

SHORT FORM ORDER

56m

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X **TRIAL TERM PART 48**
ANTONIA GARCIA and SATURNINA VARGAS,
Plaintiffs,
INDEX NO. 9010/06

-against-

**MOTION DATE: 10-18-07
SUBMIT DATE: 2-25-08
SEQ. NUMBER: 006, 008**

**MIGUEL PAEZ, AVIS RENT A CAR SYSTEM,
INC., ALLISON DILAURENZIO and JOHN
DILAURENZIO,**

**MOTION DATE: 11-27-07
SUBMIT DATE: 2-25-08
SEQ. NUMBER: 009, 010**

Defendants

-----X
The following papers have been read on this motion:

Notice of Motion, dated 9-18-07.....	1
Notice of Cross Motion, dated 10-5-07.....	2
Notice of Motion, dated 10-23-07.....	4
Memorandum of Law in Support (def. Avis.,dated 10-23-07.5	
Notice of Cross Motion, dated 11-1-07.....	6
Affirmation in Opposition, dated 2-13-08.....	7
Reply Affirmation, undated.....	8
Reply Affirmation, 2-20-08.....	9

This motion by defendant Avis Rent A Car System, Inc. (“Avis”) [seq. 9] and “cross motion” by defendants Allison DiLaurenzio and John DiLaurenzio [seq. 10] pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that neither plaintiff has sustained a “serious injury” as that term is defined by the Insurance Law are

granted and the complaint is dismissed in its entirety. The motion by Avis [seq. 6] and “cross motion” by the DiLaurenzio defendants [seq. 8] dismissing the complaint pursuant to CPLR 3216 as a sanction for failure to provide discovery are denied as academic.

In this motor vehicle accident case (accident date June 24, 2002), defendants Avis and DiLaurenzio move for summary judgment on the ground that neither plaintiff sustained a “serious injury” as that term is defined by Insurance Law § 5102(d). They also move for dismissal as a sanction for failure to provide discovery. The Court notes that the DiLaurenzio cross motions are improperly identified, as they seek no relief against the movant, Avis. They are therefore referred to and will be treated as separate motions.

The motions made pursuant to CPLR 3212 and the Insurance Law will be considered first.

Antonia Garcia

Insurance Law § 5102(d) defines "serious injury" as a personal injury which results in, among other things, "significant disfigurement;... 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 her bill of particulars this plaintiff alleges that she sustained all of the foregoing “serious injuries.”

In support of these claims Garcia alleges a herniated disc at L5-S1, tendonitis, joint effusion, sprain/strain and restriction of motion, all of the left shoulder; reversal of the cervical curvature and cervical strain/sprain and radiculopathy of the cervical spine area; lumbar radiculopathy and lumbrosacral strain/sprain; and depression, headaches, anxiety, fear and emotional upset and shock.

By way of submissions of deposition transcripts taken during the examination before trial of plaintiff Antonia Garcia, the affirmed report of James B. Sarno, M.D., a neurologist, the affirmed report of Isaac Cohen, M.D., an orthopedic surgeon, and the affirmation of S. Farkas, M.D., an orthopedic surgeon, defendants have demonstrated that this plaintiff has suffered no serious injury.¹

Garcia testified only to limitations on standing and sitting for unspecified periods of time, lifting heavy objects, and of difficulty in carrying her child. There was no mention of an inability to work.

Dr. Sarno conducted an independent medical examination on August 2, 2007. He noted subjective reports of pain in her neck and lower back, and that an MRI was read as showing a herniation as described above, but upon objective testing found only resolved sprains of the cervical and lumbar spine, and a normal neurological examination with no deficits or disabilities.

¹ The DiLaurenzio defendants have submitted an affirmation from counsel essentially adopting and relying on the Avis submissions with regard to the absence of a "serious injury" by either plaintiff. Independent medical examinations were performed by physicians retained by counsel for moving defendants, explaining the duplication of orthopedic examinations.

Dr. Cohen conducted an examination of this plaintiff on May 29, 2007. He reviewed medical records and noted Garcia's reports of occasional headaches and some backaches, especially with some discomfort on the left side of her body. Dr. Cohen performed range of motion testing of the cervical and thoracolumbar spines, and the results were compared to normal values. This testing revealed that there were no limitations on Garcia's range of motion. His diagnosis upon such examination was soft tissue strains on the neck, back, left side, healed. He noted that she was receiving no medical care and that none was needed.

Dr. Farkas's affirmation describes an examination conducted on September 26, 2007. He noticed no skin lesions, masses or warmth. The plaintiff complained of pain in her neck. Dr. Farkas noted forward flexion was 45 degrees (90 normal), but that after the examination she was able to bend forward from a sitting position to pick up upon her shoes with no indication of discomfort. Lateral bending of the lumbar spine was normal, as were rotation and flexion of the cervical spine. Objective testing of the left shoulder revealed normal abduction bilaterally, full forward flexion and negative impingement. He found that she presented with resolved lumbar and cervical sprains, and resolved left shoulder sprain. She also mentioned a left knee injury, not mentioned in the bill of particulars, concerning which Dr. Farkas stated was a resolved sprain.

Garcia did not complain to any of these examining physicians of depression, anxiety, fear and emotional upset and shock.

Finally, Avis presents the affirmed reports of David Fisher, M.D., a radiologist, dated April 4, 2007, who states that he reviewed MRI films of the left shoulder (taken a few days

after the accident) and of the lumbar spine (three weeks after the accident). He found no evidence of trauma to the shoulder, but rather osteoarthritis at the acromioclavicular joint with resultant impingement. He noted that this was a degenerative change which could not have developed in such a short interval and represented a preexisting condition. Dr. Fisher found no disc herniations of the lumbar spine.

Based on the foregoing, the Court finds that moving defendants have established a *prima facie* showing that they are entitled to summary judgment in their favor as against Antonia Garcia based on the absence of a "serious injury," thereby shifting the burden to this plaintiff to come forward with proof placing this in issue. *See, e.g., Gaddy v Eyley*, 79 NY2d 955, 957 (1992). They have demonstrated that she has suffered no disfigurement, and sustained no more than strains and sprains. In view of the medical evidence presented, the reports of pain made to defendants' physicians are insufficient. *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 (2002); *Scheer v Koubek*, 70 NY2d 678, 679 (1987); *Tuna v Babendererde*, 32 AD2d 574, 575 (3d Dept. 2006).

Defendants have also demonstrated that in the period after the accident she did not alter her activities of daily living such that she might be deemed to have met the requirements of the "90/180" category of serious injury. *See, Duran v Sequino*, 17 AD3d 626 (2nd Dept. 2005); *Sainte-Aime v Ho*, 274 AD2d 569 (2nd Dept. 2000).

In response, the plaintiff Antonia Garcia has failed to sustain her burden. The undated report of treating physician Sergei Kochlatyi, M.D. and the records upon which he relied are not affirmed, and are thus inadmissible as proof. *Govori v Agate Corp.*, 44 AD3d 821 (2d

Dept. 2007); *Yeung v Rojas*, 18 AD3d 863 (2d Dept. 2005). In any event, he fails to quantify restrictions on range of motion, which is referred to as being “moderately decreased.” Such a description, on its face, is insufficient to demonstrate the presence of a “serious injury.” *Granger v Keeter*, 23 AD3d 886 (3d Dept. 2005).

Further, the disc herniation to which he refers, even if established, is also insufficient in that it has been shown not to have led to any impairment bringing the injury within the ambit of statutory definitions. *See Albano v Onolfo*, 36 AD3d 728 (2d Dept. 2007); *Yakubov v CG Trans Corp.*, 30 AD3d 509, 510 (2d Dept. 2006). Finally, Dr. Kochlati refers to treatment and medical evaluations that ended in March of 2003. There is no explanation from this plaintiff as to why treatment ceased over four years before the present motion to dismiss was made, which is another reason to grant that motion. *See Pommels v Perez*, 4 NY2d 566, 574 (2005).

The affirmation by Y. Fill Slukhinsky, M.D. is similarly insufficient. It is based on a recent examination (February, 2008) by a physician who had not previously treated the plaintiff. Although he refers to one quantified restriction – lumbar spine flexion limited to 65 degrees, where normal is 90 degrees – he does not present any medical proof that this restriction was caused by the accident (*Tudisco v James*, 28 AD3d 536 [2d Dept. 2006]), nor, relatedly, does he refer to any proof that there was a significant restriction in the same area contemporaneous with that accident. *See, Bell v Rameau*, 29 AD3d 839 (2nd Dept. 2006); *Li v Yun*, 27 AD3d 173 (2nd Dept. 2006); *Suk Ching Yeung v Rojas*, 18 AD3d 863 (2nd Dept.

2005). The reference to the MRI and the disc herniation is insufficient for the reasons stated above with regard to the report of Dr. Kochlati. *Albano v Onolfo, supra*; *Yakubov v CG Trans Corp., supra*.

Finally, there is no acceptable proof rebutting the defendant's showing that she did not suffer an injury satisfying the "90/180" category. Garcia's affidavit stating that she "could not engage in any type of activity which required physical involvement... for the entire period of seven (7) months that I was in therapy following the accident" is without weight because it is unsupported by medical proof. *See, Duran v Sequino*, 17 AD3d 626 (2nd Dept. 2005); *Sainte-Aime v Ho*, 274 AD2d 569 (2nd Dept. 2000); *Albano v Onolfo, supra*.

Accordingly, the complaint insofar as asserted by Antonia Garcia is dismissed.

Saturnina Vargas

In her bill of particulars, Vargas asserts that she suffered the same "serious injuries" claimed by Garcia: significant disfigurement, permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or system, and or a non-permanent impairment that prevented her from performing substantially all of the material acts which constituted her customary daily activities for ninety days of the first one hundred eighty days following the accident.

The presence of these "serious injuries" is based on her claim that she sustained the following: a herniated disc at L5-S1; a bulging disc at C3-C4 deforming the thecal sac; straightening of the cervical lordotic curvature; cervical and lumbar radiculopathy; cervical

and lumbar strain/sprain; (unspecified) restriction of motion; and depression, headaches, anxiety, fear and emotional upset and shock.

On its motion for summary judgment Avis presents Vargas's deposition transcript, which indicates that she stayed in bed for two days after the accident and in her home for 3 or 4 weeks, but not on a physician's advice. This proof also indicates that she was not steadily employed at that time, performing occasional cleaning jobs. There was no statement that she was unable to take such a job, but that it did take her longer to perform her work. She also testified that the last time she received treatment was in March of 2003.

Defendant Avis also presents affirmed reports by Dr. Fisher (two reports dated April 26, 2007), Dr. Cohen (date of examination May 29, 2007), Dr. Sarno.(date of examination August 2, 2007) and an affirmation by Dr. Farkas (date of examination September 26, 2007).

Dr. Fisher reviewed MRIs of the lumbar spine (performed three weeks post-accident) and cervical spine (taken six days after the accident). He found no disc herniations or bulges in either case, declaring each to be a normal examination/study.

Dr. Cohen stated that Vargas complained of headaches and discomfort at the lumbar and cervical spines. However, upon quantified range of motion testing he found no restrictions of the cervical and thoracolumbar spines and of the right shoulder, and diagnosed cervical and lumbrosacral strain, with right shoulder contusion, resolved.

Dr. Sarno performed a neurological examination. She complained to him of pain in both her neck and low back, and that she is unable to sit or stand for prolonged periods of

time. Upon objective testing, he concluded that she had a normal neurological examination with no deficits. He diagnosed sprains of the cervical and lumbar spines, which had resolved. He concluded that there was no objective evidence to corroborate her subjective complaints.

Dr. Farkas reported that Vargas complained of nervousness, and pain in her head and back. He saw no lesions, masses or noted warmth of the skin. He examined and tested her lumbar spine, cervical spine, both shoulders and right knee. He found no restrictions on range of motion, or other stated signs of injury. In all such areas of the body he diagnoses resolved sprains.

Under the authority cited above, the foregoing is sufficient to make out a *prima facie* showing by the moving defendants that Saturnina Vargas did not sustain a “serious injury” as described in the Insurance Law categories she claims to satisfy, and is sufficient to shift the burden to her to demonstrate that issues of fact exist regarding the same.

This plaintiff has failed to sustain her burden. Dr. Kochlatyi’s report is again unaffirmed, and thus inadmissible, and provides no described objective testing to support Vargas’s claims under the Insurance Law “serious injury” categories described above. As with Garcia, references to bulging and herniated discs are also inadequate, even if admissible evidence had been presented, because there is no established nexus to an objectively proved impairment. Dr. Slukhinsky’s affirmation, again based on an examination conducted after these motions were made, states that Vargas has recovered from a cervical spine injury and

that lumbar spine flexion and extension were within normal limits. He noted complaints of “mild back pain” and mild paraspinal spasm at L4-L5 levels, but concluded that “Mrs. Vargas recovered from the injuries she sustained” as a result of the the accident.

There is no evidence of treatment beyond March of 2003.

Finally, the complaints regarding her inability to lead a normal life for the seven months after the accident is unsupported by medical proof.

Accordingly, given the foregoing and the authority cited above, the motions for summary judgment as made against Saturnina Vargas are granted and the complaint insofar as asserted by this plaintiff is dismissed.


As the motions for summary judgment on the “serious injury” threshold have been granted, the motions for dismissal made pursuant to CPLR 3216 are denied as academic. The Court notes, however, that they are effectively unopposed.

The complaint is dismissed in its entirety.

This shall constitute the Decision and Order of this Court

ENTER

DATED: March 14, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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