

**Dominick v Rizzuto**

2010 NY Slip Op 30914(U)

March 31, 2010

Supreme Court, Nassau County

Docket Number: 001379/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

**JUSTICE**

**TRIAL/IAS PART 20**

**X**

VANESSA DOMINICK,

Plaintiff,

-against

Index No.: 001379/08  
Motion Sequence...01  
Motion Date...01/14/10  
**XXX**

VALERIE RIZZUTO,

Defendant.

**X**

Papers Submitted:

- Notice of Motion.....x
- Affirmation in Opposition.....x
- Reply Affirmation.....x

Upon the foregoing papers, the Defendant’s motion seeking an order granting summary judgment pursuant to CPLR §3212 and dismissing the Plaintiff’s complaint on the grounds that the Plaintiff’s injuries do not satisfy the “serious injury” threshold requirement of Insurance Law § 5102 (d) and thus the complaint for non-economic loss is barred by Insurance Law § 5104 (a) is determined as hereinafter provided.

The Plaintiff’s personal injury action arises out of a motor vehicle accident that occurred on November 6, 2006 at approximately 3:20 p.m. on North Village Avenue, at or

near its intersection with Hempstead Avenue, County of Nassau, State of New York. At the time of the accident, the Plaintiff was the driver of a 2005 Volkswagen Jetta owned by the non-party, Valerie Dominick. The Defendant was the driver of a 1997 Mercury.

The Plaintiff testified at her examination before trial that at the time the Police arrived on the scene of the accident she spoke with the officer and said she was “okay.” She further testified that the police officer offered to call an ambulance for her but that she stated, “no, thank you.” Additionally, when the accident occurred, the Plaintiff was asked if any portion of her body came into contact with the interior of the motor vehicle, to which she answered, “the left side” and “my whole side of my body.” The Plaintiff was also asked if there was any other part of her body that came into contact with any portion of the vehicle, and she replied, “no” (see transcript of the Plaintiff’s Examination Before Trial at pp. 65,62-63, annexed to the Defendant’s Notice of Motion as Exhibit E).

After the accident, the Plaintiff began medical treatment with Dr. Brett Halper. Dr. Halper examined the Plaintiff’s back, neck, shoulders and arms but did not take any x-rays of these areas. Dr. Halper referred the Plaintiff to an orthopedist, Dr. Gary Gonya, and according to the Plaintiff, she saw this doctor within a week afterward and then only once or twice after this initial visit. According to the Plaintiff, Dr. Gonya told her that she had soreness in the lower back, middle back, neck and shoulders. Dr. Gonya did not take any x-rays nor did he take an MRI of the Plaintiff, but he did refer her to physical therapy (see the transcript of the Plaintiff’s Examination Before Trial at p. 71, annexed to the Defendant’s

Notice of Motion as Exhibit E).

The Plaintiff claims that because of this accident, she has suffered personal injuries, which qualify as “serious injuries,” pursuant to Article 51 of the New York State Insurance Law. Under this law, “serious injury” is defined as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of fetus; (6) permanent loss of use of body organ, member, function or system; (7) permanent consequential limitation of use of a body function or system; (8) significant limitation of use of a body organ or member; or (9) 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 constitutes 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. *See McKinney’s Consolidated Laws of New York*, Insurance Law § 5102(d).

The Defendant argues, that the Plaintiff’s injuries do not meet any definition of “serious injury” as defined in Insurance Law § 5102 (d) and therefore moves for summary judgment pursuant to CPLR § 3212 seeking the dismissal of the Plaintiffs complaint in its entirety.

In moving for summary judgment, the Defendant must make a prima facie showing that the Plaintiff did not sustain a “serious injury” within the meaning of the statute. Once this is established, the burden shifts to the Plaintiff to come forward with evidence to overcome the Defendant’s submissions by demonstrating a triable issue of fact that a serious

injury” was sustained (*see Pommels v. Perez*, 4 N.Y.3d 566 [2005]; *see also Grossman v. Wright*, 268 A.D. 2d 79, 84 [2d Dept. 2000]).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the Plaintiff did not sustain a “serious injury” as enumerated in Article 51 of the Insurance Law § 5102 (d) (*Gaddy v. Eycler*, 79 N.Y.2d 955 [1992]). Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a “serious injury” (*Licari v. Elliot*, 57 N.Y.2d 230 [1982]).

Within the scope of the Defendant’s burden, a Defendant’s medical expert must specify the objective tests upon which the stated medical opinions are based and when rendering an opinion with respect to the Plaintiff’s range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (*Qu v. Doshna*, 12 A.D.3d 578 [2<sup>nd</sup> Dept. 2004]; *Browdame v. Candura*, 25 A.D.3d 747 [2<sup>nd</sup> Dept. 2006]; *Mondi v. Keahan*, 32 A.D.3d 506 [2<sup>nd</sup> Dept. 2006]).

On September 16, 2009, the Defendant’s medical expert, Dr. John C. Killian examined the Plaintiff. At this examination, the Plaintiff complained of a pain in her neck and upper and lower back. However, her history revealed that the Plaintiff was in a motor vehicle accident prior to the one in the instant action. This motor vehicle accident occurred in 2001, and the Plaintiff sustained a lower back injury due to this accident (see Examination

of Dr. John Killian annexed to Defendant's Notice of Motion as Exhibit F).

Upon physical examination of the Plaintiff, Dr. Killian found that the Plaintiff's head, pelvis and shoulders were all normal and there was no evidence of scoliosis. Dr. Killian also performed a neurological exam of all major muscle groups in both the upper and lower extremities, which were rated 5 out of 5 in strength. Additionally, an examination of the Plaintiff's cervical spine revealed that flexation and extension were full at 45 degrees, right and left rotation were full at 90 degrees and right and left lateral flexation were full at 45 degrees. All of these extensions, rotations and flexations are normal (see Examination of Dr. John Killian annexed to Defendant's Notice of Motion as Exhibit F).

Dr. Killian also examined the Plaintiff's cervical spine and the examination revealed that flexation and extension were full at 45 degrees. Additionally, upon examination, Dr. Killian contends that the Plaintiff's thoracolumbar extension was full at 40 degrees (40 degrees normal), right and left rotation and lateral flexion were full at 35 degrees (35 degrees normal) and the Plaintiff was without complaint of pain or evidence of muscle spasm. Dr. Killian's exam also revealed that the Plaintiff was able to fully bend forward to reach within four to six inches of the floor. This range is normal and there was no complaint of pain by the Plaintiff (see Examination of Dr. John Killian annexed to Defendant's Notice of Motion as Exhibit F).

Dr. Killian also reviewed X-rays of the Plaintiff's neck and back and concluded that the x-rays revealed curvature changes, which could suggest muscle spasms, but other

than that, there were no other abnormalities. There were no objective findings, which included restricted motion or muscle spasm. Dr. Killian also concluded that there were no positive objective physical findings and therefore the Plaintiff had fully recovered from any problems for which she was treated after the November 6, 2006 accident (see Examination of Dr. John Killian annexed to Defendant's Notice of Motion as Exhibit F).

On September 24, 2009, another medical expert of the Defendants', Dr. John Kelemen, a neurologist, examined the Plaintiff. Dr. Kelemen reports upon examination, the Plaintiff was able to bend and move without difficulty. He concluded that her head, mental status, cranial nerve examination, motor examination and sensory examination were all normal. He further concluded that there was no further evidence of neurological abnormality or disability from a neurological perspective (see Dr. Kelemen's Report annexed to Defendant's Notice of Motion as Exhibit G).

Applying the aforesaid criteria to the reports of Dr. Killian and Dr. Kelemen, this Court finds that the moving Defendant has established a prima facie case that the Plaintiff failed to sustain a serious injury within the categories designated a permanent loss of use of a body organ, member, function or system, a significant limitation of use of a body organ or member (*Gaddy v. Euler*, 79 N.Y.2d 955 [1992], *supra*).

The Court further notes that with respect to the categories designated a significant limitation of use of a body function or system and a permanent consequential limitation of use of a body organ or member, Dr. Killian concluded that the Plaintiff

exhibited normal ranges of extension with respect to all major muscle groups, cervical spine and thoracolumbar extension. Dr. Killian also concluded that there were no objective findings of restricted motion and that the Plaintiff had fully recovered from any problems that may have occurred from the motor vehicle accident at issue. Additionally, Dr. Kelemen found no evidence of any neurological abnormality or disability. Thus, the burden now shifts to the Plaintiff to demonstrate a triable issue of fact with respect to the existence of a “serious injury” (*Licari v. Elliot*, 57 N.Y.2d 230 [1982], *supra*).

In order for the Plaintiff to satisfy the statutory serious injury threshold, the legislature requires objective proof of the Plaintiff’s injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345 (2002), stated that a plaintiff’s proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor’s observations during the physical examination of the plaintiff.

In opposition to the Defendant’s instant application, the Plaintiff contends that the Defendant’s cannot rely on the conclusions of Dr. Killian and Dr. Kelemen, because these doctors examined the Plaintiff almost three years after the accident. The Plaintiff contends that because these examinations were done so late, the doctors cannot fully determine the extent that the Plaintiff suffered injuries under the 90/180 day category of “serious injury.” The Plaintiff has provided testimony that she suffered from the effects of the accident for a long period thereafter, seeking orthopedic examinations, scientific tests and protracted

physical therapy in order to alleviate her symptoms and disabilities, despite the fact that she continued to attend school and work part-time to support herself. According to her deposition testimony, the medical treatment persisted for more than 90 days during the 180 days immediately following the accident and occurrence (see deposition transcript of Vanessa Dominick annexed to the Plaintiff's Affirmation in Opposition).

The Defendant notes however, that at the time of the accident, the Plaintiff was a full-time student. The Plaintiff graduated one month after the accident and did not miss any time from school because of her injuries. The Plaintiff also had been working part-time at a tanning salon since July of 2006, and she testified that because of the accident she probably lost "a couple of days". Additionally, the Plaintiff claimed that she was unable to go to the gym for a period of time after the accident but was still able to attend yoga classes.

When examining medical evidence offered by a Plaintiff on a threshold motion, the court must ensure that the evidence is objective in nature and that a Plaintiff's subjective claims as to pain or limitations of motion are sustained by verified objective medical findings (*Grossman v. Wright*, 268 A.D.2d 79 [2<sup>nd</sup> Dept 2000]).

Further, in addition to providing medical proof contemporaneous with the subject accident, the Plaintiff must also provide competent medical evidence containing verified objective findings based upon a recent examination wherein the expert must provide an opinion as to the significance of the injury (*Kauderer v. Penta*, 261 A.D.2d 365 [2<sup>nd</sup> Dept 1999]; *Constantinou v. Surinder*, 8 A.D.3d 323 [2<sup>nd</sup> Dept. 2004]; *Brown v. Tairi Hacking*

*Corp.*, 23 A.D.3d 323 [2<sup>nd</sup> Dept. 2005].

Applying the foregoing principles, the Court finds that the Plaintiff has not offered any medical evidence in support of her argument and is unable to raise a triable issue of fact. The only evidence that the Plaintiff is relying on is her own deposition testimony.

When a claim is raised under the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, then, in order to prove the extent or degree of the physical limitation, an expert’s designation of a numeric percentage of the plaintiff’s loss of range of motion is acceptable (*see Toure v. Avis Rent-a- Car Systems, Inc.*, 98 N.Y.2d 345 [2002], *supra*). In addition, an expert’s qualitative assessment of a plaintiff’s condition is also probative, provided that: (1) the evaluation has an objective basis, and (2) the evaluation compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see id.*).

The Plaintiff asserts that she has tightness in her shoulders and back and dull pain in her lower and middle back. However, she has failed to provide any objective medical evidence of the extent of this pain or any limitations it may have on her motions.

To prevail under the “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” category, a Plaintiff must demonstrate through competent, objective proof, a “medically determined injury or impairment of a non-permanent nature” (Insurance Law § 5102 [d]) “which would have caused the alleged limitations on the Plaintiff’s daily activities” (*Monk v. Dupius*, 287 A.D.2d 187, 191 [3<sup>rd</sup> Dept. 2001]). A curtailment of the Plaintiff’s usual activities must be “to a great extent rather than some slight curtailment” (*Licari v. Elliot, supra* at 236).

The Plaintiff contends that she was not confined to her home after the accident and was not confined to her bed. The Plaintiff was able to graduate from college on time without missing any classes and was also able to work part-time.

Regarding this category, a Plaintiff must present objective medical evidence of a medically determined injury or impairment of a non-permanent nature which prevented the Plaintiff 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 or impairment (*Toure v. Avis Rent-a- Car Systems* 98 N.Y.2d 345 [2002], *supra*; *Licari v. Elliot*, 57 N.Y.2d 230 [1982], *supra*). In this case, the Plaintiff has failed to present objective medical evidence of such a limitation as previously described.

In the instant matter, the Defendant has succeeded in making a prima facie showing that the Plaintiff did not sustain a serious injury pursuant to the Insurance Law, and the Plaintiff was unable to successfully counter this showing with sufficient medical evidence

which would demonstrate the existence of material issues of fact that she has sustained a “serious injury” pursuant to the aforementioned insurance law.

Accordingly, based on the foregoing, the motion by the Defendant for summary judgment dismissing the Plaintiff’s complaint must be **GRANTED**.

This decision constitutes the decision and order of the court

DATED: Mineola, New York  
March 31, 2010



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Hon. Randy Sue Marber, J.S.C.  
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**ENTERED**  
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