

Saciolo v Bing Yong Gao

2010 NY Slip Op 32259(U)

August 12, 2010

Supreme Court, Nassau County

Docket Number: 12315/07

Judge: Michele M. Woodard

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X

KATHERINE SACIOLO, CHRISTOPHER REARDON
and ROSALIND SACIOLO,

Plaintiffs,

-against-

BING YONG GAO,

Defendant.

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

TRIAL/IAS Part 12

Index No.: 12315/07

Motion Seq. No.: 02

DECISION AND ORDER

-----X

Papers Read on this Motion:

Defendant's Notice of Motion	02
Plaintiffs' Affirmation	xx
Defendant's Reply	xx

The defendant in this personal injury action seeks an order against plaintiffs, Katherine Saciolo, Christopher Reardon and Rosalind Saciolo granting Summary Judgment pursuant to §3212 dismissing their Complaint on the ground that plaintiffs did not sustain a serious injury within the meaning of the Insurance Law §5102(d). Defendant's motion is **granted** and the Complaint is **dismissed**. The defendant's counterclaim against the plaintiffs for contribution is **dismissed**.

FACTS.

On or about July 19, 2004 at 12:30 a.m. the plaintiffs, Rosalind Saciolo ("Rosalind") and her daughter, Katherine Saciolo ("Katherine"), were traveling westbound in a vehicle owned and operated by Katherine. The plaintiff's vehicle, a 1999 two-door Ford sedan, was stopped in a toll booth lane for the Throgs Neck Bridge when the vehicle operated by Bing Yang Gao, a four-door Honda sedan, rear-ended their vehicle. The plaintiffs, after refusing medical assistance at the scene and/or transportation

to a hospital, were able to leave the scene and drive the vehicle to their respective residences in Long Island.

The plaintiffs did seek medical treatment the following day at the office of chiropractor, Christopher Skurka, M.D. Both plaintiffs underwent treatment and testing for the injuries sustained in the motor vehicle accident, which included but was not limited to: chiropractic treatment, electrophysiological testing, and Magnetic Resonance Imaging (“MRI”).

Katherine Saciolo missed three days of work from her employment as a legal assistant with the Law Offices of Paul Bornow. She treated with Dr. Skurka for about eight months after the accident. She alleges that she still suffers from aches and pain in her neck and back, and that her activities have been curtailed as she is not able to resume her physical regiment at the gym where she held membership. Since the accident, Katherine attended and graduated from Touro Law School and she had maintained employment during her full time enrollment. She presently works full time as an associate for the law firm, Rosicki & Rosicki.

Rosalind Saciolo treated with Dr. Skurka for about a year until “early 2005”. She was unemployed as of the date and time of the accident. Rosalind was involved in a vehicular accident in 1996¹ and another in 2002. She sustained injuries to her neck, back and shoulders as a result of the [1996] accident. As a result of the subject accident, she alleges that she is unable to engage in her usual activities such as bowling and to resume her exercise program at the gym. She complains of continued

¹Rosalind Saciolo’s testimony at her Examination Before Trial is that she was involved in a car accident in 1996 and another in 2002. She does not make reference to a 1987 accident. Dr. Katz, however, reports a 1987 accident involving this plaintiff which caused her to sustain injuries to her neck, shoulders, and back. (see Notice of Motion for Summary Judgment, Exhibit K, Tr. Rosalind Saciolo, p. 39 ln. 18-21)

pain to the neck and shoulder.

There is a copy of a stipulation in the record which has been executed only by the plaintiff, Christopher Reardon and his counsel, George Trovato, purporting to discontinue the action as to his interest. He alleges a loss of services from his wife, Katherine, as a result of the accident.

The plaintiff commenced this action by filing a Summons and Complaint on or about July 17, 2007. The Bill of Particulars alleges that Katherine, age 26 at the time of the accident, sustained the following injuries:

“...cervical radioculopathy; straightening and reversal of lordosis; cervical neuritis; lumbar facet syndrome; myospasm; myofibrosis; spinal intersegmental joint dysfunction; peripheral neuropathy; right brachial plexopathy; cervical sprain/strain; thoracic-lumbar sprain/strain; and cephalalgia....”.

Rosalind, age 51 at the time of the accident, allegedly sustained the following injuries:

“... kyphotic cervical curvature; C3/4 and C6/7 posterior subligamentous disc bulges; C4/5 disc hydration loss, diminished height and posterior disc bulge with ventral CSF impression and narrowing of the right C4/5 foramen; C5/6 posterior disc herniation with foraminal narrowing and ventral cord abutment, lower lumbar curvature straightening; transitional lower intervertebral disc termed S1/2; L4/5 and L5/S1 posterior disc herniations; L3/4 posterior right sided disc bulge; cervical sprain/strain; thoracic-lumbar sprain/strain; cervical neuritis; myospasm; myofibrosis; lumbar neuritis; sacroiliac joint sprain; lumbar facet syndrome; spinal intersegmental joint dysfunction; neck pain that radiates into the shoulders; suboccipital headaches; lower back pain that radiates into the superior buttocks; and neck pain that radiated into the clavicular region bilaterally...”

Plaintiffs claim serious injury pursuant to Insurance Law § 5012(d) on the basis of: significant disfigurement; a fracture; permanent loss of use of a body organ, member, function, or system; permanent consequential limitation of use of body organ or member; significant limitation of a use of a body function or system; a medically determined injury which prevents plaintiff from performing all of

the material acts of his or her daily activities for more than 90 of the 180 days since the occurrence of the accident.

Defendants' evidence includes reports from its expert orthopaedist, Michael J. Katz, M.D. and various unsworn medical documents which include MRI reports ordered by Dr. Skurka. Plaintiffs, in addition to the affirmation of their counsel, submit additional unsworn and unaffirmed MRI reports.

DISCUSSION

In a personal injury action, a summary judgment motion seeking to dismiss a complaint requires that a defendant establish a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (*Gaddy v Eycler*, 79 NY2d 955 [1992]). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence in admissible form to demonstrate the existence of a question of fact on the issue (*Gaddy v Eycler*, *supra*). The court must then decide whether the plaintiff has established a *prima facie* case of sustaining serious injury (*Licari v Elliot*, 57 NY2d 230 [1983]).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians (*see Pagano v Kingsbury*, 182 AD2d 268 [(2d Dept 1992]). It has long been established that an attorney's affirmation is sufficient to support a motion for summary judgment when it is accompanied by documentary evidence and exhibits establishing a movant's right to relief (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]).

Insurance Law §5102(d) defines serious injury to mean 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.['90/180 Claim']”.

Even if it is established that there is objective evidence to support plaintiffs' claims of serious injury, certain factors may undermine such evidence and entitle defendants to summary judgment and a resulting dismissal of plaintiffs' complaint. (*Pommels v Perez*, 4 NY3d 566, [2005]). Additional contributing factors such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury.

KATHERINE SACIOLO

Defendant met his initial burden by submitting the August 14, 2009 report of his expert, Dr. Katz who reviewed reports of Katherine's treating physicians in addition to personally examining her. He avers that the plaintiff's alleged pain and injuries of cervical sprain, thoracolumbosacral strain, and right shoulder contusion have been resolved. Dr. Katz also conducted range of motion tests on Katherine's right shoulder, neck, and back as those were the areas that she cited as the source of continued pain resulting from the accident. The results of those tests indicate a range of motion within normal limits. Further, he opines that this plaintiff is not disabled, and that she is capable of gainful employment without restrictions. Finally, he diagnosed her prognosis as excellent while noting that she shows no signs of permanence relative to the musculoskeletal system (see Notice of Motion for Summary Judgment, Exhibit I). In addition to the foregoing, the defendants submitted the plaintiff's electrophysiological reports from a neurological examination, as prescribed by Dr. Skurka to examine

the probability of neurological compromise, which indicated a normal study. (see Notice of Motion for Summary Judgment, Exhibit G, H)

In order to establish a permanent consequential limitation or a significant limitation of use for purposes of determining whether a plaintiff suffered serious injury under no-fault law, the medical evidence submitted by plaintiff must contain objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system; medical evidence must be sufficient to differentiate serious injuries from mild or moderate ones. (*Dean v Brown*, 67 AD3d 1097 [3d Dept 2009]). Plaintiff, whose medical evidence is scant and dated at best, has not refuted Dr. Katz's findings nor has she submitted any objective evidence.

As the findings of the plaintiff's unsworn MRI report of the lumbar spine, annexed to the defendant's motion as an exhibit, reported that the lumbar spine was normal (see Defendant's Notice of Motion for Summary Judgment, Exhibit J), the plaintiff in turn submitted an MRI of her cervical spine. The report indicated:

"...a mild degenerative disease, and a straightening and mild reversal of lordosis which can be seen with muscle spasm..." (see Affirmation in Opposition, Exhibit B).

It is noted that this report also states:

"...[t]here is no pathological narrow edema or fracture. The facets are well aligned. The posterior soft tissues and ligaments are intact. The prevertebral soft tissues are normal...There is no disc herniation, mass effect on the cord or encroachment of foramina." (see Affirmation in Opposition, Exhibit B).

This evidence does not support the plaintiff's attempt to survive the instant motion for summary judgment.

Further, it is noted that the aforementioned medical examinations and tests were conducted in 2004. As the plaintiff alleged a serious injury pursuant to Insurance Law §5102, she may not merely rely on stale medical reports, affirmation from her counsel, and her own statements that her limitations are ongoing. Also, proof of significant limitations which are merely contemporaneous with the accident may not be sufficient to establish a serious injury, particularly if there is evidence provided by the defendant expert that plaintiff's injuries have resolved and the plaintiff has recovered (see *Vidal v Maldonado*, 873 NYS2d 842 [2008]). The plaintiff's conclusion that she sustained permanent injuries and significant limitations, was not based on recent examinations and consequently does not support a finding of serious injury. (see *Landicho v Rincon*, 53 AD3d 568 [2d Dept 2008]; *Clemmer v Drah Cab Corp.*, 74 AD3d 660 [1st Dept 2010]).

The defendant's submission of unsworn medical reports and records of the injured plaintiff's physicians in support his motion for summary judgment opens the door for the plaintiff to rely upon these same unsworn or unaffirmed reports and records in opposition to the motion (see *Kearse v New York City Transit Authority*, 16 AD3d 45 [2nd Dept 2005]).

The plaintiff, however, does not rely on the unsworn MRI report of the plaintiff's lumbar spine as submitted by the defendant. The plaintiff instead submits an additional unsworn MRI report of her cervical spine and even argues that the defendant's failure to reference it, undermines his determination that the plaintiff has not sustained a serious injury.(see Affirmation in Opposition, ¶10). As such, the evidence submitted on behalf of Katherine is not in admissible form, and therefore it cannot be considered.

In sum, the defendant herein, in support of his motion, relies on the duly sworn affirmation of Dr. Katz and concluded, *inter alia*, that there is no evidence that Katherine sustained a serious injury. In

[* 8]

opposition, plaintiff relies only on an attorney's affirmation accompanied by unaffirmed, and unsworn reports which are insufficient to raise an issue of fact (*Henkin v Fast Times Taxi, Inc.* 307 AD2d 814 [1st Dept 2003]).

Finally, there is no explanation as to why plaintiff ceased treatment. Her own testimony indicates that she treated up until "some point in 2005" (see Notice of Motion for Summary Judgment, Exhibit F., Tr., Katherine Saciolo, p. 39, ln. 19, p. 40, ln. 1). While plaintiff complains that her condition is unchanged since the accident, she has not sought any other treatment since 2005. While a gap in or cessation in treatment is not necessarily dispositive as the law does not require a record of needless treatment in order for a plaintiff's case to survive a summary judgment motion, a plaintiff who suspends therapeutic measures while claiming a serious injury, must offer a bonafide and reasonable explanation for having done so (see *Ketz v Harder*, 16 AD3d 930 [3d Dept 2005], *Moore v Sarwar*, 29 AD3d 752 [2nd Dept 2006], *Krieger v Diallo*, 62 AD3d 504, [1st Dept 2009] *Pommells v Perez*, 4 NY3d 566, supra.). Here, this plaintiff has not submitted the required bonafide reason for the cessation of treatment.

90/180 Claim.

To prevail on this basis, a plaintiff must again provide competent, objective medical evidence to support the alleged limitations on plaintiff's daily activities. (*Monk v Dupuis*, 287 AD2d 187, 191 [3d Dept 2001]). Further, plaintiff must demonstrate that he/she has been curtailed from performing his/her activities to a great extent rather than some slight curtailment" (See *Sands v Stark*, 299 AD2d 642 [2d Dept 2002]).

Interpreting the statutory definition of a 90/180 claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great

extent rather than some slight curtailment.” *Thompson v Abbasi*, 15 AD3d 95 (1st Dept 2005).

Generally, Courts have been unwilling to find a “serious injury” under the 90/180-day limitation where the plaintiffs’ treating physician placed no restrictions on them or their activities (See *Gonzales v Green*, 24 AD3d 939 [3d Dept 2005]; *Clements v Lasher* 15 AD3d 712 [3d Dept 2005]). Not only did Katherine Saciolo fail to submit any evidence and/or report from her treating physician placing any restrictions on her activities, plaintiff’s own testimony failed to support the conclusion that her injuries caused a significant limitation in her activities particularly when she returned to work within three days of the accident. (*Petinrin v Levering*, 17 AD3d 173 [1st Dept 2005]).

ROSALIND SACIOLO

Defendant met his initial burden in its submission of Dr. Katz’s August 14, 2009 report of his personal examination of Rosalind Saciolo and his review of the reports and medical records of her treating physicians. His report is persuasive evidence that plaintiff’s alleged pain and injuries of cervical sprain, thoracolumbosacral strain, bilateral shoulder strain and sacroiliac joint strain are resolved. Dr. Katz also conducted range of motion tests on Rosalind’s right and left shoulders, thoracolumbosacral spine, both hips, and sacroiliac joint, and the results indicated a range of motion within normal limits. Further, Dr. Katz noted that Rosalind’s medical records reported injuries to her neck, back, both shoulders and sacroiliac joint resulting from a car accident in [1996], and that she was also involved in another car accident in 2002. He also opined that plaintiff has multi-level pre-existing degenerative disc changes as indicated by the MRI report as well as determining that the plaintiff is free of signs of symptoms of permanence relative to the musculoskeletal system Finally, Dr. Katz averred that the plaintiff is not disabled and that she is capable of gainful employment.(see Notice of Motion for Summary Judgment, Exhibit L).

The plaintiff submitted the unsworn MRI report of her cervical spine with the following impressions:

“...kyphotic cervical curvature; C3/4 and C6/7 posterior subligamentous disc bulges; C4/5 disc hydration loss, diminished height and posterior disc bulge with ventral CSF impression and narrowing of the right C4/5 foramen; C5/6 posterior disc herniation with foraminal narrowing and ventral cord abutment...”(see Affirmation in Opposition, Exhibit B).

As the defendant referenced the findings of this MRI, although same has not been submitted with his motion, there is no issue regarding its admissibility (see *Perry v Pagano*, 267 AD2d 290, 290[2d Dept 1999]; *Dietrich v Puff Cab Corp.* 63 AD3d 778 [2d Dept 2009]).

However, an issue of causation is raised in that Rosalind has been involved in two prior vehicular accidents, and was treated by Dr. Skurka after both accidents. Plaintiff has the burden to come forward with evidence addressing causation and plaintiff failed to meet that burden (*Clark v Perry*, 21 AD3d 1373 [4th Dept 2005]; see also *McCarthy v Bellamy*, 39 AD3d 1166 [4th Dept 2007]). Plaintiff's submitted reports in opposition did not address how plaintiff's current medical problems, in light of her past medical history, are causally related to the subject accident (*Style v Joseph*, 32 AD3d 212 [1st Dept 2006]) Dr. Skurka had treated the plaintiff for those injuries and by failing to acknowledge the prior trauma and the back and neck injuries they caused, any finding or determination that the plaintiff's alleged disability or injury was causally related to the subject accident cannot be considered (*Kupka v Emmerich*, 2 AD3d 595 [2d Dept 2003]).

It is also noted that plaintiff has not provided any objective evidence to refute Dr. Katz's findings that Rosalind Saciolo's MRI report revealed evidence of “multi-level pre-existing degenerative disc changes” (see Notice of Motion for Summary Judgment, Exhibit L). Consequently, the plaintiff failed to raise an inference that her injury was caused by the accident. (see *Linton v Nawaz* 62 AD3d

434, 443 [1st Dept 2009]).

Further, the mere existence of bulging or herniated discs, as reported by the MRI submitted by the plaintiff, is not evidence of serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and their duration (*see Kearse v New York City Tr. Auth.*, 16 AD3d 45 [2005]; *Diaz v Turner*, 306 AD2d 241 [2003], *Yakubov v CG Trans Corp.*, 30 AD3d 509, [2d Dept 2006]). The plaintiff has not submitted any such evidence in her opposition.

Finally, as already discussed herein regarding Katherine Saciolo, the argument that Rosalind Saciolo sustained a serious injury pursuant to Insurance Law §5012 is defeated by her failure to set forth a bonafide reason for her cessation of treatment in 2005 (see Notice of Motion for Summary Judgment, Exhibit K, Tr. Rosalind Saciolo, p. 52 ln. 6-8).

90/180 Claim

As stated in the foregoing, there is nothing in the record before this Court to support that Rosalind Saciolo was restricted or confined to her residence and that she was unable to substantially perform her daily activities during the statutory time period. Accordingly, the defendant's motion as to Rosalind Saciolo, with respect to the specific 90/180 claim, is **granted**.

CHRISTOPHER REARDON

As Christopher Reardon's cause of action to recover damages for loss of his wife's services is derivative in nature, the dismissal of the primary causes of action necessitates the dismissal of this cause of action as well (*see Holmes v City of New Rochelle* 190 AD2d 713 [2d Dept 1993]; *Maddox v City of New York*, 108 AD2d 42 [2d Dept 1985]).

DEFENDANTS' COUNTERCLAIM

The defendant's counterclaim is premised on the plaintiffs' culpability. He contends that if

Katherine and Rosalind Saciolo sustained injuries as a result of the motor vehicle accident, such injuries arise from their negligence and/or culpable conduct. Therefore, if the defendant is found to be negligent, he is entitled to contribution from the plaintiffs.


As the Complaint against all the plaintiffs is dismissed, this counterclaim is dismissed, as the defendant is not aggrieved thereby (see, CPLR §5511; *Mazzotta v Vacca*, 289 AD2d 305 [2d Dept 2001]). Based on the foregoing, it is hereby

ORDERED, that, defendants' motion for an Order granting summary judgment dismissing the Complaint is **granted** in its entirety.

This constitutes the Decision and Order of the Court.

DATED: August 12, 2010
Mineola, N.Y. 11501

ENTER:


HON. MICHELE M. WOODARD

J.S.C.

ENTERED

AUG 19 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

H:\DECISION - SERIOUS INJURY\Saciolo v Gao.wpd