

**Gerena v Burrell**

2010 NY Slip Op 33012(U)

October 5, 2010

Sup Ct, Suffolk County

Docket Number: 08-33917

Judge: Ralph T. Gazzillo

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

**PRESENT:**

Hon. RALPH T. GAZZILLO  
Justice of the Supreme Court

MOTION DATE 5-11-10  
ADJ. DATE 7-22-10  
Mot. Seq. # 001 - MD

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KAREN GERENA,	:		:	JACOBY & JACOBY
	:		:	Attorney for Plaintiff
	:	Plaintiff,	:	1737 North Ocean Avenue
	:		:	Medford, New York 11763
	:	- against -	:	
	:		:	KELLY, RODE & KELLY, LLP
DAKOTA BURRELL,	:		:	Attorney for Defendant
	:		:	330 Old Country Road, Suite 305
	:	Defendant.	:	Mineola, New York 11501
-----X	:		:	

Upon the following papers numbered 1 to 19 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 12 - 17; Replying Affidavits and supporting papers 18 - 19; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

The instant action arises from a rear-end motor vehicle accident which occurred on August 30, 2007 on southbound Route 110 at its intersection with Dawson Street in Huntington, New York. The accident purportedly occurred when a vehicle owned and operated by the defendant collided with the plaintiff's vehicle. The plaintiff alleges that she 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 C5-C6 broad central disc herniation with impingement on the anterior aspect of the cervical cord; T2-T3 left sided disc herniation which indents on the anterior aspect of the thecal sac; left-sided cervical radiculopathy at the level of C6; cervical sprain/strain; thoracic sprain/strain; cephalgia; reaction arcual kyphosis in the cervical spine; myospasm and myofascitis; myofascial pain syndrome; vertebral/subluxation complex syndrome of the cervical and thoracic spine; tinnitus; and dysphagia. It further alleges that these injuries aggravated, activated, exacerbated and/or precipitated an underlying, *inter alia*, degenerative condition, which was asymptomatic prior to the accident. It alleges that the plaintiff was not confined to bed or home as a

result of the subject accident and did not lose any time from work. Lastly, it alleges that the injuries sustained were serious within the meaning of the insurance law in that they constituted 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; a significant limitation of use of a body function and/or system; and/or a permanent significant limitation of the use of a body function and/or system, with accompanying pain, which is expected to be permanent.

The defendant now moves for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury within the meaning of 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 *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 Eyer*, 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 defendant met her *prima facie* burden 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 New York City Transit Auth.*, 14 AD3d 585, 787 NYS2d 883 [2005]; *Petropoulos v New York 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, the defendant submitted, *inter alia*, the independent orthopedic evaluation report of Isaac Cohen, M.D., the affirmation of Maria Audrey DeJesus, M.D., the affirmation of Stephen W. Lastig, M.D., and the plaintiff's deposition testimony. In his affirmed independent orthopedic evaluation report, Dr. Cohen avers that he examined the plaintiff on April 9, 2009. Upon examination of her cervical spine, he found it to be nontender with no evidence of muscle spasm. He measured the range of motion, compared it to the normal ranges, and found the range of motion of the plaintiff's cervical spine to be within normal limits. He performed the Compression test, the Spurling test, and the Percussion test, and obtained negative results. Dr. Cohen measured the range of motion of the plaintiff's thoracolumbar spine, compared it to normal range of motion, and found it to be normal in all respects. He performed the Straight leg raise test and obtained negative results bilaterally. Dr. Cohen concluded that the plaintiff was status post motor vehicle accident and had sustained a cervical strain and thoracolumbar strain, which had resolved. He found that his examination of the plaintiff was completely unremarkable with no showing of disability or permanency related to the subject accident. In summary, Dr. Cohen opined that the plaintiff had sustained soft tissue injuries to the neck and thoracolumbar spine as a result of the accident and had satisfactory resolution of her symptoms with the passage of time. He found no evidence of sequelae.

In her affirmed independent neurologic examination report, Dr. DeJesus avers that she examined the plaintiff on April 21, 2009. Dr. DeJesus measured the range of motion of the plaintiff's cervical spine, compared it to normal range of motion, and found it to be normal in all respects with no complaints of pain and no spasm. Likewise, she measured the range of motion of the plaintiff's thoracolumbar spine, compared it to normal values, and found it to be normal in all respects with complaints of minimal pain and no spasms. She found there was mild thoracic kyphosis, which was preexisting. Dr. DeJesus diagnosed the plaintiff as post cervical and thoracic spine strain/sprain, which she found had resolved. She asserted that the plaintiff's neurological examination was normal. It was her opinion, with a reasonable degree of medical certainty, that the plaintiff had recovered from any injury to the cervical and thoracic spine that she may have sustained. She found that the plaintiff was not disabled from a neurologic point of view, was currently working, and was able to perform all activities of daily living.

Dr. Lastig affirmed that he reviewed the MRI studies performed on the plaintiff's cervical spine on October 20, 2005, May 30, 2007, and October 5, 2007. With respect to the MRI performed on October 20, 2005, which predated the subject accident, Dr. Lastig found multilevel degenerative disc disease; no focal disc herniations were identified; posterior annular bulging at C5-C6, which is slightly more pronounced to the left of midline, impressing upon the ventral subarachnoid space; bilateral foraminal narrowing at C5-C6 due to osteophyte formation; and posterior annular bulging at T2-T3, which was more pronounced to the left of midline, impressing upon the ventral thecal sac. With respect to the MRI performed on May 30, 2007, which also predated the subject accident, Dr. Lastig found multilevel degenerative disc disease; no focal herniations were identified; posterior annular bulging at C5-C6, which is slightly more pronounced to the left of midline, impressing upon the ventral

subarachnoid space; bilateral foraminal narrowing at C5-C6 due to osteophyte formation; and posterior annular bulging at T2-T3, which is more pronounced to the left of midline, impressing upon the ventral thecal sac. Dr. Lastig concluded that, compared with the prior October 20, 2005 MRI study, there had been no significant interval change as of the May 30, 2007 MRI study. With respect to the MRI study performed on October 5, 2007, Dr. Lastig found multilevel degenerative disc disease; no focal disc herniations were identified; posterior annular bulging at C5-C6, which was slightly more pronounced to the left of midline, impressing on the ventral subarachnoid space; bilateral foraminal narrowing at C5-C6 due to osteophyte formation; and annular bulging at T2-T3, which is more pronounced to the left of midline, impressing upon the ventral thecal sac. Dr. Lastig concluded that compared with the prior MRI study performed on May 30, 2007, there had been no significant interval change. In conclusion, Dr. Lastig asserted that, in his opinion, there were no findings on the October 5, 2007 MRI study which were causally related to the subject accident. Rather, the study demonstrated no significant interval change compared with the prior studies. Therefore, in his opinion, the described disc pathology at the C5-C6 and T2-T3 levels represented a pre-existing condition, which was unrelated to the subject accident.

The plaintiff testified that she went to her primary care doctor the day of the accident and complained about feeling dizzy and nauseous. She, thereafter, began treating with a chiropractor, Dr. Campo. She treated with Dr. Campo three times a week for approximately one year. She stopped treating with Dr. Campo because she was denied benefits. Following the termination of her chiropractic treatment, she treated with a physical therapist two times a week for six months. She visited a neurologist with complaints of numbness in her arm and was referred to a pain management doctor. The plaintiff admitted that she was involved in a prior accident in June of 1995 that resulted in a lawsuit. Her neck was injured in the prior accident, but her back was not. The plaintiff further admitted that she was involved in an accident subsequent to the subject accident, in October of 2008. She testified that this accident was minor. The plaintiff testified that she returned to work as a substitute teacher when school commenced in the Fall of 2007. As a result of the accident, she can no longer exercise and she does not sleep well.

In opposition to the defendant's *prima facie* showing, the plaintiff submitted sufficient evidence to demonstrate the existence of a triable issue of fact as to whether she sustained a "serious" injury to her cervical spine as a result of the subject accident (*see, Toure v Avis Rent A Car Sys.*, *supra* at 350; *Charley v Goss*, *supra*). The evidence submitted by the plaintiff included, *inter alia*, the affidavit of Michael Campo, D.C., the affidavit of Robert Melo, D.C., the affirmation of Allen Rothpearl, M.D., and her own affidavit. The plaintiff's treating chiropractor, Dr. Campo, opined in his affidavit, based on his contemporaneous and most recent examinations of the plaintiff, as well as on his review of the plaintiff's magnetic resonance imaging reports, that the plaintiff's cervical injuries and observed range of motion limitations were permanent and causally related to the subject accident (*see, Harris v Boudart*, 70 AD3d 643, 893 NYS2d 631 [2010]; *Nigro v Kovac*, 45 AD3d 547, 845 NYS2d 404 [2007]). In this regard, Dr. Campo expressly noted and addressed that the plaintiff was involved in a prior car accident in 1995, where she sustained an injury to her neck and was also involved in a minor subsequent motor vehicle accident. Having reviewed the plaintiff's prior MRIs, two taken prior to the subject accident and one taken shortly after the subject accident, he concluded that the MRI taken shortly after the subject accident indicated that the plaintiff had sustained herniations at C5-6 and T2-3. Dr. Campo opined that these herniations were caused by, and that the plaintiff's underlying condition at these levels was

