

**Canales v Michel**

2008 NY Slip Op 32103(U)

June 10, 2008

Supreme Court, Suffolk County

Docket Number: 0013840/2006

Judge: Joseph C. Pastorella

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INDEX No. 06-13840  
CAL. No. 07-02236-MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

MOTION DATE 1-11-08  
ADJ. DATE 5-6-08  
Mot. Seq. # 001 - MD; # 002 - MD

-----X			
OSCAR A. CANALES, ELMER ROSA and	:	CANNON & ACOSTA, LLP	
CRUZ SARAVIA,	:	Attorneys for Plaintiffs	
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	:		
Plaintiffs,	:	FINNING CARCAGNO & SANTANDER	
	:	Attorneys for Plaintiff Canales on Counterclaim	
- against -	:	80 Broad Street, Suite 1203	
	:	New York, New York 10004	
	:		
DENISE MICHEL,	:	ROBERT P. TUSA, ESQ.	
	:	Attorneys for Defendant	
Defendant.	:	898 Veterans Memorial Highway, Suite 320	
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Upon the following papers numbered 1 to 38 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers) 1 - 15 ; Notice of Cross Motion and supporting papers 16 - 28 ; Answering Affidavits and supporting papers 29 - 38 ; Replying Affidavits and supporting papers     ; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (001) by defendant, Denise Michel, pursuant to CPLR 3212 dismissing the complaint as asserted by plaintiffs, Oscar A. Canales, Elmer Rosa and Cruz Saravia, on the basis that plaintiffs' injuries do not meet the serious injury threshold as defined by Insurance Law §5102(d), is denied; and it is further

**ORDERED** that this cross motion (002) by the plaintiff on the counterclaim, Oscar A. Canales, pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment on the basis that the injuries of plaintiffs, Elmer Rosa and Cruz Saravia, do not meet the serious injury threshold as defined by Insurance Law §5102(d), is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiffs, Oscar A. Canales, Elmer Rosa, and Cruz Saravia, when they were involved in a motor vehicle accident on July 5, 2005, on Calebs Path at or near the intersection with Myrtle Avenue, Town of Islip, County of Suffolk, State of New York. Oscar Canales was the operator of the vehicle in which Elmer Rosa and Cruz Saravia were passengers. Denise Michel was the operator of the other vehicle involved in the collision.

The defendant in motion (001), Denise Michel, seeks summary judgment dismissing the complaint on the basis the plaintiffs have not sustained a serious injury within the definition of Insurance Law §5102(d). Denise Michel seeks judgment over in her counterclaim asserted against Oscar Canales, alleging that if the plaintiffs Elmer Rosa and Cruz Saravia sustained the injuries alleged in the manner alleged, then such injuries were caused in whole or in part by the culpable conduct of Oscar Canales. In cross motion (002), Oscar Canales seeks summary judgment dismissing the counterclaim on the basis that the injuries of plaintiffs, Elmer Rosa and Cruz Saravia, do not meet the serious injury threshold.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

Pursuant to Insurance Law § 5102(d), “ ‘[s]erious injury’ means 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 medical 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.”

The term “significant,” as it appears in the statute, has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to “present evidence in competent form, showing that plaintiff has no cause of action” (*Rodriquez v Goldstein*, 182 AD2d 396 [1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (*DeAngelo v Fidel Corp.*

*Services, Inc.*, 171 AD2d 588 [1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268 [1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (*Cammarere v Villanova*, 166 AD2d 760 [1990]).

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott* (supra)).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (see, *Tipping-Cestari v Kilhenny*, 174 AD2d 663 [2d Dept 1991]). The initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396 [1<sup>st</sup> Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyer*, 79 NY2d 955 [1992]).

#### OSCAR CANALES

In support of defendant Michel’s motion for summary judgment the following, inter alia, have been submitted: copies of the pleadings and verified bill of particulars; the report of the orthopedic evaluation by Vartkes Khachadurian, M.D. dated June 1, 2007; the report of the neurological evaluation of Matthew Chacko, M.D. dated June 1, 2007; the report of the radiology review performed by Stewart Berliner, M.D., undated, for a review on June 9, 2006 of the MRI films of the plaintiff’s cervical spine conducted August 9, 2005; the report of the radiology review performed by Stewart Berliner, M.D., undated, for a review on June 9, 2006 of the MRI films of the plaintiff’s lumbosacral spine conducted August 10, 2005; and the report of the radiology review performed by Stewart Berliner, M.D., undated, for a review on June 9, 2006 of the MRI films of the plaintiff’s right shoulder conducted August 29, 2005.

Oscar Canales has claimed in his bill of particulars that as a result of the accident, he sustained disc herniations at T12-L1, L1-L2, L2-3; bilateral pars fractures of L-5; disc herniation at C3-4 which indents the ventral thecal sac; disc herniation at C4-5 which indents the ventral thecal sac; partial tear of the right shoulder; supraspinatus tendonitis of the right shoulder; subacromial impingement of the right shoulder; right shoulder derangement; right knee derangement; left knee contusion.

Dr. Khachadurian has set forth in his report that he examined Mr. Canales on June 1, 2007 and elicited from him that he was the seat-belted driver of an automobile and was treated after the accident at Southside Hospital for complaints of pain in his right knee, neck and lower back. His present complaints were noted to be pain in the neck area, right scapular region, right shoulder, pain in the lower back and the right knee.

Dr. Khachadurian examined Mr. Canales cervical spine and quantified his findings, comparing them to the normal ranges of motion and determined all ranges of motion in the cervical spine to be normal, however, cervical extension was determined to be 70 degrees with the normal stated to be 70 to 80 degrees, thus raising a factual issue as to this deficit. Upon examination of the lumbar spine, knees, lower extremities, and upper extremities, the range of motion findings were quantified and compared to normal. However, Dr. Khachadurian sets forth that impingement and rotator tests were negative bilaterally, but fails to state what tests were done and fails to quantify the degree of internal rotation of the shoulders, thus raising factual issues. Dr. Khachadurian further fails to address the claim of herniated discs and the MRI results relative to the cervical, thoracic and lumbar spines, or the claimed fracture at L5. He, however, opines that the accident was the competent producing cause of the injuries sustained on July 5, 2005, but further states that Mr. Canales has no evidence of ongoing orthopedic disability related to the accident.

Dr. Chacko performed an independent neurological examination of Mr. Canales on June 1, 2007 and states Mr. Canales presents with complaints of neck pain, lower back pain, upper back pain, pain in the right shoulder and right knee. Upon examination of Mr. Canales' cervical spine he found the active range of motion findings to be: flexion 40 degrees (50 normal), extension 30 degrees (60 normal), lateral rotations 60 degrees (80 normal), and lateral flexions 30 degrees (45 normal). Examination of Mr. Canales' lumbar spine revealed active range of motion to be: flexion 60 degrees (60 normal), lateral flexions 25 degrees (25 normal), and extension 25 degrees (25 normal). Straight leg raising was 60 degrees on the right and 90 degrees on the left (90 normal). Dr. Chacko has quantified deficits in the range of motion examination as set forth above, and has further raised factual issues with the report of Dr. Khachadurian in that they have set forth different normal range of motion parameters for both the cervical and lumbar spines and for straight leg raising, thus precluding summary judgment. Although Dr. Chacko reviewed the MRI report of the lumbar spine from August 10, 2005 and of the cervical spine performed on August 9, 2005, he has not commented on those studies. He has set forth, however, that if the history is accurate, there is a causal relationship between the claimant's symptoms and the accident of July 5, 2005. It is Dr. Chacko's impression that Mr. Canales exhibited limitation of range of motion in the cervical region but states it should be noted that these are voluntary movements done fully under the control of Mr. Canales and thus not an objective finding. This, therefore, raises factual issues and issues of credibility for jury determination (*see, Washington v Delossantos*, 44 AD3d 748, 843 NYS2d 186 [2d Dept 2007]; *Lalla v Connolly*, 17 AD3d 322, 791 NYS2d 845 [2d Dept 2005]).

Stewart Berliner, M.D. submitted his undated reports concerning his review of the MRI studies conducted of Mr. Canales' cervical spine on August 9, 2005, lumbar spine on August 10, 2005, and right shoulder on August 29, 2005, but the moving parties have not submitted a copy of the MRI reports generated by the radiologist who interpreted said films. Dr. Berliner opines that the MRI of the cervical spine reveals minimal bulges at C3-4 and C4-5, but does not quantify the measurements for a bulging disc as opposed to a herniated disc, nor does he opine as to causation. He finds there are no bulging or herniated discs in the lumbosacral spine, but does not address the thoracic spine. He states that the MRI of the right shoulder showed some mild degenerative changes of the acromioclavicular joint and finding of mild impingement and a small degenerative subchondral cyst within the humeral head. However, Dr. Berliner does not opine as to causation of the degenerative changes, the impingement or the cyst and does not rule out that those findings are unrelated to the accident, thus raising further factual issues precluding summary judgment.

Based upon the foregoing, the defendant, Denise Michel, has not demonstrated prima facie entitlement to summary judgment on the issue of whether Mr. Canales sustained a serious injury as defined by Insurance Law §5102.

#### ELMER ROSA

In support of defendant Michel's motion for summary judgment, the defendant has submitted, inter alia, copies of the pleadings and verified bill of particulars; the report of the orthopedic evaluation by Vartkes Khachadurian, M.D. dated June 1, 2007; the report of the neurological evaluation of Matthew Chacko, M.D. dated June 1, 2007; the report of the radiology review performed by Stewart Berliner, M.D., undated, for a review on June 9, 2006 of the MRI films of the plaintiff's lumbosacral spine conducted August 9, 2005. Oscar Canales has submitted the same supporting exhibits and medical reports of Dr. Khachadurian, Dr. Chacko and Dr. Berliner in his cross-motion for summary judgment as against plaintiffs Rosa and Saravia, inclusive of his own medical records.

Elmer Rosa has claimed in his verified bill of particulars that as a result of this accident that he has sustained disc herniation at L4-5 with thecal sac impingement and bilateral foraminal encroachment; disc herniation at L5-S1 with ventral canal encroachment; wedge fracture at T-12; exaggerated lumbar lordosis; cervical spine sprain/strain; and lumbosacral spine sprain/strain.

Dr. Khachadurian performed an independent orthopedic examination of Mr. Rosa on June 1, 2007 and states that Mr. Rosa was a restrained, front seat passenger when the accident occurred and offers complaints that he has difficulty squatting with pain on the right side of his thigh and hip, and pain in his lower back extending to the right hip area. The findings of the lumbar spine examination were quantified and compared to normal ranges of motion with no deficits quantified. Straight leg raising in the sitting position with forward inclination of the lumbar spine was 70 degrees, however, the normal range has not been set forth in the report, thus raising a factual issue and leaving this court to speculate as to whether or not the finding was normal. Examination of the cervical spine was performed and range of motion findings have been quantified and compared to normal ranges of motion, with no deficits set forth. It is Dr. Khachadurian's opinion that the accident is a competent producing cause of the injury sustained on July 5, 2005, that there is no objective finding of disability, and that Mr. Rosa is capable of performing his usual activities of daily living.

Dr. Chacko performed a neurological examination of Mr. Rosa on June 1, 2007 and sets forth that following the accident, Mr. Rosa experienced lower back pain, pain in the right shoulder and right hip, underwent physical therapy and chiropractic treatment, and presents to his office with complaints of pain in his lower back, right hip and right shoulder. Examination of the cervical spine was done and the range of motion findings were compared to normal range of motion, as were the range of motion testing of the lumbar spine. Although no deficits were set forth, Dr. Chacko set forth normal range of motion values which differed from the normal range of motion values set forth in Dr. Khachadurian's report, thus creating a factual issue in the moving papers precluding summary judgment.

Although Elmer Rosa has claimed in his verified bill of particulars that as a result of this accident that he sustained disc herniation at L4-5 with thecal sac impingement and bilateral foraminal encroachment; disc herniation at L5-S1 with ventral canal encroachment; wedge fracture at T-12, inter

alia, neither Dr. Khadurian nor Dr. Chacko has opined on these claims or the radiological studies performed on Mr. Rosa, which MRI reports they reviewed. Dr. Stewart Berliner performed an independent radiology review of the MRI studies performed on Mr. Rosa's lumbar spine on August 9, 2005, and opines there are mild degenerative disc changes at the L4-5 and L5-S1 levels with small bulges causing mild effacement of the anterior thecal sac at the L4-L5 level causing mild encroachment on the neural foramen bilaterally, with no evidence of focal disc herniation or acute stenotic injury or significant stenosis or intra dural abnormalities. He finds no evidence of fracture, but does not indicate that he reviewed T-12. Dr. Berliner does not opine as to causation or give the measurement of the bulging disc, as compared to a herniated disc, and has thus raised a factual issue precluding summary judgment.

Based upon the foregoing, the defendant, Denise Michael, and Oscar Canales on the cross-motion, have not demonstrated prima facie entitlement to summary judgment on the issue of whether Mr. Rosa sustained a serious injury as defined by Insurance Law §5102.

#### CRUZ SAVARIA

In support of defendant Michel's motion for summary judgment, the defendant has submitted, inter alia, copies of the pleadings and verified bill of particulars; the report of the orthopedic evaluation by Vartkes Khachadurian, M.D. dated September 14, 2007; and the report of the neurological evaluation of Matthew Chacko, M.D. dated September 14, 2007. Oscar Canales has submitted, inter alia, the same supporting exhibits and medical reports of Dr. Khachadurian and Dr. Chacko in his cross-motion for summary judgment as against plaintiffs Elmer Rosa and Cruz Saravia, inclusive of his own medical records.

Cruz Saravia has claimed in his verified bill of particulars that as a result of this accident he has sustained patella alta of the right knee; chondromalacia of the right knee, joint effusion of the right knee; thoracic spine sprain/strain; left shoulder derangement; right knee medial femoral condyle contusion.

Dr. Khachadurian set forth in his report of September 14, 2007, that Mr. Saravia was a passenger in the rear of the vehicle behind the driver when the accident occurred, and suffered injuries to his chest wall, his right knee, left shoulder and neck as a result of the impact. Dr. Khachadurian performed examination of Mr. Saravia's cervical spine and quantified the range of motion findings, comparing those findings to the normal ranges of motion, and set forth no deficits. Upon examination of Mr. Cruz' shoulder, he found backward extension to be 50 degrees (60 normal), and does not set forth which shoulder was examined. Dr. Khachadurian did not examine Mr. Saravia's knees and therefore leaves it to this court to speculate as to the condition of Mr. Saravia's right knee and has thus raised a factual issue. Although Dr. Khachadurian reviewed the MRI studies of Mr. Saravia's right knee taken September 12, 2005 and the MRI studies of his left shoulder of August 30, 2005, and cervical spine of August 8, 2005, Dr. Khachadurian does not opine on the results of those studies. He does opine, however, that it is his orthopedic opinion that the accident of July 5, 2005 was the competent producing cause of the injury sustained, and that Mr. Saravia does not require further orthopedic treatment or physical therapy.

Dr. Chacko performed an independent neurological examination of Mr. Saravia on September 14, 2007 and states that following the accident Mr. Saravia underwent physical therapy and chiropractic treatment for pain in the right knee, left shoulder, left arm and neck, and currently complains of pain in the

right knee, left shoulder, left arm and neck. Active cervical and lumbar range of motion examinations were performed wherein the findings were compared to the normal ranges of motion and no deficits were set forth. Again, however, the normal cervical range of motion values set forth by Dr. Chacko are different from the normal values for the same set forth in Dr. Khachadurian's report, thus raising a factual issue to preclude summary judgment. Dr. Chacko also finds a causal relationship between Mr. Saravia's symptoms and the accident of July 5, 2005

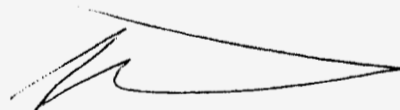
Based upon the foregoing, the defendant, Denise Michael, and Oscar Canales on the cross-motion, have not demonstrated prima facie entitlement to summary judgment on the issue of whether Cruz Saravia sustained a serious injury as defined by Insurance Law §5102.

Here, defendants failed to satisfy their burden of establishing, prima facie, that the plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see, Agathe v Tun Chen Wang*, NYS2d \_\_\_, 2006 WL 2965205, 2006 NY Slip Op 07434 [NYAD 2 Dept Oct 17, 2006]; *see also, Walters v Papanastassiou*, 31 AD3d 439 [2d Dept 2006]) as the examining physicians failed to provide specific range of motion measurements as set forth above, and failed to compare those findings with normal ranges of motion as set forth above (*see, Hypolite v International Logistics Management, Inc.*, 43 AD3d 461, 842 NYS2d 453 [2<sup>nd</sup> Dept 2007]; *Somers v Macpherson*, 40 AD3d 742 [2<sup>nd</sup> Dept 2007]; *Browdame v Candura*, 25 AD3d 747 [2<sup>nd</sup> Dept 2006]). Dr. Khachadurian and Dr. Chacko have submitted different values for the normal ranges of motion to which they are comparing their findings. By failing to quantify the range of motion findings in degrees as set forth above, or to use the same values for the ranges of motion, the reports of the examining physicians leave it to this Court to speculate as to whether the ranges of motion concerning plaintiffs' cervical, lumbar, shoulder or knee ranges of motion are normal or abnormal (*see, Rodriguez v Schickler*, 229 AD2d 326 [1st Dept 1996], *lv denied* 89 NY2d 810 [1997]). Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (*Jankowsky v Smith*, 294 AD2d 540; 742 NYS2d 876[2nd Dept 2002]). A disc bulge may constitute a serious injury within the meaning of Insurance Law §5102 (*Hussein, et al. v Harry Littman, et al.*, 287 AD2d 543, 731 NYS 2d 477 [2<sup>nd</sup> Dept 2001]). The reports of the examining physicians submitted in support of the motion and cross motion do not exclude the possibility that plaintiffs suffered serious injury within the meaning of Insurance Law §5102 and do not establish that the plaintiffs' injuries were not causally related to this accident; therefore, the moving parties are not entitled to summary judgment (*see, Peschanker v Loporto*, 252 AD2d 485 [2d Dept 1998]).

Since defendants failed to establish their entitlement to judgment as a matter of law, it is not necessary to consider whether plaintiffs' papers in opposition to defendants' motions were sufficient to raise a triable issue of fact (*see, Agathe v Tun Chen Wang, supra; Walters v Papanastassiou, supra*).

Accordingly, motion (001) and cross motion (002) for summary judgment dismissing the complaint on the issue that the plaintiffs did not sustain serious injury within the definition of Insurance Law §5102(d) are denied.

Dated: June 10, 2008



HON. JOSEPH C. PASTORESSA, J.S.C.

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