

**Smith v Erlich**

2008 NY Slip Op 31571(U)

May 22, 2008

Supreme Court, Nassau County

Docket Number: 5880-07/

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17

SCAN

Present: HON. WILLIAM R. LaMARCA  
Justice

WOODROW SMITH,

Plaintiff,

-against-

ILONA J. ERLICH,

Defendant.

Motion Sequence #1  
Submitted March 27, 2008  
XXX

INDEX NO: 5880/07

The following papers were read on this motion:

Notice of Motion.....1

Relief Requested

Defendant, ILONA J. ERLICH, moves for an order, pursuant to CPLR §3212 and Article 51 of the Insurance Law, dismissing the complaint of plaintiff, WOODROW SMITH, on the ground that the injuries alleged by the plaintiff do not satisfy the "serious injury" threshold requirement of Section 5102(d) of the Insurance Law of the State of New York and, as such, plaintiff has no cause of action under Section 5104(a) of the Insurance Law. An Affidavit of Service reflects that counsel for plaintiff were duly served with the instant motion, on January 2, 2008, but no papers are submitted in connection with the motion, which is determined as follows:

### Background

The action seeks to recover for personal injuries allegedly sustained by plaintiff in a motor vehicle accident that occurred on September 7, 2006, on Route 24 at or near the intersection of James Street, Franklin Square, New York. According to plaintiff, he was driving eastbound on Hempstead Turnpike in an automobile owned by his daughter, and had just passed the intersection when his automobile was struck by the vehicle owned and operated by the defendant, who was traveling westbound on Hempstead Turnpike.

At his deposition, plaintiff testified that, after the collision, he stated to a police officer that he did not need an ambulance and further testified, that he might have struck his right hip on the gear shift lever, that he did not lose consciousness and, when he exited the vehicle, he felt pain in his lower back, neck area and left shoulder. He testified that his daughter picked him up from the accident scene and took him home, and that he first sought medical care the next day when he was seen by his doctor, Dr. Leon Mullen, a cardiologist, who he sees periodically for regular check ups. He testified that he was referred by his attorney to Dr. Butani, a chiropractor, who he saw two (2) times per week for three (3) months for physical therapy which consisted of massages, hot compresses and exercise machines. Plaintiff testified that he was sent for MRI and EMG testing, and thereafter was referred by his attorney to Dr. Gelsman, another chiropractor, who he saw three (3) times a week for four (4) or (5) months, on different days than Dr. Butani but during the same period of time. Plaintiff testified that in January 2007, he switched to Dr. Salvatore, another chiropractor recommended by his attorney, who he continues to see three (3) times per week to date. Furthermore, plaintiff testified that he was in another car accident thirteen (13) years ago, when, as a passenger in a car, he hit his head on the

windshield and thereafter underwent back and neck treatments with a Dr. Bazakos, another chiropractor. He stated that he received the sum of \$30,000.00 from a lawsuit against the driver that caused the accident.

On April 5, 2007, plaintiff commenced the instant action for personal injuries against defendant by filing and later serving the Summons and Complaint. On or about May 7, 2007, defendant interposed an answer denying the material allegations of the complaint together with affirmative defenses. Following joinder of issue, plaintiff served a Bill of Particulars in which he alleged that he sustained a serious injury in that he sustained a significant limitation and/or permanent consequential limitation of the use of a body organ or function and/or had a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing all or substantially all of the material acts which constituted his normal daily activities for at least ninety (90) of the first one hundred eighty (180) days following the accident, as follows:

- Cervical Spine- multilevel disc herniations approximating or in contact with the thecal sac, facet joint hypertrophy narrowing the lateral neural foramina, loss of cervical lordosis consistent with muscle strain, cervical spondylotic change with left neural foraminal stenosis at C4-C5 and C5-C6;
- Lumbar Spine- posterior disc bulge approximating the thecal sac L4-5 and L5-S1, disc bulge and focal herniations L5-S1, facet arthropathy at L4-5 and L5-S1;
- Cervical radiculopathy, lumbar radiculopathy and low back pain syndrome.

The Bill of Particulars also claimed that plaintiff, who was retired, was confined to his home for a period of one (1) week following the accident.

*Verified Bill of Particulars*, annexed to moving papers as Exhibit "D", paragraph 5.

Upon the instant application, defendant now moves for summary judgment dismissing the complaint on the ground that the injuries claimed by the plaintiff fail to meet the "serious injury" threshold requirement of the No Fault Law. In support of the motion, defendant submits the affirmed medical report of Steven Ender, D.O., Board Certified in Neurology and Electromyography, dated October 9, 2007, who examined plaintiff on said date and reviewed his medical records. Dr. Ender diagnosed plaintiff with a "resolved cervical and lumbosacral paraspinal muscle strain" and concluded that claimant has a normal neurological examination and no residual neurological disability and can continue with his current activities of daily living without restrictions.

Additionally, defendant submits the affirmed medical report of John Killian, M.D., Board Certified in Orthopedic Surgery, dated September 28, 2007, who examined plaintiff on said date and reviewed his medical records. Dr. Killian performed quantitative and comparative range of motion testing on plaintiff's cervical and lumbar spine, as well as other clinical tests, and diagnosed plaintiff with a "mild impairment of his neck and back due to age related degenerative disease". He concluded that there were no findings in the exam to suggest residua from trauma, that plaintiff had fully recovered from any injuries sustained as a result of the accident, and he has no impairment or disability caused by the accident.

Finally, defendant submits the affirmed report of Meilissa Sapan Cohn, M. D., a Diplomate of the American Board of Radiology, who conducted a review of the MRI films of plaintiff's lumbar spine performed on October 21, 2006 and found no trauma related abnormality. Dr. Sapan Cohn reported findings consistent with degenerative disc disease. With respect to the cervical spine, Dr. Sapan Cohn conducted a review of the MRI films of

plaintiff's cervical spine performed on October 19, 2006 and reported findings consistent with degenerative disc disease, with no evidence of disc herniation or trauma related injury.

Counsel for defendant asserts that defendant has made a *prima facie* showing that plaintiff did not suffer a "serious injury" as defined by Insurance Law §5102(d), through admissions at his deposition, objective medical evidence and the affirmed reports of defendant's medical experts and urges that defendant's motion for summary judgment be granted.

### The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2<sup>nd</sup> Dept. 2001]). Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2<sup>nd</sup> Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2<sup>nd</sup> Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2<sup>nd</sup> Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2<sup>nd</sup> Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden

on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2<sup>nd</sup> Dept. 2001]).

Under the “no-fault” law, in order to maintain an action for personal injury, a plaintiff must establish that a “serious injury” has been sustained. (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [C.A. 1982]). On the present motion, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a “serious injury.” (*Lowe v Bennett*, 122 AD2d 728, 511 NYS2d 603 [1<sup>st</sup> Dept. 1986], *affirmed*, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant’s motion is sufficient to raise the issue of whether a “serious injury” has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. (*Licari, supra*; *Lopez v Senatore*, 65 NY2d 1017, 494 NYS2d 101 [1985]).

### **Conclusion**

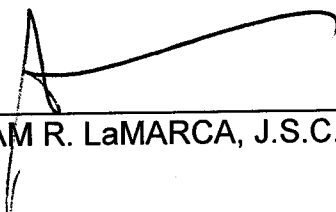
After a careful reading of the submissions herein, it is the Court’s judgment that defendant’s evidence is sufficient to establish a *prima facie* case that plaintiff’s injuries are “not serious” within the meaning of Insurance Law §5102(d), and, therefore, the burden shifts to plaintiff to come forward with some evidence of a “serious injury” in order to survive the motion (*Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 [C.A. 1992]). There being no opposition, defendant’s motion must be granted. It is therefore

ORDERED, that defendant's motion for an order dismissing the complaint on the ground that plaintiff does not satisfy the "serious injury" threshold requirement of Section 5102(d) of the Insurance Law of the State of New York and, therefore, has no cause of action under Section 5104(a) of the Insurance Law is granted and the action is dismissed.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: May 22, 2008

  
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WILLIAM R. LaMARCA, J.S.C.

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**ENTERED**

MAY 30 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**