

**Poux v New York City Tr. Auth.**

2008 NY Slip Op 30705(U)

March 11, 2008

Supreme Court, Kings County

Docket Number: 0019709/2004

Judge: Sylvia O. Hinds-Radix

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At an IAS Term, Part 20 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of March, 2008.

P R E S E N T:

HON. SYLVIA HINDS-RADIX,  
Justice.

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CAROLYN POUX,  
Plaintiff,

Index No. 19709/04

- against -

THE NEW YORK CITY TRANSIT AUTHORITY, ET. AL,  
Defendants.

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The following papers numbered 1 to 8 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-6 _____
Opposing Affidavits (Affirmations) _____	7 _____
Reply Affidavits (Affirmations) _____	8 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendants New York City Transit Authority, MABSTOA, MTA, and Patrick Simeon (collectively, "defendant NYCTA") move for an order, pursuant to CPLR 3211 and 3212, granting summary judgment dismissing plaintiff's complaint on the ground that plaintiff Carolyn Poux (Poux or plaintiff) did not sustain a

“serious injury” as that term is defined in Insurance Law §§ 5102 (d)<sup>1</sup> and 5104 (a).<sup>2</sup> Defendants Williams Transportation Inc. and Teddy Williams (the “Williams’ defendants”) cross-move for the same relief. Lastly, plaintiff cross-moves for an order, pursuant to CPLR 3212, granting her partial summary judgment on the issue of whether she suffered a “serious injury” under Insurance Law § 5102(d).

### ***Facts and Procedural Background***

This negligence action arises out of a December 19, 2003 accident where Poux, a back seat passenger in a van owned by Williams Transportation, Inc. and operated by Teddy Williams, collided with a bus operated by defendant NYCTA. Plaintiff commenced the instant action by filing a summons and verified complaint on June 21, 2004. In her pleadings, Poux alleges she sustained various injuries, including: disc bulges at vertebrae: C4-C5, L4-L5 and L5-S1, and a left C4-5 radiculopathy.

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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 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.”

<sup>2</sup> Insurance Law § 5104 (a) provides, in relevant part, that “[n]otwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.”

### ***DEFENDANTS' CONTENTIONS***

In seeking to dismiss the complaint, the respective defendants contend that plaintiff did not sustain a "serious injury," as that term is defined in Insurance Law §5102 (d).<sup>3</sup>

In support of the respective motion and cross motion, the defendants rely upon plaintiff's bill of particulars; her deposition testimony and independent medical examinations performed on defendants' behalf by: Dr. Robert Zaretsky, an orthopedic surgeon, on September 12, 2005; Dr. Mohsin Ali, a neurologist, on September 12, 2005; and a review of plaintiff's cervical and lumbar MRI films by Dr. Sheldon Feit, a radiologist, on July 12, 2007.<sup>4</sup>

At her March 14, 2006 deposition, plaintiff testified that at the time of the accident she was employed as a billing and medical assistant at Lenox Hill Hospital, and that she was out of work for three months following the accident. With respect to her physical complaints and limitation of activities, she testified that she returned to work in April 2004, resumed her regular 37 hour per week shift, and used public transportation approximately 2.5 hours per work day. Plaintiff testified that she can no longer play sports with her young son and nephew, and that she can no longer assist her son with his homework because she cannot sit for long periods.

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<sup>3</sup> In their cross motion, the Williams defendants likewise seek summary judgment dismissing plaintiff's complaint on these grounds, and rely upon NYCTA's submissions and arguments.

<sup>4</sup> Amended reports indicating the correct date of plaintiff's MRI studies were annexed to defendant's opposition/reply papers.

In his affirmed report, Dr. Zaretsky noted plaintiff's present complaints and reviewed plaintiff's January 29, 2004 report of the MRI study of her cervical spine, and the February 5, 2004 report of the MRI study of her lumbar spine. On September 12, 2005, Dr. Zaretsky examined plaintiff and administered range-of-motion, spasm, and muscle strength tests on plaintiff's neck and back. He reported that plaintiff had resolved sprains/strains of the cervical spine and lumbosacral spine and concluded that she had no orthopedic disability.

In his affirmed report, Dr. Ali noted plaintiff's present complaints. He reviewed her cervical and lumbar MRI reports. Dr. Ali performed a full neurological examination on September 12, 2005 and administered range of motion tests. Dr. Ali reported that plaintiff's examination results were normal, that plaintiff had resolved sprains/strains of the cervical and lumbar spines and he concluded that there was no objective finding of a neurological disability.

On July 12, 2007, Dr. Feit performed a radiological review of plaintiff's cervical and lumbar spine films. He concluded that the cervical and lumbar spine studies demonstrate no discernible abnormalities and he concluded that there were no abnormalities causally related to the accident of December 19, 2003.

In opposition to defendants' respective motions, and in support of her cross motion for partial summary judgment on the issue of "serious injury," plaintiff submits the affirmed reports of Dr. Aric Haucknecht, a neurologist, dated April 4, 2006 and September 11, 2007; the October 10, 2007 affirmation of Dr. Jean Pratt Daniel and his medical records; the

affirmed MRI reports of Dr. Robert Scott Schepp, radiologist, of plaintiff's January 28, 2004 cervical and February 4, 2004 lumbar studies; plaintiff's affidavit; and, her attorney's affirmation.

Plaintiff avers that due to the accident, she continues to suffer from severe and persistent neck and back pain. She states that the day after the accident, she was treated for neck and back pain at the emergency room of Kingsbrook Jewish Medical Center and released with prescriptions for pain medication. Thereafter, she sought treatment with Dr. Jean Pratt Daniel at Belland Medical Care, P.C, and began a three times a week course of treatment including physical therapy, chiropractic care and acupuncture, which lasted until April 2004. She states that she missed about four months of work and that when she returned to work, she had to take frequent breaks because of pain. She explains that she has difficulty bending, lifting and carrying heavy objects, playing with and bathing her two year old daughter, shopping, going up and down stairs, walking and sitting for long periods, that she can no longer coach her son's basketball team, and must pay someone to do her laundry and to take her son to school. She further adds that when her no-fault benefits ended in April 2004, financial constraints prevented her from obtaining further medical treatment. In April 2006, due to continued pain, she saw Dr. Aric Hausknecht and received additional physical therapy about four times.

In his affirmation, dated October 10, 2007, Dr. Jean Pratt Daniel, explained that he examined, tested, and supervised plaintiff's medical care at Belland Medical Care, P.C. In

his January 30, 2004 report (incorporated by reference), he noted plaintiff's initial complaints of headache, neck and back pain and stiffness, and difficulty in bending, standing and sitting for long periods of time. His examination of plaintiff's cervical spine revealed severe spasms and tenderness over the paraspinal muscles on level C1-C7, bilaterally, and of the right and left trapezius muscles. Ranges of motion of the cervical spine were: right and left lateral flexion 25/40°, flexion 30/60°, extension 30/50°, right rotation 55/80°, left rotation 50/80°. The examination of plaintiff's lumbar spine revealed pain and tenderness around L4-L5 and S1 with mild paraspinal muscle spasm, bilaterally. Straight leg raising was positive on both sides. Range of motion testing for the lumbar spine was: right and left lateral flexion 11/20°, flexion 45/90°, extension 15/30°. <sup>5</sup> His diagnosis based upon his clinical findings and the MRI report of plaintiff's cervical spine was: cervical spine sprain/strain with ROM limitation and lumbosacral spine <sup>6</sup> joint/ligament sprain with ROM limitation; central posterior bulging disc at C4-C5 deforming the thecal sac and spinal cord centrally, and straightening of the normal cervical curvature. He concluded the injuries sustained were causally related to the accident of December 19, 2003. He further concluded that normal activities of daily living would cause stress to the compromised areas, causing pain of variable degree and frequency, and that the exact extent of the disability would likely

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<sup>5</sup> Range of motion testing was performed using a goniometer with results compared to American Medical Association guidelines.

<sup>6</sup> The results of the MRI of plaintiff's lumbar spine was pending at the time of Dr. Daniel's report.

require further intermittent supportive physiotherapy and testing. In his October 10, 2007 affirmation, Dr. Daniel further concludes that plaintiff was disabled and unable to work for approximately four months following the accident. He also adds that plaintiff stopped therapy at Belland Medical Care, P.C. inasmuch as her no-fault benefits ended and because she had reached the maximum medical benefit of treatment.

In his September 11, 2007 report, Dr. Hausknecht, a neurologist, noted that plaintiff was still experiencing pain in her neck and lower back. He noted that he had initially seen plaintiff on April 4, 2006, at which time he conducted a full neurological examination and referred her for additional physical therapy based upon his physical examination. Following re-examination on September 11, 2007, he found plaintiff's subjective complaints of neck and back pain were verified by his physical examination findings. He found cervical and lumbosacral paravertebral tenderness, associated muscular spasm, and clinically significant restrictive mobility. The Spurling maneuver was positive on the left. Using an arthroidal protractor and goniometer he performed range of motion testing and noted the following for her cervical spine: lateral flexion 30/50°, right lateral flexion 40/50°, left rotation 70/80°, right rotation 80/80°, forward flexion 60/60°, extension 60/60°. The lumbar spine range of motion testing showed: forward flexion 70/90°, extension 22/25°, right and left lateral flexion 25/25°, left and right rotation 30/30°. He also performed an NCV/EMG study on plaintiff's cervical spine on September 11, 2007. After examining and testing plaintiff in April 2006 and most recently in September 2007, and upon reviewing her medical records

and MRI films, his impression was that plaintiff had cervical derangement with C4-5 disc bulge and associated spinal cord deformity<sup>7</sup> and left C4-5 radiculopathy, and lumbosacral derangement with L4-L5 and L5-S1 disc bulges with associated L5 and S1 nerve root impingement. He also found that plaintiff had an abnormal neurologic evaluation, including subjective complaints, which were verified by findings on his physical examination. He concluded that the MRI studies provide objective evidence of structural pathology in the neck and back with associated neural impingement, and the NCV/EMG study provides objective evidence of physiologic impairment in the cervical nerve roots. Dr. Hausknecht opined that plaintiff's "injuries are causally related to the accident that occurred on 12/19/03," and that plaintiff sustained a permanent consequential limitation of her cervical and lumbosacral spine. He noted that plaintiff's injuries have significantly impacted her daily activities, that she missed three months of work, that she still has problems sitting and lifting, and that plaintiff sustained a permanent consequential limitation of function of her neurologic and musculoskeletal system.

In his affirmed reports, Dr. Schepp's impression of plaintiff's cervical MRI study was: a central posterior bulging disc at C4-C5 deforming the thecal sac and spinal cord centrally,

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<sup>7</sup> Dr. Hausknecht indicated that he personally reviewed plaintiff's MRI films and agreed with Dr. Schepp's interpretation.

and his impression of plaintiff's lumbar MRI is: posterior bulging disc L5-S1 deforming the thecal sac.<sup>8</sup>

Plaintiff argues that her injuries satisfy the "serious injury" requirement of Insurance Law § 5102 in that she suffers from, inter alia, bulging discs with impingement in her neck and lower back, and she continues to experience pain in her back and neck and is limited in her capabilities. She argues that the doctors' reports and medical records provide evidence that she sustained permanent and serious injuries and that she has a loss of varying ranges of motion. Moreover, she argues that it is clear that she was unable to perform substantially all of her usual and customary activities for 90 of the first 180 days after the accident.

In opposition/reply NYCTA reiterates that its examining physicians found that plaintiff had normal findings with full ranges of motion, and that plaintiff suffered from no disabilities causally related to this accident. NYCTA also argues that bulging discs, are not, per se, "serious injuries." Further, NYCTA points out that plaintiff's doctors have not offered any explanation as to how her neck and back injuries limited her activities at all, let alone during the statutory period. Lastly, NYCTA notes that plaintiff's affidavit is self-serving and that she has an unexplained two year gap in medical treatment.

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<sup>8</sup> The copy of Dr. Schepp's lumbar MRI report, annexed to plaintiff's cross-motion, is illegible.

## ***DISCUSSION***

### ***Defendants' Motion and Cross Motion***

Defendants seeking summary judgment dismissing a complaint based on the lack of a “serious injury” as that term is defined by Insurance Law § 5102 (d) “bear[] the initial burden to present competent evidence that the plaintiff has no cause of action” (*Brown v Achy*, 9 AD3d 30, 31 [2004]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). To succeed on the motion, defendants must first tender evidence that eliminates any material issues of fact with respect to the “serious injury” threshold (*see Gaddy v Eycler*, 79 NY2d 955 [1992]; *see also Ocasio v Henry*, 276 AD2d 611 [2000]; *Villalta v Schechter*, 273 AD2d 299 [2000]).

Here, defendants have failed to demonstrate prima facie entitlement to judgment as a matter of law. Although defendants’ submissions may have demonstrated the absence of two of the “serious injuries”—namely, permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system (*see e.g. Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49 [2005]; *see also Powell v Alade*, 31 AD3d 523, 523 [2006]), defendants have “failed to establish their prima facie entitlement to judgment as a matter of law” regarding plaintiffs’ “90/180” claims (*Nembhard v Delatorre*, 16 AD3d 390, 391 [2005]). The conclusion reached by defendants’ physicians that plaintiff did not sustain a serious injury, which was based on examinations performed approximately two years after the accident, is insufficient to establish that plaintiff did not sustain a

medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for a period of not less than 90 days during the 180 day period immediately following the accident (*see Frier v Teague*, 288 AD2d 177, 178 [2001]; *see also Peplow v Murat*, 304 AD2d 633 [2003]). Indeed, the affirmations submitted by defendants are insufficient to establish prima facie entitlement to judgment as a matter of law because, despite the deposition testimony of plaintiff that she did not return to work until April, 2004, the examining physicians never addressed the possibility that the plaintiff had a medically-determined injury or impairment immediately following the subject accident that affected her activities during the 90 out of 180 days immediately following the accident (*see Talabi v Diallo*, 32 AD3d 1014, 1014-1015 [2006]; *Sayers v Hot*, 23 AD3d 453, 454 [2005]).

Accordingly, defendants' motion and cross motion are denied.

### ***Plaintiff's Cross Motion***

A plaintiff's motion for summary judgment on the issue of "serious injury," although infrequent, may be granted in a proper circumstance (*see Deeks v Estate of Bass*, 15 Misc.3d 1101(A), 2007 Slip Op 50450U [Sup Ct Nassau Cty 2007]; *see also Horton v Warden*, 32 AD3d 570 [2006]; *Cook v Garrant*, 27 AD3d 984 [2006]; *Boorman v Bowhers*, 27 AD3d 1058 [2006]; *Mustello v Szczepanski*, 245 AD2d 553 [1997]). Plaintiff is required to make a prima facie showing of such injury, and the burden shifts to defendant to rebut plaintiff's

prima facie case (see generally, *GTF Marketing, Inc. V Colonial Aluminum Sales, Inc.*, 66 NY2d 965 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Here, while the affirmation and report of Dr. Scheff establish the existence of the bulges with impingement, the existence of bulges do not establish, per se, the existence of a serious injury (see *Noble v Ackerman*, 252 AD2d 392, 394 [1998]). Plaintiff is still required to provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration (see *Grossman v Wright*, 268 AD2d 79 [2000]). The affirmation and report of Dr. Daniel establish limitations to plaintiff's ranges of motion of her cervical and lumbar spines contemporaneous with the accident. However, to the extent that the nerve conduction and EMG testing as described by Dr. Hausknecht and his measurement of plaintiff's limitations in range of motion four years post-accident, may support his conclusion that plaintiff sustained a "serious injury" in the "permanent consequential" or "significant limitation" categories, such claims are directly contested by the affirmations of Drs. Zaretsky, Ali, and Feit, and create issues of fact as to these two categories. Plaintiff's two year gap in treatment, explained by her financial constraints, does not mandate the dismissal of plaintiff's claims, but in any event is irrelevant to her claim of "serious injury in the 90/180 day category (see e.g. *Pommells v Perez*, 4 NY3d 566 [2005]).

In order to establish a prima facie case in the 90/180 day category, the plaintiff must establish: (1) an inability to perform the requisite acts for no less than the 90 days following

the occurrence of the injury (*see Baker v Zalem*, 202 AD2d 617 [1994]); (2) that plaintiff's inability to perform "substantially all" activities was medically determined (*see Gaddy*, 79 NY2d at 959); (3) that there is medical proof connecting the purported inability to work or engage in usual activities to the alleged accident-related injuries (*see McNight v Lavall*, 147 AD2d 902 [1989]); and (4) medical proof must consist of objective findings (*see Relin v Brotherton*, 221 AD2d 840 [1995]).


Here, Dr. Daniel's affirmation and report demonstrates plaintiff's limitation in motion of her cervical and lumbar spine, which he causally relates to the accident. However, other than Dr. Daniel's belated and conclusory statement in his October 10, 2007 affirmation, that plaintiff was "disabled and unable to work" until approximately April 2004, he fails to explain how her neck and back injuries limited her physical activities and rendered her unable to work during the statutory period (*see Keena v Trappen*, 294 AD2d 405 [2002] [injured plaintiff failed to establish that she sustained a medically determined injury which prevented her from performing substantially all of her usual and customary daily activities for 90 or more days out of the first 180 days immediately following her accident where she failed to submit a physician's affidavit substantiating the existence of a medically determined injury producing the alleged impairment of her activities]). Moreover, Dr. Daniel's conclusion in his affirmation that plaintiff was disabled is contradicted by statements in his report that "plaintiff was instructed about limitations of certain [undescribed] activities, but

to *stay as active as possible*.” Therefore, since plaintiff has failed to make out a prima facie case that she suffered a “serious injury” in the 90/180 category, her cross motion is denied.

For the foregoing reasons, defendants’ motion and cross motion, and plaintiff’s cross motion are all denied in their entirety.

This constitutes the decision and order of this court.

E N T E R,



J. S. C.

**HON. SYLVIA O. HINDS-RADIX JSC**