

**Rivas v Clark**

2013 NY Slip Op 30396(U)

January 31, 2013

Supreme Court, Suffolk County

Docket Number: 09-12231

Judge: W. Gerard Asher

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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 7-17-12  
ADJ. DATE 10-2-12  
Mot. Seq. # 001 - MG  
# 002 - XMG

-----X  
JUANA RIVAS and YESENIA RIVAS, :  
 :  
 :  
 Plaintiffs, :  
 :  
 :  
 - against - :  
 :  
 CEDRICK CLARK, CHARLENE CLARK and :  
 OSCAR M. RIVAS, :  
 :  
 Defendants. :  
-----X

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Upon the following papers numbered 1 to 32 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 15; Answering Affidavits and supporting papers 16 - 30; Replying Affidavits and supporting papers 31 - 32; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendants Charlene M. Clark and Cedrick C. Clark for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint of plaintiff Juana Rivas on the ground that she did not sustain a serious injury as defined in Insurance Law § 5102 (d) is granted; and it is further

**ORDERED** that this cross motion by defendant Oscar M. Rivas for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint of plaintiff Juana Rivas on the ground that she did not sustain a serious injury as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiffs, Juana and Yesenia Rivas, in a motor vehicle accident that occurred on March 31, 2006. Plaintiffs were passengers in a vehicle operated by defendant Oscar M. Rivas which collided with a vehicle owned by defendant Cedrick Clark and operated by defendant Charlene Clark. The accident allegedly occurred at the intersection of Fifth Avenue and Pine Aire Drive in Brentwood, New York.

By her bill of particulars, plaintiff Juana Rivas alleges that as a result of the subject accident she sustained serious injuries including, cerebral concussion without loss of consciousness, post-concussion headaches, carpal tunnel syndrome in her right wrist, bulging discs at C2-C3, C3-C4, C4-C5, and C5-C6, cervical radiculopathy, cervical myofascial pain syndrome, thoracic radiculopathy, bulging discs at L2-L3, L3-L4, L4-L5, L5-S1, lumbar radiculopathy, lumbar myofascial pain syndrome, and post-traumatic stress syndrome. In addition, plaintiff claims that following said accident she was confined to bed for two weeks. Plaintiff also claims that she sustained economic loss in excess of basic economic loss as defined in Insurance Law § 5104.

Defendants Clark now move and defendant Rivas cross-moves for summary judgment dismissing the complaint of plaintiff Juana Rivas on the ground that she did not sustain a serious injury as defined in Insurance Law § 5102 (d). In support of their motion, defendants Clark submit, among other things, the summons and complaint, their answer, Southside Hospital Emergency Department records for plaintiff, cervical and lumbar electrodiagnostic study results for plaintiff, late responses F-wave study results for plaintiff, plaintiff's deposition transcript, and the affirmed report of defendants' examining orthopedic surgeon, Michael J. Katz, M.D. Defendant Rivas submits his cross motion in conjunction with co-defendants' motion and submissions. His attorney's affirmation in support reiterates and incorporates the affirmation in support of the motion by co-defendants Clark.

Insurance Law § 5102 (d) defines "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 "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 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 a "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 (see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). In order to qualify under the 90/180-days category, an injury must be "medically determined" meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (see *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (see *Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos* 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may

satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Faroze v Kamran* 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Plaintiff's deposition testimony reveals that she was a front seat passenger in the vehicle operated by her husband, defendant Rivas, that her daughter plaintiff Yesenia Rivas was a rear seat passenger, and that the impact occurred on the front passenger side door. According to plaintiff, that same evening she had right shoulder pain and went to Southside Hospital's emergency room. In addition, plaintiff testified that four or five days after the accident, she followed-up with a chiropractor with complaints of pain in her right arm and right leg and the chiropractor advised chiropractic treatment as well as other treatments. Plaintiff received chiropractic, physical therapy and acupuncture treatments three times a week for approximately three months and received no other treatment from any other medical providers. At the time of the accident, plaintiff was working as a temporary employee at a company that made forms for bread and she testified that following the accident she missed two weeks then returned to work and continued at the same position until 2008 when she started her current employment. Plaintiff also testified that she is currently employed full-time in aircraft electronics assembly and packing and that the parts vary in weight from one to three pounds. She explained that since the accident, her right hand is not as strong, that she cannot pick up even slightly heavy objects because the fingers on her right hand turn numb and she feels pain traveling up to her shoulder, and that her right leg frequently cramps. Plaintiff further testified that prior to said accident she never experienced discomfort in her right arm, hand, shoulder or leg.

Plaintiff's emergency room records indicate complaints of right arm pain and mild neck stiffness, and physical examinations revealing an a-traumatic head, limited range of motion and tenderness of the neck, and that she was oriented with normal affect. The results of a cervical spine x-ray indicate normal alignment, mild spondylitic changes at C5-6, no fracture or subluxation, and a diagnosis of mild degenerative changes. The records also indicate that she was discharged with the diagnosis of motor vehicle accident trauma and neck strain, and advised to take Tylenol or Advil for pain and to follow-up with a primary care physician. Plaintiff's records of results of tests that she underwent on May 30, 2006 at Padova Physical Rehabilitation Medicine, P.C. reveal that the nerve conduction studies she underwent to rule out lumbar radiculopathy and the F-wave studies she underwent to rule out peripheral neuropathy and lumbosacral radiculopathy were all within normal limits. In addition, the results of EMG tests performed at the same location on June 20, 2006 to rule out cervical radiculopathy indicated no evidence of cervical radiculopathy.

The affirmed report of defendants' examining orthopedic surgeon, Dr. Katz, indicates that he examined plaintiff on July 6, 2010, that plaintiff complained of paresthesias in the right hand, and that he examined plaintiff's cervical spine, lumbosacral spine, right shoulder and right wrist and hand. Noting that he determined range of motion using a goniometer, Dr. Katz reported that the examination of plaintiff's cervical spine revealed no tenderness or paravertebral muscle spasm, and that range of motion testing for flexion, extension, lateral flexion and rotation were all normal. He also indicated that motor strength was present in the C5-T1 innervated segments, sensation was intact in the C5-T1 innervated dermatomes, reflex

testing of the biceps, triceps and brachioradialis was 2+ and symmetric, and that Adson's test was negative. With respect to plaintiff's lumbosacral spine, Dr. Katz noted that there was no paravertebral muscle spasm, that active range of motion testing showed flexion, extension, lateral and side bending to be normal, and that straight leg raising was negative. He also found that plaintiff had full sensation to light touch in the L3-S1 dermatomes, that reflexes of the quadriceps, tibialis posterior, and Achilles tendon were 2+ and symmetric bilaterally, and that Babinski and Patrick tests were negative. Regarding plaintiff's right wrist and hand, Dr. Katz found no gross deformities, no tenderness about the joint line, and no anterior or posterior instability. He reported range of motion for dorsiflexion 70 degrees (normal 70 degrees), palmar flexion 80 degrees (normal 80 degrees), radial deviation present to 20 degrees (normal 20 degrees) and ulnar deviation present to 30 degrees (normal 30 degrees). Dr. Katz found that Phalen's test was negative, that Tinel's test was positive at the median nerve, there was no tenderness at the extensor compartments, no cystic masses, no tenderness at the Triangular Fibrocartilage complex, and there was an intact vascular arch as evidenced by a normal compression test. Notably, Dr. Katz reported that using the power pinch meter to measure pinch strength, there was four kilograms of force on the right and on the left, and using the Jamar dynamometer to measure grip strength, there was 28 kilograms of force on the right and on the left. Dr. Katz's findings with respect to plaintiff's right shoulder were all normal, noting that there was no joint line tenderness, sensation was intact, and that O'Brien's test and Hawkins-Kennedy test were negative. He diagnosed cervical strain with radiculitis, resolved, lumbosacral strain with radiculitis, resolved, right shoulder contusion, resolved, and unrelated right carpal tunnel syndrome, related to plaintiff's work as a packer. Dr. Katz opined in conclusion that plaintiff showed no signs or symptoms of permanent loss of use with respect to her neck, back or right shoulder and that plaintiff was capable of gainful employment full time, full duty as a packer.

Here, defendants met their prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Quintana v Arena Transp., Inc.*, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]). Defendants submitted competent medical evidence establishing, prima facie, that plaintiff did not sustain any serious injuries to her right hand or shoulder or to the cervical and lumbar regions of her spine and, in any event, that any injuries were not caused by the subject accident (*see Frisch v Harris*, 101 AD3d 941, \_\_\_ NYS2d \_\_\_ [2d Dept 2012]; *Lim v Flores*, 96 AD3d 723, 946 NYS2d 183 [2d Dept 2012]). Defendants also submitted evidence establishing, prima facie, that plaintiff did not sustain a serious injury under the 90/180 day category of Insurance Law § 5102 (d) (*see Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; *Kaminski v Kawamoto*, 49 AD3d 501, 853 NYS2d 588 [2d Dept 2008]). Moreover, there is no evidence that plaintiff incurred economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a) (*see Moran v Palmer*, 234 AD2d 526, 651 NYS2d 195 [2d Dept 1996]).

Thus, the burden of proof shifted to plaintiff to come forward with sufficient evidence that she sustained a serious injury (*see Marietta v Scelzo*, 29 AD3d 539, 815 NYS2d 137 [2d Dept 2006]; *Ocasio v Henry*, 276 AD2d 611, 714 NYS2d 139 [2d Dept 2000]).

In opposition to the motion, plaintiff Juana Rivas contends that she did sustain a serious injury as defined by Insurance Law § 5102 (d) as a result of the subject accident. She also contends that defendants failed to meet their burden inasmuch as Dr. Katz did not provide the basis for his conclusion that plaintiff's carpal tunnel syndrome was work-related, and in relying on the MRI reports of plaintiff's examining

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physicians rather than reviewing the MRI films, Dr. Katz did not contradict the findings of plaintiff's radiologist and thus failed to demonstrate the absence of a serious injury. Plaintiff's submissions in support include her affidavit, an affidavit of business records, records and reports from Padova Physical Rehabilitation Medicine, P.C. including MRI reports, the police accident report, the summons and complaint, the answers of defendants Clark and Rivas, the bill of particulars of plaintiff Juana Rivas, and her deposition transcript.

The mere existence of carpal tunnel syndrome is not evidence of a serious injury in the absence of objective testing of the extent and duration of the alleged physical limitations resulting from the injury (*see Jacobs v Slight*, 47 AD3d 679, 850 NYS2d 166 [2d Dept 2008]; *Patterson v N.Y. Alarm Response Corp.*, 45 AD3d 656, 850 NYS2d 114 [2d Dept 2007]). Dr. Katz performed objective range of motion and other testing of plaintiff's right wrist whose results showed that range of motion, pinch strength and grip strength were all normal (*compare Rodgers v Duffy*, 95 AD3d 864, 944 NYS2d 175 [2d Dept 2012]). A plaintiff's complaints of subjective pain are insufficient to raise a triable issue of fact regarding serious injury (*see Calabro v Petersen*, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]; *see also Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]). In addition, plaintiff's MRI report of her cervical spine dated April 24, 2006, MRI report of her lumbar spine dated May 13, 2006 and MRI report of her right shoulder dated April 19, 2006, which were reviewed by Dr. Katz, fail in and of themselves to establish the existence of serious injury. The mere existence of a herniated or bulging disc, or even of radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (*see Furrs v Griffith*, 43 AD3d 389, 841 NYS2d 594 [2d Dept 2007]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]). Dr. Katz reported examination findings showing no physical limitations with objective testing.

Moreover, the submitted reports of plaintiff's treatment providers at Padova Physical Rehabilitation Medicine, P.C. were unaffirmed and, thus, insufficient to raise a triable issue of fact as to whether any of her alleged injuries constituted a serious injury (*see Quintana v Arena Transp., Inc.*, 89 AD3d 1002, 933 NYS2d 379). Plaintiff submitted no other medical evidence in support of her opposition. Plaintiff's own affidavit is insufficient to raise an issue of fact regarding serious injury (*see Riley v Randazzo*, 77 AD3d 647, 908 NYS2d 445 [2d Dept 2010]). Furthermore, plaintiff failed to establish economic loss in excess of basic economic loss (*see Diaz v Lopresti*, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]). Finally, plaintiff failed to raise an issue of fact as to whether she sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d) (*see Omar v Goodman*, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]). Thus, plaintiff failed to raise a triable issue of fact (*see Capriglione v Rivera*, 83 AD3d 639, 919 NYS2d 882 [2d Dept 2011]; *D'Orsa v Bryan*, 83 AD3d 646, 919 NYS2d 881 [2d Dept 2011]).

Accordingly, the motion and cross motion are granted and the complaint of plaintiff Juana Rivas is dismissed. The complaint of plaintiff Yesenia Rivas is severed and continued against the defendants.

Dated: January 31, 2013

W. Gerard Ashe

J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION