

**Rodriguez v Umanzor**

2013 NY Slip Op 31177(U)

May 20, 2013

Sup Ct, Suffolk County

Docket Number: 11-4080

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 37 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. JOSEPH FARNETI  
Acting Justice Supreme Court

MOTION DATE 8-24-12  
ADJ. DATE 2-21-13  
Mot. Seq. # 001 - MG; CASEDISP

-----X

NICOLE RODRIGUEZ,  
  
Plaintiff,  
  
- against -  
  
LUIS R. UMANZOR,  
  
Defendant.

-----X

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Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 15 - 25; Replying Affidavits and supporting papers 26 - 27; Other     ; it is,

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

This is an action to recover damages for injuries allegedly sustained by plaintiff on December 16, 2010, when her vehicle was struck by defendant's vehicle on Suffolk Avenue, at or near its intersection with Lukens Avenue, in Brentwood, New York. By her bill of particulars, plaintiff alleges that as a result of the subject accident she sustained the following serious injuries, cervicgia requiring multiple trigger point injections and bilateral suprascapular nerve blocks, acute right C5-6 radiculopathy, disc bulges C4-5, C5-6 and C6-7 with ventral CSF impression, cervical sprain and strain, displacement of cervical intervertebral disc, headaches, lumbar spine sprain and strain, lumbago, cephalgia, supraspinatus and suprascapularis tendinosis/tendinopathy of the right shoulder, right shoulder rotator cuff impingement, downsloping acromion extending to abut the supraspinatus of the right shoulder, glenohumeral joint fluid of the right shoulder, right shoulder sprain, strain and contusion, myofascial pain syndrome and myalgia. In addition, plaintiff alleges that following the subject accident she received emergency room treatment at Southside Hospital in Bay Shore and was released, and that thereafter she was confined to bed and home for approximately 120 days, all non-continuous. At the

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time of the accident, plaintiff was employed by Developmental Disabilities Institute. Plaintiff also alleges that as a result of said accident she sustained economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d). In support of his motion, defendant submits the summons and complaint, his answer, plaintiff's bill of particulars, plaintiff's Southside Hospital emergency department record, plaintiff's deposition transcript, the affirmed report dated February 21, 2012 of defendant's examining orthopedic surgeon Michael J. Katz, M.D., and the affirmed reports dated April 17, 2012 of defendant's examining radiologist Stephan W. Lastig, M.D. based on his review of plaintiff's MRI studies of the cervical spine and the right shoulder.

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 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 objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of plaintiff must be provided 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 *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]). 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]).

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). 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, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

The cervical spine x-ray report from plaintiff's December 16, 2010 emergency room visit indicates that the radiographs were "unremarkable."

Dr. Katz indicated in his report that he examined plaintiff on February 21, 2012, that plaintiff complained of right shoulder pain when lifting, and that plaintiff informed that she is a direct care aide who was currently unemployed. Dr. Katz provided range of motion testing results obtained by using a goniometer and/or inclinometer. He reported that an examination of plaintiff's cervical spine revealed no tenderness and no paravertebral muscle spasm, that flexion was present to 50 degrees (normal 50 degrees), extension to 60 degrees (normal 60 degrees), right-sided lateral flexion to 45 degrees (normal 45 degrees), left-sided lateral flexion to 45 degrees (normal 45 degrees), and right-sided rotation to 80 degrees (normal 80 degrees) and left-sided rotation to 80 degrees (normal 80 degrees). Dr. Katz added that motor strength was present in the C5-T1 innervated segments, that sensation was intact in the C5-T1 innervated dermatomes, that reflex testing showed that plaintiff's biceps, triceps and brachioradialis reflexes were 2+ and symmetric, and that Adson's test was negative. With respect to plaintiff's lumbosacral spine, Dr. Katz noted that no paravertebral muscle spasm was present, that sensory examination showed full sensation to light touch in the L3-S1 dermatomes, that reflexes of the quadriceps, tibialis posterior and Achilles tendon were 2+ and bilaterally symmetric, that Babinski was negative and there was no demonstrable clonus, and that Patrick was negative. He reported that active range of motion indicated forward flexion to 90 degrees (normal 90 degrees), extension to 30 degrees (normal 30 degrees), and lateral and side bending to 30 degrees (normal 30 degrees). Dr. Katz added that the straight leg raising test was negative.

Regarding plaintiff's right shoulder, Dr. Katz found that there was no swelling, erythema or induration. He reported that active abduction was present from 0-170 degrees (normal 170 degrees), flexion was present from 0-170 degrees (normal 170 degrees), and internal rotation was present from 0-45 degrees (normal 45 degrees) and external rotation was present from 0-90 degrees (normal 90 degrees). Dr. Katz indicated that the apprehension test was negative, that there was no impingement at 90 degrees (normal 90 degrees), that there was no crepitation at the AC joint, and no joint line tenderness. He reported that sensation was intact in the Axillary nerve autonomous zone, that there was no dislocation, clicking or grating with movement, and that O'Brien's Test, Hawkins Kennedy Test and Lift-Off Sign were all negative. Dr. Katz diagnosed cervical strain, lumbosacral strain and right shoulder contusion, all resolved. In conclusion, he opined that plaintiff's prognosis was excellent and that she showed no signs or symptoms of permanence relative to the musculoskeletal system and to the subject accident. Dr. Katz also opined that plaintiff was not disabled, that she was capable of gainful employment as a direct care aide, and that she was capable of her activities of daily living and all her pre-loss activities. He noted that it was significant that plaintiff was involved in a prior motor vehicle accident in 2007 or 2008.

Dr. Lastig's reports reveal that he found upon reviewing plaintiff's cervical MRI study from March 4, 2011 that plaintiff had multilevel degenerative disc disease and multilevel disc desiccation. He notes that there were no focal disc herniations but that there were mild smooth posterior disc bulges at the C4-C5, C5-C6 and C6-C7 levels that mildly impressed upon the ventral subarachnoid space without any evidence of cord compression or foraminal stenosis. Dr. Lastig opines that the disc bulges are degenerative in origin and therefore unrelated to the subject accident and that there are no findings on

the study that are causally related to the accident. With respect to the plaintiff's MRI study of the right shoulder on March 4, 2011, Dr. Lastig notes that there is mild degeneration or tendinopathy of the supraspinatus tendon, that there is no evidence of a rotator cuff tear or tendon retraction, and that no fluid is observed in the subacromial-subdeltoid bursa. He adds that there is mild lateral downsloping of the acromion. Dr. Lastig finds no evidence of a rotator cuff tear or a labral tear nor evidence of an osseous injury, but does find mild supraspinatus tendinopathy. He opines that there are no findings in the study that are causally related to the subject accident.

Plaintiff's deposition testimony of December 13, 2011, reveals that her airbags did not deploy at the time of the collision, that she complained of pain in her neck, shoulder, back and head at the scene of the accident and at the hospital, that her neck was x-rayed at the hospital, and that she was released from the hospital on the same day and solely given pain medication. Plaintiff testified that at the time of the subject accident, plaintiff was employed as a bus driver and a community instructor at Developmental Disabilities Institute, that following the accident she was out of work for two to three weeks, and that when she returned to work she maintained the same hours and the same pay but was placed on light duty and was no longer allowed to drive. She noted that she could not assist the adults with disabilities with their bags or with entering or exiting vehicles and added that she never thereafter worked overtime because it entailed taking care of the adults at their residence and she would be unable to perform tasks such as holding them up in the shower, bathing them, and fixing their hair. In addition, plaintiff testified that her medical providers told her to refrain from overtime activities. She added that she returned to driving after three months then left her employment in June 2011. Plaintiff explained that she was laid off for violation of the policy of using a company vehicle for personal use, and had not worked since that time. Plaintiff informed that the first medical provider that she saw after the accident was Dr. Lester, a chiropractor, whom she saw within one week after the accident and continued to see three times per week until May 2011. According to plaintiff, she had acupuncture treatment and electrostimulation for her shoulder, she was referred for a nerve study, she had MRI testing of her neck and right shoulder, and she received six steroid injections to her right shoulder. Plaintiff stated that she was not currently treating with any medical providers. She described her current complaints as hot tingling of her right shoulder and numbness of her hands and arms, and tension in her neck when sleeping. Plaintiff also stated that she had never had this discomfort prior to the accident but that she reinjured her shoulder after the accident. She explained that she can no longer lift weights as she used to do two to three times per week due to her shoulder injuries, or lift her three-year-old nephew, play baseball or drive for a long period of time. Plaintiff added that she cannot do regular or big grocery shopping or cook or pursue a career as a chef, for which she trained, because she cannot stand for long periods of time.

Here, defendant met his *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 Sohn v Dusling*, 99 AD3d 668, 951 NYS2d 400 [2d Dept 2012]). Defendant submitted competent medical evidence establishing, *prima facie*, that the alleged injuries to the cervical and lumbar spine regions of plaintiff's spine, and to her right shoulder, did not constitute serious injuries within the meaning of Insurance Law § 5102 (d) (*see Fitzgerald v Czubek*, 104 AD3d 908, 960 NYS2d 905 [2d Dept 2013]), and, in any event, that any injuries were not caused by the subject accident (*see Frisch v Harris*, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]). In addition, defendant demonstrated, *prima facie*, that plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102 (d) by

submitting the plaintiff's deposition testimony, which demonstrated that she was not prevented from performing substantially all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*see Frisch v Harris*, 101 AD3d 941, 957 NYS2d 235; *Williams v Perez*, 92 AD3d 528, 938 NYS2d 536 [1st Dept 2012]; *Weaver v Derr*, 242 AD2d 823, 661 NYS2d 684 [3d Dept 1997]). 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]).

Once defendant made his *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident, the burden shifted to plaintiff to produce sufficient evidence to raise a triable issue of fact (*see Dantini v Cuffie*, 59 AD3d 490, 873 NYS2d 189 [2d Dept 2009], *lv denied* 13 NY3d 702, 886 NYS2d 93 [2009]).

In opposition to the motion for summary judgment, plaintiff contends that she did sustain a serious injury as defined by Insurance Law § 5102 (d) from which she has not recovered. In addition, plaintiff contends that defendant failed to meet his burden on summary judgment inasmuch as Dr. Lastig did not address her claims of aggravation or exacerbation of her pre-existing conditions and his opinion that her conditions were all degenerative was conclusory, Dr. Katz did not address her claimed injury of radiculopathy or her tingling and failed to review plaintiff's MRI studies or reports, and plaintiff's deposition testimony demonstrates that she satisfied the 90/180 category. In support of her opposition, plaintiff submits the electrodiagnostic study report dated February 7, 2011 of Jean Futoran, M.D., an unsworn letter dated August 7, 2012 from the Benefits Assistant of Developmental Disabilities Institute, an unsworn disability certificate of Michelle J. Lester, D.C., and unsworn verification of medical documentation for an employee absence and other records.

Plaintiff failed to raise a triable issue of fact (*see Frisch v Harris*, 101 AD3d 941, 957 NYS2d 235). Although plaintiff contends that Dr. Lastig did not address her claims of aggravation or exacerbation of her pre-existing conditions, any failure to address her purported pre-existing conditions or finding of degeneration, is immaterial given that defendant's examining orthopedic surgeon, Dr. Katz, found that plaintiff had full range of motion and no limitations of her cervical spine, lumbosacral spine or right shoulder (*compare Little v Ajah*, 97 AD3d 801, 949 NYS2d 109 [2d Dept 2012]; *Edouazin v Champlain*, 89 AD3d 892, 933 NYS2d 85 [2d Dept 2011]; *Pero v Transervice Logistics, Inc.*, 83 AD3d 681, 920 NYS2d 364 [2d Dept 2011]). Notably, plaintiff did not submit any range of motion testing results to contradict or challenge defendant's submissions. With respect to plaintiff's assertions that defendant's examining orthopedic surgeon, Dr. Katz, failed to address her claimed injury of radiculopathy and her tingling, the Court notes that the mere existence of a herniated disc, a bulging disc, or 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 injury and its duration (*see Keith v Duval*, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]; *Casimir v Bailey*, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]). Dr. Katz provided range of motion testing results showing no limitations. In addition, the electrodiagnostic study report dated February 7, 2011 of Jean Futoran, M.D. is in inadmissible form and even if it could be considered for the diagnosis contained therein of "[e]lectrodiagnostic evidence of acute right C5-C6 radiculopathy," plaintiff's submissions are insufficient to raise a triable issue of fact as

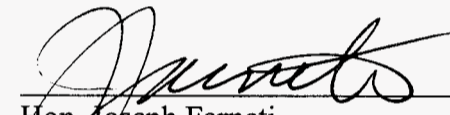
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to whether her claimed injury of radiculopathy constituted serious injuries within the meaning of Insurance Law § 5102 (d) (*see Keith v Duval*, 71 AD3d 1093, 898 NYS2d 184; *Bleszcz v Hiscock*, 69 AD3d 890, 894 NYS2d 481 [2d Dept 2010]; *Raboit v Park*, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]).

Although plaintiff argues that Dr. Katz failed to review plaintiff's MRI studies or reports, there is no evidence that plaintiff provided said records for his review inasmuch as they are not on the list of records reviewed in his report. As for plaintiff's assertion that she satisfied the 90/180 category, inasmuch as defendant demonstrated that she did not have a causally-related, medically-determined injury satisfying the other serious injury threshold categories, it was established that plaintiff did not satisfy the requirements of the 90/180 category (*see Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114). Moreover, plaintiff failed to raise a triable issue of fact inasmuch as the electrodiagnostic study report and the medical leave related records submitted by plaintiff were inadmissible, as they were unaffirmed and/or unsworn (*see Varveris v Franco*, 71 AD3d 1128, 898 NYS2d 213 [2d Dept 2010]; *see also Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 173 [1991]; *Maffei v Santiago*, 63 AD3d 1011, 886 NYS2d 29 [2d Dept 2009]; *Niles v Lam Pakie Ho*, 61 AD3d 657, 877 NYS2d 139 [2d Dept 2009]). Finally, 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]).

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: May 20, 2013

  
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 Hon. Joseph Farneti  
 Acting Justice Supreme Court

  X   FINAL DISPOSITION           NON-FINAL DISPOSITION