

**Figueroa v Campos**

2010 NY Slip Op 33660(U)

December 14, 2010

Supreme Court, Suffolk County

Docket Number: 09-6594

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

*Clara*

**PRESENT:**

Hon. RALPH T. GAZZILLO  
Justice of the Supreme Court

MOTION DATE 4-30-10 (#003)  
MOTION DATE 6-1-10 (#004)  
MOTION DATE 8-19-10 (#005)  
ADJ. DATE 9-16-10  
Mot. Seq. # 003 - MG  
              # 004 - MD  
              # 005 - XMD

-----X  
CLARA FIGUEROA and ANGEL FIGUEROA, :  
  : Plaintiff, :  
  : - against - :  
JOSE CAMPOS, :  
  : Defendant. :  
-----X

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Upon the following papers numbered 1 to 37 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; 18 - 24 ; Notice of Cross Motion and supporting papers 25 - 31 ; Answering Affidavits and supporting papers 13 - 15; 25 - 31; 32 - 33 ; Replying Affidavits and supporting papers 16 - 17; 32 - 33; 34 - 37 ; Other \_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (#003) by the plaintiffs, in effect, for leave to renew their prior motion for summary judgment on the issue of liability is granted and, upon renewal, the motion is granted; and it is further,

**ORDERED** that the motion (#004) by the defendant for summary judgment dismissing the complaint is denied; and it is further,

**ORDERED** that the cross motion (#005) by the plaintiffs for summary judgment on the issue of whether the plaintiff sustained a serious injury under Insurance Law § 5102 (d)(9) is denied.

The instant action seeks to recover damages for personal injuries arising from a rear-end motor vehicle accident, which occurred on April 29, 2008, at the intersection of Route 25 and Commack Road

in Commack, New York. The accident occurred when a vehicle owned and operated by the defendant collided with the rear of the vehicle owned and operated by the plaintiff Clara Figueroa (hereinafter the plaintiff). The complaint alleges that the plaintiff sustained serious and permanent injuries as a result of the defendant's negligence in causing the accident. Specifically, the bill of particulars alleges serious and permanent injuries including: multiple posterior disc herniations at C3-4, C4-5 and C5-6; C4-5 and C5-6 intervertebral disc space narrowing; severe neck pain with radiation into the arms bilaterally; severe right shoulder pain with radiation into the arms bilaterally; severe low back with radiation into the lower extremities; and severe mid-back pain with radiation into the lower extremities. It alleges that, as a result of her injuries, the plaintiff was confined to bed and home on an intermittent basis from April 29, 2008 to the present. Lastly, the bill of particulars alleges that the injuries sustained by the plaintiff are serious within the meaning of the Insurance Law in that she sustained a permanent loss of use of a body organ, member, function or system; a significant limitation of use of a body organ, member, function or system; a permanent consequential limitation of use of a body function or system; and/or a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence. The complaint alleges a derivative cause of action on behalf of the plaintiff's husband, Angel Figueroa.

In a prior motion, the plaintiffs moved for summary judgment on the issue of liability. By order dated March 24, 2010, this Court denied the motion without prejudice to renewal based on the plaintiffs' inadvertent failure to annex a copy of the defendant's deposition transcript, an exhibit referenced and relied on by the motion.

The plaintiffs now, in effect, seek leave to renew their prior motion for summary judgment on the issue of liability and, upon renewal, seek an order granting such motion. The defendant moves for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d). By separate motion, the plaintiffs also cross-move for summary judgment in their favor on the issue of whether the plaintiff sustained a serious injury as defined by Insurance Law § 5102(d)(9).

The branch of the plaintiffs motion which, in effect, seeks leave to renew their prior motion for summary judgment on the issue of liability is granted. On this motion the plaintiffs seek to cure the defect in their prior papers and submit the defendant's deposition transcript. The Court rejects the defendant's unsubstantiated contention that the deposition transcripts submitted on the instant motion cannot be considered by this Court. Because renewal is appropriate to correct a procedural error (*cf.*, ***Gillis v Toll Land XIII Ltd. Partnership***, 309 AD2d 734, 765 NYS2d 265 [2003]; ***S & D Petroleum Co. v Tamsett***, 144 AD2d 849, 534 NYS2d 800 [1988]), leave to renew is granted.

Upon renewal, the Court grants the plaintiffs' motion for summary judgment on the issue of liability. A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence with respect to the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see*, ***Volpe v Limoncelli***, 74 AD3d 795, 902 NYS2d 152 [2010]; ***Zdenek v Safety Consultants, Inc.***, 63 AD3d 918, 883 NYS2d 57[2009] ***Ramirez v Konstanzer***, 61 AD3d 837, 878 NYS2d 381 [2009]; ***Jumandeo v Franks***, 56 AD3d 614, 867

NYS2d 541 [2008]; *Arias v Rosario*, 52 AD3d 551, 860 NYS2d 168 [2008]). The plaintiffs sustained their burden of establishing a *prima facie* case of negligence by submitting the deposition testimony of the plaintiff and the defendant, which, consistently, state that defendant's vehicle collided with the rear of the plaintiff's vehicle after the plaintiff came to a stop for a yellow traffic light (see, *Volpe v Limoncelli*, *supra*; *Zdenek v Safety Consultants, Inc.*, *supra*; *Jumandeo v Franks*, *supra*). In opposition, the defendant failed to raise a triable issue of fact. Contrary to the defendant's contention, under the circumstances of this case, the allegation that the plaintiff came to a sudden stop was insufficient to rebut the inference of negligence by providing a non-negligent explanation for the collision (see, *Volpe v Limoncelli*, *supra*; *Zdenek v Safety Consultants, Inc.*, *supra*; *Ramirez v Konstanzer*, *supra*; *Jumandeo v Franks*, *supra*).

The motion by the defendant for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d) is denied. A "serious injury" is defined 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 constitutes 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" (Insurance Law § 5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (see, *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Charley v Goss*, 54 AD3d 569, 863 NYS2d 205 [2008] *aff'd* 12 NY3d 750, 876 NYS2d 700 [2009]).

In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (see, *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*).

In support of the motion for summary judgment, the defendant submitted, *inter alia*, the affirmed report of Stuart Kandel, M.D. and the affirmed report of Jacob J. Barie, M.D. This evidence fails to demonstrate the defendant's *prima facie* entitlement to summary judgment on the grounds that the plaintiff did not sustain a "serious" injury as a result of the subject accident (see, *Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Loadholt v N.Y. City Transit Auth.*, 12 AD3d 352, 783 NYS2d 660 [2004]). To the contrary, the evidence presented raises triable issues of fact as to whether the plaintiff sustained permanent and significant limitations to her cervical spine as a result of the injuries she sustained in the subject accident. In this regard, the defendant's own expert, Dr. Kandel, found limitations in the plaintiff's cervical extension during his examination of the plaintiff on February 5, 2010 (see, *Kim v Orourke*, 70

AD3d 995, 893 NYS2d 892 [2010]; *Landman v Sarcona*, 63 AD3d 690, 880 NYS2d 168 [2009]; *Powell v Prego*, 59 AD3d 417, 872 NYS2d 207 [2009]; *compare*, *Tai Ho Kang v Young Sun Cho*, 74 AD3d 1328, 904 NYS2d 743 [2010]; *see also*, *Gaccione v Krebs*, 53 AD3d 524, 863 NYS2d 444 [2008]). He also noted tenderness over the right trapezius muscle. In addition, although Dr. Kandel states that the plaintiff's right shoulder extension was normal and that the results of the straight leg raising test were normal, he fails to compare his findings to normal values (*see*, *Karvay v Gueli*, \_\_AD3d\_\_, 908 NYS2d 454 [2010]; *Chiara v Dernago*, 70 AD3d 746, 894 NYS2d 129 [2010]; *Wallace v Adam Rental Transp., Inc.*, 68 AD3d 857, 891 NYS2d 432 [2009]). To the extent that Dr. Kandel concludes that the plaintiff's alleged cervical spine injuries cannot be considered causally related to the subject accident, his affirmation was without probative value since in reaching this conclusion he clearly relied on the unsworn reports of others (*see*, *Vilomar v Castillo*, 73 AD3d 758, 901 NYS2d 651 [2010]; *Villante v Miterko*, 73 AD3d 757, 901 NYS2d 311 [2010]; *Ferber v Madorran*, 60 AD3d 725, 875 NYS2d 518 [2009]). Dr. Barie's affirmation likewise raised issues of fact as to whether the plaintiff sustained a serious injury to her cervical spine as a result of the subject accident. Although Dr. Barie notes some long-standing degenerative changes, upon reviewing the cervical spine MRI performed on the plaintiff on May 24, 2008, he states that the issue of whether the C5-6 disc protrusion was causally related to the subject accident must be related to the plaintiff's clinical presentation. He further states that to what extent this patient's accident aggravated her underlying condition must also be determined by clinical evaluation.

In any event, the defendant's motion papers were insufficient to establish his *prima facie* entitlement to summary judgment because they failed to establish that the plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*see*, *Marmar v IF USA Express, Inc.*, 73 AD3d 868, 899 NYS2d 884 [2010]; *Negassi v Royle*, 65 AD3d 1311, 885 NYS2d 760 [2009]; *Carr v KMO Transp., Inc.*, 58 AD3d 783, 872 NYS2d 476 [2009]).

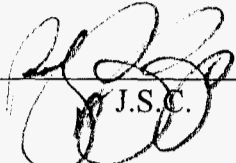
Inasmuch as the evidence submitted by the defendant failed to establish a *prima facie* entitlement to judgment as a matter of law, it is unnecessary to consider whether plaintiffs' opposition papers were sufficient to raise a triable issue of fact (*see*, *Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2005]; *McDowall v Abreu*, 11 AD3d 590, 782 NYS2d 866 [2004]; *Coscia v 938 Trading Corp.*, 283 AD2d 538, 725 NYS2d 349 [2001]). Accordingly, the defendant's motion for summary judgment dismissing the complaint is denied.

The plaintiffs' cross motion for summary judgment in their favor on the issue of whether the plaintiff sustained a serious injury as defined by Insurance Law § 5102(d)(9), which defines a "serious injury" as a medically determined injury or impairment of a nonpermanent nature which prevents the plaintiff from performing substantially all of the material acts which constituted his/her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident, is also denied. At the outset, the Court notes that this cross motion offends the rules against successive motions for summary judgment (*see*, *Phoenix Four v Albertini*, 245 AD2d 166, 665 NYS2d 893 [1997]; *compare*, *Greene v Sager*, 2010 NY Slip Op 8068 [2d Dept 2010]). In any event, the evidence submitted in support of this cross motion fails to demonstrate as a matter of law that the

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plaintiff sustained a serious injury under this category. To the contrary, the evidence presented, including the affirmed reports of Nizarali Visram, M.D. and Julio Westerband, M.D. and the plaintiff's deposition testimony, presents, at the very least, a triable issue of fact as to whether the plaintiff in fact sustained such an injury.

Dated: 12/04/10

  
\_\_\_\_\_  
J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION