

**Blumstein v Abrego-Nunez**

2011 NY Slip Op 30495(U)

February 15, 2011

Supreme Court, Suffolk County

Docket Number: 06-27051

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 12-15-10  
Mot. Seq. # 001 - MD  
#003 - XMD

-----X  
SHARON M. BLUMSTEIN and  
LORRAINE NOONAN,

STEVEN D. DOLLINGER & ASSOCIATES  
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Melville, New York 11747

Plaintiffs,

KELLY, RODE, & KELLY  
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- against -

RICHARD T. LAU & ASSOCIATES  
Attorney for Defendant Genaro Gamez  
PO Box 9040  
Jericho, New York 10753

HECTOR ABREGO-NUNEZ and  
GENARO GAMEZ,  
Defendants

MCCABE COLLINS MCGEOUGH & FOWLER  
Attorney for Sharon M. Blumstein on the counterclaim  
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Carle Place, New York 11514

Upon the following papers numbered 1 to 15 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-12; Notice of Cross-Motion and supporting papers (003) 13-15; Answering Affidavits and supporting papers 11-16; Replying Affidavits and supporting papers 17-18; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (001) by the plaintiff on the counterclaim, Sharon M. Blumstein, pursuant to CPLR §3212 for an order granting summary judgment against the defendants on the counterclaim as asserted against her and dismissing that part of the complaint asserted by the plaintiff Lorraine Noonan because the plaintiff Lorraine Noonan did not sustain a serious injury within the meaning of Insurance Law §5102(d) is denied; and it is further

**ORDERED** that this cross-motion (003) by the defendant Hector Abrego-Nunez pursuant to CPLR §3212 and Insurance Law §5102(d) for summary judgment dismissing that part of the complaint asserted by the plaintiff Lorraine Noonan because the plaintiff Lorraine Noonan did not sustain a serious injury within the meaning of Insurance Law §5102(d) is denied.

This is a personal injury action to recover damages allegedly sustained by the plaintiffs Sharon M. Blumstein (hereinafter Blumstein) and Lorraine Noonan (hereinafter Noonan) when they were involved in a motor vehicle accident on July 3, 2004 on Route 111 in the Town of Islip, New York. The plaintiff

*JK*

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Noonan was a passenger in the vehicle operated by the plaintiff Blumstein when the vehicle came into contact with the vehicle operated by the defendant Hector Abrego-Nunez (hereinafter Abrego-Nunez) and owned by the defendant Genaro Gamez.

The defendant Abrego-Nunez, and the plaintiff on the counterclaim, Blumstein, now seek summary judgment dismissing that part of the complaint asserted by the plaintiff Noonan because the injuries claimed by the plaintiff Noonan fail to meet the threshold imposed by Insurance Law §5102(d). Blumstein, as plaintiff on the counterclaim, seeks dismissal of the counterclaim asserted against her because the defendant Abrego-Nunez was the sole and proximate cause of the accident.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (*Joseph P. Day Realty Corp. v Aeraxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [1979], *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980].) and must assemble, lay bare and reveal her proof in order to establish that the assertions in her pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Pursuant to Insurance Law § 5102(d), “ ‘[s]erious injury’ means 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 medical 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.”

The term “significant,” as it appears in Insurance Law §5102, has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to state a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to “present evidence in competent form, showing that plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1<sup>st</sup> Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1<sup>st</sup> Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2<sup>nd</sup> Dept 1992]). The proof must be viewed in a

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light most favorable to the non-moving party. (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [3<sup>rd</sup> Dept 1990]).

In order to recover under the “permanent loss of use” category, the plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott, supra*).

The Court determines in the first instance whether a prima facie showing of “serious injury” has been established (see, *Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2<sup>nd</sup> Dept 1991]). The initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein, supra*). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]).

In support of motion (001), Blumstein, the plaintiff on the counterclaim, has submitted an attorney’s affirmation; copies of the complaint; defendants’ answers with counterclaims; reply to counterclaim; plaintiff’s bill of particulars; an uncertified copy of the police accident MV-104 report; unsigned copies of the transcripts of the examinations before trial of Blumstein and Noonan, both dated February 3, 2010; and the sworn report of Michael J. Katz, M.D. (hereinafter Katz), dated June 8, 2010, concerning his independent orthopedic examination of the plaintiff Noonan, and the sworn report of Richard A. Pearl, M.D. (hereinafter Pearl), dated March 16, 2010, concerning his independent neurological examination of the plaintiff Noonan.

Initially, the Court notes that the unsworn police accident MV-104 report constitutes hearsay and is inadmissible (see, *Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; *Hegy v Collier*, 262 AD2d 606, 692 NYS2d 463 [2<sup>nd</sup> Dept 1999]). The unsigned depositions transcripts of Blumstein and Noonan are not in admissible form and are not considered on this motion for summary judgment, nor are they accompanied by an affidavit pursuant to CPLR §3116 (see, *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2<sup>nd</sup> Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2<sup>nd</sup> Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2<sup>nd</sup> Dept 2006]).

Noonan has claimed in her bill of particulars that as a result of this accident she sustained insult to the muscular skeletal system of the cervical and lumbar spine; insult to the neuroperipheral system of the cervical and lumbar spine; headaches; radiculitis throughout the entire spine; straightening of the cervical curvature compatible with reflex muscle spasm; posterior disc herniations at C3-4 through C6-7 with ventral CSF impression; right maxillary sinus cyst or polyp; left maxillary sinusitic change; posterior disc herniation at L5-S1 extending to narrow the foramina and impress the ventral thecal sac with impingement on the exiting left L5 root and impression on the exiting right L5 root; posterior disc herniation at L4-5 with flattening of the ventral thecal sac; and posterior disc bulge at L3-4.

Based upon a review of the admissible evidence, Blumstein, the plaintiff on the counterclaim, has failed to establish prima facie entitlement to summary judgment dismissing the complaint because Noonan did not sustain a serious injury within the meaning of Insurance Law §5102(d).

Katz states in his report the records and reports he reviewed, including x-ray reports of the cervical and thoracic and lumbar spine, dated July 24, 2004, and the MRI reports of the cervical and lumbar spine of Stand-Up MRI of Islandia, dated September 18, 2004. Noonan has claimed multiple disc herniations attributable to the accident herein, and while disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (*Jankowsky v Smith*, 294 AD2d 540; 742 NYS2d 876 [2nd Dept 2002]), Katz does not comment on the results of the films he reviewed and does not rule out whether these claimed herniations of the cervical and lumbar spine are causally related to the accident herein.

Pearl has stated his findings based upon his examination of Noonan's cervical spine, but has omitted the testing for right and left lateral flexion. Pearl and Katz have stated differing degrees for the normal range of motion for the lumbar spine flexion, extension and lateral bending, leaving it to this court to speculate as to which normal range of motion values are correct. Using Pearl's findings for lumbar lateral flexion, extension and lateral bending would reveal significant deficits when comparing those findings with the values stated by Katz. Pearl does not rule out that the cervical and lumbar herniations and compression of the thecal sac and nerve roots were not proximately caused by the accident and has recommended a board certified neuroradiological review of the films he reviewed. The Court has not received the recommended review.

The examining orthopedic surgeon and neurologist reports are deficient inasmuch as the standard of comparison for the normal ranges of motion employed by each leave it to this Court to speculate whose range of motion values are correct. Pearl and Katz fail to address the claimed disc herniations, and thecal sac and nerve root compression and thus have failed to address all Noonan's claimed injuries (see, *Bentivegna v Stein*, 42 AD3d 555, 841 NYS2d 316 [2nd Dept 2007]; *Staubitz v Yaser*, 41 AD3d 698, 839 NYS2d 113 [2nd Dept 2007]; *Wade v Allied Bldg. Products Corp.*, 41 AD3d 466, 837 NYS2d 302 [2nd Dept 2007]; *Tchjevaskaia v Chase*, 15 AD3d 389, 790 NYS2d 175 [2nd Dept 2005]). Based upon the foregoing, Blumstein, the plaintiff on the counterclaim, has failed to demonstrate entitlement to summary judgment dismissing Noonan's complaint.

Blumstein's examining physicians did not examine Noonan during the statutory period of 180 days following the accident, thus rendering the examining physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether Noonan was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (*Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]; see, *Uddin v Cooper, et al*, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; *Toussaint v Claudio*, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]).

Blumstein, the plaintiff on the counterclaim, has failed to satisfy the burden of establishing prima facie that Noonan did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d) (see, *Agathe v Tun Chen Wang*, 98 NY2d 345, 746 NYS2d 865 [2006]); see also, *Walters v Papanastassiou*, 31 AD3d 439, 819 NYS2d 48 [2nd Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (see, *Yong Deok Lee v Singh*, 56

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AD3d 662, 867 NYS2d 339 [2<sup>nd</sup> Dept 2008]); **Krayn v Torella**, 833 NYS2d 406, NY Slip Op 03885 [2<sup>nd</sup> Dept 2007]; **Walker v Village of Ossining**, 18 AD3d 867, 796 NYS2d 658 [2<sup>nd</sup> Dept 2005]) as the burden has not shifted.

Accordingly, that part of motion (001) by Blumstein, the plaintiff on the counterclaim, for summary judgment dismissing that part of the complaint asserted by Noonan on the issue that she did not meet serious injury threshold imposed by Insurance Law §5102(d) is denied.

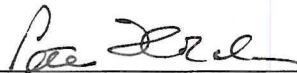
In support of cross-motion (003) Abrego-Nunez also seeks dismissal of Noonan's complaint because she did not sustain a serious injury within the meaning of Insurance Law §5102(d). However, in support of the cross-motion, the defendant Abrego-Nunez has submitted only an attorney's affirmation and incorporates by reference the affirmation in support of the cross-motion by counsel for Blumstein, the plaintiff on the counterclaim, and adopts counsel's same arguments. CPLR §3212 does not provide for incorporating by reference other affirmations and exhibits submitted by other parties. Even if this motion (003) did contain those same exhibits, because Blumstein, on the counterclaim, failed to show entitlement to summary judgment and dismissal of that part of Noonan's complaint, this cross-motion by the defendant Abrego-Nunez logically fails as well.

Accordingly, cross-motion (003) by the defendant Abrego-Nunez is denied.

As to that part of motion (001) wherein Blumstein, the plaintiff on the counterclaim, seeks dismissal of the counterclaim because the defendant Abrego-Nunez's negligence was the sole proximate cause of the accident, the supporting depositions are not in admissible form to be considered on a motion for summary judgment and, therefore, Blumstein, the plaintiff on the counterclaim, has failed to establish prima facie entitlement to summary judgment dismissing the counterclaim.

Accordingly, that part of motion (001) which seeks summary judgment on the issue of liability is denied.

Dated: FEB 15 2011

  
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J.S.C.

FINAL DISPOSITION  NON-FINAL DISPOSITION