

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

-----x
JOSE S. ZAVALA,

Plaintiff,

-against-

DAWN ANN SHEVLIN,

Defendants.

**MICHELE M. WOODARD,
J.S.C.**

TRIAL/IAS Part 18

Index No.: 018734/05

Motion Seq. No.:01

DECISION AND ORDER

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The Defendant moves by Notice of Motion for an Order granting the Defendant Summary Judgement dismissing the Plaintiff's Complaint on the grounds that the Plaintiff has not sustained a "serious injury" as defined by Insurance Law §5102(d). The Plaintiff opposes the Motion.

As the result of an accident that occurred on January 27, 2005, the Plaintiff claims that he has suffered the following injuries:

- Posterior disc bulges at C3, C5 and C6 levels which are each encroaching upon the ventral aspect of the thecal and lateral recesses bilaterally.
- Straightening of the curvature of the cervical spine with some loss of the normal lordosis.
- Left convex lumbar scoliosis with loss of the normal lordosis.
- Posterior disc bulge at L5-S1 which is encroaching upon the anterior epidural fat and lateral recesses bilaterally.
- Posterior disc bulges at L3 and L4 which are each encroaching upon the ventral aspect of the thecal and lateral recesses bilaterally.

After the accident, Mr. Zavala was taken to the hospital via ambulance. He remained in the hospital for several days and underwent tests and x-rays which included CT scans of the cervical spine and head. All tests results were normal. The Plaintiff proceeded on a course of

treatment which consisted of bicycle exercises and hot packs. After three months, the Plaintiff had to discontinue treatment because he did not have health insurance and the No Fault benefits expired. He did not work for two months after the accident.

The Plaintiff submitted to Independent Medical Exams in conjunction with this lawsuit.

Defendant's Expert radiologist Dr. Peter Ross reviewed Plaintiff's lumbar spine MRI taken on February 24, 2005. Dr. Ross found no evidence of focal lumbar disc herniations. He found mild vertebral spondylosis changes involving L4 and L5 vertebrae, pre-existing the subject accident. Dr. Ross affirmed that the L5-S1 level showed a small smooth diffused broad-based annular bulge extending posteriorly into the epidural fat and right and left laterally into the bases of the neural foramina, degenerative in nature and associated with degenerative vertebral changes, and therefore pre-existing, and not caused by or related to the subject accident.

The Defendant had a neurologist, Dr. Lawrence Robinson examine the Plaintiff on December 12, 2006. Dr. Robinson's report stated that an examination of the cervical spine revealed a supple neck with flexion and extension 45/45 degree rotation 70/70 degrees and lateral flexion 40/40 degrees. According to Dr. Robinson, there was no focal tenderness or spasm. Examination of the lumbar spine revealed intact flexion at 90/90 degrees and extension, rotation and lateral flexion each intact at 30/30 degree. Straight leg raising was bilaterally negative. There was no focal tenderness or spasm. According to Dr. Robinson, the neurological examination was normal. Reflexes were 2+ symmetric throughout all four limbs. Sensory testing was normal to pinprick and touch. Motor examination revealed normal strength, tone and coordination. There was no evidence of cervical or lumbar radiculopathy. Dr. Robinson concluded there was no focal tenderness or spasm and that there was no causal relationship to the accident. He further opined

that there was no neurological disability or impairment.

Dr. Leon Sultan conducted an independent orthopedic examination. His examination of the Plaintiff's cervical spine detected no paracervical muscle spasm. According to Dr. Sultan, there were no paracervical muscle spasm. There were no trigger points on palpation over the trapezius musculature. Range of motion testing was performed. Head and neck examination was 30 degrees (normal is 25-30 degrees) flexion was to 45 degrees (normal 40-50 degrees), right and left rotation was to 55 degrees (normal 45-60 degrees), and right and left lateral tilt was to 25 degrees (normal 20-30 degrees). Biceps and triceps reflexes were symmetrically present. Sensory testing in both upper extremities was normal. Dr. Sultan's examination of the Plaintiff's thoracolumbar spine indicated maintained lordotic curve. There was no active parathoracic or paralumbar muscle spasm. Heel and toe standing were unimpaired. Tren delenburg test was negative on both sides. The gait was steady. Range of motion testing revealed forward flexion at the waist easily carried out to 75 degrees (normal 60-90 degrees); lumbar extension to 15 degrees (normal 10-15 degrees); trunk rotation to right and left was to 50-60 degrees, tilting to the right and left was 25 degrees. Straight leg raising was negative bilaterally in the supine position. Sensory testing of both lower extremities was normal. Patrick test conducted by the Doctor was normal bilaterally.

The Plaintiff opposes the Defendant's Motion claiming that immediately after being discharged from the hospital, he began treating with Dr. Joseph Gregorace. According to Dr. Gregorace's report, at his initial visit, Mr. Zavala complained of headaches, neck and lower back pain as well as right lower pain and tingling. Zavala reported at that time that he had no previous motor vehicle accidents or injuries to the neck and/or lower back. Initially Dr. Gregorace

diagnosed the Plaintiff as having quantitative reduced range of motion in his cervical and lumbar spine. Dr. Gregorace referred Mr. Zavala to receive physical therapy, MRI testing and to take Motrin 600 mg. Dr. Gregorace also recommended that Mr. Zavala refrain from working.

Four months after the accident, the Plaintiff visited with Dr. Bruce Mann, a neurologist and pain management specialist who recommended medication and epidural injections. The Plaintiff followed the Doctor's instructions with the exception of the epidurals, until his No-Fault benefits were exhausted. He did not have the epidural injections because he did not have health insurance to cover the procedure.

Eight months after the accident, Dr. Avella reported that the Plaintiff had a quantitative limitation of motion in his cervical and Thoraco lumbar spine. The cervical spine examination revealed that his Flexion was 60 degrees and that normal is 60 degrees; His extension was 35 degrees and normal is 45 degrees; Rotation was 80 degrees and normal is 90 degrees. Lateral bending is 30 degrees with 30 degrees being normal. Dr. Avella's Thoraco lumbar Spine Examination revealed that there was tenderness in the left lumbar paraspinals with flexion being 70 degrees and normal being 90 degrees. Extension was 20 degrees with normal being 90 degrees. Extension was 20 degrees with normal being 30 degrees. Rotation is 70 degrees normal being 90 degrees. Lateral bending was 20 degrees with normal being 30 degrees.

MRI's taken at this time showed left convex lumbar scoliosis with loss of the normal lordosis; posterior disc budes of the L 3/4 and 4/5 levels, which are each encroaching upon the ventral aspect of the thecal sac recesses bilaterally; Posterior disc bulges of the L5/S1 level which is encroaching upon the anterior epidural fat and lateral recesses bilaterally.

Dr. Himelfart, a radiologist reported that the Magnetic Resonance Imaging scan at

Zavala's cervical spine revealed the straightening of the curvature of the cervical spine with some loss of the normal lordosis and that there are posterior bulges at C 3/4, C 4/5, C 5/6 and C 6/7 levels which are each encroaching upon the ventral aspect of the thecal and lateral recesses bilaterally.

Dr. Richard Obedian, an orthopedic surgeon, examined Mr. Zavala June 6, 2007. Dr. Obedian reviewed the actual MRI films and confirmed the diagnosis of lumbar and cervical spine bulges. Dr. Obedian also examined Mr. Zavala and performed objective orthopedic tests and found quantitative limitation of motion in both cervical and lumbar spine.

Pursuant to Sections 5102 and 5104 of the Insurance Law, an individual may not institute an action for personal injuries arising out of an automobile accident unless that individual has suffered a "serious injury." A "serious" injury is statutorily defined as: "death; dismemberment; significant disfigurement; fracture; loss of fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ, significant limitation of uses of a body function or system; an injury or impairment of a non-permanent nature which prevents the injured person from substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment."

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. Ctr.*, 64 NY2d 851, 853; *Zuckerman v. City of New York*, 49 NY2d 557, 562). 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 NY2d 320, 324; *Zuckerman v. City of New York*, supra, at 562).

Plaintiff has successfully rebutted any prima facie showing of defendant's entitlement to summary judgement on the issue of "serious Injury".

Additionally, it is not unreasonable for a Plaintiff to cease treatment when No-Fault benefits have been terminated. See *Black v. Robinson* 305 A.D. 2d 438 (2 Dept 2003).

Conflicting expert medical evidence concerning the injury Plaintiff sustained as a result of the automobile accident creates issues of fact for a jury as to whether the Plaintiff suffered serious injury as defined in Insurance Law, see *Martin v. Seaman* 184 A.D. 2d 996 (4th Dept 1992).


Based on the foregoing, the Defendant's application is **Denied**. It is hereby

ORDERED, that all parties and their respective Counsels are directed to appear in CCP on December 7, 2007 for a Trial on the above matter.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: November 14, 2007
Mineola, N.Y.

ENTER:


HON. MICHELE M. WOODARD
J.S.C.

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