

**Trinidad v Anlag**

2011 NY Slip Op 31536(U)

June 6, 2011

Sup Ct, Suffolk County

Docket Number: 08-30773

Judge: Denise F. Molia

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**COPY**  
SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 39 - SUFFOLK COUNTY

**PRESENT:**

Hon. DENISE F. MOLIA  
Justice of the Supreme Court

MOTION DATE 11-5-10  
ADJ. DATE 3-18-11  
Mot. Seq. # 002 - MG; CASEDISP

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LUIS TRINIDAD,	:	JOHN L. JULIANO, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	39 Doyle Court
	:	E. Northport, New York 11731
- against -	:	
	:	MARTYN, TOHER & MARTYN, ESQS.
AILEEN BUM ANLAG, ADRIAN BUM ANLAG,	:	Attorney for Defendants
RICHARD A. MUGAVERO, GRACE	:	330 Old Country Road., Suite 211
AAYANNA JT and DEVELOPMENTAL	:	Mineola, New York 11501
DISABILITIES, INC.,	:	
	:	
Defendants.	:	
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Upon the following papers numbered 1 to 13 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers     ; Replying Affidavits and supporting papers     ; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendants Aileen Bum Anlag and Adrian Bum Anlag seeking summary judgment dismissing plaintiff's complaint is granted.

Plaintiff Luis Trinidad commenced this action against defendants Aileen Bum Anlag, Adrian Bum Anlag, Richard Mugavero,<sup>1</sup> Grace Aayanna JT and Developmental Disabilities, Inc.<sup>2</sup> to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Deer Park Road and Jericho Turnpike in the Town of Huntington on June 9, 2008. The

<sup>1</sup> The action as against defendant Richard Mugavero was discontinued by stipulation of the parties, dated September 24, 2008.

<sup>2</sup> The action as against defendants Grace Aayanna JT and Developmental Disabilities, Inc. was discontinued by stipulation of the parties, dated September 30, 2008.

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accident allegedly occurred when a vehicle operated by defendant Aileen Bum Anlag and owned by defendant Adrian Bum Anlag attempted to make a left turn onto Jericho Turnpike and hit the vehicle operated by defendant Aayanna JT and owned by defendant Developmental Disabilities, Inc. At the time of the accident, plaintiff was in the course of his employment and was riding as a passenger in the vehicle operated by defendant Aayanna JT. Prior to the accident, defendant Aayanna JT was traveling north on Deer Park Road and defendant Aileen Bum Anlag was traveling south on Deer Park Road, and the traffic signal was green for traffic traveling straight on Deer Park Road. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as a result of the accident, including laceration to the scalp/forehead; post traumatic headaches; cervical and lumbar strains/sprains; cervical and lumbar radiculopathy; lower extremities contusions and post traumatic cervical and lumbar myofascial pain and dysfunction. Plaintiff alleges that he was confined to his bed and home for approximately one month following the accident. Plaintiff further alleges that he has been incapacitated from his employment as a community instructor with Developmental Disabilities, Inc. from June 9, 2008 to the present.

The Bum Anlag defendants now move for summary judgment on the ground that plaintiff did not sustain an injury within the meaning of Insurance Law § 5102(d). In support of the motion, the Bum Anlag defendants submit a copy of the pleadings, plaintiff's deposition transcript, and the affirmed medical reports Dr. Isaac Cohen and Dr. Mark Zuckerman. Dr. Cohen, at defendant's request, conducted an independent orthopedic examination of plaintiff on April 22, 2010. Dr. Zuckerman, at defendant's request, conducted an independent neurological examination of plaintiff on June 28, 2010.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 1984]).

Insurance Law § 5102 (d) defines a "serious injury" 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 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."

In order to recover under the "limitations of use" categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815

NYS2d 140 [2d Dept 2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). 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 may also suffice (see *Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Dufel v Green*, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). Further, evidence of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (see *Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]).

A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant’s own witnesses, “those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff’s deposition testimony and medical reports and records prepared by the plaintiff’s own physicians (see *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for “serious injury” under New York’s No-Fault Insurance Law (see *Dufel v Green*, *supra*; *Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; *Pagano v Kingsbury*, *supra*). However, if a defendant does not establish a prima facie case that the plaintiff’s injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff’s opposition papers (see *Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; see generally, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Dr. Cohen states, in his medical report, in pertinent part, that an examination of plaintiff’s cervical spine revealed that plaintiff exhibits “flexion and extension of 55 degrees (normal is 45-65 degrees), left and right lateral bending in the 45-degree range (normal up to 46 +-6.5), and rotational motion to the right and left in the 80-degree range (normal up to 78 +-15).” Dr. Cohen’s report states that an examination of plaintiff’s lumbosacral spine reveals that he exhibits “flexion to 80 degrees (normal up to 66 +-15), extension to 30 degrees (normal up to 33 +-5.5), and right and left lateral bending to 25 degrees (normal up to 29 +-6.6). Left and right rotational motion is possible to 30 degrees (normal up to 30).” The report states that plaintiff’s cervical and lumbosacral curvatures are normal, and that his paravertebral muscles are supple and non-tender upon palpation. Dr. Cohen’s report states that plaintiff walks with a normal heel/toe gait, that there is no muscle atrophy or motor weakness, and that the straight leg sign test is negative to 90 degrees (90 degrees is normal). Dr. Cohen’s report further states that plaintiff’s range of motion in his left knee is 135 degrees (normal up to 130 to 150 degrees). Dr. Cohen opines that the soft tissue contusions to plaintiff’s left knee, shoulder, and right ankle, and the

sprains to his cervical and lumbar spine sustained as a result of the accident have resolved, that there is no evidence of any disability related to the accident, and that plaintiff is capable of performing his daily living activities without restrictions.

Similarly, Dr. Zuckerman, states, in his medical report, in relevant part, that an examination of plaintiff's lumbar spine revealed that plaintiff exhibits flexion of 75 degrees (normal is 80 degrees), left and right flexion of 40 degrees (normal is 45 degrees), right and left lateral flexion of 20 degrees (normal is 30 degrees), and extension to 30 degrees (normal is 30 degrees). The report states that there is no lumbar tenderness or spasm upon palpation of the lumbar spine, and that plaintiff's gait, balance and coordination are normal. Dr. Zuckerman's report states that an examination of plaintiff's motor strength revealed no focal weakness in his upper or lower extremities; that pronation and supination are intact; and that there is no atrophy or abnormal movements in his upper or lower extremities. Dr. Zuckerman opines that the cervical and lumbar spine sprains that plaintiff sustained as a result of the accident have resolved, and that there is no evidence of either cervical or lumbosacral radiculopathy or central nervous system dysfunction. He concludes that plaintiff does not have any neurological disability, and that he is capable of gainful employment.

Here, the Bum Anlag defendants' submissions establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, *supra*; *Singh v City of New York*, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]). Initially, the Court notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102(d) (see *Rabolt v Park*, 50 AD3d 995, 858 NYS2d 995 [2d Dept 2008]; *Washington v Cross*, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; *Maenza v Letkajornsook*, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Dr. Cohen found that plaintiff had full range of motion in his cervical and lumbar spine and his left knee. Although Dr. Cohen failed to provide the normal degrees of movement in the spine, leaving it to the court to speculate as to whether plaintiff's range of motion findings were normal, or that any limitations were mild, minor, or slight so as to be considered insignificant within the meaning of the No-Fault statute (see *McLaughlin v Rizzo*, 38 AD3d 856, 832 NYS2d 666 [2007]; *Powell v Alade*, 31 AD3d 523, 818 NYS2d 600 [2006]; *Aronov v Leybovich*, 3 AD3d 511, 770 NYS2d 741 [2004]), Dr. Zuckerman's report states that plaintiff had full range of motion in his lumbar spine and his shoulders, and concludes that plaintiff had no ongoing impairment resulting from the subject accident and is capable of his normal daily living activities (see *Dunbar v Prahovo Taxi, Inc.*, \_\_ AD3d \_\_, 2011 NY Slip Op 03994 [2d Dept 2011]; *Torain v Bah*, 78 AD3d 588, 913 NYS2d 27 [1st Dept 2010]; *Mohamed v Siffrein*, 19 AD3d 561, 797 NYS2d 532 [2d Dept 2005]). Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the "limitation of use" categories of serious injury (see *Colon v Tavares*, 60 AD3d 419, 873 NYS2d 637 [1st Dept 2009]; *Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664, 852 NYS2d 287 [2d Dept 2008]) and the "90/180 days" category under Insurance Law § 5102(d) (see *Jack v Acapulco Car Serv., Inc.*, 63 AD3d 1526, 897 NYS2d 648 [4th Dept 2010]; *Bleszcz v Hiscock*, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; *Nguyen v Abdel-Hamed*, 61 AD3d 429, 877 NYS2d 26 [1st Dept 2009]; *Kuchero v Tabachnikov*, 54 AD3d 729, 864 NYS2d 459 [2d Dept 2008]).

Therefore, the burden shifted to plaintiff to raise a triable issue of fact (see *Gaddy v Eyler*,

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*supra*). Plaintiff failed to submit any evidence to demonstrate that he sustained a serious injury within the meaning of Insurance Law § 5102(d) (*see Knoll v Seafood Express*, 5 NY3d 817, 803 NYS2d 25 [2005]). In fact, plaintiff failed to submit any papers in opposition to the motion. Accordingly, defendant's motion for summary judgment is granted.

Dated: 6-6-11

Hon. Denise F. Molla  
J.S.C.

X FINAL DISPOSITION    \_\_\_\_\_ NON-FINAL DISPOSITION