

**Vardanian v Morelli**

2008 NY Slip Op 31628(U)

June 2, 2008

Supreme Court, Suffolk County

Docket Number: 0001351/2006

Judge: Denise F. Molia

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA,**  
Justice

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TAMARA VARDANIAN,

Plaintiff,

- against -

MATTHEW MORELLI, DONNA MORELLI and  
EUGENE PROHASKE,

Defendants.

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CASE DISPOSED: NO  
MOTION R/D: 8/24/07  
SUBMISSION DATE: 3/28/08  
MOTION SEQUENCE No.: 001 MD  
002 MG

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated July 19, 2007; Affirmation dated July 19, 2007; Exhibits A through J annexed thereto; Notice of Cross Motion dated November 9, 2007; Affirmation dated November 9, 2007; Exhibits A through I annexed thereto; Affirmation in Opposition dated November 30, 2007; Exhibits A through H annexed thereto; Reply Affirmation dated January 2, 2008; Reply Affirmation dated January 7, 2008; Reply Affirmation dated January 14, 2008; and upon due deliberation; it is

**ORDERED**, that the motion by defendants Matthew Morelli and Donna Morelli, pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of moving defendants and dismissing the Complaint as against them upon the ground that the plaintiff has not sustained a "serious injury" as defined by Insurance Law §5102(d), is denied; and it is further

**ORDERED**, that the cross motion by defendant Eugene Prohaske, pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of moving defendant and dismissing the Complaint and all cross-claims as asserted against him upon the ground that no triable issue of fact exists as to the negligence on the part of said moving defendant, is granted.

The underlying action stems from a claim for personal injuries allegedly sustained by the

plaintiff as a result of an automobile accident, which occurred on March 24, 2005, on Danville Drive at or near its intersection with Darrow Lane, Huntington, New York. Pursuant to the Verified Bill of Particulars, the plaintiff alleges that she “sustained serious personal injuries which resulted in permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system.” The Bill of Particulars further alleges that as a result of the accident, the plaintiff sustained a disc bulge at C4-5, spasm, radiculopathy, and post traumatic headaches, among various other complaints. The plaintiff has also alleged in her Bill of Particulars that overgrown foliage on the defendant Prohaske’s property blocked the view of oncoming traffic at the intersection of Danville Drive and Darrow Lane, thereby causing the subject accident.

At her deposition, the plaintiff testified that she neither lost consciousness nor experienced bleeding at the accident scene. She further testified that although her head struck the driver’s door window, she refused ambulance assistance. Three hours after the accident, plaintiff presented to the emergency room at Huntington Hospital for treatment. At that time she underwent an x-ray of her back, which was negative. She was released the same day without the administration of medicine or bandages. The next time she sought medical attention was two days after the accident. When testifying about any restricted activities, the plaintiff stated that she is unable to shop the way she did prior to the accident, and cannot do yard work. She stated that she was able to travel to Europe in August 2005 and to California in 2006.

An independent medical examination of the plaintiff was performed on February 21, 2007 by Matthew M. Chacko, M.D., on behalf of the defendants. Chacko report indicates the following:

Neurological examination at the present time does not reveal any focal neurological deficits. There are no findings consistent with the presence of any cervical or lumbar radiculopathy. There are no findings consistent with carpal tunnel syndrome at the present time. Limitation of range of motion exhibited by the claimant is not an objective finding as the movements are voluntary and fully under the control of the examinee.

MRI studies did not reveal any significant pathology like disc herniation or spinal cord compression or neural foraminal stenosis...

There is no objective finding of any neurological disability or permanency related to the accident of 3/24/05 in this claimant. She is working and capable of performing normal activities of daily living.

However, the Chacko report fails to set forth the objective tests performed at the examination or the plaintiff’s range of motion pursuant to such tests. Dr. Chacko did find a reduced range of motion in plaintiff’s cervical spine, but then stated that limitation of range of motion is not an objective finding. Although Chacko mentions reviewing the plaintiff’s MRI reports, he states that they do not show disc herniations, but does not discuss what is shown in the reports. No mention of the plaintiff’s disc bulge at C4-C5 or the straightening of the cervical curvature is made, nor is there an opinion as to its possible cause.

It also appears that the plaintiff was involved in a prior motor vehicle accident on January 31, 2002. Although she initially denied this at her deposition and at her examination by Dr. Chacko, evidence demonstrates that she made a claim for no-fault/personal injury protection benefits through GEICO, including for an injury to her head, which is one of the same parts of her

body for which she is now claiming injury. On the basis of the foregoing, the defendants maintain that the plaintiff has not sustained a serious injury under any category as defined by Insurance Law §5102(d), and seeks summary judgment dismissing the Complaint.

In opposition to the motion, the plaintiff states that she sought treatment from various medical professionals, commencing with Dr. Ronald Bailey on March 30, 2005. Plaintiff's initial complaints at the time of that examination included neck pain, left shoulder pain, and lower SI joint region pain to the left hip. Thereafter plaintiff presented at New York Physical Therapy and Wellness, PLLC, where she first saw Thomas Dow, D.C., on April 20, 2005. Plaintiff's complaints at the time of the Dow examination concerned cervical spine pain, which she said radiated into the shoulders and thoracic spine, together with occipital headaches, low back pain and left knee pain. Dow prescribed physical therapy. Plaintiff also treated with Dr. Angelito Tan on May 5, 2005, complaining of neck pain, and mid and lower back pain radiating to her arms and legs. After an MRI was taken, the plaintiff was told that she had disc bulges in her upper back. Vardanian terminated her treatment with New York Physical Therapy and Wellness in July 2005, allegedly based upon a denial of further no-fault benefits and a lack of financial ability to pay for treatments on her own. Plaintiff also states that the treatments were no longer helping her.

Plaintiff also stated that she saw Dow on September 7, 2007 for a re-evaluation examination, for which the assessment was cervical spine subluxations, thoracic spine subluxations, lumbar spine subluxations, C4-C5 disc bulge, lumbar spine radiculopathy, and cervical spine radiculopathy. The Dow report sets forth the objective testing used during the examination, together with the range of motion results for the plaintiff, the norms, degree of loss and percentage of deficit. A review of the entire report appears to present objective quantified evidence of the extent or degree of limitation and permanency of the injuries sustained by Vardanian. Dow also concluded that plaintiff's permanent injuries are a direct result of the accident of March 24, 2005.

A motion for summary judgment places the burden on the moving party to establish a prima facie case that there are no triable issues of fact. Based upon the conflicting medical reports, the Court finds that questions of fact exist concerning whether Tamara Vardanian has sustained a serious injury within the meaning of §5102(d) of the Insurance Law.

The Complaint also alleges that the defendant Prohaske was negligent in the maintenance of trees and shrubs on his property, which obstructed the view of drivers approaching the subject intersection. At her deposition, the plaintiff testified that she did not see the Morelli vehicle at any time prior to the accident, and only first saw it when it struck her vehicle. Vardanian further testified that nothing obstructed her vision and that she could see approximately half a block down Danville Road prior to entering the intersection, which she intended to travel straight through. Plaintiff also testified that she was unaware of any complaints made to the Town concerning a hedge or sight obstruction emanating from Prohaske's property.

Defendant Morelli testified at his deposition that he stopped approximately six inches before the stop sign on Danville Road at Darrow Lane for two or three seconds before entering the intersection. He further testified that he did not see the Vardanian vehicle prior to the collision, and was three quarters of the way into the intersection and looking straight ahead when the accident occurred. He also stated that he was familiar with the subject intersection, and that bushes, approximately four to five feet in height, obstructed his vision of cars on Darrow Lane. He was unaware of any complaints made to Prohaske about the foliage on his corner property.

The defendant Eugene Prohaske testified that he never experienced any difficulty or

obstruction of his view from a vehicle when looking down Darrow Lane from the stop sign at Danville Drive. He further testified that he did not receive any complaints, notices or violations concerning the foliage at the corner of his property prior to the subject accident.

Non-party witness Timothy P. Brogan testified at his deposition that he is familiar with the subject intersection and has passed through it hundreds of times, and has never had any difficulties or noticed any obstructions to the stop sign. He further testified that on the date of the accident there might have been one or two small trees but that there was nothing on the corner to obstruct Morelli's view of the Vardanian vehicle.

No evidence has been adduced demonstrating that Prohaske was in violation of the Code of the Town of Huntington and the deposition testimony of plaintiff, defendant Prohaske and non-party witness Brogan indicate that there was no reduced visibility or overgrown vegetation obstructing drivers' views at the subject intersection. Defendant Morelli's self-serving statements at his deposition do not constitute sufficient evidence to proceed against Prohaske. Even the presence of an obstruction would not absolve Morelli of his duty to see what there was to be seen before proceeding into an intersection or re-positioning himself for a clear view before proceeding. See, Weiser v. Dalbo, 184 A.D.2d 935, 585 N.Y.S.2d 124; Hamilton v. State of New York, 277 A.D.2d 982, 716 N.Y.S.2d 529. The affirmation of Morelli's attorney, who is without personal knowledge of the facts as relating to the condition of Prohaske's property is without probative value and is insufficient to create an issue of fact as to said defenant's negligence. Key Bank of Maine v. Lisi, 225 A.D.2d 669, 639 N.Y.S.2d 489; Cannon v. Pfeider, 19 A.D.2d 625, 241 N.Y.S.2d 85. The allegations of counsel's affirmation are speculative and unsupported by evidence in the record and may not be considered herein. Acheson v. Shepard, 27 A.D.3d 596, 811 N.Y.S.2d 781. In light of the foregoing, there is no evidence of any act of negligence on behalf of the defendant Prohaske with regard to the maintenance of his property and the Complaint and all cross-claims asserted against him are dismissed.

The foregoing constitutes the Order of this Court.

Dated: June 2, 2008

**DENISE F. MOLIA**

HON. DENISE F. MOLIA J.S.C.