

**Francois v Ryga**

2009 NY Slip Op 30735(U)

March 24, 2009

Supreme Court, Nassau County

Docket Number: 2303/07

Judge: Roy S. Mahon

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SCW

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ROY S. MAHON**

**Justice**

**ANNE P. FRANCOIS,**

**Plaintiff(s),**

**- against -**

**MICHELLE AND STEPHEN RYGA and  
"JOHN DOE",**

**Defendant(s).**

**TRIAL/IAS PART 8**

**INDEX NO. 2303/07**

**MOTION SEQUENCE  
NO. 1**

**MOTION SUBMISSION  
DATE: January 25, 2009**

**The following papers read on this motion:**

<b>Notice of Motion</b>	<b>X</b>
<b>Affirmation in Opposition</b>	<b>X</b>
<b>Reply Affirmation</b>	<b>X</b>

Upon the foregoing papers, the motion by defendants Michelle and Stephen Ryga for an Order pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment to defendants, Michelle Ryga and Stephen Ryga, and dismissing the Complaint of plaintiff, Anne P. Francois, for personal injuries allegedly sustained in a motor vehicle accident on April 11, 2006, on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of New York Insurance Law §5102(d); and thus, her claim for non-economic loss is barred by §5104(a) of the Statute, is determined as hereinafter provided:

This personal injury action arises out of a automobile accident that occurred on April 11, 2006 at 8:12 pm at South Ozone Park/Belt Parkway, Exit 18B.

The plaintiff in the plaintiff's Verified Bill of Particulars sets forth:

"5. Plaintiff sustained the following injuries:

SPRAIN OF THE CERVICAL SPINE;  
SPRAIN OF THE LUMBOSACRAL SPINE;  
CERVICAL RADICULOPATHY;  
LUMBOSACRAL RADICULOPATHY;  
CERVICAL SPRAIN/STRAIN;

LUMBAR SPRAIN/STRAIN  
 LIMITATION OF MOTION;  
 HEADACHES;  
 DEPRESSION;  
 ANXIETY;  
 FEAR;  
 EMOTIONAL UPSET AND SHOCK;

The above has resulted in pain, tenderness, weakness, discomfort, aching, restriction of motion, numbness, stiffness, atrophy, insomnia, deformity, the possible need for future surgery, spasm, stiffness, impairment of function, soft tissue injury, swelling partial and permanent loss of use of the right knee and back areas, and, as a result, the entire body. The plaintiff also was and is required to take medication, with other side effects. In addition, this plaintiff was required to undergo painful and uncomfortable testing, casting, and treatment and therapy, and has suffered curtailment of a great many activities. Upon information and belief, all of the above injuries and/or their residuals, except those of a superficial nature, are of a permanent nature."

The defendants, amongst other things, in support of the requested relief, submit the January 23, 2008 deposition transcript of the plaintiff; the plaintiff's Mercy Medical Center Emergency Department records from April 12, 2006; two letter reports both dated September 7, 2005 of Freeport Medical PC by John T. Rigney, MD, a radiologist, one of an MRI of the plaintiff's lumbar spine and the other an MRI of the plaintiff's cervical spine; an affirmed letter report dated March 25, 2008 of John C. Killian, MD, an orthopedist of an orthopedic examination of the plaintiff conducted on March 21, 2008; and an affirmed letter report dated March 20, 2008 of Lawrence J. Robinson, MD, a neurologist of a neurological examination of the plaintiff conducted on March 20, 2008.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law (**see Licaro v. Elliot**, 57 NY2d

**230, 455 NYS2d 570, 441 NE2d 1088; Palmer v. Amaker, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; Tipping-Cestari v. Kilhenny, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991).**

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) (see, **Zoldas v. Louise Cab Corp., 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; Wright v. Melendez, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988).**

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

"(d) 'Serious 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 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."

The unsworn reports of the plaintiff's treating physician's are properly considered in support of the defendants' application (see, **Pagano v Kingsbury, 182 AD2d 268, 587 NYS2d 692 (Second Dept., 1992).** In this regard the respective radiological reports of Dr. Rigney set forth:

"MAGNETIC RESONANCE IMAGING OF THE CERVICAL SPINE:  
Examination was performed in the sagittal plane using T1 and T2 weighted pulse sequences and in the axial plane.

Examination demonstrates straightening of curvature with tendency to mild reversal.

There is normal height and signal intensity of the vertebral bodies without marrow edema or compression fracture.

There is slight loss in signal intensity of the intervertebral discs indicating slight loss in disc fluid content.

At no level is there evidence of posterior bulge, herniation, central canal or neuroforaminal narrowing.

The cervical cord is normal in position and appearance. The cervico-medullary junction demonstrates no abnormality.

IMPRESSION: Straightening of curvature with tendency to slight reversal. No evidence of posterior bulge or herniation at any level."

"MAGNETIC RESONANCE IMAGING OF THE CERVICAL SPINE:  
Examination was performed in the sagittal plane using T1 and T2 weighted

pulse sequences and in the axial plane.

There is normal height and signal intensity of the intervertebral discs without fluid loss at any level.

At no level is there evidence of posterior bulge, herniation, central canal or neuroforaminal narrowing.

The distal aspect of the spinal cord is normal in appearance. The abdominal aorta is of normal caliber.

**IMPRESSION:** No evidence of posterior bulge or herniation."

The report of Dr. Kullian states:

#### **PHYSICAL EXAMINATION:**

The claimant was a well developed, overweight female, who was in no acute distress.

#### **SPINE COLUMN**

Our inspection in the standing position the normal cervical lordosis, thoracic kyphosis and lumbar lordosis were maintained without visible evidence of atrophy, asymmetry, deformity, or muscle spasm. Her head was held in a normal attitude, her shoulders and pelvis were level and there was no evidence of scoliosis. On palpation she complained of tenderness on the right side in the lower cervical paraspinal muscles extending into the right trapezius but she did not complain of midline tenderness in the neck. She complained of midline lower lumbar tenderness and she complained of right-sided lumbar paraspinal tenderness extending down into the buttock. There was no palpable muscle spasm or deformity in the cervical or lumbar regions. The range of motion of her cervical spine was tested (by visual observation) and found to be full with 45 degrees of flexion and extension (normal 45 degrees), 90 degrees of right and left rotation (normal 90 degrees) and 45 degrees of right and left lateral flexion (normal 45 degrees). She did not complain of pain with any of the cervical motions and there was no muscle spasm. The thoracolumbar motions were tested (by visual observation) and it was found that she bent forward fully to reach within 4" to 6" of the floor (normal 4" to 6" with a normal reversal of lumbar lordosis and a complaint of pain. Extension was full at 40 degrees (normal 40 degrees) with a complaint of pain. Right and left rotation were full and pain free at 30 degrees (normal 30 degrees) and right and left lateral flexion were full and pain free at 35 degrees (normal 35 degrees). There was no muscle spasm with any of the thoracolumbar motions. Straight leg raising was negative bilaterally in the sitting position and in the supine position.

#### **NEUROLOGICAL EXAMINATION**

The upper and lower extremity neurological examination was done and it was

found that the reflexes including the biceps, triceps, brachioradialis, knee jerks and ankle jerks were intact and symmetrical. All major muscle groups in both upper extremities and both lower extremities were 5 out of 5 in strength and symmetrical. Sensation was intact and symmetrical to pin and light touch over both upper extremities and both lower extremities. The circumferential muscle masses of her upper extremities and lower extremities were measured and found to be symmetrical with the biceps measuring 13", the forearms 11", the thighs 19" and the calves 15 ½". Her gait was observed and she was noted to ambulate without evidence of a limp. She was able to toe walk and heel walk satisfactorily and symmetrically.

#### OPINION

Based on the available history and medical documentation I would conclude that Ms. Francois was treated for complaints of neck pain and back pain after the 4/11/06 accident. It is clear that she did not sustain significant trauma to those areas as a result of this accident given that she did not have pain immediately and did not go for medical attention until the next day. She eventually had MRIs of the neck and back which showed no traumatic abnormalities. The curvature changes can be seen incidentally and are of no clinical significance. She continues to complain of nonradiating neck pain and low back pain.

The physical examination of her spinal column was remarkable for subjective complaints of tenderness and subjective complaints of pain at certain extremes of lumbar motion. Those subjective complaints were not accompanied by objective findings including restricted motion or muscle spasm. The sciatic nerve tension signs were negative. The neurological examination was normal.

There were no positive objective physical findings in this examination to confirm this claimant's subjective complaints. Based on this examination I would conclude that she has fully recovered from any alleged injuries to her neck and back resulting from the 4/11/06 accident. She has no residual impairment or disability due to injuries from that accident. She is capable of working at her normal capacity and performing all of her usual activities of daily living without limitations due to problems caused by injuries from that accident. There is no need for further orthopedic evaluation, follow-up or treatment for problems caused by injuries from the 4/11/06 accident."

Dr. Robinson sets forth:

"NEUROLOGICAL EXAM: This claimant appears well. She is in no acute distress. The neck is supple. There is no tenderness or spasm. Flexion and extension performed 45 degrees/45 degrees which is normal. Rotation performed 70 degrees/70 degrees which is normal. Lateral flexion performed 40 degrees/40 degrees which is normal.

Lumbar spine reveals normal preserved lordosis, no restriction of forward bending. Flexion performed 90 degrees/90degrees which is normal.

Extension, rotation and lateral flexion all performed 30 degrees/30 degrees, all normal. There is no tenderness or spasm. Straight leg raising is bilaterally negative.

Higher intellectual functioning reveals an alert claimant oriented with clear sensorium and normal speech.

Cranial nerve exam reveals equal reactive pupils, sharp discs, full visual fields, full extraocular movements. There is no nystagmus, no facial weakness. Tongue protrudes in the midline. The Palate elevates normally.

Motor exam reveals normal strength and tone, no focal atrophy. There is no drift, no abnormal movements, no dysmetria.

Reflexes are 2+ symmetric throughout all four limbs. Plantars are down going.

Sensory exam is normal. There is no dermatomal loss to pinprick or touch.

The gait is normal including bilaterally walking on her heels and toes without antalgia and there is no ataxia.

Range of motion was performed using inspection and hands-on movement of the necessary parts of the spine according to protocol.

**IMPRESSION:** Normal neurological examination performed today. There is no objective evidence of neurological dysfunction of the central or the peripheral nervous system. There is no evidence of neurological impairment.

**DISABILITY:** None

The history suggests that the claimant is status post cervical and lumbar strain but there is no evidence of neurological injury. The treatment appears to be consistent with the conditions diagnosed in the clinical record. The etiology of muscle strain would be whiplash-type injury to the neck and back but there is no evidence of neurological injury. Based on my exam of the claimant, review of the submitted records and clinical experience and research, this patient's condition was caused by the 4/11/06 incident from the standpoint of neck and back pain. However, there is no objective evidence to substantiate causally related neurological injury. There is no evidence of a neurological injury, disease or disorder. The claimant's prognosis would be excellent. In my opinion, the claimant did not sustain any permanent or temporary neurological impairment as a result of the 4/11/06 incident. She is able to work and return to pre-loss levels of activity including occupational duties.

There was a preexisting injury to the neck and back occurring at work in 2004 which could affect her recovery of injuries as a result of the 4/11/06 incident."

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" (**Winegrad v. New York University Medical**

**Center, 64 NY2d 851, 853; Pagano v. Kingsbury, supra at 694)** and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact (see **Gaddy v. Eyler, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; Jean-Meku v. Berbec, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; Horan v. Mirando, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995**).

In opposition to the requested relief, the plaintiff submits an affirmation of the plaintiff's treating physician Jean-Marie L. Francois, MD together with certain office records of Dr. Francois which reflect treatment of the plaintiff from April 20, 2006 to September 11, 2006; the plaintiff's Mercy Medical Center April 12, 2006 record and the plaintiff's deposition transcript.

A review of the plaintiff's deposition transcript sets forth subjective complaints of pain which is insufficient to establish a serious injury pursuant to §5102 of the Insurance Law (see, **Scheer v Koubek, 70 NY2d 678, 518 NYS2d 788, 512 NE2d 309**).

As to the submission of Dr. Francois, said physician does not set forth the objective tests performed to substantiate said physician's clinical impression as to the plaintiff's condition (see, **Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197**). Notwithstanding the foregoing, Dr. Francois opinion that the plaintiff suffered an acute sprain of the cervical and lumbar spine is insufficient to establish a serious injury pursuant to §5102 of the Insurance Law (see, **Licari v Elliot, 57 NY2d 230, 455 NYS2d 570**).

Based upon the foregoing, the defendants Michelle and Stephen Ryga's application for an Order pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment to defendants, Michelle Ryga and Stephen Ryga, and dismissing the Complaint of plaintiff, Anne P. Francois, for personal injuries allegedly sustained in a motor vehicle accident on April 11, 2006, on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of New York Insurance Law §5102(d); and thus, her claim for non-economic loss is barred by §5104(a) of the Statute, is **granted**.

All stays previously issued herein are vacated.

SO ORDERED.

DATED: 3/24/2009

  
..... J.S.C.

**ENTERED**

MAR 26 2009

NASSAU COUNTY  
COUNTY CLERK'S OFFICE