

**Nostramo v Sokol**

2014 NY Slip Op 32495(U)

September 22, 2014

Sup Ct, Suffolk County

Docket Number: 11-9243

Judge: Joseph A. Santorelli

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

MOTION DATE 4-18-14  
ADJ. DATE 7-8-14  
Mot. Seq. # 003 MG; CASEDISP  
# 004 XMG; CASEDISP

-----X

LARISSA NOSTRAMO,

Plaintiff,

- against -

RUSS J. SOKOL, JONATHAN R. SOKOL,  
JOSEPH G. MARTIN AND GRACEANNE M.  
MARTIN,

Defendants.

-----X

JEFFREY M. DONATO, ESQ., PLLC  
Attorney for Plaintiff  
80 Orville Drive  
Bohemia, New York 11716

RICHARD T. LAU & ASSOCIATES  
Attorney for the Defendants Sokol  
300 Jericho Quadrangle, P.O. Box 9040  
Jericho, New York 11753

RUSSO, APOZNANSKI & TAMBASCO  
Attorney for Defendants Martin  
115 Broad Hollow Road, Suite 300  
Melville, New York 11747

Upon the following papers numbered 1 to 57 read on this motion and cross motion for summary judgment :  
Notice of Motion/ Order to Show Cause and supporting papers 1 - 1 ; Notice of Cross Motion and supporting papers 12 - 26 ;  
Answering Affidavits and supporting papers 27 - 52 ; Replying Affidavits and supporting papers 53 - 54; 55 - 57 ;  
Other        ; (~~and after hearing counsel in support and opposed to the motion~~) it is

**ORDERED** that the motion by defendants Joseph Martin and Grace Anne Martin for summary judgment dismissing the complaint is granted; and it is further

**ORDERED** that the cross motion by defendants Russ Sokol and Jonathan Sokol for summary judgment dismissing the complaint is granted.

Plaintiff Larissa Nostramo commenced this action to recover damages for personal injuries she allegedly sustained in a motor vehicle accident that occurred at the intersection of Hawkins Avenue and Patricia Lane in the Town of Brookhaven on May 19, 2007. The accident allegedly happened when a vehicle owned by defendant Joseph Martin and driven by defendant Grace Anne Martin collided with a

vehicle owned by defendant Russ Sokol and driven by defendant Jonathan Sokol. Plaintiff was a passenger in the Sokol vehicle at the time of the collision. By her bill of particulars, plaintiff alleges she suffered various personal injuries and symptoms as a result of the accident, including a disc herniation at level L4-5, sciatica, lumbar sprain, and a “head injury.” Plaintiff alleges she received treatment at the emergency department of Stony Brook University Medical Center immediately after the accident, and that she has been partially disabled since that time. She further alleges that her injuries constitute “serious injury” within the “significant limitation of use” and the “permanent consequential limitation of use” categories of Insurance Law § 5102 (d).

Defendants Grace Anne Martin and Joseph Martin now move for summary judgment in their favor dismissing the complaint on the ground plaintiff is precluded by Insurance Law §5104 from recovering for non-economic loss, as she did not sustain a “serious injury” within the meaning of Insurance Law §5102 (d). In support of their motion, the Martin defendants submit copies of the pleadings, the bill of particulars, the transcript of plaintiff’s deposition testimony, and sworn medical reports prepared by Dr. Lee Kupersmith, an orthopedist, and Dr. Sondra Pfeffer, a radiologist. At defendants’ request, Dr. Kupersmith performed an orthopedic examination of plaintiff on June 11, 2013, and examined various medical records relating to the injuries alleged in this action, and Dr. Pfeffer reviewed the films from magnetic resonance imaging (MRI) and computerized tomography (CT) examinations of plaintiff’s lumbar spine performed in November 2007 and December 2008.

Defendants Jonathan Sokol and Russ Sokol also move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). The Sokol defendants’ submissions in support of their motion include the transcript of plaintiff’s deposition testimony, Dr. Kupersmith’s sworn medical report, and an unsworn medical report of Dr. Rakesh Patel, plaintiff’s treating orthopedist. Also submitted with the Sokol defendants’ moving papers was a student incident report prepared by Sachem North High School in connection with an incident at school that occurred in the school locker room on November 17, 2007 in which plaintiff required treatment for back pain. Plaintiff, who was born in April 1990, was a student at Sachem North High School at the time of the accident, and continued to participate on the school athletic teams after the accident.

Plaintiff opposes the motions, arguing that defendants’ submissions are insufficient to make out a prima facie case of entitlement to judgment in their favor. Alternatively, plaintiff asserts that the hospital records and the medical reports and records of Dr. Patel, Dr. Frederic Mendelsohn, Dr. Sanford Scheman and other medical providers submitted in opposition raise a triable issue as to whether she suffered a serious injury to her spine within the “limitation of use” categories of Insurance Law § 5102 (d).

It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained “serious injury” and may maintain a common law tort action (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). 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.”

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, “those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (see *Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692; see generally *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The Martin defendants' submissions established a prima facie case that plaintiff did not sustain serious injury to the lumbar region of her spine as a result of the subject accident (see *Henry v Hartley*, 119 AD3d 528, 989 NYS2d 94 [2d Dept 2014]; *Persaud v Palmer*, 117 AD3d 927, 985 NYS2d 913 [2d Dept 2014]; *Mohamed v Blackowl*, 116 AD3d 678, 983 NYS2d 98 [2d Dept 2014]; *Lim v Flores*, 96 AD3d 723, 946 NYS2d 183 [2d Dept 2012]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; *Rodriguez v Huerfano*, 46 AD3d 794, 849 NYS2d 275 [2d Dept 2007]). The report of Dr. Kupersmith states that plaintiff presented at the June 2013 examination with complaints of pain in her lower back and right side pain occasionally referring down her right leg to the foot. The report states, in relevant part, that range of motion testing of the lumbosacral region of plaintiff's spine revealed no limitations in movement, and that palpation of the region revealed minimal tenderness and no muscle spasm. It also states that plaintiff walked with a normal gait, that she exhibited normal motor strength, reflexes and sensation in her lower extremities, and that the straight-leg raise test, which is used to assess compression or irritation of the sciatic nerve, was negative. Dr. Kupersmith diagnoses plaintiff as having suffered lumbosacral sprain/strain and “lumbosacral nucleus pulposus as per report only.” He concludes the lumbosacral sprain/strain symptoms have resolved, and that there is no objective evidence that plaintiff suffers from an orthopedic disability. Defendants' examining radiologist, Dr. Pfeffer, states in her report that the MRI examination of plaintiff conducted in November 2007 revealed, in relevant part, no fractures, spondylolistheses or contusions of the lumbar vertebrae, mild disc desiccation and a chronic posterior disc herniation at level L4-5, and severe disc desiccation and minimal disc bulging at level L5-S1. She states that the CT examination, performed in December 2008, showed progression of the disc herniation at level L4-5, but no disc changes at level L5-S1.

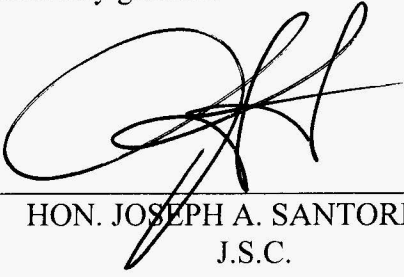
The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990). A plaintiff claiming injury within the “limitation of use” categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see Ferraro v Ridge Car Serv.*, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or 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]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]).

Here, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury under the significant limitation of use or permanent consequential limitation of use categories of Insurance Law § 5102 (d), as she failed to present any objective medical findings from a recent examination (*see Valera v Singh*, 89 AD3d 929, 932 NYS2d 530 [2d Dept 2011]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 ). Specifically, plaintiff failed to proffer any recent medical evidence demonstrating range-of-motion limitations in her lumbar region (*see Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322; *Pierson v Edwards*, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722). Furthermore, there is no quantitative or qualitative medical evidence showing substantial limitations in plaintiff’s lumbar joint function contemporaneous with the subject accident (*see Lewars v Transit Facility Mgt. Corp.*, 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]; *Heumann v JACO Transp., Inc.*, 82 AD3d 1046, 919 NYS2d 198 [2d Dept 2011]; *Nieves v Michael*, 73 AD3d 716, 901 NYS2d 100 [2d Dept 2010]). The unsworn and unaffirmed medical reports and records of Dr. Scheman, Dr. Patel, Dr. Mendelsohn and Excel Rehabilitation and Sports Therapy, as well as the uncertified hospital records, submitted in opposition to the Martin defendants’ motion were not in admissible form and, therefore, were insufficient to raise a triable issue of fact (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Balducci v Velasquez*, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]; *Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; *Karpinos v Cora*, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; *Lozusko v Miller*, 72 AD3d 908, 899 NYS2d 358 [2d Dept 2010]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692). Even if considered by the Court, the medical reports presented by plaintiff failed to raise a triable issue of fact as to whether the alleged injury to her lumbar spine was causally related to the May 2007 motor vehicle accident. Here, plaintiff’s submissions indicate she did not seek medical treatment for a back injury until November 2007, more than six months after accident (*see Lewars v Transit Facility Mgt. Corp.*, 84 AD3d 1176, 923 NYS2d 701). The medical reports of Dr. Patel, Dr. Mendelsohn, and Dr. Sanford Scheman also do not contain numerical measurements of the joint function in plaintiff’s lumbar region or provide a qualitative description of any limitations in movement. In fact, Dr. Patel’s report states that plaintiff exhibited full range of motion in her spine at an examination conducted in December 2007, and Dr. Mendelsohn’s report states he observed only a “slight” decrease in lumbar movement at an examination conducted in November 2010.

Moreover, the MRI and CT reports submitted by plaintiff are insufficient to raise a triable issue, as the mere existence of herniated or bulging discs is not proof of serious injury absent objective evidence of the extent and duration of the alleged physical limitations resulting from the disc injury (*see Pierson v Edwards*, 77 AD3d 642, 909 NYS2d 726; *Vilomar v Castillo*, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; *Washington v Mendoza*, 57 AD3d 972, 871 NYS2d 336 [2d Dept 2008]; *Kilakos v Mascera*, 53 AD3d 527, 862 NYS2d 529 [2d Dept], *lv denied* 11 NY3d 707, 868 NYS2d 599 [2008]; *Sharma v Diaz*, 48 AD3d 442, 850 NYS2d 634 [2d Dept 2008]). Such reports also do not address the issue of whether the disc conditions observed in plaintiff's spine are causally related to the subject accident (*see Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283; *Sorto v Morales*, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; *Smeja v Fuentes*, 54 AD3d 326, 863 NYS2d 689 [2d Dept 2008]). Finally, absent objective medical evidence of a serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable question as to whether she suffered a serious injury as a result of the accident (*see Shvartsman v Vildman*, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722).

Accordingly, the Martin defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted. In view of this determination, the motion by the Sokol defendants seeking the same relief is similarly granted.

Dated: SEP 22 2014

  
\_\_\_\_\_  
HON. JOSEPH A. SANTORELLI  
J.S.C.

X  FINAL DISPOSITION    \_\_\_\_\_ NON-FINAL DISPOSITION