

**Bayne v Rosario**

2008 NY Slip Op 30574(U)

February 25, 2008

Supreme Court, Suffolk County

Docket Number: 0004990/2005

Judge: John J.J. Jones

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

**COPY**

SHORT FORM ORDER

INDEX NO. 05-4990

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. JOHN J.J. JONES, JR.  
Justice of the Supreme Court

MOTION DATE 8-15-07  
ADJ. DATE 11-7-07  
Mot. Seq. # 002 MG; CASEDISP

-----X			
NINA M. BAYNE,	:	SIBEN & SIBEN	
	:	Attorneys for Plaintiff	
Plaintiff,	:	90 East Main Street	
	:	Bay Shore, NY 11706	
- against -	:		
	:	ROBERT P. TUSA LAW OFFICES	
IDA ROSARIO and DURBIN ROSARIO,	:	Attorneys for Defendants	
	:	898 Veterans Memorial Hwy., Suite 320	
Defendants.	:	Hauppauge, NY 11788	
-----X			

Upon the following papers numbered 1 to 33 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers \_\_\_\_\_ ; Answering Affidavits and supporting papers 21 - 31 ; Replying Affidavits and supporting papers 32 - 33 ; Other \_\_\_\_\_ : (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by defendants for summary judgment dismissing the complaint is granted.

Plaintiff Nina Bayne commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred at the intersection of Montauk Highway and Wellwood Avenue in the Town of Babylon on August 25, 2004. The accident allegedly happened when a vehicle owned and operated by defendants Ida and Durbin Rosario struck the front of a vehicle operated by plaintiff as it was making a left turn from Montauk Highway onto Wellwood Avenue. The bill of particulars alleges that plaintiff sustained various personal injuries as a result of the accident, including cervical and lumbar sprains, bilateral shoulder sprain, left hand sprain, a herniated disc at level L2-3, and chondromalacia patella and internal derangement of the left knee.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff is precluded under Insurance Law § 5104 from recovering for non-economic loss, as she did not suffer "serious injury" within the meaning of Insurance Law § 5012 (d). Defendants' submissions in support of the motion include copies of the pleadings, a transcript of plaintiff's

deposition testimony, and sworn medical reports prepared by Dr. Mathew Chacko, Dr. Joseph Stubel, and Dr. Sheldon Feit. At defendants' request, Dr. Chacko, a neurologist, and Dr. Stubel, an orthopaedic surgeon, conducted examinations of plaintiff in February and March 2007, and reviewed records related to the injuries alleged in this action.

At a deposition conducted on November 13, 2006, plaintiff testified, in relevant part, that she was treated the day of the accident at the emergency department of Good Samaritan Hospital. She testified that she sought treatment a two days later from an orthopaedist, Dr. Fitzsimmons, for pain in her neck, back, knees and left hand.<sup>1</sup> Plaintiff testified that she received treatment from Dr. Fitzsimmons, as well as from Dr. Elemam and other caregivers associated with Dr. Fitzsimmons' medical office, from the end of August 2004 to November 2004. She testified that she missed approximately two weeks from her part-time position at United Parcel Service due to the injuries she sustained in the accident, but did not miss any time from her part-time position as an aide at a home run by United Cerebral Palsy. Plaintiff further testified in 1991 she suffered neck and back injuries as a result of a motor vehicle accident, and that she received medical treatments for such injuries for approximately one year. Moreover, she testified that she suffered a back injury in August 2005 while working at her job as a health care aide, and that she still was receiving medical treatment for this injury at the time of the deposition.

The report by Dr. Stubel states, among other things, that plaintiff exhibited full range of motion in her cervical and lumbar regions, with no evidence of muscle tenderness, trigger points or spasms on palpation. It states that plaintiff had normal motion in her shoulder joints, and that objective tests for assessing shoulder impingement and instability were negative. It states that plaintiff had full motion in her hands and full flexion in her thumbs, with no evidence of instability in the interphalangeal or the metacarpophalangeal joints. It further states that examination of the left knee showed full range of motion, with no tenderness or swelling, and that objective tests for ligament instability and chondromalacia patella were negative. Dr. Stubel opines that plaintiff suffered sprains of the neck, lower back, left knee, shoulders and thumbs due to the August 2004 accident, and concludes that such injuries have resolved without any residual disability. The report by Dr. Chacko states, in relevant part, that examination of her neurological systems revealed no abnormalities. It states that plaintiff demonstrated normal flexion, extension and lateral rotation in her cervical region, as well as normal lateral flexion and extension in her lumbar region. However, it also states that plaintiff's lateral flexion in her cervical spine was reduced to 30 degrees, instead of the normal 45 degrees, and that her flexion in her lumbar spine was 45 degrees, instead of the normal 60 degrees. Dr. Chacko concludes that plaintiff's cervical and lumbar sprains have "resolved from an objective neurological standpoint," and that there are no findings consistent with radiculopathy. Significantly, the Court notes that it appears from their medical reports that neither Dr. Stubel nor Dr. Chacko were advised by plaintiff that she suffered a work-related back injury to her back in 2005, as such information is not mentioned in their discussions of her past medical history and all of the

---

<sup>1</sup>An MRI report prepared by Dr. Meir Zombek, dated November 8, 2004, indicates that Dr. Fitzsimmons is a chiropractor, not an orthopaedic surgeon.

medical records provided to them for review are from 2004.

In addition, Dr. Feit, a radiologist, conducted an independent review of magnetic resonance imaging (MRI) studies of plaintiff's lumbosacral spine and left knee, which were performed in October and November 2004. Dr. Feit's report concerning the MRI studies of plaintiff's lumbosacral region states that the films reveal moderate disc bulges at levels L4-5 and L5-S1 impinging on the exiting nerve roots, as well as a mild disc bulge at level L3-4, but no evidence of focal herniation. Further, the report states that the films show desiccatory changes at all of the lumbar intervertebral discs, degenerative spondylosis with associated stenosis, and "Grade 1 spondylolisthesis of L5 on S1" with associated osteophyte formation. Dr. Feit concludes that the MRI scan of plaintiff's lumbar region reveals pre-existing degenerative changes and disc bulges "secondary to annular degeneration and/or ligamentous laxity," and that such findings are not causally related to the subject motor vehicle accident. Dr. Feit's report concerning plaintiff's left knee opines that the MRI films reveal no evidence of meniscal tears. It states that while the anterior cruciate ligament is "thickened with mild brightening and ganglion infiltration," such findings are indicative of a prior partial tear. Dr. Feit opines that the pathology of the anterior cruciate ligament appears to be a chronic condition and not related to the injuries sustained in August 2004.

Plaintiff opposes the motion for summary judgment, arguing that defendants' submissions are insufficient to make a prima facie showing of entitlement to judgment. In particular, plaintiff asserts that Dr. Chacko's finding of restricted movement in the lumbar region creates a question as to whether she suffered injuries within the "significant limitation of use" category or the 90/180 category. Alternatively, plaintiff asserts that the medical evidence offered in opposition, namely medical reports prepared by Dr. Elemam, a physiatrist, and an MRI report prepared by Dr. Meir Zombek, are sufficient to raise a triable issue as to whether she suffered serious injury due to the subject accident.

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."

A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement and its duration (*see Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for

its omission (*see Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; *Suk Ching Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; *Ifrach v Neiman*, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (*see Laruffa v Yui Ming Lau, supra; Murray v Hartford*, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; *Batista v Olivo*, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; *Kauderer v Penta*, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). “Whether a limitation of use or function is ‘significant’ or ‘consequential’ \* \* \* relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part” (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). In addition, to qualify as a serious injury within the 90/180 category, there must be objective medical evidence of a medically-determined injury or impairment of a non-permanent nature, as well as evidence that plaintiff’s activities were significantly curtailed due to such injury (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Hamilton v Rouse*, 46 AD3d 514, 846 NYS2d 650 [2d Dept 2007]; *Ocasio v Henry*, 276 AD2d 611, 714 NYS2d 139 [2d Dept 2000]). Moreover, a plaintiff claiming serious injury who terminates treatment after the accident must offer a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see Joseph v Layne*, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]; *Ali v Vasquez*, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; *Batista v Olivo, supra*).

Furthermore, a defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (*see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant’s own witnesses, “those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff’s deposition testimony and medical reports and records prepared by the plaintiff’s own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury, supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eyler, supra; Pagano v Kingsbury, supra; see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The evidence submitted by defendants establishes prima facie that plaintiff did not sustain a serious injury as a result of the accident (*see Baez v Rahamatali*, 6 NY3d 868, 817 NYS2d 204 [2006]; *Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra; DeLeon v Ross*, 44 AD3d 545, 844 NYS2d 36 [1st Dept 2007]; *Cennamo v Themistkleous*, 22 AD3d 700, 804 NYS2d 401 [2d Dept 2005]; *Pommells v Perez*, 4 AD3d 101, 772 NYS2d 21 [1st Dept 2004], *affd* 4 NY2d 566, 797 NYS2d 380). Here, defendants’ orthopaedic expert found that plaintiff has normal motion in her

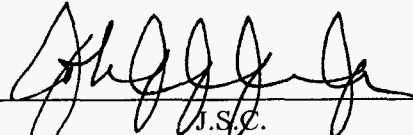
Bayne v Rosario  
 Index No. 05-4990  
 Page 5

2005]; *Pommells v Perez*, 4 AD3d 101, 772 NYS2d 21 [1st Dept 2004], *affd* 4 NY2d 566, 797 NYS2d 380). Here, defendants' orthopaedic expert found that plaintiff has normal motion in her spine, left knee, shoulders and hands; that any sprains she suffered as a result of the collision have resolved; and that she has no disability related to the accident. Further, defendants' radiologist opined that plaintiff suffers from a degenerative disc condition in her spine, as well as a preexisting, chronic pathology in her left knee. Moreover, plaintiff testified that she stopped receiving medical treatment for her alleged injuries just three months after the subject accident, and that she currently was receiving treatment for neck and back injuries that she sustained in a 2005 motor vehicle accident. She also testified that she missed just two weeks at her job at United Parcel Service, yet missed no time from her job as a health aide, due to the injuries she sustained. In view of such evidence, defendants' neurologist's findings that plaintiff exhibited limitations in cervical lateral flexion and lumbar extension at her examination in February 2007 do not raise a triable issue of fact precluding summary judgment.

Plaintiff's submissions in opposition are insufficient to defeat summary judgment. Significantly, neither plaintiff nor her treating physicians offered any explanation for the termination of medical treatment in November 2004 (*see Pommells v Perez, supra; Ning Wang v Harget Cab Corp.*, \_\_\_ AD3d \_\_\_, 2008 WL 193177 [2d Dept, Jan. 22, 2008]; *Verette v Zia*, 44 AD3d 747, 844 NYS2d 71 [2d Dept 2007]). The medical reports by Dr. Ellemam are insufficient to raise a triable issue as to whether plaintiff suffered a "significant limitation of use" in his cervical or lumbar regions, as Dr. Ellemam last examined plaintiff on November 2, 2004 (*see Ali v Mirshah*, 41 AD3d 748, 840 NYS2d 83 [2d Dept 2007]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]; *Laruffa v Yui Ming Lau, supra*). In addition, Dr. Ellemam's reports do not address the issue of whether the findings of decreased motion in plaintiff's spine and shoulders are causally related to the subject accident. Plaintiff's submissions also fail to address the findings by defendants' radiologist that plaintiff suffers from a pre-existing degenerative condition in her lumbar spine, as well as from a pre-existing condition in her left knee (*see Luciano v Luchsinger*, 46 AD3d 634, 847 NYS2d 622 [2d Dept 2007]; *Gordon-Silvera v Long Is. R.R.*, 41 AD3d 431, 837 NYS2d 324 [2d Dept 2007]; *Giraldo v Mandanici*, 24 AD2d 419, 805 NYS2d 124 [2d Dept 2005]). Finally, the MRI report by Dr. Zombek concerning plaintiff's cervical and lumbar regions are insufficient to raise a triable issue of fact. The mere existence of a herniated or bulging disc is not proof of a serious injury "in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and [their] duration" (*Patterson v NY Alarm Response Corp.*, 45 AD3d 656, 656-657, \_\_\_ NYS2d \_\_\_ [2d Dept 2007]; *see Roman v Fast Lane Car Serv., Inc.*, 46 AD3d 535, 846 NYS2d 613 [2d Dept 2007]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Accordingly, defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: 25 February 08

FINAL DISPOSITION  NON-FINAL DISPOSITION

  
 J.S.C.