tunnel syndrome; a disc herniation at C5-6; and sprains/strains of the cervical and lumbar spine with radiculopathy. Plaintiff also claims that she was confined to her bed and home for approximately two weeks and intermittently to date. Additionally, plaintiff claims that she was incapacitated from her employment as a developmental aide with LIDDSO from May 9, 2005 through to May 16, 2005, and that she was incapacitated in her secondary position as a direct care counselor with IGHM from May 9, 2005 to the present time. Plaintiff further claims that she sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

Plaintiff's Central Suffolk Hospital Emergency Nursing Record dated December 18, 2003 shows that she was treated on that date in connection with a work-related injury to her neck and right shoulder. Specifically, plaintiff complained that she was "yanked in the arm by a disturbed [patient]" causing pain in her neck and right shoulder, with numbness in the fingers. After being examined and administered some medications, plaintiff was released that day. These records also show that plaintiff's reported pain level at the time of her discharge was an eight out of ten.

In his report dated October 31, 2006, Dr. Cohen states that he performed an independent neurological examination of plaintiff on that date, and his findings include DTR's that were "1+"; normal muscle tone and bulk; strength that was "5/5" in all groups, except for a slightly diminished strength of left hand grasp; a positive Tinel's sign on the right wrist; and a normal sensory system, except for a slight diminution of sensation to pinprick over the right arm diffusely. He also observed that there was a full range of motion of the cervical, thoracic and lumbar spine with no spasm, trigger points or tenderness. Dr. Cohen opined that plaintiff had sustained strains/sprains of the cervical, thoracic and lumbar spine which had resolved. He also opined that plaintiff had sustained "probable" carpal tunnel syndrome, with parasthesis of the hand and forearm, but that the remainder of her neurological exam was otherwise unremarkable. Additionally, Dr. Cohen opined that plaintiff had sustained cervical, thoracic and lumbar sprains/strains which had resolved, and that she was not disabled.

In his report dated May 8, 2007, Dr. Katz states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include a full range of motion of the right hand and wrist with no swelling; a negative Tinel's sign at the right wrist; a negative Phalen's test; radial and ulnar pulses that were "2+"; and a negative straight leg raising test bilaterally. He also noted that plaintiff was working in a full duty capacity as a direct care aide. Dr. Katz opined that plaintiff had sustained a contusion of the left wrist that had resolved, as well as strains of the cervical and lumbosacral spine which had also resolved. He further concluded that plaintiff was capable of performing the activities of her daily living and is not disabled insofar as it related to the accident.

Plaintiff testified that she was confined to her home for a few days after the accident. She missed about two weeks of work at her job with LIDDSO. She never returned to her other job with IGHIL partly due to her injuries, and partly due to her pregnancy in 2005. At the time of the accident, she worked for LIDDSO on Thursdays, Fridays and Saturdays, and at IGHIL on Saturdays, Sundays, and Mondays from 10:00 p.m. to 8:00 p.m. She went to an orthopedist once in June 2005, but could not remember his name. Plaintiff also treated with Dr. Leahy, a chiropractor, three times per week for about three months. She stopped regular treatment because no-fault denied payment, but then resumed treatment for another four to six weeks through her own health insurance. Plaintiff further testified that her insurance, however, would not pay for massage therapy.

By their submissions, defendants made a prima facie showing that plaintiff did not sustain a serious injury (*see, Aponte v Tusa*, 28 AD3d 407, 811 NYS2d 569 [2d Dept 2006]; *Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teoduro v Conway Transp. Serv.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Khan v Hamid*, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). While Dr. Cohen observed, at the time of his October

2006 examination, a positive Tinel's sign at the right wrist, he also noted that there was normal muscle tone as well as a normal sensory exam, except for a slight diminution of sensation to pinprick at the right arm diffusely. Although Dr. Cohen opined that plaintiff had sustained a "probable" carpal tunnel syndrome, he concluded that plaintiff was not disabled, finding that the remainder of her neurological exam was unremarkable. Seven months later, Dr. Katz found, upon an independent orthopedic examination, that plaintiff's radial and ulnar pulses were "2+" and that there was a negative Tinel's sign at the right wrist. He opined that plaintiff had sustained a contusion of the right wrist which had resolved, as well as strains of the cervical and lumbosacral spine which had also resolved. Defendants' remaining evidence, including plaintiff's deposition testimony, also supports a finding that she did not sustain a serious injury. As defendants have met their burden as to all categories of serious injury alleged, the Court turns to plaintiff's proffer (*see, Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition, plaintiff submits, inter alia, the affirmed report of her treating radiologist, Americo Fiore, M.D.; the affidavit of her treating chiropractor, Robert Leahy, D.C.; and plaintiff's personal affidavit. In his report dated June 3, 2005, Dr. Fiore states that he performed MRI studies of plaintiff's cervical spine on June 1, 2005, and his findings include normal vertebral alignment; moderate straightening of spinal curvature; shallow dextroconvex scoliosis; and a small, posterior disc herniation at C5-6, causing indentation of the thecal sac centrally in its anterior aspect.

Dr. Leahy avers that he first examined plaintiff on May 20, 2005 in connection with her motor vehicle accident, and his findings include palpable spasm in the muscles of the cervical spine and upper trapezius, as well as a positive cervical compression test. His initial diagnosis was that plaintiff had sustained, among other things, an acute cervical derangement/sprain/strain and acute cervical radiculitis. Dr. Leahy continued to treat plaintiff until August 19, 2005, and he opined that she was not able to resume her full duties as a direct care counselor at that time. Plaintiff returned to Dr. Leahy for treatment on May 1, 2006, and the findings of his examination on that date include a positive Tinel's sign at the right wrist; palpable bilateral cervical muscle spasm; right upper trapezius muscle spasm; and active/latent periscapular trigger points. Plaintiff subsequently returned to Dr. Leahy for treatment on July 30, 2007, and the findings of his examination on that date include a positive Tinel's sign on the right wrist and a positive shoulder depression test. Dr. Leahy also observed that plaintiff's cervical flexion, extension, right/left rotation and right/left lateral bending were 36, 40, 62/68 and 45/40 degrees, with the normal ranges being 60, 50, 80/80 and 45/45 degrees. He opined that plaintiff is suffering from chronic myofascial pain syndrome with an associated segmental dysfunction to the cervical and thoracic spine.

Plaintiff avers that she began chiropractic treatments with Dr. Leahy on May 20, 2005, but stopped treatment on or about October 7, 2005 when no fault denied additional payment. She also avers, that although she had medical insurance, she could not afford the co-pays for each visit. Plaintiff treated with Dr. Leahy on May 1, 2006 and again on July 30, 2007. As a result of her injuries, plaintiff did not return to her employment with IGHL as a direct care counselor. At the present time, she has difficulty lifting objects, picking up her children and driving.

Plaintiff has provided insufficient medical proof to raise an issue of fact that she sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation or a significant limitation (see, *Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; *Vidor v Davila*, 37 AD3d 826, 830 NYS2d 772 [2d Dept 2007]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]; *Wilbur v Breen*, 25 AD3d 836, 808 NYS2d 783 [3d Dept 2006]). Initially, Dr. Leahy's conclusion that the injuries and limitations in the range of motion of plaintiff's spine were caused by the subject accident was speculative in light of his failure to address her prior neck and right shoulder injuries in December 2003 (see, *Cervino v Gladysz-Steliga*, 36 AD3d 744, 829 NYS2d 169 [2d Dept 2007]; *Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]). Additionally, while Dr. Leahy noted limitations in the range of plaintiff's cervical spine during his most recent examination, he failed to present objective medical proof that was contemporaneous with the accident showing any initial range of motion restrictions for the affected body parts (see, *D'Onofrio v Floton, Inc.*, \_\_ AD3d \_\_, 845 NYS2d 421 [2d Dept 2007]; *Quagliarello v Paladino*, 40 AD3d 836, 835 NYS2d 724 [2d Dept 2007]). While a disc herniation may constitute a serious injury, the MRI report of plaintiff's treating radiologist is not probative for the purposes of demonstrating a serious injury because it contains no opinion as to causation of the disc injury (see, *Furrs v Griffith*, 43 AD3d 389, 841 NYS2d 594 [2d Dept 2007]; *Collins v Stone*, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]), and does not establish the extent of any physical limitations resulting from the alleged disc injuries (see, *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]; *Davis v Evan*, 304 AD2d 1023, 758 NYS2d 203 [2d Dept 2003]). In any event, plaintiff has failed to adequately explain, by submission of objective medical evidence, the lengthy gap since her last treatment in 2006 and her most recent medical examination in July 2007, shortly after the filing of defendants' motion (see, *Albano v Onolfo*, 36 AD3d 728, 830 NYS2d 205 [2d Dept 2007]; *Pimentel v Mesa*, 28 AD3d 629, 813 NYS2d 517 [2d Dept 2006]; *Neugebauer v Gill*, 19 AD3d 567, 797 NYS2d 541 [2d Dept 2005]). Further, while plaintiff claims that her no-fault benefits were denied in October 2005, her initial treatment with Dr. Leahy stopped on or about August 19, 2005. Plaintiff's two gaps in treatment were, in essence, complete cessations of treatment (see, *Verette v Zia*, \_\_ AD3d \_\_, 844 NYS2d 71 [2d Dept 2007]; *Bycinthe v Kombos*, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]).

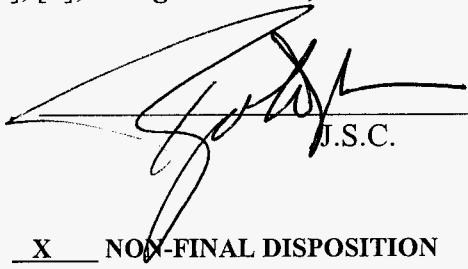
Plaintiff also failed to proffer any competent medical evidence that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the accident (see, *Thompson v Abbasi*, 15 AD3d 95, 788 NYS2d 48, *lv denied*, 2005 NY App Div LEXIS 6849 [2005]; *Burns v McCabe*, 17 AD3d 1111, 794 NYS2d 267 [4<sup>th</sup> Dept 2005]; *Mercado v Garbacz*, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]). While plaintiff avers that she has difficulty lifting heavy objects, picking up her children and driving a car, the record lacks objective proof of any substantial curtailment of her activities within the relevant time period after the accident (see, *Grimes-Carrion v Carroll*, 17 AD3d 296, 794 NYS2d 30 [1<sup>st</sup> Dept 2005]; *McNeil v Dixon*, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]). In any event, plaintiff admitted during her deposition that she only missed about two weeks from her position with LIDDSO, and that she did not resume working at IGHL, in part, due to her pregnancy that year (see, *Lalli v Tamasi*, 266 AD2d 266, 698 NYS2d 276 [2d Dept 1999]; *Baker v Zelem*, 202 AD2d 617, 609 NYS2d 330 [2d Dept 1994]; compare, *Richards v Toomey*, 221 AD2d 754, 633 NYS2d 846 [3d Dept 1995]). Additionally, since Dr. Leahy avers that he did not treat plaintiff for the remainder of the 180 day statutory period after her August 19, 2005 appointment, his affirmation lacks

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probative value as to her activities after that date (*see, Drexler v Melanson*, 301 AD2d 916, 754 NYS2d 433 [3d Dept 2003]; *compare, Sands v Stark*, 299 AD2d 642, 749 NYS2d 334 [3d Dept 2002]). Moreover, since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, her claim in this regard must be dismissed (*see, CPLR 3212 [b]*; *see, Watford v Boolukos*, 5 AD3d 475, 772 NYS2d 566 [2d Dept 2004]; *Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]).

Accordingly, defendants' motion is granted solely to the extent that the first cause of action is dismissed. As defendants' moving papers are silent as to plaintiff's claim for property damage to her vehicle, the second cause of action which alleges that plaintiff sustained damages in the sum of \$10,000 is severed and continued for trial (*see, CPLR 3212 [e], [1]*; *Yaraghi v Zeller*, 286 AD2d 765, 730 NYS2d 517 [2d Dept 2001]).

Dated:   JAN 02 2008  

  
\_\_\_\_\_  
J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION