

**Manning v Garcia**

2010 NY Slip Op 32676(U)

September 20, 2010

Sup Ct, Suffolk County

Docket Number: 08-34055

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 43 - SUFFOLK COUNTY

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**PRESENT:**

Hon. ARTHUR G. PITTS  
Justice of the Supreme Court

MOTION DATE 4-16-10  
ADJ. DATE 7-15-10  
Mot. Seq. # 005 - MG  
# 006 - MG; CASEDISP

-----X  
AUDREY MANNING and ANDREW MANNING, :  
: :  
Plaintiffs, :  
: :  
- against - :  
: :  
KARLA GARCIA and JEANINE O'REILLY, :  
: :  
Defendants. :  
-----X

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Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers 12 - 20; Answering Affidavits and supporting papers 21 - 26; Replying Affidavits and supporting papers 27 - 28; Other       ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by the defendant Jeanine O'Reilly for summary judgment dismissing the complaint pursuant to CPLR 3212 (#005) is granted; and it is further,

**ORDERED** that the cross motion by the defendant Karla Garcia for dismissal of the complaint pursuant to CPLR 3211(a)(7) and CPLR 3212 (#006) is granted.

The instant action seeks to recover damages from the defendants for personal injuries sustained by the plaintiff Audrey Manning in a three-car rear-end motor vehicle accident which occurred on January 8, 2007 on westbound Route 27 at Exit 50A in Holbrook, New York. The plaintiff alleges that she sustained serious and permanent injuries as a result of the defendants' negligence in causing the accident. Specifically, the bill of particulars alleges that the plaintiff sustained serious and permanent injuries including C5-C6 concentric bulging of disc and annular tears; cervical sprain/strain; thoracic sprain/strain; lumbar sprain/strain; cephalgia; cervical radiculitis; bilateral radicular lumbar pain with

multiple trigger points requiring lumbar paravertebral trigger point injections; myospasm and myofascitis; myofascial pain syndrome; vertebral/subluxation complex syndrome of the cervical, thoracic and lumbar spines; lumbar myalgia; and right wrist sprain. It alleges that, following the accident, the plaintiff was confined to bed for one day, was confined to home for three days, missed three days of work, and was totally disabled for three days. It alleges that she is partially disabled to date. According to the bill of particulars, the plaintiff's injuries are serious within the meaning of the insurance law in 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment; a permanent and/or partial consequential limitation of the use of a body organ and/or member; and/or a permanent significant limitation of the use of a body function and/or system. A derivative cause of action is alleged on behalf of the plaintiff's husband, Andrew Manning.

Defendant O'Reilly now moves for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury as set forth in Insurance Law §5102(d). Defendant Karla Garcia cross-moves for dismissal of the complaint on the same grounds.

A "serious injury" is defined 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 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" (Insurance Law § 5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see, Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Charley v Goss*, 54 AD3d 569, 863 NYS2d 205 [2008]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (*see, Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see, Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once this showing has been made, however, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*see, Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992];

*Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2000]; *Pagano v Kingsbury*, *supra*; *see also*, *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

The defendants met their *prima facie* burdens of showing that the plaintiff did not sustain a serious injury with the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see*, *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *DiFilippo v Jones*, 22 AD3d 788, 802 NYS2d 756 [2005]; *Casella v N.Y. City Transit Auth.*, 14 AD3d 585, 787 NYS2d 883 [2005]; *Petropoulos v N.Y. City Transit Auth.*, 11 AD3d 522, 782 NYS2d 797 [2004]; *Hodges v Jones*, 238 AD2d 962, 661 NYS2d 159 [1997]; *Nigro v Penree*, 238 AD2d 908, 661 NYS2d 137 [1997]; *Pagano v Kingsbury*, *supra*). In support of her motion for summary judgment, defendant O'Reilly submits, *inter alia*, the affirmed report of Michael J. Katz, M.D., MRI reports prepared with respect to the plaintiff's cervical spine and lumbar spine, and the plaintiff's deposition testimony. In support of her cross motion for summary judgment, defendant Garcia submits, *inter alia*, the affirmed report of Richard A. Pearl, MD., the affirmed report of Michael J. Katz, M.D., the affirmed report of Audrey Eisenstadt, M.D., and the plaintiff's deposition testimony.

Dr. Katz avers that he performed an examination on the plaintiff on January 26, 2010. Upon examination of the plaintiff's cervical spine he found no tenderness and no paravertebral muscle spasm. He measured the range of the motion of the plaintiff's cervical spine, compared it to normal values, and found it to be normal in all respects. He performed Adson's test and obtained a negative result. With respect to the plaintiff's thoracolumbosacral spine, he measured her range of motion, compared it to normal values, and found it to be normal in all respects. He performed the straight leg raising test and obtained negative result. He performed Babinski and Patrick tests and obtained negative results. There was no spasm. With respect to examination of the plaintiff's right wrist, Dr. Katz measured the plaintiff's range of motion, compared it to normal values, and found it to be normal in all respects. He performed Tinel's test and obtained negative results. Dr. Katz concluded that the plaintiff had sustained a cervical strain, thoracolumbosacral strain, and right wrist contusion, and that such injuries had resolved. Dr. Katz found that the plaintiff currently shows no signs or symptoms of permanence relative to her musculoskeletal system or the subject accident. He found that she was not disabled and was capable of gainful employment and her pre-loss activities of daily living.

The MRI report, which was prepared for the plaintiff following the March 12, 2007 MRI of her lumbar spine, indicates that the L5-S1 level shows disc desiccation without evidence of focal disc herniation or central spinal stenosis. The MRI report, which was prepared for the plaintiff following the March 12, 2007 MRI of her cervical spine, indicates that the C5-C6 level shows concentric bulging of the disc and annular tears without evidence of focal disc herniation or central spinal stenosis.

Dr. Pearl performed a neurological examination on the plaintiff on January 25, 2010. He measured the range of motion of her cervical and lumbar spines, compared her range of motion to normal values, and found her range of motion to be normal in all respects. He performed the Straight Leg Raising test, Babinski sign, and Romberg test and obtained negative results. He performed Tinel's sign and obtained negative results at the wrists and elbows. He concluded that there were no objective neurological findings to indicate neurologic injuries.

Dr. Eisenstadt affirmed that she reviewed the MRIs performed on the plaintiff's cervical and lumbar spine. With respect to the lumbar spine MRI, her impression was that it depicted cervical straightening, dessication, and bulging involving the C5-6 intervertebral disc level. She averred that the drying out of disc material is a degenerative process, greater than three months in origin, without a causal relationship or association with the accident. She further notes that there is no osseous, ligamentous or intervertebral disc change, which would have been seen if there was an injury of traumatic nature associated with the subject accident. With respect to the cervical spine MRI, Dr. Eisenstadt found that it depicted dessication at the C5-6 level. She reiterated that drying out is a degenerative process that could not have occurred in less than three months and which must have predated the subject accident. Dr. Eisenstadt further noted that bulging was also seen at this level. Bulging is not a traumatic abnormality but, rather, is degeneratively induced and related to ligamentous laxity. She found that there were no osseous, ligamentous or intervertebral disc changes attributed to the accident. She noted that the straightening observed in the MRI was nonspecific and was most frequently related to the patient's position and comfort during the examination.

During her deposition, the plaintiff testified that immediately following the accident her lower back and shoulders were hurting. She was taken to the hospital by ambulance. At the hospital, she complained about pain to the back of her neck and lower back, and tingling in her fingers. She was released the same day with pain killers. The plaintiff was confined to her bed and home for three days following the accident and missed three days from work. On January 11, 2007, three days after the accident, the plaintiff went to a chiropractor, Dr. Campo, with complaints of pain in her shoulder, back, and right wrist. She treated with Dr. Campo's office, receiving chiropractic care and physical therapy, for a period over six months. Dr. Campo was the only doctor who treated her with respect to her injuries. In approximately July of 2007 she stopped treating with Dr. Campo with respect to the injuries she sustained in the subject accident. Her injuries were a little better. Thereafter, in September of 2008, she had another car accident during which she re-injured the same parts of her body injured in the subject car accident, with the exception of her wrists. Her neck, back, and shoulder complaints increased as a result of the subsequent accident. She recommenced treatment with Dr. Campo as a result of the injuries. She treated with Dr. Campo approximately three times a week for three months and two times a week for three months. She testified that three or four months after the subsequent accident she began feeling better.

In opposition to the defendants' prima facie showing, it was incumbent upon the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she did sustain a "serious" injury as a result of the instant accident, or that there are questions of fact as to whether she sustained such an injury as a result of the subject accident (*see, Toure v Avis Rent A Car Sys., supra* at 350; *Charley v Goss, supra*). The plaintiff failed to meet this burden.

In opposition, the plaintiff submitted, *inter alia*, the affidavit of Michael Campo, D.C., the affirmation of David Randall Dynoff, M.D., the affirmed reports of Allen Rothpearl, M.D., and the plaintiff's affidavit. Contrary to the plaintiff's contentions, the evidence submitted was insufficient to establish a triable issue of fact as to whether she sustained a serious injury to her cervical spine or lumbar spine as a result of the subject accident. The expert affidavit and affirmations submitted by the plaintiff were insufficient to raise a triable issue of fact as they failed to address the fact that the plaintiff injured her neck and back in a subsequent accident in September of 2008 (*see, Donadio v Doukhnych, 55 AD3d*

Manning v Garcia  
 Index No. 08-34055  
 Page No. 5


532, 867 NYS2d 92 [2008]; *Berkowitz v Taylor*, 47 AD3d 740, 851 NYS2d 597 [2008]). The failure to address that accident, and the resulting injuries, rendered speculative their conclusions that the range of motion limitations noted in the plaintiff's cervical and lumbar regions after this date were caused by the subject accident (see, *Vickers v Francis*, 63 AD3d 1150, 883 NYS2d 77 [2009]; *Maffei v Santiago*, 63 AD3d 1011, 886 NYS2d 29 [2009]; *Jules v Calderon*, 62 AD3d 958, 880 NYS2d 131 [2009]; *Donadio v Doukhnych*, supra; *Mooney v Edwards*, 12 AD3d 424, 784 NYS2d 599 [2004] cf., *Iovino v Scholl*, 69 AD3d 799, 893 NYS2d 230 [2010]). Further rendering the expert affidavit and affirmations inadequate was their failure to address the findings of the defendant's expert which attributed the condition of plaintiff's cervical and lumbar spine to degenerative processes and chronic conditions (see, *Nicholson v Allen*, 62 AD3d 766, 879 NYS2d 164 [2009]; *Ciordia v Luchian*, 54 AD3d 708, 864 NYS2d 74 [2008]). In addition, Dr. Dynoff's affirmed report was insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury to her cervical spine or lumbar spine as it was not based on a recent examination of the plaintiff (see, *Ciancio v Nolan*, 65 AD3d 1273, 885 NYS2d 767 [2009]; *Diaz v Lopresti*, 57 AD3d 832, 870 NYS2d 408 [2008]).

The affidavit of the plaintiff was insufficient to raise a triable issue of fact (see, *Villante v Miterko*, 73 AD3d 757, 901 NYS2d 311 [2010]; *Maffei v Santiago*, supra; *Luna v Mann*, 58 AD3d 699, 872 NYS2d 467 [2009]).

Lastly, the plaintiff failed to submit any competent medical evidence to support a claim that she was unable to perform substantially all of their daily activities for not less than 90 of the 180 days immediately following the accident as a result of the subject accident (see, *Collado v Abouzeid*, 68 AD3d 912, 890 NYS2d 326 [2009]; *Vickers v Francis*, supra; *Ciordia v Luchian*, supra; *Amato v Fast Repair Inc.*, 42 AD3d 477, 840 NYS2d 394 [2007]).

Based on the foregoing, the motion by defendant O'Reilly(#005) and the cross motion by defendant Garcia (#006) for summary judgment dismissing the plaintiff's complaint are granted.

Dated: September 20, 2010

  
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 J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION