

**Gutierrez-Delacruz v DeDomenico**

2012 NY Slip Op 32054(U)

July 12, 2012

Supreme Court, Suffolk County

Docket Number: 09-45208

Judge: W. Gerard Asher

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**COPY**

SHORT FORM ORDER

INDEX No. 09-45208

CAL. No. 11-01333MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 32 - SUFFOLK COUNTY

**PRESENT:**

Hon. W. GERARD ASHER  
Justice of the Supreme Court

MOTION DATE 11-22-11  
ADJ. DATE 1-10-12  
Mot. Seq. # 002 - MD

<p>JUAN GUTIERREZ-DELACRUZ, JAIME RAMOS and VICTORIA ELIZABETH RAMOS,  Plaintiffs,  - against -  FRANCESCO DEDOMENICO,  Defendant.</p>	X	<p>LAW OFFICES OF PETER R. GARCIA, P.C. Attorney for Plaintiffs 38 Cedar Street Stony Brook, New York 11780-1736  RICHARD T. LAU &amp; ASSOCIATES Attorney for Defendant 300 Jericho Quadrangle, P.O. Box 9040 Jericho, New York 11753</p>
--	---	--

Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-11; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers 12-25; Replying Affidavits and supporting papers 26-28; Other \_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is

**ORDERED** that this motion (002) by the defendant, Francesco DeDomenico, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiffs, Jamie Ramos and Victoria Elizabeth Ramos, have failed to meet the serious injury threshold imposed by Insurance Law §5102(d), is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiffs when they were involved in a motor vehicle accident on August 14, 2008, on Pine Hollow Road at or near its intersection with Oyster Bay Road in the Hamlet of Oyster Bay, New York. Plaintiff Jaime Ramos was the operator of a vehicle in which plaintiff Juan Gutierrez-Delacruz was a passenger, when they were struck in the rear by defendant's vehicle. The plaintiff, Victoria Elizabeth Ramos was joined as a party to this action by order dated November 4, 2010 (Sweeney, J.), permitting her to add a derivative claim. That order also granted summary judgment on the issue liability to the plaintiffs, and against the defendant Francesco DeDomenico. By way of his answer, Francesco DeDomenico asserted a counterclaim against Jaime Ramos for apportionment of liability and contribution, however, apportionment of liability has been rendered academic pursuant to the granting of summary judgment against the defendant.

The defendant now seeks summary judgment dismissing the complaint as asserted by the plaintiff, Jaime Ramos, on the basis that he did not sustain a serious injury as defined by Insurance Law 5102 (d),

and further seeks dismissal of the attendant derivative cause of action asserted by his spouse, Victoria Elizabeth Ramos.

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 offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

The term “significant,” as it appears in the statute, 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 set forth 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” (*Rodriquez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st 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 [1st 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 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the “permanent loss of use” category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 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*).

In support of this motion, the defendant has submitted, inter alia, an attorney’s affirmation; copies of the pleadings and plaintiff’s bill of particulars; a signed and certified transcript of the transcript of the examination before trial of Jaime Ramos dated January 11, 2011; and the sworn reports of Isaac Cohen M.D. dated July 26, 2010 concerning his independent orthopedic examination of the plaintiff on February 17, 2011, and Stephen Lastig, M.D. concerning his independent review of plaintiff Ramos’ MRI studies of his cervical and lumbar spine, each dated September 14, 2008.

By way of his verified bill of particulars, Jaime Ramos alleges to have sustained the following injuries as a result of this motor vehicle accident: anterior wedging at L1; right posteriolateral herniation with right foraminal encroachment at L5-S1; right S1 nerve root irritation as confirmed by NCV December 17, 2008; right S1 radiculopathy confirmed by EMG December 17, 2008; SLR positive bilaterally indicating sciatic lesion; right lumbar trunk rotation impairment; left lumbar lateral flexion impairment; sciatic nerve lesion; intervertebral disc syndrome; hypoesthesia of bilateral S2 dermatome; muscle spasm; back pain with stiffness radiating to the lower extremities; weakness of the lower extremities; loss of lumbar range of motion; loss of normal cervical lordosis; spinal stenosis; bilateral distal median sensory neuropathy; right upper trap-elevation impairment; right sternocleidomastoid RTN impairment; right lateral bending impairment; nerve root encroachment, hypoesthesia of the bilateral C5 dermatome; cervical sprain; muscle spasms; neck pain associated with stiffness radiating to the upper extremities with weakness; loss of cervical range of motion; post concussive headaches; and chest pain.

Based upon review of the defendant’s evidentiary proof, it is determined that the defendant has not established prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d).

The defendant has not submitted to this court the reports and medical records which the examining physician reviewed and upon which he bases his opinion in part. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and the expert testimony is limited to facts in evidence (*see Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O’Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]). The MRI report submitted in defendant’s reply is not considered (*In the Matter of the Application of Veronica Montgomery-Costa et al v The City of New York et al*, 2009 NY Slip Op 29461, 2009 Misc Lexis 3116 [Supreme Court of New York, New York County 2009]). Defendant’s medical experts have not submitted copies of their curriculum vitae to qualify as experts, other than each stating that he is licensed to practice medicine in New York.

Although the plaintiff claimed in his bill of particulars that he sustained lumbar radiculopathy and cervical nerve encroachment as a result of this accident, the defendant has not submitted a report from a neurologist who examined the plaintiff ruling out the claimed neurological injuries (*see Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]).

Additionally, Dr. Cohen has set forth his range of motion findings upon examination of the plaintiff's lumbar and cervical spine, and has compared those findings to what he states are the normal ranges of motion. However, he has set forth the normal range of motion values within a range or spectrum rather than a specific number. When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown (*see Sainnoval v Sallick*, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; *Lee v M & M Auto Coach, Ltd.*, *supra*; *Hypolite v International Logistics Management, Inc.*, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; *Somers v Macpherson*, 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; *Rodriguez v Schickler*, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]), thus raising factual issues.

In his review of the plaintiff's MRI studies, Dr. Lastig has not provided a copy of the original report of the films to enable this court to compare the interpretations by the plaintiff's radiologist with his interpretation. Although Dr. Lastig opines that the lumbar spine MRI revealed a broad-based right lateral disc protrusion which mildly encroaches on the subarticular recess at L-S1, and that there is degenerative disc disease with disc dessication which is most likely unrelated to this accident, he does not set forth the basis for this opinion, except in an unsupported, conclusory statement. He does not rule out that the disc herniation and disc desiccation was proximately caused by the subject accident. 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 [2d Dept 2002]).

It is further noted that the defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's physician's affidavit 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 his 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 [3d Dept 2001]; *see, Uddin v Cooper*, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; *Toussaint v Claudio*, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the expert offers no opinion with regard to this category of serious injury (*see Delayhaye v Caledonia Limo & Car Service, Inc.*, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]).

These factual issues raised in defendants' moving papers preclude summary judgment. The defendants failed to satisfy their burden of establishing, prima facie, that the plaintiff 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 [2d Dept 2006]), or a basis for dismissal of the derivative claim.

Inasmuch as the moving parties have failed to establish their 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 §

Gutierrez-Delacruz v DeDomenico  
Index No. 09-45208  
Page No. 5

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 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); *Krayn v Torella*, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; *Walker v Village of Ossining*, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]) as the burden has not shifted.

Accordingly, motion (002) for summary judgment dismissing the complaint is denied.

Dated: July 12, 2012

W. Gerard Aske  
J.S.C.

           FINAL DISPOSITION   X   NON-FINAL DISPOSITION