

Doherty v Galla

2006 NY Slip Op 30419(U)

August 24, 2006

Supreme Court, Suffolk County

Docket Number: 04-6629

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 3/21/06
ADJ. DATE 5/22/06
Mot. Seq. # 001 - MG; CASEDISP

-----X	
LISA DOHERTY and CHARLES DOHERTY,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
BRIAN J. GALLA and RYDER TUCK RENTAL,	:
INC.,	:
	:
Defendants.	:
-----X	

DECOLATOR, COHEN & DIPRISCO
Attorneys for Plaintiffs
1399 Franklin Avenue, Suite 201
Garden City, New York 11530

CONNORS & CONNORS, P.C.
Attorneys for Defendants
766 Castleton Avenue
Staten Island, New York 10310

Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 12 - 20; Replying Affidavits and supporting papers 21 - 23; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants' motion for summary judgment in their favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted and the complaint is dismissed.

This is an action to recover damages, individually and derivatively, for serious injuries allegedly sustained by plaintiff Lisa Doherty as a result of a motor vehicle accident which occurred on Sunrise Highway, approximately 200 feet east of Long Beach Avenue in the Village of Freeport, County of Nassau, New York on December 13, 2003. The accident occurred when the vehicle operated by plaintiff Lisa Doherty ("Mrs. Doherty") was allegedly struck by the vehicle owned by defendant Ryder Truck Rental, Inc. ("Ryder") and operated by defendant Brian J. Galla ("Galla"). Defendants now move for summary judgment in their favor dismissing the complaint on the ground that plaintiff Lisa Doherty did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiffs oppose this motion, and defendants have filed a reply.

Insurance Law § 5102 (d) defines “serious injury” 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 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 order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (*Tippling-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of this motion, defendants submit, *inter alia*, the pleadings; the plaintiffs’ verified bill of particulars; the transcript of Mrs. Doherty’s deposition conducted on April 28, 2005; the unaffirmed reports dated March 4 and May 19, 2004 of Mrs. Doherty’s radiologist Allan Keil, M.D.; the affirmed report dated May 25, 2005 of defendants’ examining neurologist Frederick S. Mortati, M.D.; the affirmed report dated May 25, 2005 of defendants’ examining orthopedist Craig B. Ordway, M.D.; and the unaffirmed reports dated September 8, September 23, and October 16, 2005 of defendants’ examining radiologist Andrew W. Litt, M.D. Initially, the Court notes that the unaffirmed reports of Dr. Litt, which are not in admissible form, have not been considered in this determination (*see, Pagano v Kingsbury, supra*).

Plaintiffs, in their bill of particulars, claim that Mrs. Doherty sustained cervical spine disc bulges and herniations, lumbar spine disc bulges and herniations; L5-S1 foraminal narrowing with abutment of the existing L5 roots; and straightening of the cervical curvature. Plaintiffs also claim that Mrs. Doherty

was confined to her bed for about one week and to her home from approximately December 13, 2003 to January 2, 2004. In addition, plaintiffs claim that Mrs. Doherty sustained a loss of earnings of approximately \$750. Moreover, plaintiffs claim that Mrs. Doherty sustained, *inter alia*, a serious injury in the categories of a permanent consequential limitation, a significant limitation, and a non-permanent injury.

Mrs. Doherty testified that she did not lose consciousness and was not bleeding from any part of her body as a result of the accident. She exited her car and when an ambulance arrived, she declined emergency services. Several days later she was able to secure an appointment at Medical Spine Care with Dr. Jerald Dariano. She then went through an approximate three-month period of physical therapy with respect to complaints of pain in her spine and neck. She subsequently switched providers and continued with another three to five months of therapy. She then completely stopped therapy. Mrs. Doherty testified that she had previously injured her neck and back in a car accident in 2001. In connection with her prior accident she saw Dr. Orlin and underwent approximately two months of physical therapy. Her present complaints include pain in her neck for which she takes aspirin and sometimes uses a heating pad. As a result of this accident, she cannot do heavy cleaning or yard work.

Dr. Keil in his one of his x-ray reports dated March 4, 2004 states that he performed x-rays of Mrs. Doherty's cervical and thoracic spine on February 24, 2004, and his findings include no fractures or osseous lesions. However, he also observed C5-6 intervertebral disc narrowing and thoracolumbar scoliosis. Dr. Keil in another of his x-ray reports states that he performed x-rays of Mrs. Doherty's lumbar spine on May 11, 2004, and his findings include no fractures or osseous lesions. However, Dr. Keil also observed a lumbosacral transitional vertebra which was fused to the sacrum on the right side and a L4 transitional vertebra with disc space narrowing.

Dr. Mortati states that he performed an independent neurological examination of Mrs. Doherty on May 25, 2005, and his findings include intact cranial nerves and cerebellar testing; no muscle atrophy DTR's that were symmetrically active and "2+"; a normal sensory exam; no spasm of the posterior cervical, trapezii, or lumbosacral paraspinal muscles; and a negative seated straight leg raise. In addition, he noted that plaintiff's seated straight leg raise was negative to 90 degrees on both sides. Dr. Mortati opined that Mrs. Doherty's cervical and shoulder pains were not attributable to radiculopathy and not explainable on a neurological basis.

Dr. Ordway states that he performed an independent orthopedic examination of Mrs. Doherty on May 25, 2005, and his findings include no weakness or atrophy of any flexor or extensor muscle group; no limitation of any joint of the upper extremities; no kyphosis or abnormal curvature of the mid and lower back; a seated straight leg raise to 90 degrees without symptoms; and no sign of lumbar nerve root compression. He also observed that plaintiff had a normal range of cervical motion; no spasm in the cervical or lumbar paravertebral musculature; and negative nerve root testing of the neck and lower back. Dr. Ordway opined that there was no evidence of any post-traumatic neurological deficit or deformity secondary to the accident, and that Mrs. Doherty was not impaired.

Defendants made a prima facie showing that Mrs. Doherty did not sustain a serious injury in the categories of a permanent consequential limitation, a significant limitation, and a non-permanent injury

by their submission of plaintiffs' bill of particulars, the transcript of Mrs. Doherty's deposition, the reports of Mrs. Doherty's treating physicians, and the reports of defendants' examining neurologist and orthopedist (*see, Gousgoulas v Melendez*, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]; *Temple v Doherty*, 301 AD2d 979, 755 NYS2d 448 [3d Dept 2003]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Edwards v DeHaven*, 155 AD2d 757, 547 NYS2d 462 [3d Dept 1989]). Drs. Mortati and Ordway both found that Mrs. Doherty had a normal straight leg test with no spasm (*see, Willis v New York City Trans. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). Further, Dr. Ordway found that she had a normal range of cervical motion with no spasm (*see, Willis v New York City Trans. Auth., supra*). As defendants have met their burden as to all categories of serious injury alleged by Mrs. Doherty, the Court turns to plaintiff's proffer (*see, Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to this motion, plaintiffs submit, *inter alia*, the affidavit dated April 20, 2006 of Mrs. Doherty; the affirmation dated May 2, 2006, and affirmed report dated May 8, 2006 of Mrs. Doherty's psychiatrist Mike Pappas, M.D.; the affirmed reports dated February 2, April 4, and May 3, 2004 of Mrs. Doherty's other psychiatrist Josephine Brawner, M.D.; and the affirmed reports dated February 4 and 23, 2004 of plaintiff's radiologist, Dr. Robert Diamond. At the outset, the Court notes references by Dr. Pappas to range of motion findings made by Dr. Brawner on February 2, 2004, of which he has no firsthand knowledge, have been disregarded as without probative value (*see generally, DeMacos v DeMacos*, 142 AD2d 546, 529 NYS2d 904 [2d Dept 1988]). In any event, Dr. Brawner's report dated February 2, 2004 does not contain any specific range of motion test findings (*see, Petinrin v Levering, Jr.*, 17 AD3d 173, 794 NYS2d 12 [1st Dept 2005]). Further, statements by Dr. Pappas, as to injuries not alleged in plaintiffs' bill of particulars, have also been disregarded (*see generally, Robinson v Schiavoni*, 249 AD2d 991, 672 NYS2d 560 [4th Dept 1998]).

Mrs. Doherty alleges in her affidavit that she is unable to jog or hike and that she does not ride her bicycle as often as she did prior to the accident. She also states that she sought medical care the day after the accident and that her medical treatment continued until approximately February 2005. At that time, her attending physician told her that her condition was permanent and not likely to improve, and she was discharged from medical care. Mrs. Doherty further states that she sustained minor injuries in a prior motor vehicle accident in 2001 for which she underwent treatment for two months.

Dr. Brawner states that she performed an initial psychiatric examination of Mrs. Doherty on February 2, 2004, and her findings include an intact sensory exam; DTRs that were +1 to 2 bilaterally; and a normal motor examination, except for mild weakness of the left shoulder abductors. She observed that while there was no tenderness on the lumbar paravertebral muscles, there was tenderness at the coccyx. She also noted that there was spasm in the left rhomboids, left upper traps, and moderate tenderness in the left cervical paraspinals. Dr. Brawner noted that Mrs. Doherty had sustained a prior neck injury and opined that she had sustained a cervical strain/sprain with chronic myofascial pain. Dr. Brawner, states that she performed a psychiatric examination of Mrs. Doherty on March 22, 2004, and her findings include moderate tenderness of the left cervical paraspinal muscles; stiffness of the lumbar paraspinal muscles; and residual weakness of the left shoulder abductors. She also noted that Mrs. Doherty's sensory examination was intact and that she had a negative straight leg raise. She opined that Mrs. Doherty had sustained a post-traumatic cervical strain/sprain. Dr. Brawner states that she

performed EMG/NCV testing of Mrs. Doherty on April 4, 2004, and her findings include an abnormal EMG consistent with left C5 cervical radiculopathy. Dr. Brawner states that she examined Mrs. Doherty on May 3, 2004, and her findings include moderate tenderness over the cervical paraspinal muscles; motor testing that was "5/5"; an intact sensory examination; and a negative straight leg raise test. Dr. Brawner also noted at that time that Mrs. Doherty's statements that her neck pain seemed to be worse on days in which she worked at a computer.

Dr. Mike Pappas states that an initial physiatric examination of Mrs. Doherty was performed by Dr. Brawner at his office on February 2, 2004. Mrs. Doherty continued to treat at his office and was seen on March 22, May 3, August 23, November 11, December 30, 2004, February 24, 2005, and April 25, 2006. On February 25, 2005, Dr. Pappas noted tightness in Mrs. Doherty's cervical and lumbar paraspinal musculature. It was his opinion, at that time, that Mrs. Doherty had reached maximal benefit from physical therapy. During her most recent visit on April 25, 2006, Dr. Pappas noted that Mrs. Doherty's cervical flexion, extension, and right/left rotation were 50, 40, 65/58 degrees, compared with the normal ranges of 60, 50, 80/80 degrees, and that her lumbar flexion and extension were 74 and 22 degrees, compared with the normal ranges of 90 and 30 degrees. Dr. Pappas opined on that date that Mrs. Doherty's prognosis for a complete recovery was poor, and he recommended that she continue with a home exercise program. In conclusion, Dr. Pappas opines that Mrs. Doherty sustained significant injuries to her cervical and lumbar spine as a result of the subject accident and that she has a partial permanent disability.

Dr. Diamond states that he performed an MRI of Mrs. Doherty's cervical spine on February 4, 2004, and his findings include no significant protrusions into the neural canal, recesses or foramina, and a cervical cord which was otherwise unremarkable in signal and morphology. He also noted posterior subligamentous disc bulges and a right-sided T2 vertebral lesion compatible with hemangioma¹. In addition, Dr. Diamond states that he performed an MRI of Mrs. Doherty's lumbar spine on February 23, 2004, and his findings include scoliosis² and no abnormal masses. While Dr. Diamond observed an L3-4 disc bulge and L4-5, L5-S1 disc herniations, he also noted that there was osseous vertebral edema and facet hypertrophic changes at L4-5. In addition, Dr. Diamond observed foraminal narrowing with abutment of existing nerve roots at L5-S1.

Plaintiffs' submissions are insufficient to raise a triable issue of fact as to Mrs. Doherty's alleged injuries as Dr. Pappas failed to adequately address the pre-existing congenital and degenerative condition of her cervical and lumbar spine, and as he did not provide any foundation or objective medical basis supporting the conclusions which he reached, namely, that the alleged conditions were causally related to or exacerbated by the accident (*see, Knoll v Seafood Express*, 5 NY3d 817, 803 NYS2d 25 [2005]; *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Gomez v Epstein*, 2006 NY Slip Op 4246 [2d Dept, May 30, 2006]; *Flores v Leslie*, 27 AD3d 220, 810 NYS2d 464 [1st Dept 2006]). Instead, the

¹ Hemangioma is defined as a congenital abnormality, in which proliferation of blood vessels leads to a mass that resembles a neoplasm (Stedman's Medical Dictionary 795 [27th ed 2000]).

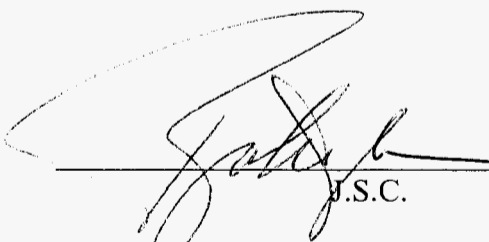
² Scoliosis is defined as the abnormal labral and rotational curvature of the vertebral column (Stedman's Medical Dictionary 1606 [27th ed 2000]).

affirmation of Dr. Pappas largely consists of unsubstantiated speculation concerning the causal relationship between the accident and Mrs. Doherty's condition several years after the accident (*see, Damstetter v Martin*, 247 AD2d 893, 668 NYS2d 863 [4th Dept 1998]), and conclusory assertions tailored to meet the statutory requirements (*see, Khan v Hamid*, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Further, although Dr. Pappas, in his most recent examination of Mrs. Doherty, observed limitations in range of cervical and lumbar motion, plaintiffs failed to provide any admissible medical proof that was contemporaneous with the subject accident which showed range of motion limitations in Mrs. Doherty's cervical and lumbar spine (*see, Ranzie v Abdul-Massih*, 28 AD3d 447, 813 NYS2d 473 [2d Dept 2006]).

While a disc herniation may constitute a serious injury, the MRI reports of Dr. Diamond are not probative for the purposes of demonstrating a serious injury because they contain no opinion as to causation (*see, Collins v Stone*, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]), and do not establish the duration of plaintiff's alleged injuries (*see, Nelson v Amicizia*, 21 AD3d 1015, 803 NYS2d 87 [2d Dept 2005]; *McKinney v Lane*, 288 AD2d 274, 733 NYS2d 456 [2d Dept 2001]; *Elgendy v Nieradko*, 307 AD2d 251, 762 NYS2d 275 [2d Dept 2003]). In any event, plaintiffs have not submitted sufficient medical proof adequately addressing Mrs. Doherty's prior automobile accident (*see, Grant v Fofana*, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). Additionally, plaintiffs failed to submit any competent medical evidence that Mrs. Doherty was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days following the subject accident as a result of the accident (*see, Holder v Brown*, 18 AD3d 815, 796 NYS2d 641 [2d Dept 2005]; *Mercado v Garbacz*, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]; *Omar v Goodman*, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]). Thus, plaintiff has provided insufficient medical proof to raise an issue of fact with respect to any of the categories of serious injury alleged in her bill of particulars (*see, Tirado v Craig*, 241 AD2d 449, 663 NYS2d 831 [2d Dept 1997]; *Fitzmaurice v Chase*, 288 AD2d 651, 732 NYS2d 690 [3d Dept 2001]).

Since there is no evidence in the record demonstrating that Mrs. Doherty's alleged economic loss exceeded the statutory amount of basic economic loss, plaintiffs' claim for economic loss in excess of basic economic loss must be dismissed (*see, CPLR 3212 [b]; see, Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Based upon the foregoing, plaintiff Charles Doherty's individual claims for loss of services and companionship also fail (*see, Maddox v City of New York*, 108 AD2d 42, 487 NYS2d 354 [2d Dept 1985]; *Cody v Village of Lake George*, 177 AD2d 921, 576 NYS2d 912 [3d Dept 1991]). Accordingly, this motion by defendants for summary judgment dismissing the complaint on the ground that Mrs. Doherty has not sustained a "serious injury" is granted, and the complaint is dismissed.

Dated: AUG 24 2006



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION