

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

EVELYN DRAZNIN,

Plaintiff(s),

- against -

FANTASTIC TRANS CORP. and JON HOFGREN,

Defendant(s).

TRIAL/IAS PART 11

INDEX NO. 6116/05

MOTION SEQUENCE
NO. 1

MOTION SUBMISSION
DATE: March 14, 2007

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X
Memorandum of Law	X

Upon the foregoing papers, the motion by the defendants for an Order pursuant to §3212 of the CPLR dismissing plaintiff's complaint against the defendant on the grounds plaintiff, Evelyn Draznin, did not sustain a serious injury as defined under §5102(d) if the Insurance Law, is determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident that occurred on April 8, 2004 at approximately 8:15 pm at or near the intersection of Willis Avenue and Searing Avenue, Nassau County, New York.

The plaintiff in the plaintiff's Verified Bill of Particulars sets forth:

"11. The following injuries and sequelae were sustained by the plaintiff, known to plaintiff at this time:

Left paracentral and foraminal extruded disc herniation at C5-6 impinging exiting left C6 nerve root, effacing ventral CSF space and flattening the cord

Right paracentral and foraminal extruded disc herniation at C6-7 effacing ventral SCF space, flattening the cord and impinging exiting right C7 nerve root

Left C5-6 radiculopathy
Tendonitis of left shoulder
Pinching sensation of left arm
Low back pain
Lumbar derangement
Cervical and lumbar muscle spasm
Left shoulder pain
Aggravation and/or activation of degenerative changes of cervical spine
Aggravation and/or activation of osteophytes of cervical spine
Aggravation and/or activation of acquired central stenosis at C3-4 and C5-6

Plaintiff suffers pain and discomfort to the aforementioned areas, with radiation to the extremities, weakness, loss and restriction of function, loss of strength, restriction of motion, difficulty in ambulation and standing for extended periods of distances and/or periods of time; inability to perform usual and customary physical activities previously and customarily performed; interference and curtailment of plaintiff's usual physical and social activities, loss and restriction and inability to attend to normal and customary vocation with a resulting loss of enjoyment of life; and injury to and involvement of surrounding nerves, tendons, blood vessels, ligaments and connected tissue in and around the above said forth areas.

Upon information and belief, all of the aforementioned injuries and their effects are permanent and lasting in nature and character with permanent effects of pain, loss of use, loss of motion, disability, atrophy, oseoarthritic changes, anxiety and mental anguish."

The defendants, amongst other things, submit an affirmed letter report dated June 13, 2006 of Wayne Kerness, MD, an orthopedist of an orthopedic physical examination conducted on June 13, 2006 of the plaintiff; an affirmed letter report dated June 13, 2006 of Wayne Cohen, MD, a neurologist of a neurologic examination of the plaintiff conducted on June 13, 2006 and a copy of the plaintiff's Winthrop University Hospital radiology report of x-rays of the plaintiff's left shoulder and cervical spine performed on April 8, 2004 the day of the incident in issue upon the plaintiff's visit to Winthrop University Hospital.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the

burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law (see *Licaro v. Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; *Palmer v. Amaker*, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; *Tipping-Cestari v. Kilhenny*, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991).

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) (see, *Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; *Wright v. Melendez*, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988).

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

"(d) 'Serious injury' means 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 pertinent part, the report of Dr. Kerness sets forth:

PHYSICAL EXAMINATION: Evelyn Draznin presents as a 49 year old, right hand dominant female, standing 5'4" and weighing 118 lbs in no apparent distress. Evelyn Draznin was not wearing any braces, or supports and ambulated without aid.

OBSERVATIONS: Evelyn Draznin was able to turn her head freely to speak with me in unguarded moments and was able to get on and off the examination table without difficulty.

Cervical Tests:

Tenderness Paraspinals: Negative
Tenderness Suprascapular: Negative
Spasm: Negative
There are no surgical scars noted.

Cervical Spine: Range of Motion in Degrees

	<u>Claimant</u>	<u>Normal</u>
Flexion	45 degrees	45 degrees

Extension	45 degrees	45 degrees
Lateral Flexion (R)	45 degrees	30-45 degrees
Lateral Flexion (L)	45 degrees	30-45 degrees
Rotation (R)	60 degrees	60 degrees
Rotation (L)	60 degrees	60 degrees

Shoulder Tests:

There was no tenderness noted.

Impingement sign:	Negative	Left	Right
Supraspinatus Test:	Negative	Left	Right

There are no surgical scars noted.

Shoulder: Range of Motion in Degrees

	<u>Claimant</u>	<u>Normal</u>
Forward Elevation (R)	180 degrees	180 degrees
(L)	180 degrees	180 degrees
Abduction (R)	180 degrees	180 degrees
(L)	180 degrees	180 degrees
Adduction (R)	45 degrees	45 degrees
(L)	45 degrees	45 degrees
Internal Rotation (R)	70 degrees	70 degrees
(L)	70 degrees	70 degrees
External Rotation (R)	90 degrees	90 degrees
(L)	90 degrees	90 degrees

Lumbar Tests:

There was no tenderness noted.

Lasegue: negative

Spasms: negative

There were no surgical scars noted

Supine SLR was negative to the left and right

Reverse seated SLR was negative to the left and right.

Lumbar Spine: Range of Motion in Degrees

	<u>Claimant</u>	<u>Normal</u>
Flexion	90 degrees	90 degrees
Extension	30 degrees	30 degrees
Lateral Flexion (R)	30 degrees	30 degrees
Lateral Flexion (L)	30 degrees	30 degrees
Rotation (R)	30 degrees	30 degrees
Rotation (L)	30 degrees	30 degrees

WALK: The claimant walks with a normal gait and without a limp. She walks well on her toes and heels.

MUSCLE STRENGTH: Muscle strength is 5/5 throughout bilaterally. There is no atrophy noted.

DEEP TENDON REFLEXES: Deep tendon reflexes are equal and reactive.

SENSATION: Sensation is intact.

DIAGNOSIS:

Resolved cervical, thoracic and lumbar sprain/strain
Resolved left shoulder injury

DISABILITY/ADL's: Based on my examination, the claimant has no disability or restriction of ADL's at this time."

In regards to the plaintiff's neurological examination, Dr. Cohen states:

"PHYSICAL EXAMINATION:

Claimant presents as a 49 year old, right hand dominant female, standing 5'4" and weighing 118 lbs in no apparent distress, not wearing braces or other orthotic devices, and ambulating without an assistive device.

GENERAL EXAM:

Examination of the head, eyes, ears, nose, throat, and thorax is unremarkable. Extremities: There is no limitation of movement of elbows, wrists, hips, knees, ankles. Defer to Orthopedic regarding evaluation of shoulder complaints.

CERVICAL SPINE: Cervical Thoracic Tests:

Foraminal Compression/Suprling Test:	Negative
Jackson's Compression Test:	Negative
Shoulder Depression Test:	Negative
Soto-Hall Test:	Negative
Cervical Distraction Test:	Negative
Tenderness	None
Triggers points:	None
Spasm:	None

Cervical Spine: Range of Motion in Degrees

	<u>Claimant</u>	<u>Normal</u>
Flexion	45 degrees	45 degrees
Extension	45 degrees	30-45 degrees
Lateral Flexion (R)	45 degrees	30-45 degrees
Lateral Flexion (L)	45 degrees	30-45 degrees
Rotation (R)	60 degrees	60 degrees
Rotation (L)	60degrees	60 degrees

THORACIC SPINE:

Thoracic spine movement with normal excursion and without pain. No spasm or tenderness noted.

LUMBO-SACRAL SPINE: Lumbar Tests:

Forward Flexion:	Negative
Bechterew/Sitting Boot Test:	Negative
Straight Leg Raising (Supine)	
Right:	Negative

Straight Leg Raising (Sitting)	Left:	Negative
	Right:	Negative
Kernig Test:	Left:	Negative
	Right	Negative
	Left	Negative

Lumbar tenderness	None
Sacral tenderness:	None
Trigger points:	None
Spasm:	None
Squat	Not attempted

Lumbar Spine: Range of Motion in Degrees

	<u>Claimant</u>	<u>Normal</u>
Flexion	90 degrees	90 degrees
Extension	30 degrees	30 degrees
Lateral Flexion (R)	30 degrees	30 degrees
Lateral Flexion (L)	30 degrees	30 degrees
Rotation (R)	30 degrees	30 degrees
Rotation (L)	30degrees	30 degrees

NEUROLOGIC EXAM:

MENTAL STATUS:

Claimant appears alert, oriented, and cooperative.
 Speech is clear and fluent.
 There is no apparent deficit of memory, cognition, affect, thought.

CRANIAL NERVES:

Cranial nerves II-XII intact.

MUSCLE STRENGTH:

Normal muscle tone. Normal muscle bulk.
 5/5 strength all muscle groups all extremities.
 Grip strength is normal bilaterally.

REFLEXES

Deep tendon reflexes:

	Triceps	Biceps	Brachioradialis	Knee jerk	Achilles
Right	2+	2+	2+	2+	2+
Left	2+	2+	2+	2+	2+

Clonus: absent

Plantar responses: flexor bilaterally

SENSATION:

Sensation is normal, intact to touch, pin, vibration, position

GAIT: Normal without the aid of assistive device

Heel gait, toe gait, tandem gait performed well.

DIAGNOSIS

Resolved cervical, thoracic and lumbar sprains
Neurologic exam reveals no neurologic deficit and there is no evidence of radiculopathy or traumatic neuropathy. Comment regarding the left shoulder is outside the scope of Neurology and therefore deferred to the appropriate specialty."

The Court may properly consider the unsworn reports of the plaintiff's treating physicians in support of the defendants' application (see, **Pagano v Kingsbury**, 182 AD2d 268, 587 NYS2d 692 (Second Dept., 1992). In this regard, the report of the Radiology Department at Winthrop University Hospital provides:

"Exam: SHOULDER LEFT

HISTORY: PAIN

INTERNAL ROTATION, EXTERNAL ROTATION, AND Y VIEWS OF THE LEFT SHOULDER;

THERE IS NO EVIDENCE OF FRACTURE OR DISLOCATION. THERE IS NO EVIDENCE OF DEGENERATIVE CHANGE NO BONY DESTRUCTIVE LESIONS ARE SEEN.

IMPRESSION: NO FRACTURE OR DISLOCATION OF THE LEFT SHOULDER.

FIVE VIEWS OF THE CERVICAL SPINE:

THERE IS NO EVIDENCE FOR FRACTURE OR SUBLUXATION. THE PREVERTEBRAL SOFT-TISSUES ARE UNREMARKABLE. THE ALTANTOAXIAL ARTICULATION APPEARS UNREMARKABLE ON THE OPEN MOUTH VIEW. DEGENERATIVE CHANGES WITH OSTEOPHYTES ARE IDENTIFIED. THERE IS DISC SPACE NARROWING AT C4-5. MULTILEVEL BILATERAL NEURAL FORAMINA NARROWING IS IDENTIFIED.

IMPRESSION: NO FRACTURE OF THE CERVICAL SPINE DEGENERATIVE CHANGES."

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" (**Winegrad v. New York University Medical Center**, 64 NY2d 851, 853; **Pagano v. Kingsbury**, *supra* at 694) and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact (see **Gaddy v. Eyler**, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; **Jean-Meku v. Berbec**, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; **Horan v. Mirando**, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995).

In opposition to the requested relief the plaintiff submits an affirmation from the plaintiff's treating physician, Dr. James M. Liquori; an affirmation from Dr. Samuel Mayerfield, a radiologist, of a review of a June 21, 2004 MRI of the plaintiff's cervical spine and an affidavit from the plaintiff Evelyn Draznin.

A review of the respective affirmations of Dr. Liguori and Dr. Mayerfield establish an issue of fact as to whether the plaintiff suffered a serious injury in the April 8, 2004 accident in issue in light of the alleged limitations of movement related to the plaintiff's disc injury which Dr. Liguori causally related to the accident. As such, the defendants' application for an Order pursuant to §3212 of the CPLR dismissing plaintiff's complaint against the defendant on the grounds plaintiff, Evelyn Draznin, did not sustain a serious injury as defined under §5102(d) of the Insurance Law, is denied.

SO ORDERED.

DATED: 5/21/2007

.....*Ray S. Melton*.....
J.S.C.

ENTERED

MAY 25 2007

~~NASSAU COUNTY~~
COUNTY CLERKS OFFICE