

**Barbato v Cerami**

2008 NY Slip Op 32731(U)

September 25, 2008

Supreme Court, Richmond County

Docket Number: 101016/06

Judge: Philip G. Minardo

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

-----X  
CATHERINE R. BARBATO and VINCENT BARBATO,

*Plaintiffs,*

*-against-*

JCP-8  
Present:  
Hon. Philip G. Minardo

RHONDA B. CERAMI and GUS F. MUNIZ

Decision and Order

Index No. 101016/06  
Motion Nos. 690-002  
702-003

*Defendants.*

-----X  
The following papers numbered 1 to 5 were submitted on this motion the 17<sup>th</sup> day of July, 2008:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendant Gus F. Muniz, with Supporting Papers and Exhibits (dated March 3, 2008).....	1
Notice of Motion for Summary Judgment by Defendant Rhonda B. Cerami, with Affirmation in Support (dated March 7, 2008).....	2
Attorney’s Affirmation in Opposition, with Supporting Papers and Exhibits (dated April 24, 2008).....	3
Reply Affirmation by Defendant Gus. F. Muniz (dated May 23, 2008).....	4
Reply Affirmation by Defendant Rhonda B. Cerami (dated May 27, 2008).....	5

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Upon the foregoing papers, defendants’ motions for summary judgment dismissing the complaint based on the failure of plaintiff Catherine R. Barbato to sustain a “serious injury” pursuant

to Insurance Law §5102(d) are granted, and the complaint is dismissed.

This is a personal injury action arising out of a pedestrian “knockdown” that occurred on May 17, 2005, at or near the intersection of Light Oak Lane and Hemlock Lane in Staten Island, New York. As a result of the alleged accident, plaintiff Catherine R. Barbato (hereinafter “plaintiff”) claims, inter alia, to have sustained “serious injuries” within the Insurance Law §5102(d) definition.<sup>1</sup> Specifically, plaintiff’s alleged injuries are said to include a “MCL tear grade II of the right knee” (*see* Plaintiff’s Bill of Particulars, Defendants’ Exhibit “C”).

In support of the motions for summary judgment, defendants<sup>2</sup> submit a report affirmed by a neurologist, Dr. Sarasavani Jayaram (Defendants’ Exhibit “F”), who reviewed plaintiff’s medical records and conducted a physical examination of the plaintiff on July 30, 2007. In relevant part, Dr. Jayaram’s report quantifies the range of motion of plaintiff’s cervical spine, elbows, wrists, thoracic spine, and lumbar spine in degrees and, upon comparing these results to those which are considered within the normal range, concludes that plaintiff had a “normal neurological examination” and exhibits “no neurological disability” (*id.*). Also annexed to the moving papers is a report affirmed by an orthopedist, Dr. Wayne Kerness (Defendants’ Exhibit “G”), who also reviewed plaintiff’s medical records and conducted a physical examination of the plaintiff on July 30, 2007. During his physical examination, Dr. Kerness conducted various tests on plaintiff’s right knee, including the McMurray test, an effusion test, and a patellar compression test, each of which was found to be

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<sup>1</sup>Plaintiff claims serious injuries under three 5102(d) clauses: “a permanent consequential limitation of use of a body organ or member”; and/or “a significant limitation of use of a body function or system”; and/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 90 days during the 180 days immediately following the occurrence of the injury of impairment” (*see* Plaintiff’s Bill of Particulars, Defendants’ Exhibit “C” para 10).

<sup>2</sup>“For the sake of judicial economy and brevity”, defendant Cerami has incorporated by reference the arguments and exhibits tendered in the moving papers of co-defendant Muniz.

negative (*id.*). In addition, Dr. Kerness measured the range of motion of plaintiff's right and left knee in degrees, and compared his numerical findings to the accepted "normal" ranges of motion (*id.*). In his conclusion, Dr. Kerness stated that plaintiff "has no need for orthopedic care or follow up and is not in need of household help, transportation, testing, medical supplies or any other treatment as prescribed or rendered [by an orthopedic] special[ist]. There is no need for any conservative care modality including physical therapy at this time. There is no apportionment to prior injury" (*id.*). His diagnosis was stated to be "post right knee sprain/contusion resolved" (*id.*). In further support, defendants point to the report of an "MRI" of plaintiff's right knee taken eight days post-incident at Regional Radiology (Defendants' Exhibit "H") which states that "there is a mild strain involving the deep fibers of the medial collateral ligament. Meniscocapsular involvement is also suspected".

In reliance, *inter alia*, upon these affirmed findings and MRI report, defendants move for summary judgment dismissing the complaint for failure to meet the statutory threshold of "serious injury" under Insurance Law §5102(d), i.e., that there is no objective evidence to substantiate plaintiff's claim that she sustained a "MCL tear grade II of the right knee" as a result of the subject incident.

In the opinion of this Court, defendants have met their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (*see Fiorillo v. Arriaza*, \_\_AD3d\_\_, 859 NYS2d 699 [2<sup>nd</sup> Dept.]; *cf. Gaccione v. Krebs*, \_\_AD3d\_\_, 2008 Slip Op 6188 [2<sup>nd</sup> Dept.]; *Spahn v. Wohlmacher*, \_\_AD3d\_\_, 2008 Slip Op 5918 [2<sup>nd</sup> Dept.]) through, *e.g.*, the affirmations of an orthopedist and a neurologist, who examined the plaintiff and determined that there was no disability, restriction, or limitation as a result of the subject motor vehicle accident (*see Gousgoulas v. Melendez*, 10 AD3d 674 [2<sup>nd</sup> Dept 2004]). In opposition, plaintiff has failed to raise a triable issue of fact.

Although the medical records of Dr. Mary Irene Flynn and Staten Island Physical Therapy

submitted on plaintiff's behalf (Plaintiffs' Exhibits "E", "F") both concluded that plaintiff suffered a "grade II MCL strain of the right knee after a motor vehicle accident"(Plaintiff's Exhibit "E"), these records are not sworn and do not constitute competent evidence of serious injury (*see Perdomo v. Scott*, 50 AD3d 1115 [2<sup>nd</sup> Dept 2008]). In addition, plaintiff has submitted the same unaffirmed MRI report of her right knee that was submitted by defendants in support of their motions for summary judgment (Plaintiff's Exhibit "D"). Although the plaintiff properly relied on this report since its results were set forth in the affirmed medical report of defendants' orthopedist (*see Browne v M & P Distrib Corp*, \_\_AD3d\_\_, 2008 NY Slip Op 5641 [2<sup>nd</sup> Dept]), said report merely states that plaintiff had sustained a "mild strain" of the "medial collateral ligament". In addition, the reporting radiologist did not offer any opinion on the cause of that "mild strain" (*see Silla v. Mohammad*, \_\_AD3d\_\_, 2008 NY Slip Op 5674 [2<sup>nd</sup> Dept]). The mere existence of a mild strain does not rise to the level of a serious injury within the meaning of Insurance Law §5102(d) (*see Scotto v Suh*, 50 AD3d at 1012; *Washington v. Cross*, 48 AD3d 457 [2<sup>nd</sup> Dept 2008]). Moreover, plaintiff has submitted no objective evidence of an "MCL tear grade II of the right knee" as alleged in her bill of particulars. Injuries that are minor, mild or slight do not constitute serious injuries within the meaning of Insurance Law §5102(d) (*see Kravtsov v. Wong*, 11 AD3d 516 [2<sup>nd</sup> Dept 2004]; *Coughlan v. Donnelly*, 172 AD2d 480 [2<sup>nd</sup> Dept 1991]).

Finally, plaintiff's claims under the 90/180 category of serious injury are insufficient to require a trial. In her affidavit, plaintiff attests that due to the accident, she suffers from a grade II MCL strain of her right knee and is unable to bend her knee making it difficult for her "to walk, climb up and down [the] stairs and to carry on any of [her] customary every day duties such as caring for [her] children". However, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*see Michel v. Blake*, \_\_AD3d\_\_, 2008 NY Slip Op 5056 [2<sup>nd</sup> Dept]). Furthermore, plaintiff has failed to proffer any competent medical evidence demonstrating that she sustained a medically-determined injury of a nonpermanent nature which prevented her from performing her usual and

customary activities for 90 of the first 180 days following the subject accident (*see Perdomo v. Scott*, 50 AD3d at 1116).

Accordingly, it is

ORDERED that defendants' motions for summary judgment are granted; and it is further

ORDERED that the complaint is dismissed; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

s/ Philip G. Minardo

J.S.C.

DATED: September 25, 2008