

**Donovan v Corker**

2008 NY Slip Op 30353(U)

January 31, 2008

Supreme Court, Nassau County

Docket Number: 3532-06/

Judge: Ute W. Lally

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SCAW

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6  
NASSAU COUNTY

JOHN F. DONOVAN and MARGARET DONOVAN,

Plaintiff(s),

MOTION DATE: 12/12/07

INDEX No.: 13532/06

-against-

MOTION SEQUENCE NO: 2

X X X

CAL. NO.: 2007H3171

THOMAS E. CORKER and MIRIAM MULLAGAN,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-6
Answering Affidavits.....	7-12
Replying Affidavits.....	13,14
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Upon the foregoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3212 dismissing the complaint on the ground that plaintiffs have not sustained a serious injury as required by Insurance Law § 5104 and defined by Insurance Law § 5102(d) is granted.

This is an action to recover money damages for personal injuries that the plaintiffs allegedly sustained in a motor vehicle accident on September 4, 2004 on Franklin Avenue near its intersection with Gerris Avenue, Franklin Square, New York. Their vehicle was allegedly struck head-on by a car owned by defendant Mullagan and operated by defendant Corker.

In this motion for summary judgment the defendants maintain that the plaintiffs did not sustain a serious injury as required by Insurance Law § 5104(a) and defined by Insurance Law § 5102(d). and accordingly seek dismissal of the complaint.

Margaret Donovan's action has been discontinued.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Sheppard-

Mobley v King, 10 AD3d 70, 74, aff'd. as mod., 4 NY3d 627, citing Alvarez v Prospect Hosp., 68 NY2d 320, 324; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (Alvarez v Prospect Hosp., supra, at p. 324). The evidence presented by the opponent of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference ( See, Demishick v Community Housing Management Corp., 34 AD3d 518, citing Secof v Greens Condominium, 158 AD2d 591).

In support of their motion to dismiss plaintiff's complaint, the defendants have submitted the affirmed to report of Arthur Fruauff, M.D. dated September 18, 2006, who reviewed Mr. Donovan's MRIs of October 19, 2004 and November 1, 2004 and John Killian, M.D., a board certified orthopaedic surgeon, dated July 11, 2007. who examined Mr. Donovan on July 2, 2007.

From his review of Mr. Donovan's MRIs, Dr. Fruauff found that Mr. Donovan suffered from hypertrophic degenerative changes in the acromioclavicular joint of his left shoulder; degenerative disc disease, at times severe, of his cervical spine, which, Dr. Fruauff characterized as "clearly degenerative in etiology and longstanding in nature; and, well-defined areas of abnormal signal intensity involving the proximal shaft of the first metacarpal in his left wrist, which, Dr. Fruauff said, could be related to cysts. Dr. Fruauff concluded that none of Mr. Donovan's symptomatology was causally related to the motor vehicle accident.

From his review of Mr. Donovan's medical records and personal examination, Dr. Killian found that Mr. Donovan maintained a normal cervical lordosis without evidence of atrophy, asymmetry, deformity or muscle spasm. Dr. Killian found that Mr. Donovan's range of motion testing for extension, left and right rotation and left and right flexion were all within normal limits. Dr. Killian's examination of Mr. Donovan's shoulders found both sides symmetrical without any evidence of atrophy, asymmetry, deformity, swelling or discoloration and his visual observation of external rotation was found to be mildly limited. His examination of Mr. Donovan's left wrist was found to be normal with no evidence of deformity. The range of motion testing he performed found Mr. Donovan to be full and symmetrical. The neurological examination he conducted revealed that all major muscle groups in both upper extremities were of

maximum strength and symmetrical. Dr. Killian concluded that Mr. Donovan has no residual causally related impairment or disability. He concluded that the restriction of motion in his neck is due to age related degenerative disease and that his mild impairment of his left shoulder is from acromioclavicular arthritis, both of which predated this accident. He found that while inflammation of his wrist developed subsequent to the accident, none of his problems can be attributed to injuries allegedly sustained from his accident. Dr. Killian opined that Mr. Donovan requires no further treatment or orthopedic evaluation and that no proof exists that Mr. Donovan has sustained any residual disability as a result of this accident or his alleged injuries.

The defendants have established a *prima facie* entitlement to summary judgment dismissing Mr. Donovan's complaint, thereby shifting the burden to him to establish the existence of a material issue of fact (Gaddy v Eyler, 79 NY2d 955).

In opposition, the plaintiff has submitted the affirmation of Joseph Gregorace, D.O., a Diplomat of the American Board of Physical Medicine and Rehabilitation and the American Academy of Pain Management, who treated Mr. Donovan for his accident-related injuries from September 22, 2004 to May 13, 2005, on which date he discharged him. He re-examined Mr. Donovan on November 28, 2007 in obvious response to this motion. As a result of his most recent examination of Mr. Donovan, Dr. Gregorace diagnosed Mr. Donovan with a left wrist triangular fibrocartilage tear, left shoulder strain, cervical strain, cervical sprain, and herniations at C2/3 and C3/4, which injuries he affirms with a reasonable degree of medical certainty, were a direct result of the motor vehicle accident of September 4, 2004. Dr. Gregorace further affirms that Mr. Donovan continues to demonstrate significant limitations of range of motion in his cervical spine, left shoulder and left wrist which he recites. It is Dr. Gregorace's diagnosis with a reasonable degree of medical certainty that Mr. Donovan suffered a significant limitation of motion to his cervical spine and left wrist as a direct result of the motor vehicle accident of September 4, 2004.

While Mr. Donovan has also submitted the affirmed to report of S. Farkas, M.D., an orthopedic surgeon who conducted an independent medical examination of Mr. Donovan on March 16, 2005, Dr. Farkas' examination of Mr. Donovan revealed no greater limitation than 10 degrees, which does not establish a serious injury and more importantly, Dr. Farkas diagnosed Mr. Donovan with **resolved** cervical, left shoulder and left wrist sprains.

Conspicuously absent from Dr. Gregorace's affirmation and the

plaintiff's opposition is any explanation for the cessation or gap in Mr. Donovan's treatment, which is fatal (DeLeon v Ross, 44 AD3d 545; see also, Siegel v Sumaliyev, \_\_\_ AD2d \_\_\_, 846 NYS2d 583, 584; citing Waring v Guirquis, 39 AD3d 741, Li v Woo Sung Yun, 27 AD3d 624, 625; Neugebauer v Gill, 19 AD3d 561; see also, Pommells v Perez, 4 NY3d 566).

Mr. Donovan's contention that he suffered a medically determined injury and/or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the subject accident also fails. As per his testimony at his examination before trial, the transcript having been annexed to defendants' moving papers, visits for physical therapy and a lack of sexual intercourse simply do not meet the threshold for that category as this does not establish that his customary daily activities were limited to a greater extent rather than slightly curtailed (See, Licari v Eliot, 57 NY2d 230). Moreover, Mr. Donovan's alleged limitations are not backed up by any medical evidence, which is also fatal (Licari v Eliot, supra).

The defendants' motion is granted and the complaint is dismissed.

Dated: JAN 31 2008

  
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 ENTERED

FEB 05 2008  
 ROSA COUNTY  
 COUNTY CLERKS OFFICE