

**Velez v Polynice**

2012 NY Slip Op 32706(U)

October 22, 2012

Supreme Court, Queens County

Docket Number: 24719/10

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

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SABRINA VELEZ, Index No.: 24719/2010  
Plaintiff, Motion Date: 08/23/12  
- against - Motion No.: 56  
Motion Seq.: 2  
JEAN H. POLYNICE,

Defendant.

- - - - - x

The following papers numbered 1 to 17 were read on this motion by defendant, JEAN H. POLYNICE, for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits- Memo.....	1 - 7
Affirmation in Opposition-Affidavits-Exhibits.....	8 - 13
Reply Affirmation.....	14 - 17

This is a personal injury action in which the plaintiff, SABRINA VELEZ, seeks to recover damages for injuries she sustained as a result of a motor vehicle/pedestrian accident that occurred on April 8, 2010, at the intersection of Sutphin Boulevard and 116<sup>th</sup> Avenue in Queens County, New York. Plaintiff alleges that she was crossing 116<sup>th</sup> Street when she was struck by the motor vehicle owned and operated by defendant Jean H. Polynice. She states that she was lawfully crossing the intersection in a crosswalk, with the right of way, when the defendant's vehicle negligently made a left turn and struck her. Plaintiff allegedly sustained physical injuries as a result of the accident.

In her verified Bill of Particulars, the plaintiff states that as a result of the accident she sustained, inter alia, a medial meniscal tear and a lateral meniscal tear of the left knee requiring arthroscopic surgery; surgical scarring of the left knee; and a bulging disc at C5-6. In her bill of particulars she states that she was incapacitated from her position as an account representative/bookkeeper for two weeks as a result of the accident.

The plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a significant disfigurement; a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Gene W. Wiggins, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the emergency room records from Jamaica Hospital; the unaffirmed medical report of plaintiff's treating physician, Dr. David L. Hsu; the affirmed medical reports of Dr. Michael Katz, and a copy of the transcript of the plaintiff's examination before trial.

In her examination before trial, taken on October 18, 2011, plaintiff, Sabrina Velez, age 34, testified that the day of the accident April 8, 2010, she was not working but she was scheduled to start a new job as an account executive at Peyser and Alexander Management as a account executive the following week. She stated that she did in fact start working the following Monday. She stated that at the time of the accident she was coming from a store on the corner of 116<sup>th</sup> Street and Sutphin Boulevard. After she came out of the store she began to cross 116<sup>th</sup> Street. She was in the crosswalk and crossing with the "walk" signal in her favor. As she began to cross she was struck on her left leg by the front of the vehicle owned and operated by

the defendant. She fell to the ground striking her left hip. She left the scene in an ambulance and was transported to the emergency room at Jamaica Hospital. She told the emergency room personnel that she had pain in her left hip and back. They took x-rays and the plaintiff was treated and released the same day. The next day she felt pain to her left knee, arms and lower back and sought treatment at Hollis Medical. She told the physician at the intake consultation that she had pain to her neck, lower back, left knee and leg. She began a course of physical therapy and was referred for MRIs. Her physical therapy ended in August 2010. After she learned the results of the MRI she was referred to an orthopedist, Dr. Hostin who told her she required surgery for a torn meniscus in her left knee. She underwent arthroscopic surgery by Dr. Hostin in July 2010. She testified that she was able to return to work one week after the surgery. She stated that the only area where she still had soreness was her left knee. She stated that she has two small scars from the arthroscopic surgery in her left knee. She described them as smaller than a dime and they are slightly raised

Dr. Katz, a board certified orthopedic surgeon, retained by the defendant to perform an independent orthopedic examination, evaluated the plaintiff on November 28, 2011. At the time of the examination plaintiff was 33 years old. Plaintiff told Dr. Katz that as a result of the accident of April 8, 2010 she injured her neck, lower back and left knee. After performing objective and comparative range of motion tests, the doctor reported that the plaintiff had no limitations of range of motion of the cervical spine, lumbosacral spine or left knee.

Dr. Katz states that the injuries diagnosed were cervical strain, lumbosacral strain and status post arthroscopy left knee. He stated that her prognosis is excellent and states that the plaintiff showed no signs or symptoms of permanence relative to the neck and back. With regard to the left knee he states that she had an excellent surgical outcome with restoration of full range of motion without instability. He concluded that she was not disabled. In a follow-up report dated December 9, 2011, Dr Katz stated that he reviewed the MRI films of the plaintiff's left knee and cervical spine. He states that the MRIs indicate degenerative fraying of the medial and lateral menisci and mild disc bulge at C5-C6 with no spinal cord compression. He stated there were no disc herniations. In an addendum report dated January 5, 2012, Dr. Katz states that he viewed the intra-operative images of the plaintiff's arthroscopic surgery which showed a meniscal tear which appeared to be traumatic in nature but was not evident on the MRI. He agreed that the meniscal tears appear to be related to the accident of April 08, 2010.

Defendant's counsel contends that the medical reports of Dr. Katz as well as the transcript of the plaintiff's examination before trial in which she stated that she returned to work one week post accident are sufficient to establish, prima facie, that the plaintiff has not sustained a disfiguring scar; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

Counsel claims that the plaintiff does not qualify under the category for disfiguring scars with regard to the scars of her left knee because she did not claim that it was unattractive, objectionable or the subject of pity or scorn (citing Lynch v Iqbal, 56 AD3d 621[2d Dept. 2008]).

In opposition, plaintiff's attorney, Stuart Sears, Esq., submits his own affirmation, as well as the affirmed medical report of Dr. Richard Seldes and the affirmed medical report of Dr. Richard Hsu as well as the affidavit of the plaintiff dated May 25, 2012.

Dr. Hsu states that he initially examined the plaintiff on April 10, 2010 with respect to the plaintiff's accident of April 8, 2010. At that time she presented with pain in her neck, lower back, and left knee. Dr. Hue's physical examination on that date revealed significant limitations of range of motion of the cervical spine, lumbar spine, and left knee. He recommended chiropractic evaluation and treatments. He stated that the plaintiff's injuries were directly related to the accident and that the injuries are expected to be permanent in nature.

The plaintiff was re-evaluated by Dr. Seldes on May 24, 2012. At that time he administered full range of motion studies of the plaintiff's cervical spine and left knee. He found significant limitations of range of motion of the plaintiff's left knee and cervical spine. Based upon his examination and review of the plaintiff's medical records he stated that the plaintiff sustained a permanent partial injury to her cervical spine and left knee as a result of the pedestrian knockdown accident. He stated that she received maximum medical benefit from her course of physical therapy

and that is why treatment ended In August 2010. He states that the plaintiff has been left with a causally related permanent partial disability if the form of limitation of range of motion of her cervical spine and left knee.

In her affidavit, Ms. Velez states that she remained in bed for two days following the accident and then went for treatment at Hollis Medical Care, P.C. She began a course of physical therapy which lasted five months, had MRI films taken and finally had arthroscopic surgery to repair a torn meniscus of the left knee. She ended physical therapy when the no-fault benefits were terminated. She states that to date she still has problems with some of her daily activities and has not fully regained strength or flexibility in her left knee.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, it is defendant's initial obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendant, including the affirmed medical reports of Dr. Katz and the plaintiff's deposition testimony in which she stated that she returned to work one week following the accident were sufficient to meet defendants' prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Seldes and Hsu attesting to the fact that

after his examination the plaintiff had substantiated injuries contemporaneous to the accident and had significant limitations in range of motion at a recent examination, and concluding that the plaintiff's limitations of her cervical spine and left knee were significant and permanent and resulted from trauma causally related to the accident. As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903 [2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, Dr. Seldes adequately explained the gap in the plaintiff's treatment by stating that her no fault benefits were terminated and in addition, the plaintiff reached the point of maximum medical improvement and any further treatments would be palliative (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Gaviria v Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v Tortori, 62 AD3d 637 [2d Dept. 2009]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the defendant's motion for an order granting summary judgment dismissing the plaintiff's complaint is denied.

Dated: October 22, 2012  
Long Island City, N.Y.

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ROBERT J. MCDONALD, J.S.C.