

**Simpson v Dubon**

2011 NY Slip Op 33624(U)

May 25, 2011

Supreme Court, Suffolk County

Docket Number: 27311-05

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

**PRESENT:**  
**Hon. PETER FOX COHALAN**

-----x  
DOREEN C. SIMPSON,

-Plaintiff,

-against-

OSCAR DUBON & LEONEL D. GUTIERREZ,

-Defendants.  
-----x

CALENDAR DATE: February 23, 2011  
MNEMONIC: Mot D.

PLTF'S/PET'S ATTORNEY:  
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DEFT'S/RESP ATTORNEY:  
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Upon the following papers numbered 1 to 19 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 14-15 \_\_\_\_\_; Replying  
Affidavits and supporting papers 16-18 \_\_\_\_\_; Other 19 \_\_\_\_\_; and after hearing counsel in support of and  
opposed to the motion it is,

**ORDERED** that this motion by the defendants, Oscar Dubon and Leonel D. Gutierrez,  
to restore this action to active status is granted and upon reconsideration of the motion for  
summary judgment and dismissal of the plaintiff's action pursuant to CPLR §3212 and  
Insurance Law §5102 and §5104 because the plaintiff, Doreen C. Simpson, has not  
sustained a "serious physical injury" as such term is defined in Insurance Law §5102(d) is  
hereby denied.

Doreen C. Simpson (hereinafter plaintiff) instituted this action for personal injuries  
sustained by her in a motor vehicle accident occurring on December 5, 2002 on Route 110 at  
or near its intersection with Depot Road in Huntington, Suffolk County on Long Island, New  
York. The plaintiff was operating a United States Postal Truck delivering mail when her motor  
vehicle was struck in its rear by a motor vehicle owned by defendant, Leonel D. Gutierrez and  
operated by co-defendant, Oscar Dubon (hereinafter defendants). The action has been  
stayed as a result of the plaintiff's military service and subsequent deployment overseas and  
the defendants now seek to vacate the stay as the plaintiff is no longer in military service.  
There is no opposition to the defendants' application and as the plaintiff's military service has  
concluded, the stay is lifted and the case is now considered active.

The defendants now move for summary judgment pursuant to CPLR §3212 dismissing  
the plaintiff's complaint because she has not sustained a "serious physical injury" as that term  
is defined in Insurance Law §5102(d). The plaintiff opposes the motion arguing that the  
defendants have failed to establish entitlement to summary disposition as a matter of law  
and, in any event, the plaintiff's submissions in opposition to the defendants' motion raise  
sufficient factual issues requiring a trial on the issue of serious physical injury.

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For the reasons stated herein, the defendants' motion for summary judgment and dismissal of the plaintiff's complaint is denied in its entirety.

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

Here, in the case at bar, the plaintiff argues that as a result of the accident she sustained “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.” In this regard, the defendants argue that the plaintiff was injured on December 5, 2002 and was placed on light duty at her job with the United States Postal Service until March 1, 2003 or only 86 days and outside the threshold of the 90 day during the subsequent 180 days. A review of the report of the US Department of Labor establishes that an examination of Simpson by Michael P. Carroll, MD on January 3, 2003 documented soft tissue injuries and recommended “decrease work, rest” and light duty until March 1, 2003. However, even there the recommendation of light duty was prefaced with the comment under “Date employee is able to resume regular work” as March 1, 2003 *possibly* (italics added). The defendants have not established that the plaintiff returned to work on a regular schedule after March 1, 2003. In her examination before trial, the plaintiff contested the March 1, 2003 date and stated that she did not return to a regular work schedule until the spring of 2003. The defendants have not established that the plaintiff returned to a regular work schedule on March 1, 2003. Therefore they have not met their prima facie burden of establishing a lack of a serious physical injury which impaired the plaintiff for less than 90 days out of 180 days post accident.


The defendants’ examining physicians did not examine the plaintiff 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 the plaintiff 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 [3<sup>rd</sup> Dept 2001]; see, *Uddin v Cooper, et al*, 32 AD3d 270, 820 NYS2d 44 [1<sup>st</sup> Dept 2006]; *Toussaint v Claudio*, 23 AD3d 268, 803 NYS2d 564 [1<sup>st</sup> Dept 2005]). Here, the defendants have failed to make a prima facie case showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 (d). See, *Sajid v. Murzin*, 57 AD3d 593, 860 NYS2d 559 (2<sup>nd</sup> Dept. 2008); *Nembhard v. Delatorre*, 16 AD3d 390, 791 NYS2d 144 (2<sup>nd</sup> Dept. 2005).

The Court’s function on a motion for summary judgment is to consider all the facts in a light most favorable to the party opposing the motion, *Thomas v. Drake*, 145 AD2d 687, 535 NYS2d 229 (3<sup>rd</sup> Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the Court should not attempt to determine questions of credibility. *S.J. Capelin Assoc. v. Globe*, 34 NY2d 338, 357 NYS2d 478 (1974). Questions of credibility between experts on behalf of the plaintiff and the defendants are for the jury and not the Court to determine. On the question of serious injury, after considering the failure of defendants’ experts to establish the defendant’s entitlement to summary disposition [*Salina v. Joseph*, 26 AD3d 487, 809 NYS2d 464 (2<sup>nd</sup> Dept. 2006)] and considering the medical evidence offered by both sides, a question of fact is raised when weighing the differing medical authorities opinions on the issue of the 90 day threshold and when the plaintiff went off light duty and resumed a regular work schedule. The Court views the discrepancies between the medical reports and affidavits submitted on behalf of the parties to involve issues of credibility for resolution by the jury. *Moreno v. Chemtob*, 271 AD2d 585, 706 NYS2d 150 (2<sup>nd</sup> Dept. 2000); *Vasilatos v. Chatertonon*, 135 AD2d 1073, 523 NYS2d 211 (3<sup>rd</sup> Dept. 1987).

Accordingly, the defendants' motion for summary judgment and dismissal of the plaintiff's cause of action pursuant to CPLR §3212 because the plaintiff, has failed to reach the threshold of a serious physical injury as defined in Insurance Law §5104 is denied in its entirety

The foregoing constitutes the decision of the Court.

Dated: May 25, 2011

  
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J.S.C.