

**Gonzalez v Corporate Auto Rental Servs. LLC**

2009 NY Slip Op 30278(U)

February 4, 2009

Supreme Court, New York County

Docket Number: 101482/07

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN  
Justice

PART 22

GLORIA GONZALEZ,  
Plaintiff,

- v -

CORPORATE AUTO RENTAL SERVICES LLC, TURN  
THE RIVER, LLC and TRAVIS FIELDS,  
Defendants.

INDEX NO. 101482/07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. 40

The following papers, numbered 1 to 3, were read on this motion by defendants for summary judgment on the threshold "serious injury" issue.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

1

2

3

Cross-Motion:  Yes  No

On June 30, 2006, plaintiff was driving her vehicle on West Houston Street near its intersection with Sixth Avenue in New York County, New York, when defendants' vehicle struck her vehicle. On or about January 31, 2007 plaintiff commenced this action, to recover damages for alleged personal injuries suffered as a result of the of the subject motor vehicle accident. The defendants filed an answer timely and issue was joined. The parties completed discovery and a note of issue was filed. Defendants now move for an order pursuant to CPLR § 3204 granting summary judgment dismissing the complaint on the basis that plaintiff cannot prove that she suffered a serious injury, pursuant to Insurance Law § 5102 (d).

SERIOUS INJURY THRESHOLD

Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101, *et seq.* - the "No Fault" statute), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*Marquez*

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*v New York City Tr. Auth.*, 686 NYS2d 18 [1 Dept 1999]; *DiLeo v Blumberg*, 672 NYS2d 319 [1 Dept 1998]).

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 on-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 that ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Serious injury is a threshold issue, and thus, a necessary element of plaintiff's prima facie case (*Licari v Elliott*, 57 NY2d 230 [1982]; *Toure v Harrison*, 775 NYS2d 282 [1 Dept 2004]; Insurance Law § 5104 [a]). This is in accord with the purpose of the "No-Fault" law, which was to "weed out frivolous claims and limit recovery to significant injuries" (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]; *Licari v Elliott*, 57 NY2d 234 [1982]; *Rubenscastro v Alfaro*, 815 NYS2d 514 [1 Dept 2006]).

In order to satisfy the statutory threshold, the plaintiff must submit competent objective medical evidence of his or her injuries, based on the performance of objective tests (*Grossman v Wright*, 707 NYS2d 233 [2 Dept 2000]; *Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]; *Scheer v Koubek*, 70 NY2d 678, 679 [1987]).

It is well settled that positive MRI results may constitute a serious injury within the meaning of Insurance Law §5102(d) (see *Pommels v Perez*, 797 NYS2d 380 [2005]; *Nagbe v Mimigreen Hacking Group, Inc.*, 802 NYS2d 416 [1 Dept. 2005]). Furthermore, a CT scan or

MRI may constitute objective evidence to support subjective complaints (*see Arjona v Calcano*, 776 NYS2d 49 [1 Dept 2004]; *Lesser v Smart Cab Corp.*, 724 NYS2d 49 [1 Dept 2001]). The plaintiff's medical submissions must show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiff's limitations were significant (*see Milazzo v Gesner*, 822 NYS2d 49 [1 Dept 2006]; *Vasquez v Reluzco*, 814 NYS2d [1 Dept 2006]).

With respect to the categories of significant limitation of use of a body function or system and permanent consequential limitation of use, "[w]hether a limitation of use or function is "significant" or "consequential" (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure v Avis Rent A Car Sys.*, *supra* quoting *Dufel v Green*, *supra*).

#### SUMMARY JUDGMENT STANDARD

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the courts which may decide the issue on a motion for summary judgment (*Perez v Rodriguez*, 809 NYS2d 15 [1 Dept 2006]). On a motion for summary judgment based upon a failure to sustain a serious injury, the defendants bear the initial burden of establishing the absence of a serious injury by tendering evidentiary proof in admissible form eliminating any material issues of fact from the case (*Toure v Avis Rent A Car Sys.*, *supra*; *see also Gaddy v Eyer*, *supra*; *Pirrelli v Long Is. R.R.*, 641 NYS2d 240 [1 Dept 1996]).

Defendant may rely either on the sworn or affirmed statements of their examining physician, plaintiff's deposition testimony and plaintiff's unsworn physician's records (*Fragale v Geiger*, 733 NYS2d 901 [2 Dept 2001]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). An affirmed physician's report demonstrating that plaintiff was not suffering from any disability or consequential injury resulting from the accident is sufficient to satisfy a defendant's burden of

proof (*see Gaddy v Eyer, supra*). In addition, the Courts have unanimously held that a party may not use an unsworn medical report prepared by the parties' own physician on a motion for summary judgment (*see Grasso v Angerami, 79 NY2d 813 [1991]; Offman v Singh, 813 NY2d 56 [1 Dept 2006]*). Moreover, CPLR § 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury.

Once a defendant has made such a showing, the burden shifts to the plaintiff to come forward with prima facie evidence, in admissible form, to rebut the presumption that there is no issue of fact as to the threshold question (*see Pommells v Perez, 797 NYS2d 380 [2005]; Gaddy v Eyer, supra; Perez v Rodriguez, supra*). A medical affirmation or affidavit based on a physician's own examination, tests, and review of the record, can support the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co., 668 NYS2d 167 [1 Dept 1998]*).

#### DISCUSSION

In support of the motion for summary judgment, defendants proffer the pleadings, plaintiff's deposition testimony and the affirmed reports of Dr. Charles M. Toterio, a board certified orthopedic surgeon and Dr. Daniel J. Feuer, a board certified neurologist. This evidence establishes that defendants have come forward with sufficient evidence in admissible form to warrant as a matter of law a finding that plaintiff has not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d] (*see, Gaddy v Eyer, 79 NY2d 955, 956-957 [1992]; Lowe v Bennett, 511 NYS2d 603 [1 Dept 1986], Affd, 69 NY2d 700 [1 Dept 1986]; Pagano v Kingsbury, 587 NYS2d 692 [2 Dept 1992]*). Thus, the burden shifts to plaintiff to produce evidentiary proof in admissible form to warrant the showing of the existence of a serious injury creating a triable issue of fact. (*see Zuckerman v City of New York, supra; Forrest v Jewish Guild for the Blind, supra*).

In opposition, plaintiff submits the affirmation and report of Dr. Jacob Lichy, a board

certified radiologist and the unaffirmed reports of Dr. Noel Fleischer, a board certified neurologist. As mentioned above, unaffirmed reports are inadmissible on a motion for summary judgment and will not be considered (see *Grasso v Angerami, supra*; *Offman v Singh, supra*; CPLR § 2106). Nonetheless, even if the Court considered Dr. Fleischer's reports they are still devoid of any details as to what objective tests were utilized, if any, to determine the alleged limitations and diagnosis (*Bent v Jackson, supra*; *Toure v Avis Rent a Car System, supra*; *Vasquez v Reluzco, supra*). Furthermore, Dr. Lichy finds a disc bulge at C3-C4, however, this proof, "without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommels v Perez, supra*; *Park v Champagne*, 824 NYS2d 84, 86 [1 Dept 2006]). Accordingly, the evidence submitted by plaintiff is insufficient to establish the existence of a "serious injury" as defined by Insurance Law § 5102(d).

For these reasons and upon the foregoing papers, it is,

ORDERED that the defendants' motion for summary judgment is granted, and the complaint is dismissed; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants dismissing the complaint in its entirety, with costs and disbursements to defendants as taxed by the Clerk, and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiffs.

This constitutes the Decision and Order of the Court.

Dated: February 4 2009

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*[Handwritten signature]*  
Paul Wooten, J.S.C.  
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