

**Martino v Bedard**

2008 NY Slip Op 31162(U)

March 31, 2008

Supreme Court, Suffolk County

Docket Number: 0022134/2004

Judge: Martin J. Kerins

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SUPREME COURT - STATE OF NEW YORK  
IAS PART 12 - SUFFOLK COUNTY

**PRESENT:**

Hon. MARTIN J. KERINS  
Justice of Supreme Court

MOTION DATE 10-25-07  
ADJ. DATE 1-3-08  
Mot. Seq. # 003 - MD

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JANET C. MARTINO,	:		:	EDELSTEINS, FAEGENBURG & BROWN
	:		:	Attorneys for Plaintiff
	:	Plaintiff,	:	61 Broadway, Suite 2210
	:		:	New York, New York 10006
	:	- against -	:	
	:		:	BRIAN J. McGOVERN, LLC
BARBARA BEDARD,	:		:	Attorney for Defendant
	:		:	15 Maiden Lane, Suite 2000
	:	Defendant.	:	New York, New York 10038
-----X	:		:	

Upon the following papers numbered 1 to 54 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 35; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 36 - 38; Replying Affidavits and supporting papers 39 - 54; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that defendant’s motion for summary judgment dismissing the complaint is denied.

Plaintiff Janet Martino commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on William Floyd Parkway in the Town of Brookhaven on April 21, 2004. The collision allegedly occurred when a vehicle driven by defendant Barbara Bedard struck the rear of plaintiff’s vehicle, which was stopped for a red light at the intersection of William Floyd Parkway and Ridgewood Drive. By her supplemental bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the accident, including lumbar radiculopathy at level L3-4, lumbar degenerative disc disease and lumbar stenosis. She alleges that such injuries “are permanent in nature and duration, and were caused, aggravated, exacerbated and/or precipitated” by the subject accident. Plaintiff further alleges that she underwent epidural steroid injections following the subject accident to treat her lower back pain.

Defendant now moves for summary judgment dismissing the complaint on the ground that Insurance Law § 5104 precludes plaintiff from pursuing a personal injury claim, as she did not suffer “serious injury” within the meaning of Insurance Law § 5102 (d). In support of the motion defendant submits, among other things, copies of the pleadings: a transcript of plaintiff’s deposition testimony;

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medical records and report prepared by Dr. Victor Katz, plaintiff's treating orthopedist, and by Dr. Shafi Wani, plaintiff's treating neurologist; a magnetic resonance imaging (MRI) report concerning plaintiff's lumbar spine; and an affirmed medical report prepared by Dr. Alan Zimmerman, an orthopaedic surgeon, who conducted an examination of plaintiff in August 2004 at the request of the no fault carrier. Defendant also submits affirmed medical reports prepared by Dr. Arthur Bernhang and Dr. Richard Goodman. At defendant's request, Dr. Bernhang, an orthopaedic surgeon, conducted an examination of plaintiff in April 2007 and reviewed medical records related to the injuries allegedly sustained in the subject accident. Dr. Goodman, also an orthopaedic surgeon, conducted an independent examination of plaintiff in October 2006. In addition, defendant submits copies of medical records related to spinal injuries allegedly suffered by plaintiff in 2000 following a motor vehicle collision.

Plaintiff opposes the motion, arguing that defendant's submissions, in fact, demonstrate the existence of a triable issue as to whether the subject accident exacerbated a preexisting condition in her lumbar region. Alternatively, plaintiff argues that her submissions in opposition, particularly the affirmation by her treating orthopaedist, Dr. Katz, raises a triable question as to whether the motor vehicle collision between the parties significantly aggravated a lumbar condition in plaintiff's spine.

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 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]).

Here, defendant's submissions in support of the motion were insufficient to establish prima facie that plaintiff did not sustain a serious injury. Initially, the Court notes that the medical records regarding a prior injury to plaintiff's coccyx, which were submitted with the reply papers, were not considered in the determination of this motion (*see CPLR 2214; Klimis v Lopez*, 290 AD2d 538, 736 NYS2d 697 [2d

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Dept 2002]; *Voytek Tech. v Rapid Access Consulting*, 279 AD2d 470, 719 NYS2d 112 [2d Dept 2001]). The medical report by Dr. Bernhang states, in relevant part, that plaintiff presented with complaints of pain and numbness in her lower back and in her left leg, foot and toes. It states that plaintiff exhibited 30 degrees of lateral flexion in her lumbar spine, and that the average range for such joint movement is 20 degrees. It states that the straight leg raise test was negative when plaintiff was in the sitting position, but positive “at 45/60 prior to the pelvis moving” when plaintiff was lying supine, and that clinical tests for nerve root compression and for injury of the sacroiliac joint were positive on the left side, negative on the right side. The report also states that plaintiff reported loss of sensation “from the proximal calf to the entire foot,” which did not follow any dermatologic pattern, and numbness in the left leg. Dr. Bernhang concludes that, while plaintiff “may have sustained soft tissue injuries to her lumbar spine at the time of the accident with aggravation of pre-existing spinal stenosis and facet joint changes, these appear to have resolved.” He also states that “[a]s noted by Dr. Moriarty, the radiologist, there was no evidence of focal disc herniation.”

The medical report prepared by Dr. Goodman states, among other things, that plaintiff’s movement in her lumbar region was limited to 40 degrees of flexion, 5 degrees of extension, 15 degrees of right lateral rotation, 20 degrees of left lateral rotation, and 5 degrees of left and right lateral flexion. According to such report, the normal range for lumbar joint movement is 90 degrees of flexion, 30 degrees of extension, 90 degrees of rotation, and 30 degrees of lateral flexion. Dr. Goodman’s report further states that during the examination plaintiff exhibited weakness in the muscles of the left extremity and reported diminished sensory perception throughout the lower left. After discussing plaintiff’s prior coccygeal injury and preexisting conditions in her lumbar spine, including disc herniations, stenosis and Grade I spondylolisthesis, Dr. Goodman opines that plaintiff suffered “cervical and lumbar sprains, which were an exacerbation of the preexisting, noncausally related arthritis of the cervical and lumbar spine.” He further states that plaintiff is able to work in her occupation as a bus driver.

Similarly, the medical report, dated November 28, 2005, prepared by Dr. Katz states, in part, that examination of plaintiff’s lumbar region revealed paraspinal muscle spasms and tenderness, and “decreased range of motion secondary to pain.” It states that plaintiff’s “condition of central and lateral stenosis due to a combination of bulging discs, spondylolisthesis and facet hypertrophy is directly related to her work related injury in 2000 and exacerbated by the most recent motor vehicle accident.” It also states that plaintiff’s disability “is partial severe to moderate.” Dr. Wani’s reports, prepared in May and June 2000, indicate, in relevant part, that examination of plaintiff’s lumbar region indicated 60 degrees flexion, 15 degrees of extension, and 15 degrees of right and left lateral flexion, and that the norms for such motions are 90 degrees for flexion, 45 degrees for extension, and 45 degrees for lateral flexion.

Contrary to the assertions by defendant’s counsel, the affirmed reports by Dr. Goodman and Dr. Bernhang are insufficient to shift the burden of proof on the motion to plaintiff. Significantly, Dr. Bernhang, who reported positive findings for nerve root compression, decreased sensation, and numbness, failed to explain why such findings are not causally related to the subject accident (*see Sullivan v Johnson*, 40 AD3d 624, 835 NYS2d 367 [2d Dept 2007]; *McLaughlin v Rizzo*, 38 AD3d 856, 832 NYS2d 666 [2d Dept 2007]; *cf. Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). Further, his vague, conclusory statement that plaintiff “may have

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sustained soft tissue injuries to her lumbar spine at the time of the accident with aggravation of pre-existing spinal stenosis and facet joint changes, these appear to have resolved” is insufficient to show prima facie that plaintiff did not sustain a significant limitation of use of spinal function due to the subject accident, particularly in view of the fact that he did not evaluate the amount of flexion, extension and rotation in plaintiff’s lumbar spine or compare her current restrictions with the restrictions previously measured by her treating doctors (see *Washington v Delossantos*, 44 AD3d 748, 843 NYS2d 186 [2d Dept 2007]). Moreover, the report by Dr. Goodman indicates that his examination revealed muscle weakness, diminished sensation and significant joint restrictions in plaintiff’s lumbar spine 2½ years after the subject accident, and acknowledges that plaintiff suffered spinal sprains in the accident that exacerbated the preexisting arthritic condition (see *Wright v AAA Constr. Servs.*, \_\_\_ AD3d \_\_\_, 2008 WL 596527 [2d Dept, March 4, 2008]; *Harman v Busch*, 37 AD3d 537, 829 NYS2d 680 [2d Dept 2007]; *Trunk v Spross*, 306 AD2d 463, 761 NYS2d 322 [2d Dept 2003]). In fact, when compared to the range of motion measurements of plaintiff’s lumbar spine reported in Dr. Wani’s 2000 report, Dr. Goodman’s findings indicate that plaintiff suffered increased restrictions in lumbar joint function following the accident. It is well established that the aggravation of a preexisting condition can, under certain circumstances, constitute a serious injury (see *McKenzie v Redl*, 47 AD3d 775, 850 NYS2d 545 [2d Dept 2008]; *Scarano v Wehrens*, 46 AD3d 797, 847 NYS2d 664 [2d Dept 2007]; *Cebularz v Diorio*, 32 AD3d 975, 822 NYS2d 118 [2d Dept 2006]; *Walsh v Kings Plaza Replacement Serv.*, 239 AD2d 408, 658 NYS2d 345 [2d Dept 1997]).

Thus, while the medical reports by Dr. Katz, Dr. Wani and plaintiff’s other treating physicians show that plaintiff suffered from preexisting spinal injuries and conditions, the evidence submitted by defendant supports, rather than negates, the existence of a triable issue as to whether the subject accident exacerbated any of these lumbar conditions (see *McKenzie v Redl*, *supra*; *Scarano v Wehrens*, *supra*; *Cebularz v Diorio*, *supra*; *Gentile v Snook*, 20 AD3d 389, 799 NYS2d 230 [2d Dept 2005]). Accordingly, defendant’s motion for summary judgment dismissing the complaint based on plaintiff’s failure to meet the serious injury threshold is denied.

Dated: March 31, 2008  
RIVERHEAD, NY

Paul Ken  
J.S.C.

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