

**Vasquez-Gomez v Viana**

2009 NY Slip Op 31032(U)

April 27, 2009

Supreme Court, Suffolk County

Docket Number: 07-12762

Judge: Peter H. Mayer

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.



SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 11-3-08  
ADJ. DATE 12-8-08  
Mot. Seq. # 001 - MG; CASEDISP

-----X		
MILAGROS E. VASQUEZ-GOMEZ,	:	CANNON & ACOSTA, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	1923 New York Avenue
	:	Huntington Station, New York 11746
- against -	:	
	:	RICHARD T. LAU & ASSOCIATES
RUTH E. VIANA and LUIS M. VIANA,	:	Attorneys for Defendants
	:	P.O. Box 9040
Defendants.	:	Jericho, New York 11753-9040
-----X		

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated October 3, 2008, and supporting papers (including Memorandum of Law dated \_\_);(2) Affirmation in Opposition by the Plaintiff, dated November 20, 2008, and supporting papers; (3) Reply Affirmation by the defendants, dated December 5, 2008, and supporting papers;

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that this motion by defendants Ruth Viana and Luis Viana seeking summary judgment dismissing plaintiff's complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Milagros Vasquez-Gomez as a result of a motor vehicle accident that occurred at the intersection of Third Street and Third Avenue in the Town of Islip on January 9, 2006. By her bill of particulars, plaintiff alleges that she sustained various injuries due to the accident, including bulging discs in her cervical and lumbar regions and cervical radiculopathy.

Defendants now move for summary judgment on the basis that plaintiff did not sustain a "serious injury" as required by Insurance Law §5102 (d). Defendants, in support of the motion, submit copies of the pleadings, a copy of plaintiff's deposition transcript and plaintiff's emergency room records from Southside Hospital. Defendants also submit the sworn medical reports of Michael Katz, M.D., an orthopedist, and Stephen Lastig, M.D., a radiologist. Dr. Katz conducted an independent physical

examination of plaintiff at defendant's request on April 8, 2008. Dr. Lastig conducted an independent radiological review of the magnetic resonance imaging ("MRI") examination of plaintiff's cervical and lumbar spines on March 17, 2008. Plaintiff opposes the instant motion on the ground that defendants failed to make out a prima facie case that she did not meet the "serious injury" threshold required by Insurance Law §5102 (d). Plaintiff, in opposition to the motion, submits the pleadings, a copy of the photograph depicting plaintiff's vehicle after the accident, and a copy of her deposition transcript. Plaintiff also submits the sworn medical reports of Nicholas Martin, D.C., a chiropractor, and John Himelfarb, M.D., a radiologist.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see Licari v Elliott, supra*). Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see Insurance Law § 5104 [a]; Martin v Schwartz*, 308 AD2d 318, 766 NYS2d 13 [2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Martin v Schwartz, supra*).

Insurance Law § 5102 (d) defines a "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."

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 a prima facie case that the plaintiff did not sustain a "serious injury" (*see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990 [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, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see Dufel v Green*, 84 NY2d 795, 622 NYS2d 900 [1995]; *Tornabene v Pawlewski*, 305 AD2d 1025, 758

NYS2d 593 [2003]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (see *Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2005]; see generally, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Further, to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 299, 727 NYS2d 378 [2001]). 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 caused by the injury and its duration (see *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [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, 814 NYS2d 534 [2006]; *Suk Ching Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2005]; *Ifrach v Neiman*, 306 AD2d 380, 760 NYS2d 866 [2003]), as well as objective medical findings of restricted movement that are based on a recent examination (see *Laruffa v Yui Ming Lau*, *supra*; *Murray v Hartford*, 23 AD3d 629, 804 NYS2d 416 [2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; *Batista v Olivo*, 17 AD3d 494, 795 NYS2d 54 [2005]; *Kauderer v Penta*, 261 AD2d 365, 689 NYS2d 190 [1999]). "Whether a limitation of use or function is 'significant' or 'consequential' \* \* \* 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" (*Dufel v Green*, *supra*; see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see *Licari v Elliott*, *supra*). While the law does not require a plaintiff to produce a record of needless treatments in order to survive summary judgment, a plaintiff who ceases all therapeutic treatment following an accident, while claiming a "serious injury," must provide a reasonable explanation for such cessation (see *Pommells v Perez*, *supra*; *Knuchero v Tabachnikov*, 54 AD3d 729, 864 NYS2d 459 [2008]; *Cornelius v Cintas Corp.*, 50 AD3d 1085, 857 NYS2d 637 [2008]).

Here, defendants have satisfied their prima facie burden that plaintiff did not meet the serious injury threshold required by Insurance Law §5102 (d) (see *Pommells v Perez*, *supra*; *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyer*, *supra*; *Licari v Elliott*, *supra*). Dr. Katz's report states, in relevant part, that plaintiff has full range of motion in her cervical and lumbar regions, and in her left shoulder and left hand. It states that there is no evidence of tenderness or muscle spasm in plaintiff's cervical or lumbar spine, and plaintiff walks with a normal gait and has good muscle strength. The report states there is no swelling, erythema or induration in plaintiff's left shoulder or left hand. It states that her deltoid is well developed and that there is no joint line tenderness present in plaintiff's left shoulder. It also states that no deformity is present in plaintiff's clavicle or acromioclavicular joints, and that there is no dislocation, clicking or grating with movement in plaintiff's left shoulder. It states that there are no flexion contractures or triggering present in plaintiff's left hand. Dr. Katz opines that plaintiff suffered cervical sprain with radiculitis and lumbosacral sprains due to the accident, and that such conditions have resolved. He concludes that plaintiff's prognosis, although it may have been slowed by her surgery for cervical cancer in April 2007, is good. He states that plaintiff is not disabled and is capable of

gainful employment as an assembler in a demanding capacity. Dr. Katz further states that plaintiff can perform the activities of daily living and her occupational duties without any restrictions.

In addition, the radiological review of plaintiff's cervical spine by Dr. Lastig states that plaintiff has multilevel degenerative disc disease and multilevel disc desiccation. Dr. Lastig states that the MRI examination of plaintiff's cervical spine revealed there are no focal disc herniations or annular bulges. It also states that there is no evidence of cord compression or focal stenosis in plaintiff's cervical spine. Dr. Lastig's report concludes that the MRI examination showed no findings of injuries to plaintiff's cervical spine that are causally related to the subject accident. Similarly, Dr. Lastig states in his radiological review of plaintiff's lumbar spine that the study is normal and that there are no findings on the study that are causally related to the subject accident. Dr. Lastig states that there is no evidence of focal disc herniations or annular bulges in plaintiff's lumbar spine and that there is no evidence of any fracture. He also states that the vertebral bodies of plaintiff's lumbar spine are within normal limits in configuration, signal intensity, and alignment and that there is no evidence of central lumbar canal stenosis.

Furthermore, plaintiff testified at a deposition that her forehead hit the steering wheel and her back hit the back of her seat "very strongly" due to the force of the collision. Plaintiff also testified that her neck hit the headrest on her seat and her left shoulder struck the driver's door, which caused her to lose consciousness for a few seconds. Plaintiff testified that she and her daughter were taken by ambulance from the accident scene to Southside Hospital's emergency room, where they were treated and released the same day. She testified that two days later she sought treatment from a chiropractor, Dr. Nicholas Martin for pain she was experiencing in her back, neck, head and left shoulder. She testified that she treated with Dr. Martin four times per week for one year. She testified that after one year the chiropractic treatments were reduced to two to three times per week for six weeks, and then to two times per week for a few months. She testified that she last treated with Dr. Martin in April 2007.

Plaintiff further testified that at the time of the accident she was working full-time at BJB Electronics as an assembler on an assembly line for airplane connectors. Plaintiff testified that, on the advice of her chiropractor, she did not work for six weeks after the accident. Plaintiff testified that, also on the advice of her chiropractor, she now works six hours a day, five days a week, at the same company. She testified that she is unable to work full-time, because her back and shoulders hurt and that the doctor told her not to work eight hours per day. She testified that she had a baby on January 1, 2008, that she did not work six months prior to the baby's birth, and that she returned to work on February 18, 2008. Plaintiff testified that she still experiences pain in her back, neck and left shoulder. She testified that she currently is unable to lift or play with her daughter, that she is not able to lift anything over 20 pounds, and that she is unable to exercise. She further testified that she is not taking any medication for her pain and that she is capable of doing all of the things she did before the accident.

Therefore, defendants have shifted the burden to plaintiff to come forth with evidence that raises a triable issue of fact that she did in fact sustain a serious injury (*see Gaddy v Eyley, supra; Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Pagano v Kingsbury, supra; see generally Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In opposition, plaintiff has failed to raise such an issue of fact. Plaintiff primarily relies upon the affidavit of her treating

chiropractor, Dr. Nicholas Martin, who diagnosed her as suffering with cervical and lumbar derangement. Dr. Martin states in his affidavit that when he initially examined plaintiff on January 10, 2006, she was experiencing severe pain in both her neck and lower back, along with muscle spasms and swelling in her cervical and lumbar spines. Dr. Martin states that he performed range of motion testing upon plaintiff, which revealed that she had significant limitations in her cervical and lumbar ranges of motion. He states that she received a series of chiropractic adjustments, traction, ice therapy, and that she also was provided with orthopedic supports to assist her structural stability. He states that at a re-examination conducted on February 27, 2006, plaintiff continued to exhibit significant limitations in her cervical and lumbar ranges of motion, and had hypertonicity in both her cervical and lumbar spines. Dr. Martin further states that as result of her continued symptomology, he provided plaintiff with traction and performed chiropractic adjustments at that time. Dr. Martin states that plaintiff was discharged from his care on November 27, 2007, because she had “reached a plateau in her treatment and any additional treatment would only be palliative in nature.” He states that on October 21, 2008, he re-examined plaintiff and found that she remained symptomatic and continued to exhibit significant limitations in her cervical and lumbar ranges of motion. Dr. Martin opines that plaintiff’s injuries are the direct result of her accident on January 9, 2006, and that her injuries are permanent in nature. He concludes that plaintiff has sustained a significant limitation to her cervical and lumbar spines, and that she will continue to experience future pain in her cervical and lumbar regions.

Based upon the forgoing, Dr. Martin’s affidavit is insufficient to defeat defendants’ motion for summary judgment (*see Colvin v Maille*, 127 AD2d 926, 511 NYS2d 982 [1987]; *lv denied* 69 NY2d 611; 517 NYS2d 1026 [1987]). “Conclusions, even of an examining doctor, that are unsupported by acceptable objective proof, are insufficient to defeat a motion for summary judgment directed to the threshold issue of whether the plaintiff has suffered serious physical injury” (*Merisca v Alford*, 23 AD2d 613, 614, 663 NYS2d [1997], *citing Antoniou v Duff*, 204 AD2d 670, 670, 612 NYS2d 430 [1994]). The term “significant” limitation must be construed as more than a minor limitation of use (*see Licari v Elliott, supra; Leschen v Kollarits*, 144 AD2d 122, 534 NYS2d 233 [1988]; *Gootz v Kelly*, 140 AD2d 874, 528 NYS2d 446 [1988]). Although Dr. Martin’s affidavit sets forth objective quantified evidence of the degree of limitations in plaintiff’s ranges of motion in her cervical and lumbar regions, he failed to refute defendant’s evidence that plaintiff suffers from a degenerative condition in her cervical spine that predated the subject accident (*see Valentin v Pomilla*, 59 AD3d 184, 873 NYS2d 537 [2009]; *Montgomery v Pena*, 19 AD3d 288, 798 NYS2d 17 [2005]). Once a defendant presents evidence of a pre-existing injury, it is incumbent upon the plaintiff to present evidence addressing the defendant’s proof of lack of causation (*see Sky v Tabs*, 57 AD3d 235, 868 NYS2d 648 [2008]; *Carter v Full Serv., Inc.*, 29 AD3d 342, 815 NYS2d 41 [2006]; *Flores v Leslie*, 27 AD3d 220, 810 NYS2d 464 [2006]). Also, Dr. Martin failed to provide any objective medical evidence substantiating his assertions that plaintiff was asymptomatic prior to the accident and that her spinal injuries are a result of the subject accident (*see Seck v Minigreen Hacking Corp.*, 53 AD3d 608, 863 NYS2d 218 [2008]; *McNeil v Dixon*, 9 AD3d 481, 780 NYS2d 635 [2004]). Furthermore, his affidavit fails to address the fact that plaintiff became pregnant during the time that he was treating her or to explain the impact, if any, her pregnancy had on her spinal joint function (*see La Rue v Tucker*, 247 AD2d 702, 668 NYS2d 745 [1988]; *see also Jackson v Willis*, 2000 NY Misc LEXIS 184 [2000]).

Vasquez-Gomez v Viana

Index No. 07-12762

Page No. 6

In addition, the affirmed medical report of Dr. Himelfarb, dated February 26, 2006, which states that the MRI examinations of plaintiff's cervical and lumbar regions revealed posterior disc bulges at levels C3-C4 through C7-T1 and L4 through S1, is insufficient to raise a triable issue of fact as to the existence of a serious injury (*see Ponciano v Schaefer*, \_\_ AD3d \_\_, 873 NYS2d 212 [2009]). The "mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (*Luzzi-Schwenk v Singh*, 58 AD3d 811, 812, 872 NYS2d 176 [2009]; *see Kilakos v Mascera*, 53 AD3d 527, 862 NYS2d [2008]; *Sharma v Diaz*, 48 AD3d 442, 850 NYS2d 634 [2008]; *Bravo v Rehman*, 28 AD3d 694, 814 NYS2d 225 [2006]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2005]). The Court notes that Dr. Himelfarb's medical report fails to offer any opinion regarding the cause of the disc bulges that were observed on plaintiff's cervical and lumbar MRI's (*see Garcia v Lopez*, \_\_ AD3d \_\_, 872 NYS2d 719 [2009]; *Dembele v Cambisaca*, 59 AD3d 352, 874 NYS2d [2009]; *Luzzi-Schwenk v Singh*, 58 AD3d 811, 872 NYS2d 176 [2009]; *Collins v Stone*, 8 AD3d 321, 778 NYS2d 79 [2004]). "Absent an explanation of the basis for concluding that the injury was caused by the accident, an expert's 'conclusions that plaintiff's condition is causally related to the subject accident is mere speculation,' insufficient to support a finding that such a causal link exists" (*Diaz v Anasco*, 38 AD2d 295, 296, 831 NYS2d 398 [2005]; *see also Montgomery v Pena*, *supra*). As a consequence, plaintiff's failure to present nonconclusionary expert evidence sufficient to raise a triable issue of fact that her injury was causally related to the subject accident is insufficient to defeat defendant's motion for summary judgment.

Finally, plaintiff's submissions are insufficient to raise a triable issue of fact as to whether she was substantially curtailed from all of her usual and customary activities for 90 of the first 180 days following the accident (*see Toure v Avis Rent A Car Sys. supra*; *Eldrainy v Hassain*, \_\_ AD3d \_\_, 866 NYS2d 749 [2008]; *Casas v Montero*, 43 AD3d 728, 853 NYS2d 358 [2008]). Although plaintiff testified that following the accident she was unable to return to work for six weeks and that upon her return to work she received a reduced work schedule, plaintiff has failed to submit any objective medical evidence to establish this fact (*see Lopez v Simpson*, 39 AD3d 420, 835 NYS2d 98 [2007]). Without any substantiating documentation or affidavit from her employer, plaintiff's testimony does not suffice to show a "serious injury for purposes of the 90/180 day rule" (*Dembele v Cambisaca*, *supra* at 353; *see also Ronda v Friendly Baptist Church*, 52 AD3d 440, 861 NYS2d 622 [2008]; *Cartha v Quin*, 50 AD3d 530, 856 NYS2d 581 [2008]; *Burke v Torres*, 8 AD3d 118, 778 NYS2d 486 [2004]). Accordingly, defendants' motion for summary judgment is granted.

Dated: \_\_\_\_\_

4/27/09

  
PETER H. MAYER, J.S.C.