

<b>Zeldina v Malangone</b>
2010 NY Slip Op 31187(U)
May 18, 2010
Supreme Court, Richmond County
Docket Number: 101739/2008
Judge: Joseph J. Maltese
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF RICHMOND DCM PART 3

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Index.101739/2008  
 Motion No.: 001

NATALYA ZELDINA

*Plaintiff*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

ALLISON MALANGONE AND JILL MALANGONE

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*Defendants*

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The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants, Allison Malangone and Jill Malangone, seek summary judgment dismissing plaintiff's complaint pursuant to CPLR § 3212. Defendants argue that plaintiff, Natalya Zeldina, failed to meet the "serious injury" threshold as defined by New York Insurance Law § 5102(d). Defendants' motion is denied.

**Facts**

Plaintiff is suing defendants for personal injuries allegedly sustained as a result of an automobile accident that occurred on May 22, 2007 at the intersection of Richmond Road and Clove Road, Staten Island, New York. Plaintiff was traveling south on Richmond Road and attempted to make a left turn onto Clove Road. Defendant Allison Malangone was traveling east

on Clove Road across Richmond Road. Plaintiff was attempting to make a left turn on to Clove Road when the defendant's vehicle struck the plaintiff's vehicle on the passenger side. The plaintiff was taken by ambulance to Richmond University Medical Center. At the emergency room, plaintiff complained of neck and back pain, as well as, a shooting pain in her right leg. Plaintiff was x-rayed, given painkillers, and released that evening. Her treating doctor, Eleanor Lipovsky MD., conducted a range of motion examination on May 30<sup>th</sup>, 2007. In this report, Dr. Lipovsky noted a decreased range of motion in the lower extremities due to "severe trauma to the spine." The damage to the spine caused vertebrae to be misaligned; ligament and muscle tissue to be over stretched; as well as inflammation of soft tissues and nerve irritation. Dr. Lipovsky prescribed painkillers and a supervised physical therapy program. On December 23<sup>rd</sup>, 2009 Dr. Lipovsky re-examined plaintiff and concluded that there has been "permanent partial and significant loss of use and function to the areas injured." Plaintiff claims that the accident caused "serious injuries" to her neck, back, and right shoulder.

Plaintiff's MRI scans were reviewed by the Radiological Independent Medical Examiner, Dr. Sondra J. Pfeffer on May 31<sup>st</sup>, 2008 who concluded that there were no acute annular ruptures or discal edemas to suggest that herniation was caused by post-traumatic injury. Dr. Pfeffer noted that plaintiff did have a long standing degenerative disc disease. The Orthopedic Independent Medical Examiner, Dr. Anthony Spataro, conducted a 90/90 full range of motion examination on September 8<sup>th</sup>, 2009. Dr. Spataro concluded that plaintiff had no orthopedic disability and is able to resume normal activities without restrictions. Defendants move for summary judgment on December 4<sup>th</sup> 2009, arguing that plaintiff failed to sustain a "serious injury" as it is defined by Insurance Law § 5102 (d).

### **Discussion**

A motion for summary judgment requires the movant to set forth facts sufficient for entitlement to judgment as a matter of law. The opposing party then has to provide the existence

of genuine triable issues of fact.<sup>1</sup> The disputed facts are construed in the light most favorable to the non-moving party.<sup>2</sup> If any party provides a triable issue of fact, the motion is denied.<sup>3</sup>

New York Insurance Law § 5104 (the “No Fault” statute) ensures that, without regard to fault, automobile victims would be compensated for their “basic economic loss.”<sup>4</sup> A strict interpretation of a “serious injury” is required by the court to fulfill the legislative intent of the No Fault Law. The definition of “serious injury” under No Fault is relevant to the issue of whether a party can sue in negligence for non-economic loss-pain and suffering.<sup>5</sup> Defendants moving for summary judgment on the basis that the “threshold” requirement has not been met must show that no objective medical findings support plaintiff’s claim. The burden shifts to the plaintiff to provide evidentiary proof in admissible form in support of his or her allegations of “serious injury.”<sup>6</sup> Plaintiff must provide evidence of the injury, such as verifiable objective claims by a medical examiner, that compare plaintiff’s loss of motion to the normal range of motion.<sup>7</sup> The medical examination must relate the accident to a “significant” or “consequential” loss of motion.<sup>8</sup> Furthermore, subjective claims of pain and limitation of motion must be verified

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<sup>1</sup> *Piccolo v. De Carlo*, 90 AD2d 609, [3<sup>rd</sup> Dept 1982].

<sup>2</sup> *American Home Assurance Co. v. Amerford International Corp.*, 200 AD2d 472 [1<sup>st</sup> Dept 1994].

<sup>3</sup> CPLR § 3212 [b]

<sup>4</sup> *Licari v. Elliot*, 57 NY2d 230, [1982].

<sup>5</sup> Insurance Law § 5102(d) defines a “serious injury” as death, dismemberment or significant disfigurement; a fracture; loss of fetus; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or a system; or, medically determined injury or impairment of a nonpermanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary activities for not less than 90 days during 180 days following the occurrence of the injury or impairment

<sup>6</sup> *Kordana v. Pomellito*, 121 AD2d 783, [3<sup>rd</sup> Dept 1986].

<sup>7</sup> *Manceri v. Bowe*, 19 AD3d 462, [Sup Ct 2005].

<sup>8</sup> *Toure v. Avis Rent A Car Sys.*, NY2d 345, [Ct App 2002].

by objective medical findings based on recent examinations of the plaintiff.<sup>9</sup> Plaintiff must also show that the injury prevented them from performing substantially all of their customary daily activities for “not less than 90 days during the 180 days following the injury.”<sup>10</sup>

Defendants claim that plaintiff has only suffered minor injuries from the automobile accident on May 22, 2007. This possible scenario is supported by several facts. Plaintiff states that she returned to work four days after the accident. Furthermore, only ten days of work have been missed as a result of the alleged injuries.<sup>11</sup> Plaintiff claims to have trouble lifting objects ten to 15 pounds, and cannot sit or stand for long periods of time. Plaintiff also claims to be unable to run, either for exercise or to catch the bus. Without a medical explanation describing how the injury has limited plaintiff’s physical activities, these subjective statements are insufficient to constitute an objective basis to establish serious injury.<sup>12</sup> The medical examination by Dr. Pfeffer conducted on July 18, 2007, states that based on her examination there are no annular ruptures or discal edemas that suggest a likelihood of injury to the spine. The only relevant finding described by the IME doctor, Dr. Pfeffer, was a “long-standing degenerative disc disease”<sup>13</sup> after reviewing an MRI film dated July 18<sup>th</sup>, 2007.<sup>14</sup> On September 8, 2009, plaintiff was examined by Dr. Spataro, MD. He conducted a 90/90 orthopedic examination and stated that plaintiff was “able to do her normal activities without restrictions.” He found that plaintiff has no need of orthopedic treatment including physical therapy, and that plaintiff’s alleged injuries have been “resolved without any permanency.” Dr. Spataro’s

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<sup>9</sup> *Mohamed v. Dhanasar*, 273 AD2d 451, [2<sup>nd</sup> Dept 2000.]

<sup>10</sup> New York Insurance Law § 5102(d)

<sup>11</sup> Examination Before Trial of Natalya Zeldina Exhibit C (44-45).

<sup>12</sup> *Gaddy v. Eyler*, 79 NY2d 955, [Ct App1992]; *Toure v. Avis Rent A Car Sys.*, NY2d 345, [Ct App 2002]; *Abrahamson v. Premier Car Rental of Smithtown*, 261 AD2d 562, [2d Dept 1999].

<sup>13</sup> Examination by Sondra J. Pfeffer, M.D. Exhibit D.

<sup>14</sup> Examination by Sondra J. Pfeffer, M.D. Exhibit D.

examination included a comparison between “observed” and “normal” range of motion tests.<sup>15</sup> Based on the foregoing, the court finds that defendants have met their initial burden of proof. The burden now shifts to plaintiff to establish an issue of fact.

Plaintiff raises an issue of fact by the evidence submitted by her expert Dr. Lipovsky. Dr. Spataro’s report cannot be reconciled with the findings of Dr. Eleanor Lipovsky, the doctor who treated plaintiff after the accident. The report by Dr. Lipovsky, dated December 23<sup>rd</sup>, 2009, avers that plaintiff’s range of motion has been limited as a result of the accident on May 22, 2007. Dr. Lipovsky based her objective findings on the MRI report of July 18<sup>th</sup>, 2007, and quantified tests comparing “normal” to “observed” range of motion limitations of the plaintiff in the December 23<sup>rd</sup> report. The results of the lumbar spine examination are that Flexion is at 35° out of the normal 60°; Extension is at 21° out of the normal 25°; Left Lateral Flexion is at 17° out of the normal 25°; and Right Lateral Flexion is as 13° out of the normal 25°.

The findings by Dr. Spataro and Dr. Lipovsky are undeniably inconsistent. Dr. Spataro’s findings are that plaintiff has suffered no limitation to her range of motion after the accident. He also states that plaintiff “is not orthopedically disabled” and “able to do her normal activities without restrictions.”<sup>16</sup> Dr. Lipovsky’s findings based on similar orthopedic tests are completely different. Dr. Lipovsky states that “there has been severe trauma to the spine.” and will be subject to “frequent exacerbation of symptoms as a result of chronic dysfunction.”<sup>17</sup> Either the definition of “normal” is in dispute between the two doctors, or one of the doctors is being disingenuous in their examination. There is an issue of methodology or credibility when one tries to reconcile these two reports. The court has held that an issue of credibility between two medical experts constitutes an issue of fact to be determined by a trial.<sup>18</sup>

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<sup>15</sup> Examination by Anthony Spataro, M.D. Exhibit D.

<sup>16</sup> Examination by Anthony Spataro, M.D. Exhibit D.

<sup>17</sup> Examination by Eleanor Lipovsky, M.D. Exhibit C.

<sup>18</sup> *Barbuto v. Winthrop University Hospital*, 305 AD2d 623, [2<sup>nd</sup> Dept 2003] *see D’Andraia v. Pesce*, 2007 NY Slip Op 32179 [U] [2002]; *Feinberg v Feti*, 23 AD3d 517, [2<sup>nd</sup> Dept 2005]; *Dandrea v Hertz*, 23 AD2d 332, [2<sup>nd</sup> Dept 2005]; *Shields v Baktidy*, 11 AD3d 671, [2<sup>nd</sup> Dept].

### Conclusion

Summary judgement is a drastic remedy that effectively denies a plaintiff of his or her day in court. Summary judgment is reserved only for those cases where there are no issues in dispute. Here, there are conflicting reports between plaintiff's and defendant's medical experts. Furthermore, the presence of the disc herniation and it's effect is a triable issue. As there exists an issue of fact in the record suitable for a fact finder, summary judgment is denied in its entirety.

Accordingly, it is hereby:

**ORDERED**, that the defendants' , motion for summary judgment is denied;  
and it is further

**ORDERED**, that all parties shall return to DCM Part 3 Monday, June 28, 2010, for a Pre trial conference.

ENTER,

DATED: May 18, 2010

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Joseph J. Maltese  
Justice of the Supreme Court