

**Goucher v Meli**

2008 NY Slip Op 30928(U)

March 27, 2008

Supreme Court, Suffolk County

Docket Number: 0023698/2004

Judge: Ralph F. Costello

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 27 - SUFFOLK COUNTY

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

Hon RALPH F. COSTELLO  
Justice of the Supreme Court

MOTION DATE 11-19-07  
ADJ. DATE 1-25-08  
Mot. Seq. # 002 - MD

-----X  
PATRICIA A. GOUCHER and EDWARD V. :  
GOUCHER, :  
 :  
 Plaintiffs, :  
 :  
 - against - :  
 :  
 BRIDGET V. MELI, :  
 :  
 Defendant. :  
-----X

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 11 - 21; Replying Affidavits and supporting papers 22 - 24; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (002) by defendant Bridget V. Meli pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint on the issue that plaintiff's injuries do not meet the serious injury threshold, is denied.

This is an action for damages for personal injuries suffered by plaintiff Patricia A. Goucher, arising out of a two-vehicle accident which occurred on February 1, 2002 on Argonne Road at or near the intersection with Springfield Road, Town of Southampton, County of Suffolk, State of New York, wherein it is claimed that defendant's vehicle came into contact with plaintiff's vehicle, causing plaintiff to suffer personal injury. A claim for property damage has been made by Edward V. Goucher as set forth in the bill of particulars.

Defendant claims entitlement to an order granting summary judgment dismissing the complaint, asserting the plaintiff did not sustain serious injuries sufficient to meet the threshold pursuant to Insurance Law of the State of New York §5102(d).



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It is set forth in plaintiffs' bill of particulars that as a result of the within incident, Patricia Goucher sustained traumatically induced herniated intervertebral discs at C5-6 and C6-7 with foraminal impingement and straightening of the lordotic curve with listhesis at C3-4; numbness of the left arm; and pain and difficulty lifting, bending and moving;

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [2<sup>nd</sup> Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014 [2<sup>nd</sup> Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]).

Pursuant to Insurance Law §5102(d), " '[s]erious injury' means 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."

The term "significant" as it appears in the statute has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (Licari v Elliot, 57 NY2d 230 [1982]).

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 [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 "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

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Avis Rent A Car Systems, Inc., 98 NY2d 345 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott (supra).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (see, Tipping-Cestari v Kilhenny, 174 AD2d 663 [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 [1<sup>st</sup> 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 [1992]).

In support of this motion defendant Meli has submitted, inter alia, a copy of the summons and the first two pages of the complaint; defendant’s verified answer; a copy of the demand for, and a copy of, the bill of particulars; a copy of an uncertified Motor Vehicle Accident Report; a partial, unsigned copy of a transcript of an examination before trial for “Goucher”; a partial, unsigned copy of a transcript of an examination before trial for “Meli”; a copy of the sworn radiology report of Allen Rothpearl, M.D. dated November 13, 2002; and a copy of the sworn report of Michael J. Katz, M.D. dated May 22, 2007 concerning his orthopedic examination of plaintiff Patricia Goucher.

In opposing this motion, plaintiff has submitted, inter alia, her affidavit; an attorney’s affirmation; the affidavit of Dr. Chernoff, M.D.; and a complete copy of the transcripts of the examinations before trial of Patricia Goucher and Bridget Meli.

Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (see, Lacagnino v Gonzalez, 306 AD2d 250 [2d Dept 2003]; Hegy v Coller, 262 AD2d 606 [2d Dept 1999]).

It is additionally noted that the moving defendant has not submitted a complete copy of the complaint for this court’s review as required by CPLR 3212(b). Counsel for defendant has set forth in her affirmation that Edward Goucher set forth a derivative claim, however, the bill of particulars sets forth a claim of loss for property damage. In reviewing the evidentiary submissions, it is determined that defendant Meli has failed to demonstrate prima facie entitlement to summary judgment dismissing the complaint on the issue of serious injury. Therefore, there will be no dismissal of the complaint or a possible derivative claim, so this court will determine the merits of this motion without the full complaint.

Dr. Allen Rothpearl, M.D., in his report of November 13, 2002, states he reviewed the MRI of the cervical spine dated March 20, 2002. His impression is that of straightening and reversal of the lordosis; marked disc degeneration at the C5-C6 and C6-C7 levels characterized by both desiccation and attenuation of disc material; spondylosis at the C5-6 and C6-7 levels characterized by osteophytosis; and a hard disc osteophyte complex at C5-C6 which is encroaching on the thecal sac and effacing the ventral subarachnoid space as well. Dr. Rothpearl, M.D. conclusively states that the straightening of the lordosis is a nonspecific finding most commonly related to a patient’s position during this examination, however, he does not address the other causes for straightening of the lordosis and rule them in or out. He further states that the presence of disc degeneration implies a chronic process of longstanding duration, and that it

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is unrelated etiologically to the accident of February 1, 2002, however, he does not set forth his basis for this opinion and does not indicate the duration of this disc degeneration. He then states that the specific etiology of the disc herniation is indeterminate from this examination, raising a factual issue as to the duration and etiology of such herniations or attenuations, and spondylosis. Based upon the foregoing, it is determined that Dr. Rothpearl's opinion is conclusory and unsupported by specific evidentiary information or basis.

Michael Katz, M.D. performed an independent orthopedic examination of Patricia Goucher on May 22, 2007 for an alleged injury to her neck when her vehicle was struck in the rear by defendant's vehicle on February 1, 2002. He states Ms. Goucher came under the care of Dr. Chernoff and received physical therapy three times per week for six months and sporadically thereafter. She complains of burning in her neck and into her left hand, and is unable to swim or ski any longer. His physical examination revealed no paravertebral muscle spasm. He quantified the normal ranges of motion for flexion, extension, right and left lateral flexion, and right and left sided rotation and compared his findings upon examination and stated they were normal. He states sensation is intact in the C5-T1 enervated dermatomes; reflex testing reveals the biceps, triceps and brachioradialis reflexes to be 2+ and symmetric; and the Adson's test was found to be negative. Dr. Katz indicates he reviewed the radiology review of Dr. Rothpearl dated November 13, 2002 of the cervical MRI of March 20, 2002 which he states indicated the presence of disc degeneration at C5-6 and C6-7 with osteophytes. Dr. Katz does not, however, address the spondylosis at the C5-6 and C6-7 levels or the attenuation of disc material at those disc levels mentioned in Dr. Rothpearl's report and merely conclusively states that the MRI indicates pre-existing degenerative changes, without setting forth a basis for that opinion. He does not opine as to causation between the accident and the claimed injuries with regard to the attenuation of disc materials or the spondylosis mentioned by Dr. Rothpearl. Based upon the failure to address the attenuated disc materials and spondylosis diagnosed by Dr. Rothpearl and consider them in his diagnosis, there are factual issues raised in defendant's moving papers which preclude summary judgment on the issue of serious injury.

Further, in searching the recording for the complete deposition transcript of plaintiff, Patricia Goucher, it is determined that at the time of the accident, she was employed through the Dominican Sisters by Family Aides as a home health aide wherein she took care of an elderly woman, but stopped working because she could no longer lift the woman after the accident. After being unable to work for approximately two months, she testified that Dr. Chernoff issued another note directing her not to work. Plaintiff's bill of particulars indicates Ms. Goucher has been unable to return to work since the accident. Based upon the foregoing, there are also factual issues concerning whether plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident. Defendants' examining physician did not examine plaintiff until May 22, 2007, and not during the statutory period of 180 days following the accident, thus rendering defendant physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (Blanchard v Wilcox, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]).

To prevail on their motion for summary judgment dismissing the complaint, the defendant was

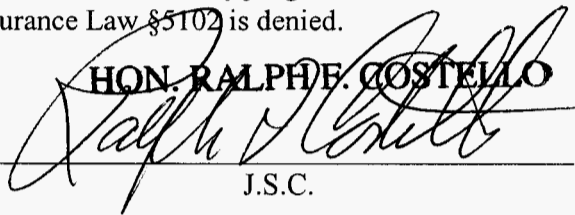
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required to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (see, Toure v Avis Rent a Car Sys., 98 NY2d 345; Gaddy v Eyler, 79 NY2d 955). Here, defendants failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (see, Agathe v Tun Chen Wang, \_\_\_ NYS2d \_\_\_, 2006 WL 2965205, 2006 NY Slip Op 07434 [NYAD 2 Dept Oct 17, 2006]; see also, Walters v Papanastassiou, 31 AD3d 439 [2d Dept 2006]).

Since defendant failed to establish entitlement to judgment as a matter of law as set forth above, the burden has not shifted to plaintiff to establish that there are issues of fact to preclude an order granting summary judgment (CPLR 3212[b]; Zuckerman v City of New York, supra), and it is unnecessary to reach the question of whether or not plaintiff has raised a triable issue of fact (Krayn v Torella, 833 NYS2d 406, NY Slip Op 03885 [2<sup>nd</sup> Dept 2007]).

Accordingly, motion (002) by defendant Bridget Meli for summary judgment on the issue that plaintiff did not sustain a serious injury pursuant to Insurance Law §5102 is denied.

Dated: March 27, 2008

**HON. RALPH E. COSTELLO**  
  
\_\_\_\_\_  
J.S.C.

\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION

