

**Funck v Iannetto**

2008 NY Slip Op 31798(U)

June 18, 2008

Supreme Court, Suffolk County

Docket Number: 0022693/2005

Judge: William B. Rebolini

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## SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

**WILLIAM B. REBOLINI**  
Justice

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 Catherine Funck and David Funck,

Plaintiffs,

-against-

Edward J. Iannetto,

Defendant.

Motion Sequence No.: 001; MG  
CASE DISP.

Motion Date: 1/16/08  
Submitted: 3/18/08

Index No.: 22693/2005

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Upon the following papers numbered 1 - 25 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers, 1 - 11; Answering Affidavits and supporting papers, 12 - 23; Replying Affidavits and supporting papers, 24 - 25.

Plaintiff Catherine Funck commenced this action to recover damages for personal injuries allegedly sustained in a multi-vehicle accident that occurred on the William Floyd Parkway in the Town of Brookhaven on April 22, 2005. Her husband, plaintiff David Funck, sued derivatively for loss of services. The accident allegedly happened when a vehicle driven by defendant Edward Iannetto struck the rear of plaintiff's vehicle as it was stopped in heavy traffic for a red light. The force of the initial impact allegedly propelled plaintiff's vehicle into the back of the preceding vehicle. The bill of particulars alleges plaintiff suffered various spinal injuries as a result of the collision, including herniated discs at levels L3-4 and L5-S1; bulging discs at levels C5-6 and L4-5; and cervical and lumbar radiculopathy. It further alleges that plaintiff, who is employed full time as a service representative for the Internal Revenue Service, was confined to home and unable to work for 10 days following the accident.

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Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain “serious injury” within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. Defendant’s submissions in support of the motion include copies of the pleadings, a transcript of plaintiff’s deposition testimony, and affirmed medical reports prepared by Dr. Joseph Stubel and Dr. Sheldon Feit. At defendant’s request, Dr. Stubel, an orthopedic surgeon, conducted a physical examination of plaintiff in July 2007 and reviewed various medical records related to her alleged injuries. Dr. Feit, a radiologist, reviewed the magnetic resonance imaging (MRI) study of plaintiff’s lumbosacral spine that was performed in June 2005.

Plaintiff opposes the motion, arguing that triable issues of fact exist as to whether her alleged spinal injuries are compensable under the No-Fault Insurance Law. Annexed to counsel’s affirmation in opposition is a copy of plaintiff’s bill of particulars; affirmed magnetic resonance imaging (MRI) reports (prepared in June 2005) regarding plaintiff’s cervical and lumbar regions; three medical reports by plaintiff’s treating orthopedist, Dr. Alpesh Shah, which are dated April 26, May 24 and June 14, 2005; and an affidavit by plaintiff.

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.”

It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established prima facie that he or she sustained “serious injury” and may maintain a common law tort action (see, Licari v. Elliott, 57 NY2d 230 [1982]; Tipping-Cestari v. Kilhenny, 174 AD2d 663 [2<sup>nd</sup> Dept., 1991]). 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 prima facie that the plaintiff did not sustain a “serious injury” (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [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 [2<sup>nd</sup> 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, Barnes v. Cisneros, 15 AD3d 514 [2<sup>nd</sup> Dept., 2005]; Fragale v. Geiger, 288 AD2d 431 [2<sup>nd</sup> Dept., 2001]; Torres v. Micheletti, 208 AD2d 519 [2<sup>nd</sup> Dept., 1994]; Pagano v. Kingsbury, 182 AD2d 268 [2<sup>nd</sup> Dept., 1992]). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact as to whether he or she suffered serious injury as defined under the

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No-Fault Insurance Law (see, Gaddy v. Eyler, 79 NY2d 955 [1992]; Pagano v. Kingsbury, 182 AD2d 268 [2<sup>nd</sup> Dept., 1992]); see, generally, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

The evidence submitted by defendant establishes prima facie that plaintiff did not suffer a serious injury as a result of the subject accident (see, Morris v. Edmond, 48 AD3d 432 [2<sup>nd</sup> Dept., 2008]; Hasner v. Budnik, 35 AD3d 366 [2<sup>nd</sup> Dept., 2006]; Cennamo v. Themistokleous, 22 AD3d 700 [2<sup>nd</sup> Dept., 2005]). The medical report of Dr. Stubel states that plaintiff presented at the independent examination with complaints of neck and back pain. It states, among other things, that plaintiff exhibited full range of motion in her cervical region, and that no tenderness, trigger points or muscle spasm was detected during palpation of the area. It states that upon examination of the lumbar region, while lateral flexion was normal, plaintiff “would only forward flex to 60 degrees (normal 90)” and she “would not laterally rotate (normal 60).” However, the report also states that when not being examined, plaintiff “would forward flex with no problem to 90 degrees and she would laterally rotate to either side to approximately 45 degrees with no difficulty.” It further states that the straight leg raise test was negative bilaterally in both the supine and seated positions, and that plaintiff’s reflexes, muscle strength and sensation were normal. Dr. Stubel opines that, while “there appeared to be symptom magnification” by plaintiff during the examination, there were “no specific objective signs of disability.” He concludes that plaintiff suffered cervical and lumbar sprains, and that such injuries have resolved.

The report by Dr. Feit states that a review of the MRI scans of plaintiff’s lumbar spine shows desiccatory changes at all the intervertebral discs. It states that plaintiff suffers bulging discs at levels L3-4, L4-5 and L5-S1 which are not posttraumatic, “but degenerative secondary to annular degeneration and/or ligamentous laxity.” It further states that a central herniation at level L3-4 is degenerative in nature, “as it is seen in association with disc bulge as well as osteophyte formation.” Dr. Feit concludes that the pathology in plaintiff’s lumbar spine is not posttraumatic and is not related to the subject accident.

Moreover, at a deposition conducted in May 2007, plaintiff testified, in relevant part, that she missed one week of work immediately after the accident, as well as “sporadic days here and there,” due to her injuries; however, she was not confined to home for any period of time. She testified that she is employed full time as a customer service representative for the Internal Revenue Service, that her annual salary at the time of the accident was approximately \$45,000, and that she has private health insurance. Plaintiff also testified that she had three office visits with her treating orthopedist, Dr. Shah, as well as one appointment with Dr. Shah’s physician assistant, during the two-month period after the accident. She testified that she received physical therapy treatments three times a week during the same time period that she treated with Dr. Shah, and then stopped all therapeutic treatment when no-fault benefits were terminated approximately 2 to 2½ months after the subject accident. When questioned why she stopped treatment, plaintiff testified that her co-payments for specialists were \$30, and that she “couldn’t afford to pay to go to physical therapy three times a week at \$30 a visit” or to pay \$30 for an appointment with the orthopedist. In addition, plaintiff testified that her only restriction at work immediately after the accident was that she was

unable to sit in her chair for the full eight hours, and that she currently is unable to garden, perform exercises at home, and lift her youngest child.

As the report of Dr. Stubel establishes prima facie that plaintiff has normal function in her cervical spine (see, e.g. Kearse v. New York Tr. Auth., 16 AD3d 45 [2<sup>nd</sup> Dept., 2005]), the report of Dr. Feit shows prima facie that plaintiff had a preexisting degenerative condition in her lumbar spine (see, Cariddi v. Hassan, 45 AD3d 516 [2<sup>nd</sup> Dept., 2007]; Lea v. Cucuzza, 43 AD3d 882 [2<sup>nd</sup> Dept., 2007]), and plaintiff's own deposition testimony shows prima facie she did sustain injury within the "significant limitation of use" category or the 90/180 category (see, Morris v. Edmond, 48 AD3d 432 [2<sup>nd</sup> Dept., 2008]; Hasner v. Budnik, 35 AD3d 366 [2<sup>nd</sup> Dept., 2006]; Diaz v. Turner, 306 AD2d 241 [2<sup>nd</sup> Dept., 2003]), the burden shifted to plaintiff to raise a triable issue of fact (see, Gaddy v. Eyer, 79 NY2d 955 [1992]). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement and its duration (see, Laruffa v. Yui Ming Lau, 32 AD3d 996 [2<sup>nd</sup> Dept., 2006]; Cerisier v. Thibiu, 29 AD3d 507 [2<sup>nd</sup> Dept., 2006]; Meyers v. Bobower Yeshiva Bnei Zion, 20 AD3d 456 [2<sup>nd</sup> Dept., 2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (see, Bell v. Rameau, 29 AD3d 839 [2<sup>nd</sup> Dept., 2006]; Suk Ching Yeung v. Rojas, 18 AD3d 863 [2<sup>nd</sup> Dept., 2005]; Ifrach v. Neiman, 306 AD2d 380 [2<sup>nd</sup> Dept., 2003]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (see, Laruffa v. Yui Ming Lau, 32 AD3d 996 [2<sup>nd</sup> Dept., 2006]); Murray v. Hartford, 23 AD3d 629 [2<sup>nd</sup> Dept., 2005], *lv denied* 6 NY3d 713 [2006]; Batista v. Olivo, 17 AD3d 494 [2<sup>nd</sup> Dept., 2005]; Kauderer v. Penta, 261 AD2d 365 [2<sup>nd</sup> Dept., 1999]). Furthermore, when a defendant in an action to recover damages for serious injury presents evidence demonstrating that a plaintiff's alleged pain and injuries are related to a preexisting condition, the plaintiff must come forward with evidence addressing the defense of lack of causation (Pommells v. Perez, 4 NY3d 566 [2005]; see, Franchini v. Palmieri, 1 NY3d 536 [2003]; Luciano v. Luchsinger, 46 AD3d 634 [2<sup>nd</sup> Dept., 2007]; Giraldo v. Mandanici, 24 AD3d 419 [2<sup>nd</sup> Dept., 2005]).

Plaintiff failed to present any medical evidence raising a triable issue as to whether she suffered injury resulting in a "significant limitation of use" of body function or of a "medically determined injury or impairment of a nonpermanent nature" which prevented her from performing substantially all of her normal daily activities for at 90 of the 180 days immediately following the accident. The medical records of Dr. Shah submitted in opposition to the motion lack probative value, as they as not affirmed (see, Grasso v. Angerami, 79 NY2d 813 [1991]; Singh v. DiSalvo, 48 AD3d 788 [2<sup>nd</sup> Dept., 2008]; Rodriguez v. Huerfano, 46 AD3d 794 [2<sup>nd</sup> Dept., 2007]). Even if such records were considered, they demonstrate that plaintiff's treating orthopedist, who ordered the MRI scans of the cervical and lumbar regions, diagnosed her as suffering only from cervical and lumbar sprains and radiculopathy. Sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (see, Rabolt v. Joohyun Park, 50 AD3d 995 [2<sup>nd</sup> Dept., 2008]; Washington v. Cross, 48 AD3d 457 [2<sup>nd</sup> Dept., 2008]), and the mere existence of a herniated or bulging disc, and even radiculopathy, is not proof of serious injury absent objective evidence of

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the extent of the physical limitations resulting from the disc injury and their duration (see, Sharma v. Diaz, 48 AD3d 442 [2d Dept 2008]; Patterson v. N.Y. Alarm Response Corp., 45 AD3d 656 [2<sup>nd</sup> Dept., 2007]; Kearse v. New York City Tr. Auth., 16 AD3d 45 [2<sup>nd</sup> Dept., 2005]).

Further, plaintiff failed to present medical proof of recent findings of substantial limitations in movement (see, Larkin v. Goldstar Limo Corp., 46 AD3d 631 [2<sup>nd</sup> Dept., 2007]; Laruffa v. Yui Ming Lau, 32 AD3d 996 [2<sup>nd</sup> Dept., 2006]); Suk Ching Yeung v. Rojas, 18 AD3d 863 [2<sup>nd</sup> Dept., 2005]), or evidence addressing the finding of defendant's expert that plaintiff suffered from a preexisting degenerative disc condition in her lumbar spine prior to the accident (see, Cornelius v. Cintas Corp., 50 AD3d 1085 [2<sup>nd</sup> Dept., 2008]; Giraldo v. Mandanici, 24 AD3d 419 [2<sup>nd</sup> Dept., 2005]). Plaintiff's subjective complaints of pain and impaired joint function, standing alone, are insufficient to raise a triable issue of fact (see, Scheer v. Koubek, 70 NY2d 678 [1987]; Rudas v. Petschauer, 10 AD3d 357 [2<sup>nd</sup> Dept., 2004]; Barrett v. Howland, 202 AD2d 383 [2<sup>nd</sup> Dept., 1994]). Finally, plaintiff's vague, conclusory statements as to why she stopped seeking medical care for her injuries upon the termination of no-fault benefits are inadequate to explain the complete cessation of all treatment less than three months after the accident (see, Singh v. DiSalvo, 48 AD3d 788 [2<sup>nd</sup> Dept., 2008]; Neugebauer v. Gill, 19 AD3d 567 [2<sup>nd</sup> Dept., 2005]; Sibrizzi v. Davis, 7 AD3d 691 [2<sup>nd</sup> Dept., 2004]; cf. Black v. Robinson, 305 AD2d 438 [2<sup>nd</sup> Dept., 2003]).

Accordingly, it is

**ORDERED** that this motion by defendant for summary judgment dismissing the complaint based on plaintiff Catherine Funck's failure to meet the serious injury threshold is granted.

Dated: June 18, 2008

  
HON. WILLIAM B. REBOLINI, J.S.C.