

**Ramos v Neston**

2013 NY Slip Op 31592(U)

July 12, 2013

Supreme Court, Suffolk County

Docket Number: 10-32948

Judge: W. Gerard Asher

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

**P R E S E N T :**

Hon. W. GERARD ASHER  
Justice of the Supreme Court

MOTION DATE 1-17-13  
ADJ. DATE 4-23-13  
Mot. Seq. # 002 - MD

-----X  
NICOLE RAMOS,  
  
Plaintiff,  
  
- against -  
  
TRACY A. NESTON and DONNA M. HASS,  
  
Defendants.  
-----X

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 12 - 19; Replying Affidavits and supporting papers 20 - 21; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

This is an action to recover damages for injuries allegedly sustained by plaintiff on July 12, 2010 when her vehicle was struck by a vehicle owned by defendant Donna M. Hass and operated by defendant Tracy A. Neston on Commack Road at or near its intersection with Nicolls Road, Deer Park, New York. By her bill of particulars, plaintiff alleges that she sustained serious injuries including disc herniation at L5-S1 resulting in thecal sac deformity, disc bulging at L4-L5, lumbosacral strain and sprain, aggravation and exacerbation of disc bulging at C5-C6, left C5-C6 cervical radiculopathy, and cervical sprain and strain. In addition, plaintiff alleges that following said accident she received emergency room treatment at Good Samaritan Hospital and was confined to bed and home for approximately 14 weeks thereafter. Plaintiff states that at the time of the accident she was employed as an assistant manager at a

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group home and claims that she was disabled from her employment for approximately 14 weeks following the accident. She also alleges that she sustained economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Defendants now 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). In support of their motion, defendants submit, among other things, plaintiff's bill of particulars, the summons and complaint, their answer, plaintiff's deposition transcript, the affirmed reports of their examining orthopedic surgeon, Michael J Katz, M.D., and examining neurologist, Mathew M. Chacko, M.D., and plaintiff's medical records from 2008.

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]). A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Scott v Long Is. Power Auth.*, 294 AD2d 348, 741 NYS2d 708 [2d Dept 2002]; *see Lopez v Beltre*, 59 AD3d 683, 873 NYS2d 726, 728 [2d Dept 2009]).

Defendants' examining orthopedic surgeon, Dr. Katz, indicates in his affirmed report dated April 17, 2012 that he examined plaintiff on said date, that plaintiff complained of pain in the left side of her back, neck and left shoulder, and that plaintiff had a prior motor vehicle accident in 2008 with injuries to said areas of her body. In addition, he states that range of motion was determined using a goniometer and provides the results of his examination of plaintiff's cervical spine, lumbar spine and left shoulder. With respect to plaintiff's cervical spine, Dr. Katz reports that there was no tenderness and no paravertebral muscle spasm. His range of motion testing results for plaintiff's cervical spine showed flexion present to 50 degrees (normal 50 degrees), extension present 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), right-sided rotation to 80 degrees (normal 80 degrees), and left-sided rotation to 80 degrees (normal 80 degrees). His other findings include motor strength present in the C5-T1 innervated segments, sensation intact in the C5-T1 dermatomes, Adson's test is negative, and biceps, triceps and brachioradialis reflexes 2+ and symmetric. Regarding plaintiff's lumbar spine, Dr. Katz reports that plaintiff's gait was normal without antalgic or Trendelenburg component, and that no paravertebral muscle spasm was present. He indicates that active range of motion showed 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). He also reports right-sided rotation of the thoracolumbosacral spine was 30 degrees (normal 30 degrees) and left-sided rotation of the thoracolumbosacral spine was 30 degrees (normal 30 degrees). Dr. Katz adds that the straight leg raising test was negative, and reflexes of the quadriceps, tibialis posterior, and Achilles tendon were 2+ and bilaterally symmetric. He notes that Babinski and Patrick were negative. As for plaintiff's left shoulder, Dr. Katz indicates that there was no swelling, erythema or induration and that active abduction from 0-170 degrees (normal 170 degrees), flexion from 0-170 degrees (normal 170 degrees), internal rotation from 0-45 degrees (normal 45 degrees), and external rotation from 0-90 degrees (normal 90 degrees). He notes that the apprehension test was negative, there was no crepitation at the AC joint, no deformity, and there was no joint line tenderness. Dr. Katz also notes 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 and Hawkins Kennedy Test were negative and there was a negative Lift-Off Sign.

In conclusion, Dr. Katz provides a diagnosis of cervical strain, resolved and lumbosacral strain, resolved. He opines that plaintiff showed no signs or symptoms of permanence relative to the musculoskeletal system and to the date of the subject accident. Dr. Katz notes that the MRI reports of plaintiff's cervical spine and lumbar spine show changes which are degenerative in nature. He further opines that plaintiff is not disabled and is capable of her full-time, full-duty work as a community instructor without restrictions as well as her activities of daily living.

Dr. Chacko indicates in his affirmed report dated April 12, 2012 that he performed an independent neurological evaluation of plaintiff on said date, that plaintiff complained of pain in her lower back, neck and left shoulder, and that plaintiff gave a history of having been involved in a prior motor vehicle accident in 2008 in which she injured her left shoulder and had physical therapy after which her symptoms resolved. Dr. Chacko reports that plaintiff's cranial nerve examination I through XII, including fundus examination was unremarkable, and that her motor examination showed normal tone and strength in her upper and lower extremities in proximal and distal muscle groups with no atrophy or fasciculations noted. In addition, he reports that plaintiff's deep tendon reflexes were 2+ and

symmetrical and that plantar responses were downgoing, which is normal. He adds that plaintiff's sensory examination was normal to touch and pinprick sensation bilaterally and that her straight leg raising was up to 90 degrees bilaterally with 90 degrees being normal. Dr. Chacko provides active range of motion testing results using a goniometer showing that plaintiff's cervical flexion was 40 degrees (50 degrees normal), cervical extension was 40 degrees (60 degrees normal), lateral rotations were 60 degrees (80 degrees normal) and lateral flexions were 30 degrees (45 degrees normal). He also provides active range of motion testing results for plaintiff's lumbar spine as flexion 30 degrees (60 degrees normal), lateral flexions 10 degrees (25 degrees normal) and extension 10 degrees (25 degrees normal). Dr. Chacko notes that plaintiff reported tenderness when her cervical region was palpated but that no muscle spasm was detected in the cervical, thoracic or lumbar areas. He concludes by stating that plaintiff has a history of cervical and lumbar strains which are resolved from an objective neurological standpoint. Dr. Chacko adds that no focal neurological deficits were noted, that there was no muscle weakness, reflex asymmetry or focal sensory changes, and that there were no findings consistent with cervical or lumbar radiculopathy or myelopathy. With respect to plaintiff's exhibited limitations of range of motion, he opines that said findings are not truly objective inasmuch as the movements are voluntary and fully under the control of the person being examined. Dr. Chacko states that if the history provided is accurate, plaintiff's symptoms were causally related to the subject accident, and that there is no objective clinical evidence of any current neurological injuries and plaintiff is working and is capable of performing her normal activities of daily living.

Plaintiff's deposition testimony reveals that her vehicle was struck on the driver's side door and fender and her air bag inflated, that she was taken by ambulance to the hospital emergency room with complaints of pain on her left side, and that she underwent x-rays and received pain medication and was discharged the same day. Plaintiff testified that a few days later she followed up with her primary care physician and then started seeing Dr. Perry of Perry Physical Medicine and Rehabilitation with complaints of pain in her back, neck, left shoulder and left leg. According to plaintiff, she received physical therapy treatments three days per week for a few months from Dr. Perry, who sent her for MRI testing of her neck, shoulder and back. She estimated that she received physical therapy treatment for approximately eight months. Plaintiff added that a few months after the accident she was referred by Dr. Perry to a pain management doctor, Dr. Quader, with whom she treated two or three times and received steroid injections to her back. Plaintiff explained that she stopped receiving physical therapy because Dr. Perry told her that she did not need to come anymore. Plaintiff also testified that after stopping physical therapy she was feeling 50 percent better and no longer felt pain in her left leg but that she still had pain in her back and left shoulder. Plaintiff further testified that she currently has sharp, shooting neck pain and left shoulder pain a few times throughout the week, as well as sharp back pain in her lower back on the left side. She stated that she had a prior motor vehicle accident in 2008 or 2009 in which she sustained injuries to her left shoulder and back and received treatment from Dr. Perry with fewer visits because her injuries were less severe. Plaintiff explained that since the accident she can no longer lift heavy objects, 5 to 10 pounds, and cannot stand for long periods of time, two hours or more, and that exercising is more difficult for her. She also stated that she did not currently have any appointments to see any physicians regarding any injuries sustained in the subject accident.

Here, defendants failed to meet their prima facie burdens of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see Uvaydov v Peart*, 99 AD3d 891,

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951 NYS2d 912 [2d Dept 2012]; *Raguso v Ubriaco*, 97 AD3d 560, 947 NYS2d 343 [2 Dept 2012]; *Ambroselli v Team Massapequa, Inc.*, 88 AD3d 927, 931 NYS2d 652 [2d Dept 2011]). The affirmed medical report of defendants' examining neurologist noted significant limitations in the range of motion of the cervical and lumbar region of plaintiff's spine which he opined was voluntary. However, he failed to explain or substantiate, with any objective medical evidence, the basis for his conclusion (*see id.*). In addition, defendants' examining neurologist raised an issue of credibility which cannot be resolved herein (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]).

Since defendants failed to meet their prima facie burden of demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident, it is unnecessary to determine whether the papers submitted by plaintiff in opposition were sufficient to raise a triable issue of fact on this issue (*see Cues v Tavarone*, 85 AD3d 846, 925 NYS2d 346 [2d Dept 2011]).

In any event, plaintiff raised a triable issue of fact as to whether she sustained a serious injury as defined in Insurance Law § 5102 (d) as a result of the subject accident by submitting the affirmation of her treating physician, Jeffrey Perry, D.O. in opposition to this motion (*see Breville v Jerez*, 103 AD3d 605, 958 NYS2d 626 [2d Dept 2013]; *Granela v Ruppert*, 101 AD3d 944, 955 NYS2d 520 [2d Dept 2012]). By said affirmation, Dr. Perry indicates that his initial consultation of plaintiff occurred two days after the subject accident, noting that plaintiff had been a prior patient and had recovered from her previous injuries. During said initial visit, Dr. Perry performed range of motion testing with a hand-held goniometer with the following results for the lumbar spine: flexion 55 degrees (90 degrees normal), right and left lateral flexion 15 degrees (30 degrees normal), extension 15 degrees (30 degrees normal), right rotation 20 degrees (45 degrees normal), and left rotation 25 degrees (45 degrees normal). The results for plaintiff's cervical spine were flexion 40 degrees (60 degrees normal), extension 45 degrees (75 degrees normal), right rotation to 45 degrees (80 degrees normal) and left rotation 50 degrees (80 degrees normal). He notes that he deemed plaintiff disabled from her work in a group home until further notice and that he reviewed the MRI films of July 16, 2010 and agreed with the radiologist's MRI findings for plaintiff's lumbar spine as showing a posterior central disc herniation at L5-S1 with thecal sac deformity and a posterior disc bulge at L4-L5. Dr. Perry adds that there was no change in MRI results with respect to plaintiff's cervical spine and her left shoulder. He lists the dates that he saw plaintiff from July 14, 2010 through February 20, 2013 and explains her symptoms and her treatment. Regarding her last visit on February 20, 2013, Dr. Perry reports that plaintiff's straight leg raising was positive bilaterally, and she had muscle spasms, tenderness and taut bands in her lumbosacral paravertebral muscles. Range of motion testing of plaintiff's lumbar spine using a hand-held goniometer on said date revealed flexion 65 degrees (90 degrees normal), extension 25 degrees (30 degrees normal), right rotation 35 degrees (45 degrees normal) and left rotation 40 degrees (45 degrees normal). As for her cervical spine range of motion testing results, Dr. Perry reports flexion 50 degrees (60 degrees normal), extension 65 degrees (75 degrees normal), right rotation 70 degrees (80 degrees normal), left rotation 75 degrees (80 degrees normal), right lateral flexion 35 degrees (45 degrees normal) and left lateral flexion 40 degrees (45 degrees normal). Dr. Perry provides a final diagnosis with a reasonable degree of medical certainty of lumbar disc herniation at L5-S1 with thecal sac deformity, an aggravation of a prior cervical injury that included painful cervical radiculopathy, and myofascial pain and left shoulder pain. He opines that the lumbar disc herniation was directly related to the trauma plaintiff

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suffered in the subject accident, that her restrictions in motion are significant and permanent, and that although plaintiff has returned to work, she was completely disabled for approximately 14 weeks after said accident as a result of the injuries to her cervical and lumbar spine.

Accordingly, the instant motion is denied.

Dated: July 12, 2013

W. Gerald Aske  
J.S.C.

       FINAL DISPOSITION   X   NON-FINAL DISPOSITION