

**Spencer v Wilson**

2010 NY Slip Op 32250(U)

August 19, 2010

Supreme Court, Richmond County

Docket Number: 103785/06

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 No.: 103785/06  
Motion No.: 003

MELANIE SPENCER,

*Plaintiff*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

MICHAEL B. WILSON,  
FRANCISCO A. GUZMAN, and  
FENG NI,

*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
Affirmation in Support	2, 3
Answering Affidavits	4
Replying Affidavits	5
Exhibits	Attached to Papers

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

The defendant, Feng Ni, moves this court for an order granting him summary judgment dismissing the plaintiff's complaint arguing that the plaintiff failed to sustain a serious injury as that term is defined by Insurance Law § 5102(d). The co-defendants failed to submit their own motion for summary judgment, but do submit an affirmation in support of Ni's motion. The defendant's motion is denied in its entirety.

**Facts**

This is an action for personal injuries sustained as a result of a motor vehicle accident. The plaintiff was a passenger in a motor vehicle owned by Michael B. Wilson and operated by

Francisco A. Guzman when it was struck by a motor vehicle owned and operated by Feng Ni. According to the plaintiff's complaint and verified bill of particulars she is claiming to have suffered a serious injury as that term is defined by Insurance Law § 5102(d). In particular she claims to have suffered a dismemberment, significant disfigurement, a fracture, permanent loss of use of a body organ, member, function or system, permanent consequential limitation of use of 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.

While the parties to this action failed to annex copies of the examinations before trial, the record indicates that Dr. David P. Jalowiec, a chiropractor, issued several "disability certificates" that indicated that the plaintiff should remain out of work until May 25, 2005. The defendants present the reports of Ravi Tikoo, M.D., a board certified neurologist; Dr. Andrew B. Weiss, a board certified orthopedist; and Dr. Audrey Eisenstadt, a radiologist.

Dr. Tikoo referenced the plaintiff's sixth month absence from work, and stated in his diagnosis that the plaintiff had the following diagnoses ". . . (1) history of cervical strain, (2) history of lumbosacral strain, and (3) history of soft tissue injuries." But, Dr. Tikoo did not relate his findings to the plaintiff's claim of nonpermanent injuries.

Dr. Weiss made no reference to the plaintiff's absence from work and made no findings with respect to the plaintiff's claims of nonpermanent injuries. But, Dr. Weiss did find that there was evidence that the plaintiff had suffered sprains of the cervical and thoracolumbosacral spine, as well as the shoulder. However, these sprains were resolved at the time of his examination some four years after the accident.

Dr. Eisenstadt's review of the MRI taken days after the plaintiff's accident concludes that the spinal straightening, bulging and desiccation were congenital and not causally connected to the accident.

### Discussion

A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations.<sup>1</sup> The burden, in other words, shifts to plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury.<sup>2</sup> The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient.<sup>3</sup> Additionally, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings which are based on a recent examination of the plaintiff.

Here, defendants are unable to meet their burden of establishing a *prima facie* case that plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d). While it was clearly indicated in the plaintiff's verified bill of particulars and noted by Dr. Tikoo, none of the medical reports submitted by the defendants address the plaintiff's claim of injuries of a non-permanent nature which prevented the plaintiff from performing substantially all of her the material acts which constitute her usual and customary daily activities for not less than ninety

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<sup>1</sup> See, *Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848.

<sup>2</sup> See, *Gaddy v. Eylar*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2<sup>nd</sup> Dept 2000].

<sup>3</sup> Id.

days during the one hundred eighty days immediately following the occurrence of the injury or impairment.<sup>4</sup>

Here, two of the three medical reports offered by the defendants found that the plaintiff suffered from sprains that had resolved over time and failed to relate their findings to the plaintiff's claims of nonpermanent injury. Only Dr. Eisenstadt stated that the spinal straightening, bulging and desiccation revealed in the plaintiff's MRI were congenital in nature and not causally related to the accident. But, Dr. Eisenstadt made no reference to the resolved sprains diagnosed by Drs. Tikoo and Weiss. As such, the defendant failed to establish his prima facie entitlement to judgment as a matter of law, since he failed to demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

### **Conclusion**

The defendant's motion papers failed to adequately address the plaintiff's claim set forth in her bill of particulars, that she sustained a medically-determined injury or impairment of a nonpermanent nature, which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days following the accident.

Accordingly, it is hereby:

ORDERED, that the defendant, Feng Ni's motion for summary judgment is denied in its entirety; and it is further

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<sup>4</sup> *Marmer v. If USA Exp., Inc.*, 73 AD3d 518, [2d Dept 2009]; *Ismail v. Tejada*, 65 AD3d 518, [2d Dept 2009]; *Joseph v. Hampton*, 48 AD3d 638, [2d Dept 2008].

ORDERED, that all parties shall return to DCM Part 3 on **Monday, September 20, 2010**  
**at 9:30 a.m.** for a Pre-Trial Conference.

ENTER,

DATED: August 19, 2010

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Joseph J. Maltese  
Justice of the Supreme Court