

**Gerli v Baggee**

2010 NY Slip Op 32733(U)

September 13, 2010

Supreme Court, Suffolk County

Docket Number: 08-41169

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. RALPH T. GAZZILLO  
Justice of the Supreme Court

MOTION DATE 3-5-10  
ADJ. DATE 5-13-10  
Mot. Seq. # 002 - MD

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NANCY GERLI,	:	ROSENBERG & GLUCK, L.L.P.	
	:	Attorney for Plaintiff	
Plaintiff,	:	1176 Portion Road	
	:	Holtsville, New York 11742	
- against -	:		
	:	BREEN & CLANCY	
CINDY M. BAGGEE,	:	Attorney for Defendant	
	:	1355 Motor Parkway, Suite 2	
Defendant.	:	Hauppauge, New York 11749	
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Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers 13 - 19; Replying Affidavits and supporting papers 20 - 21; Other \_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by the defendant for summary judgment dismissing the complaint is denied.

The instant action arises from a rear-end motor vehicle accident which occurred on September 4, 2007, on County Road 97 approximately 100 feet south of County Road 16 in the Town of Farmingdale, New York. The accident purportedly occurred when a vehicle, owned and operated by the defendant, collided with a vehicle, being operated by the plaintiff, and pushed the plaintiff's vehicle into a third vehicle, the operator of which is not a party to this action. The complaint alleges that the plaintiff sustained serious and permanent injuries as a result of the defendant's negligence in causing the accident. Specifically, the bill of particulars alleges that she sustained serious and permanent injuries including disc bulges at C3-4, C4-5 and C5-6 with spondylosis; disc bulge at C6-7; cervical radiculopathy; cervical sprain; numbness in the right arm; reversal of the normal cervical lordosis; decreased range of motion of the cervical spine; pain in the neck; and right carpal tunnel syndrome. It alleges that the plaintiff was not confined to bed or home following the accident and was incapacitated from her employment for approximately four days. The bill of particulars alleges the injuries sustained by the plaintiff were serious within the meaning of the Insurance Law in that she sustained a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of

a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent 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 immediately following the occurrence.

The defendant 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).

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*).

In support of his motion for summary judgment, the defendant submitted, *inter alia*, the pleadings, the verified bill of particulars, the police accident report, the plaintiff’s deposition testimony, MRIs of the plaintiff’s cervical spine performed on September 28, 2007, November 16, 2007, and January 16, 2008, a medical report prepared by the plaintiff’s treating physician on October 22, 2007, the neurologic independent medical examination report of Steven J. Schwartz, M.D., a letter prepared by Steven J. Schwartz, M.D., the independent psychiatric examination report of Mitchell Erlich, M.D., and the independent medical evaluation report of Mitchell Bernhang, M.D.

At the outset, the letter submitted by Dr. Schwartz, in which he reviewed the plaintiff’s medical records, has not been considered by the Court as it was not submitted in admissible form (*see, Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Budhram v Ogunmoyin*, 53 AD3d 640, 863 NYS2d 224 [2008]).

The report prepared with respect to the MRI performed on the plaintiff's cervical spine on September 28, 2007 relays the impression that the MRI depicted, *inter alia*, C3-4 through C5-6 disc bulges with spondylosis; C6-7 disc bulge with mild segmental stenosis; mild left C4-5 through C6-7 neural foraminal narrowing secondary to osteoarthritis. The report prepared with respect to an MRI of the plaintiff's cervical spine performed on November 16, 2007 indicates a "stable appearance of the cervical spine;" mild to moderate C5-6 greater than C4-5 and mild C3-4 and C6-7 segmental stenosis. The report prepared with respect to an MRI of the plaintiff's cervical spine performed on January 16, 2008 indicates multilevel degenerative changes; reversal of the cervical lordosis that has improved since the previous examination and may be due to spasm or positioning; and multiple levels of Grade I spondylolisthesis in varying positions.

The medical report prepared by the plaintiff's treating physician on October 22, 2007 notes, *inter alia*, that upon examination of the plaintiff, paraspinal spasm and tenderness were present and motion was painful during the axial rotation. He concludes that she suffered a cervical sprain and degenerative disc disease. He listed her impairment status as "Partial mild - temp," referred her for diagnostic testing, and recommended that she return for a follow up appointment in six weeks.

In his affirmation, Stephen J. Schwartz, M.D., averred that he performed a neurologic independent medical examination on the plaintiff on April 14, 2008. Dr. Schwartz concluded that he found no objective evidence of any neurological deficits, no neurological disability or functional impairment from a neurological point of view, and that the plaintiff could participate in all activities of daily living without restriction. However, upon performing range of motion testing on the plaintiff's cervical spine and shoulders Dr. Schwartz found limitations. In this regard, upon performing range of motion testing on the plaintiff's head and neck he found her left lateral rotation was 70 degrees as compared to normal of 80 degrees, that her right lateral rotation was 60 degrees as compared to normal of 80 degrees, that her left lateral flexion was 40 degrees as compared to normal of 45 degrees, and that her right lateral flexion was 30 degrees as compared to normal of 45 degrees. He also reported finding limitations in the plaintiff's shoulder movement. Dr. Schwartz further noted that the plaintiff reported pain in the cervicothoracic junction upon flexing her neck. Notably, and significantly, Dr. Schwartz concluded that there was a causal relationship between the accident and the plaintiff's upper thoracic and cervical complaints.

In his affirmation, Mitchell Ehrlich, M.D., averred that he examined the plaintiff on July 14, 2008. He concluded that there was currently no disability and that the plaintiff could resume the activities of daily living. However, upon measuring the range of motion of the plaintiff's neck he found limitations. Although he stated there was full range of motion in the plaintiff's shoulders, wrists, elbows, hands and back, he did not provide measurements or compare such measurements to normal. Moreover, Dr. Ehrlich noted that the plaintiff noted tenderness to palpation on both sides extending into the trapezius and medial border of the scapula. He further found "slight impingement" with respect to the plaintiff's right shoulder. He concluded that she sustained a cervical sprain and thoracic sprain which had resolved. Notably, Dr. Ehrlich also concluded that the complained of injuries did have a causal relationship to the subject accident.

In his affirmation, Mitchell Bernhang, M.D., averred that he examined the plaintiff on December 7, 2009 and found no functional disability. Upon measuring the range of motion of the plaintiff's cervical spine he found she had extension of 35 degrees as compared to normal of 55 degrees, flexion of 25 degrees as compared to normal of 55 degrees, right and left lateral extension of 35 and 30 degrees as compared to normal of 45 degrees, and right and left rotation of 45 degrees as compared to normal of 80 degrees. Upon measuring the range of motion of the plaintiff's shoulders, he also found limitations. Dr. Bernhang diagnosed the plaintiff with "double crush syndrome" and the traumatic aggravation of preexisting spondylitic changes of the cervical spine. He concluded "the extensive degenerative changes seen in the cervical spine could not have developed in the time from the x-rays from the caption accident and must have preexisted."

During her deposition, the plaintiff testified that following the accident she went to the hospital emergency room and made complaints about her neck, right knee, and wrists. She was prescribed a muscle relaxer and anti-inflammatory medicine and was released. The following day she saw her general practitioner with complaints of pain in her neck, shoulders, right arm, and right knee. She was referred to an orthopedist, whom she visited within a week or two complaining about pain in her neck, shoulder blades, upper back, right arm and right knee. A few weeks later she began visiting another orthopedist, Dr. Rubin. She complained about the pain in her neck, upper back, right knee, and arm and stated that the pain had gotten worse and her arm would go numb. Dr. Rubin prescribed another anti-inflammatory medication and kept her on the pain killer. For a period of five or six months, she saw Dr. Rubin twice a week. Although she was no longer treating with Dr. Rubin, she saw him in order to get her prescriptions. At the time of the deposition, the plaintiff was still taking muscle relaxers to relieve the pain from her injuries. The plaintiff also treated with a neurologist, Dr. Romano, for the injuries she sustained in the accident. The plaintiff testified that she did not injure her neck, upper back, right arm, wrist, or right knee in a prior accident. Prior to the accident, she was not under the treatment of any doctors and did not take any medication. She further testified that she was not involved in a subsequent accident where she was reinjured. The plaintiff testified that, at the time of the deposition, her neck and upper back still bothered her and that her wrist and right arm still went numb. She testified that there were no activities that she was completely prohibited from as a result of the accident, but that she was limited in her ability to work out, carry laundry, pick up heavy items, and play the guitar. She also did not sleep well. The plaintiff testified that she missed some days from work following the accident, but did not lose any income as a result of these absences.

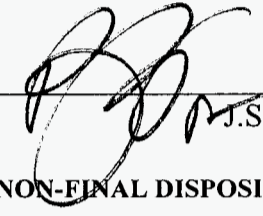
Contrary to the defendant's contention, this evidence fails to demonstrate her *prima facie* entitlement to summary judgment on the grounds that the plaintiff did not sustain a "serious" injury as a result of the subject accident (*see, Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Loadholt v N.Y. City Transit Auth.*, 12 AD3d 352, 783 NYS2d 660 [2004]). To the contrary, the evidence presented raises triable issues of fact as to whether the plaintiff sustained permanent and significant limitations to her cervical spine as a result of the injuries she sustained in the subject accident. Although the defendant posits that any limitations suffered by the plaintiff are long-standing, degenerative, pre-existing conditions, several of the defendant's own experts find significant limitations in the plaintiff's spine and conclude that the plaintiff's injuries were causally related to the subject accident (*see, Kim v Orourke*, 70 AD3d 995, 893 NYS2d 892 [2010]; *Landman v Sarcona*, 63 AD3d 690, 880 NYS2d 168 [2009]; *Powell v Prego*, 59

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AD3d 417, 872 NYS2d 207 [2009]; compare, *Tai Ho Kang v Young Sun Cho*, 74 AD3d 1328, 904 NYS2d 743 [2010]; see also, *Gaccione v Krebs*, 53 AD3d 524, 863 NYS2d 444 [2008]). Thus, under the facts of this case, there remain triable issues of fact as to whether the plaintiff's injuries are the result of the subject accident.

Inasmuch as the evidence submitted by the defendant failed to establish his *prima facie* entitlement to judgment as a matter of law, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (see, *Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2005]; *McDowall v Abreu*, 11 AD3d 590, 782 NYS2d 866 [2004]; *Coscia v 938 Trading Corp.*, 283 AD2d 538, 725 NYS2d 349 [2001]). Accordingly, the defendant's motion for summary judgment dismissing the complaint is denied.

Dated: 9/13/10

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION