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| <b>Caracciolo v Elmont Fire Dist.</b>  |
| 2011 NY Slip Op 31756(U)   |
| June 20, 2011  |
| Sup Ct, Nassau County  |
| Docket Number: 21049/09  |
| Judge: Antonio I. Brandveen  |
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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

NINA CARACCIOLO and VINCENZO  
CARACCIOLO,

TRIAL / IAS PART 30  
NASSAU COUNTY

Plaintiffs,

Index No. 21049/09

- against -

Motion Sequence No. 001

ELMONT FIRE DISTRICT, THE ELMONT  
VOLUNTEER FIRE DEPARTMENT and JAMES  
R. PRINCE,

Defendants.

The following papers having been read on this motion:

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|--|----------|
| Notice of Motion, Affidavits, & Exhibits ..... | <u>1</u> |
| Answering Affidavits .....                     | <u>2</u> |
| Replying Affidavits .....                      | <u>3</u> |
| Briefs: Plaintiff's / Petitioner's .....       | _____    |
| Defendant's / Respondent's .....               | _____    |

The defendants move for summary judgment pursuant to CPLR 3212, and to dismiss the verified complaint for the plaintiffs' failure to comply with Insurance Law § 5102 (d) and 5104. The defense contends the plaintiff Nina Caracciolo failed to sustain a serious injury, and cannot maintain a cause of action for personal injuries arising from an October 13, 2008 motor vehicle accident.

The plaintiffs oppose this motion. The plaintiffs contend the defense fail to show a prima facie entitlement to summary judgment, hence it is unnecessary to determine

whether the plaintiffs' submission is sufficient to raise a triable issue of fact. The plaintiffs aver, notwithstanding their assertion, the plaintiffs submit they have established the injured plaintiff sustained a serious injury. The plaintiffs maintain there are triable issues of fact which require a trial.

The defendants reply the defense medical expert submission shows the injured plaintiff's allegations are insufficient to meet the statutory serious injury threshold, and reiterate the defense medical expert submission demonstrate the injured plaintiff failed to sustain a serious injury. The defense point to the injured plaintiff July 8, 2009 deposition testimony, and maintain shows she fails to raise a triable issue of fact regarding the alleged injuries preventing her from performing customary activities during at least 90 out of the first 180 days immediately following the October 13, 2008 motor vehicle accident. The defense asserts the plaintiffs fail to explain the injured plaintiff's 15 month gap in treatment from her September 21, 2009 visit to the neurologist and the injured plaintiff's December 20, 2010 visit with him which coincides with the filing of the instant summary judgment motion.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. The defense expert examined Nina Caracciolo on September 14, 2010, after she testified at a July 8, 2010 deposition. The certification court order for this underlying personal injury action was done on October 28, 2010, and the plaintiffs served a note of issue on November 12, 2010. The defense counsel caused

the instant motion returnable for January 20, 2011 to be served upon the plaintiffs' attorney on December 10, 2010, and this motion was filed with the Nassau County Clerk on December 15, 2010. The plaintiffs' expert examined Nina Caracciolo on December 20, 2010, some 15 months after last examining the patient. This motion was adjourned on the return date to February 3, 2011, and the plaintiffs' expert again examined Nina Caracciolo on January 26, 2011.

The Second Department holds:

It is well established that in threshold serious injury cases, restrictions in range of motion typically are numerically quantified (*see Friscia v. Mak Auto, Inc.*, 59 A.D.3d 492, 493, 873 N.Y.S.2d 197; *Fiorillo v. Arriaza*, 52 A.D.3d 465, 466, 859 N.Y.S.2d 699; *Duke v. Saurelis*, 41 A.D.3d 770, 771, 840 N.Y.S.2d 88; *Desamour v. New York City Tr. Auth.*, 8 A.D.3d 326, 327, 777 N.Y.S.2d 706), compared to the norms (*see Fiorillo v. Arriaza*, 52 A.D.3d at 466, 859 N.Y.S.2d 699; *Malave v. Basikov*, 45 A.D.3d 539, 845 N.Y.S.2d 415; *Nociforo v. Penna*, 42 A.D.3d 514, 515, 840 N.Y.S.2d 396; *McNulty v. Buglino*, 40 A.D.3d 591, 836 N.Y.S.2d 198), and based upon identified objective tests (*see Sapienza v. Ruggiero*, 57 A.D.3d 643, 644, 869 N.Y.S.2d 192; *Gastaldi v. Chen*, 56 A.D.3d 420, 421, 866 N.Y.S.2d 750; *Young Hwan Park v. Orellana*, 49 A.D.3d 721, 854 N.Y.S.2d 447; *Murray v. Hartford*, 23 A.D.3d 629, 804 N.Y.S.2d 416; *Nozine v. Sav-On Car Rentals*, 15 A.D.3d 555, 556, 790 N.Y.S.2d 204). These requirements are applied to defendants seeking summary judgment, as well as to plaintiffs opposing summary judgment. The plaintiffs are also required to demonstrate restricted range of motion based on findings both contemporaneous to the accident (*see Stevens v. Sampson*, 72 A.D.3d 793, 898 N.Y.S.2d 657; *Jack v. Acapulco Car Serv., Inc.*, 72 A.D.3d 646, 897 N.Y.S.2d 648; *Sierra v. Gonzalez First Limo*, 71 A.D.3d 864, 895 N.Y.S.2d 863; *Little v. Locoh*, 71 A.D.3d 837, 897 N.Y.S.2d 183) and upon recent findings (*see Sham v. B & P Chimney Cleaning & Repair Co. Inc.*, 71 A.D.3d 978, 900 N.Y.S.2d 72; *Carrillo v. DiPaola*, 56 A.D.3d 712, 869 N.Y.S.2d 135; *Krauer v. Hines*, 55 A.D.3d 881, 882, 866 N.Y.S.2d 340) *Perl v. Meher*, 74 A.D.3d 930, 633-634, 902 N.Y.S.2d 632 [2<sup>nd</sup> Dept, 2010].

The defense proffers the September 14, 2010 affirmation of Dorothy Scarpinato, M.D., who performed an orthopedic examination on Nina Caracciolo on September 14, 2010. Dr. Scarpinato did range of motion tests for Nina Caracciolo's cervical spine, thoracolumbar spine and left hip. Dr. Scarpinato provided numerically quantified results in the doctor's sworn statement, and opined the range of motion testing results were within normal limits and negative. Dr. Scarpinato indicated Nina Caracciolo told her that she missed three weeks of work from the October 13, 2008 motor vehicle accident; she was currently working; and no longer received treatment from her doctor nor physical therapy, but took pain medication. Dr. Scarpinato also reviewed the medical records of Nina Caracciolo, including but not limited to MRI studies of her cervical spine, lumbosacral spine and brain. Dr. Scarpinato opined Nina Caracciolo's cervical strain and left hip strain were resolved. Dr. Scarpinato opined, while there was causal relationship between the October 13, 2008 motor vehicle accident and Nina Caracciolo's initial complaints and there is a mild causally related orthopedic disability noted, Nina Caracciolo is currently working, and may continue to work, as well as perform pre-accident status level of living activities with heavy lifting.

This Court determines the defendants established a *prima facie* entitlement to judgment as a matter of law by showing Nina Caracciolo did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the October 13, 2008 motor vehicle accident (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865,

774 N.E.2d 1197 [2002]). Dr. Scarpinato provided a detailed explanation, including specific observations that any restrictions in motion were resolved and there were no objective orthopedic findings which would indicate any disability, impairment, or limitation resulting from the October 13, 2008 motor vehicle accident (*see Perl v. Meher*, 74 A.D.3d, *supra*).

In opposition, the plaintiffs proffer the March 25, 2011 affirmation of Kerin B. Hausknecht, M.D., a board certified neurologist with other papers and sworn statements. Dr. Hausknecht stated the 59 year old Nina Caracciolo was first seen at the doctor's Lynbrook, New York office on March 23, 2009, and told the doctor about the circumstances of the October 13, 2008 motor vehicle accident, and its results upon her. Dr. Hausknecht reviewed the medical records of Nina Caracciolo, and knew the patient saw Dr. Magier, an internist who referred the patient on November 6, 2008 for a CT scan of her head which study was negative for intracranial injury or bleeding. Dr. Hausknecht knew the patient was evaluated by Dr. Miller, an orthopedist who enrolled her into physical therapy at the Island Musculoskeletal Center and Dr. Miller referred the patient for an MRI of her neck and back which revealed multiple herniated discs in the cervical spine. Dr. Hausknecht stated Nina Caracciolo completed a few months of physical therapy by attending twice weekly; she felt no pain in her neck, but her headaches were not improving much, so Dr. Miller recommended a neurological examination. Dr. Hausknecht performed that examination on March 23, 2009, which revealed pain and

weakness of neck extension, and weakness of the left shoulder abduction and elevation when compared to the right shoulder. Dr. Hausknecht found limitations in the left shoulder, left lateral forearm and left upper arm, the cervical paraspinal muscles with some spasm around C2, C3 and C4. Dr. Hausknecht did range of motion tests for Nina Caracciolo's cervical spine and thoracolumbar spine. Dr. Hausknecht provided numerically quantified results in the doctor's sworn statement, and opined the range of motion testing results were Nina Caracciolo sustained closed head injury resulting in a mild concussion with postconcussive syndrome, post-traumatic headaches, significant traumatic cervical spine derangement with disc herniation, superimposed on some mild normal degenerative changes which are part of the aging process, traumatic thoracolumbar spine derangement with intervertebral disc displacement, persistent myofascial pain and spasms of the spine. Dr. Hausknecht opines the injuries were causally related to the October 13, 2008 motor vehicle accident.

Dr. Hausknecht saw Nina Caracciolo on April 6, 2009 for a neurological reevaluation, and she complained about daily headaches. Dr. Hausknecht again performed the range of motion testing results with similar findings to the March 23, 2009 examination. Dr. Hausknecht recommended Nina Caracciolo continue physical therapy and renewed the patient's medication. Dr. Hausknecht again saw Nina Caracciolo on June 8, 2009, July 27, 2009 and September 21, 2009, and performed the range of motion testing results with similar findings to the previous examinations. Dr. Hausknecht

[\* 7]

recommended Nina Caracciolo continue physical therapy and renewed the patient's medication.

The next time Dr. Hausknecht examined Nina Caracciolo was December 20, 2010, some 15 months later, when the doctor performed the range of motion testing results with similar findings to the previous examinations with some worsening results. Dr. Hausknecht last saw Nina Caracciolo on January 26, 2011, and performed the range of motion testing results with similar findings to the previous examinations with some worsening results. Dr. Hausknecht opined Nina Caracciolo sustained a permanent medically determined 90/180 category disability, and a permanent significant limitation of use of a body function or system which significantly impairs her activities of daily living.

Since, the defense established a *prima facie* entitlement to judgment, the burden shifted to the plaintiffs to raise triable issues of fact. This Court determines the plaintiffs have not met that burden.

The Second Department holds: "it is well settled that even medical opinions based upon subjective complaints of pain or headaches are insufficient to establish "serious injury" (see *Barrett v Howland*, 202 AD2d 383 [1994]; *LeBrun v Joyner*, 195 AD2d 502 [1993]; *Coughlan v Donnelly*, 172 AD2d 480 [1991])" (*Kivlan v. Acevedo*, 17 A.D.3d 321, 322, 792 N.Y.S.2d 573 2<sup>nd</sup> Dept, 2005]). This Court determines the plaintiff's complaints of pain or headaches are insufficient, as a matter of law, to establish serious injury under the statute.

The Court notes the injured plaintiff, by her admission and the sworn statement of the plaintiffs' expert, took leave from work for a few weeks between the October 13, 2008 motor vehicle accident and April 11, 2009, the span of 180 days immediately following the October 13, 2008 motor vehicle accident. The Second Department holds:

Contrary to the plaintiffs' contentions, the appellants also established prima facie that the injured plaintiff did not sustain a serious injury under the 90/180 category of Insurance Law § 5102(d). By submitting the injured plaintiff's own deposition testimony in support of the motion, the appellants established that, at most, she missed one week of work as a result of the subject accident. In opposition, the plaintiffs failed to raise a triable issue of fact as to this category of Insurance Law § 5102(d) as well.

Consequently, the Supreme Court should have granted the appellants' motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them on the ground that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see Gaddy v. Eycler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990, 591 N.E.2d 1176)

*Lewars v. Transit Facility Management Corp.*, 923 N.Y.S.2d 701, 2011 N.Y. Slip Op. 04427 [2<sup>nd</sup> Dept, 2011].

The Second Department previously stated:

in light of the plaintiff's admission that he missed only two weeks of work and then returned to work full time, he failed to raise a triable issue of fact as to whether his alleged injuries prevented him from performing substantially all of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see*, Insurance Law § 5102 [d]; *Lalli v Tamasi*, 266 AD2d 266)

*Hernandez v. Cerda*, 271 A.D.2d 569, 570, 707 N.Y.S.2d 332 [2<sup>nd</sup> Dept, 2000].

This Court determines the plaintiffs fail to raise a material issue of fact as to regarding injuries to Nina Caracciolo preventing her from performing substantially all of the material acts constituting her customary daily activities during at least 90 out of the first 180 days immediately following the October 13, 2008 motor vehicle accident.

The plaintiffs fail to explain the 15 month gap in treatment by Nina Caracciolo. Neither the plaintiffs, Dr. Hausknecht nor any other doctor retained by the plaintiffs adequately explained the essential cessation of the Nina Caracciolo's treatment for that 15months gap (*see Pommells v Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 [2005]; *see also Shaji v. City of New Rochelle*, 66 A.D.3d 760, 886 N.Y.S.2d 764 [2dn Dept, 2009]).

Accordingly, the motion is granted.

So ordered.

Dated: **June 20, 2011**

ENTER:



J. S. C.

**ENTERED**

**JUN 22 2011**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

FINAL DISPOSITION