

Michel v Michel

2008 NY Slip Op 31145(U)

April 11, 2008

Supreme Court, Nassau County

Docket Number: 9176-06/

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

**TRIAL/IAS PART 5
NASSAU COUNTY**

**GUERDY M. MICHEL and MARIE MICHELENE
MICHEL,**

Plaintiff(s),

**ORIGINAL RETURN DATE: 12/14/07
SUBMISSION DATE: 03/03/08
INDEX No.: 9176/06**

-against-

STERLING MICHEL and VICTORIA BATRONI,

Defendant(s).

MOTION SEQUENCE #1,2

The following papers read on this motion:

Notice of Motion.....	1,2
Answering Papers.....	3
Reply.....	4

Motion by defendant Victoria Batroni for an order pursuant to CPLR 3212 granting her summary judgment dismissing the complaint on the grounds that plaintiffs did not sustain a "serious injury" as defined by Insurance Law § 5102(d) is denied. Cross-motion by defendant Sterling Michel for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint on the grounds that plaintiffs did not sustain a "serious injury" as defined by Insurance Law § 5102(d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs in a motor vehicle accident which occurred on December 18, 2003.

In her bill of particulars, plaintiff Guerdy M. Michel states that she sustained the following injuries:

- Subligamentous posterior disc herniations at C4-C5, C5-C6 and at C6-C7 abutting the anterior aspect of the spinal cord
- Posterior disc bulge at L5-S1 impinging on the anterior aspect of the spinal canal
- L5-S1 retrolisthesis
- Cervical, thoracic and lumbar muscle spasm on the left and right

RE: MICHEL v. MICHEL, et al.

Page 2.

- Restricted range of motion of the cervical spine
- Restricted range of movement of the cervical spine
- Restricted range of motion of the lumbar spine
- Restricted range of movement of the lumbar spine
- Cervical radiculopathy
- Lumbar radiculopathy
- Lumbar segmental dysfunction
- Decreased sensation in the right C6 dermatomal distribution
- Hypoesthesia of the C5 and C6 dermatomes on the right
- Lumbar subluxation
- Brachial neuritis/radiculitis
- Thoracic/lumbosacral neuritis
- Retrolisthesis at C5-C6

In her bill of particulars, plaintiff Marie Michelene Michel alleges that she sustained the following injuries:

- Posterior disc herniations at C3-C4, C5-C6 and C6-C7 impinging on the anterior aspect of the spinal cord.
- Posterior disc herniations at L3-L4 and at L4-L5 impinging on the anterior aspect of the spinal canal, the neural foramina bilaterally and right nerve root at L3-L4
- Cervical, thoracic and lumbar muscle spasm on the left and right
- Hypoesthesia of the C5, C6 and C7 dermatomes on the right
- Restricted range of motion of the cervical spine
- Restricted range of movement of the cervical spine
- Restricted range of motion of the lumbar spine
- Restricted range of movement of the lumbar spine
- Cervical brachial syndrome
- Cervical myofibrositis/myofascitis
- Lumbar radiculopathy
- Lumbar segmental dysfunction
- Thoracic/lumbosacral neuritis
- Lumbar subluxation

Defendants move for summary judgment on the grounds that plaintiffs did not sustain a serious injury as defined by Insurance Law § 5102(d).

Guerdy Michel

In support of their motions, defendants submit the affirmed medical reports of Alan Zimmerman, M.D., orthopedist; C. M. Sharma, M.D., neurologist; and Sheldon Feit, M.D., radiologist.

RE: MICHEL v. MICHEL, et al.

Page 3.

On April 5, 2007, Dr. Zimmerman conducted an independent orthopedic examination of the plaintiff Guerdy Michel. Dr. Zimmerman found a full range of motion of the plaintiff's cervical and lumbar spines and both shoulders. Dr. Zimmerman's diagnosis was as follows: "Cervical sprain resolved. The claimant's shoulder complaints are cervical in origin. Lumbar sprain resolved." Dr. Zimmerman further determined that this plaintiff does not have an orthopedic disability.

On April 5, 2007, Dr. Sharma performed an independent neurological examination of plaintiff Guerdy M. Michel. Dr. Sharma's diagnosis was: subjective cervical and lumbar pain and normal neurological examination. Dr. Sharma concluded that "[o]n examination there are no causally related neurological problems. There is no further need for neurological testing or treatment. There is no neurological disability."

On July 18, 2007, Dr. Feit performed an independent radiology review of plaintiff's films. Dr. Feit concluded as follows: "[r]eview of the MRI of the cervical spine obtained approximately two months following the date of injury reveals preexisting degenerative change. Disc bulges are not posttraumatic, but are degenerative secondary to annular degeneration and a ligamentous laxity. No posttraumatic changes are identified and there are no abnormalities causally related to the injury of December 18, 2003."

In opposition to the motion and cross-motion, this plaintiff submits affidavits of Dr. Bachenheimer and Dr. Rizzuti.

On January 5, 2004, Ronda Bachenheimer, a chiropractor, examined this plaintiff. In her affidavit, Dr. Bachenheimer stated, in pertinent part, that: "Range of motion study of the cervical spine was conducted and revealed the following: flexion was limited to 40 degrees with a norm of 60 degrees; extension was limited to 40 degrees with a norm of 50 degrees; right lateral flexion was limited to 10 degrees with a norm of 40 degrees; left lateral flexion was limited to 20 degrees with a norm of 40 degrees; right rotation was limited to 60 degrees with a norm of 80 degrees; left rotation was limited to 60 degrees with a norm of 80 degrees (§6). Range of motion study of the lumbar spine was conducted and revealed the following: Right lateral flexion was limited to 10 degrees with a norm of 20 degrees; left lateral flexion was limited to 10 degrees with a norm of 20 degrees" (§7).

Plaintiff returned to Dr. Bachenheimer's office on December 10, 2007 for re-evaluation. With regard to that re-evaluation, Dr. Bachenheimer stated in her affidavit that:

"Range of motion study of the cervical spine was conducted and revealed the following: flexion was limited to 40 degrees with a norm of 60 degrees, with pain; extension was limited to 40 degrees with a norm of 50 degrees, with pain; right lateral flexion was limited to 20 degrees with a norm of 40 degrees, with pain; left lateral flexion was limited to 20 degrees with a

norm of 40 degrees, with pain; right rotation was limited to 60 degrees with a norm of 80 degrees, with pain; left rotation was limited to 60 degrees with a norm of 80 degrees, with pain. (¶17)

Range of motion study of the lumbar spine was conducted and revealed the following: flexion was limited to 70 degrees with a norm of 90 degrees, with pain; right lateral flexion was limited to 10 degrees with a norm of 20 degrees, with pain; left lateral flexion was limited to 10 degrees with a norm of 20 degrees, with pain. (¶18)

My current diagnosis of the patient is as follows: Brachial neuritis; lumbar radiculitis; thoracic neuralgia; subligamentous posterior disc herniations at C4-5, C5-6 and at C6-7 abutting the anterior aspect of the spinal cord; posterior disc bulge at L5-S1 impinging on the anterior aspect of the spinal canal; L5-S1 retrolisthesis; headaches. (¶19)

It is my expert chiropractic opinion that the injuries as diagnosed were causally related to the accident of December 18, 2003 and said injuries were consistent with the clinical presentation in my office. It is my expert chiropractic opinion that as the patient is still symptomatic over three years post accident, said injuries can only be considered permanent. Further, as the patient is still suffering limitations of motion in her cervical spine over three years post accident, said limitations can only be considered permanent and significant, as said limitations will inhibit the patient's ability to carry out normal activities of daily living involving any activities which necessitate use of the neck or back including prolonged sitting, standing, bending, walking, driving or any other strenuous physical or recreational activities." (¶20)

Plaintiff Guerdy M. Michel presented herself at Dr. Rizzuti's office for an MRI of the cervical spine on February 19, 2004 and for an MRI examination of the lumbosacral spine on March 11, 2004.

Dr. Rizzuti's impression of the cervical spine was posterior disc bulge at L5-S1 impinging on the anterior aspect of the spinal canal and L5-S1 retrolisthesis.

Marie Michelene Michel

In support of the motion and cross-motion, defendants submit the affirmed medical reports of Dr. Kozinn and Dr. Sharma.

On July 19, 2007, Dr. Kozinn performed an independent orthopedic examination of plaintiff. Dr. Kozinn's diagnosis was: cervical and lumbar sprain and contusion of knees. Dr. Kozinn further concluded that "[a]ll findings have resolved. No further treatment is indicated."

On July 19, 2007, Dr. Sharma performed an independent neurological examination of plaintiff. Dr. Sharma's diagnosis was: subjective cervical and lumbar pain; normal neurological examination." Dr. Sharma further concluded that "[t]here is no neurological limitations to usual work and activities. There will be no permanent neurological problems of a causally related nature."

In opposition to the motion and cross-motion, plaintiff Marie Michelene Michel submits the affidavits of Dr. Bachenheimer and Dr. Rizzuti.

On January 5, 2004, Dr. Bachenheimer examined plaintiff and concluded as follows:

"Range of motion study was conducted on the cervical spine and revealed the following: extension was limited to 40 degrees with a norm of 50 degrees; left lateral flexion was limited to 30 degrees with a norm of 40 degrees; right rotation was limited to 70 degrees with a norm of 80 degrees; left rotation was limited to 70 degrees with a norm of 80 degrees (¶6). Range of motion study of the lumbar spine was conducted and revealed the following: flexion was limited to 80 degrees with a norm of 90 degrees" (¶7).

On February 1, 2008, this plaintiff returned to Dr. Bachenheimer for a re-evaluation. With regard to that re-evaluation, Dr. Bachenheimer stated in her affidavit that:

"Range of motion study of the cervical spine was conducted and revealed the following: flexion was limited to 60 degrees with a norm of 60 degrees, with pain; extension was limited to 40 degrees with a norm of 50 degrees, with pain; right and left lateral flexion were limited to 30 degrees with a norm of 40 degrees, with pain; right and left rotation were limited to 70 degrees with a norm of 80 degrees, with pain (¶17).

Range of motion study of the lumbar spine was conducted and revealed the following: flexion was limited to 80 degrees with a norm of 90 degrees, with pain; right and left lateral flexion were limited to 20 degrees with a norm of 20 degrees, with pain; and right and left rotation were limited to 30 degrees with the norm being 30 degrees, with pain (¶18).

My current diagnosis of the patient is as follows: cervicobrachial syndrome; myalgia and myositis; lumbar radiculitis; lumbar subluxation; posterior disc herniations at C3-4, C5-6 and at C6-7, impinging on the anterior aspect of the spinal cord; posterior disc herniations at L3-4 and at L4-5 impinging on the anterior aspect of the spinal canal, the neural foramina bilaterally and right nerve root at L3-4 (¶19).

It is my expert chiropractic opinion that the injuries as diagnosed were causally related to the accident of December 18, 2003 and said injuries were consistent with the clinical presentation in my office. It is my expert chiropractic opinion that as the patient is still symptomatic over three years post accident, said injuries can only be considered permanent. Further, as the patient is still suffering limitations of motion in her cervical and lumbar spine over three years post accident, said limitations can only be considered permanent and significant, as said limitations will inhibit the patient's ability to carry out normal activities of daily living involving any activities which necessitate use of the neck or back including prolonged sitting, standing, bending, walking, driving or any other strenuous physical or recreational activities" (¶20).

Plaintiff Marie Michelene Michel presented herself at Dr. Rizzuti's office for an MRI of the cervical spine on February 19, 2004 and for an MRI of the lumbosacral spine on March 11, 2007.

Dr. Rizzuti's impression of the cervical spine was posterior disc herniations at C3-4, C5-6, C6-7 and C6-7 impinging on the anterior aspect of the spinal cord. His examination of the lumbosacral spine demonstrated posterior disc herniations at L3-4 and at L4-5 impinging on the anterior aspect of the spinal canal, the neural foramina bilaterally and right nerve root at L3-4.

Law

In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as a serious injury within the meaning of Insurance Law § 5102(d) (*see Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 351 [2002]; *Scheer v Koubek*, 70 NY2d 678, 679 [1987]; *Munoz v Hollingsworth*, 18 AD3d 278, 279 [1st Dept. 2005]).

On a motion for summary judgment where the issue is whether a plaintiff has sustained a serious injury under the no-fault law, the movant bears the initial burden of presenting competent evidence that there is no cause of action (*Hughes v Cai*, 31 AD3d 385 [2d Dept. 2006]; *Brodame v Candura*, 25 AD3d 747, 748 [2d Dept. 2006]). If the movant satisfies that

burden, the burden shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she sustained a serious injury or that there are questions of fact as to whether the purported injury, in fact, is serious (*Flores v Leslie*, 27 AD3d 220, 221 [1st Dept. 2006]).

Defendants have satisfied their burden of establishing *prima facie* that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d) by submitting affirmed medical reports of experts who examined plaintiffs and concluded that no objective medical findings support plaintiffs' claim (*Toure v Avis Rent A Car Systems, Inc.*, *supra*; *DeLeon v Ross*, 44 AD3d 545 [1st Dept. 2007]; *Shinn v Catanzaro*, 1 AD3d 195 [1st Dept. 2003]). Consequently, the burden shifts to plaintiffs to establish a triable issue of fact sufficient to defeat this motion.

Plaintiffs have not presented competent medical evidence that they were unable to perform substantially all of their daily activities for not less than 90 days of the first 180 days subsequent to the accident (*Albano v Onolfo*, 36 AD3d 728 [2d Dept. 2007]; *Picott v Lewis*, 26 AD3d 319 [2d Dept. 2006]; *Doran v Sequino*, 17 AD3d 626 [2d Dept. 2005]).

In opposition, however, plaintiffs have raised an issue of fact sufficient to defeat the motion and cross-motion by submitting the aforementioned affidavits. Medical proof, which indicates limitations in the lumbar or cervical spine, is usually sufficient to raise a triable issue of fact (*see e.g. Rosario v Universal Truck & Trailer Service, Inc.*, 7 AD3d 306 [1st Dept. 2004]). As to the existence of a herniated and bulging disc, plaintiffs have presented objective medical evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (*see Albano v Onolfo*, 36 AD3d 728 [2d Dept. 2007]; *Yakubov v CG Trans Corp.*, 30 AD3d 509 [2d Dept. 2006]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45 [2d Dept. 2005]).

This decision constitutes the order of the court.

Dated: 4-11-08

HON THOMAS P. PHELAN
[Signature]
J.S.C.

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