

**Colvell v Herbert**

2008 NY Slip Op 31843(U)

June 23, 2008

Supreme Court, Nassau County

Docket Number: 1435-06/

Judge: Thomas A. Adams

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 37  
NASSAU COUNTY

DONNA COLVELL and THOMAS COLVELL,

Plaintiff(s),

MOTION DATE:6/13/08

INDEX NO.:11435/06

-against-

SEQ. NO. 2

JAMES T. HERBERT and ERIN SOBECK,

Defendant(s)

The defendants' motion, pursuant to CPLR 3212, for an award of summary judgment dismissing the plaintiffs' complaint due to the plaintiff Donna Colvell's failure to sustain a serious injury as defined by Insurance Law §5102(d) is determined as hereinafter provided.

This personal injury action emanates out of a November 16, 2004 motor vehicle accident which occurred at the intersection of County Line Road and West Oak Street in Amityville. During a July 17, 2007 deposition the plaintiff Donna Colvell testified, inter alia, that she was removed from the scene by ambulance (see defendants' Exhibit F, p.58, L9) to the Brunswick Hospital Emergency Room (p.72, L23) where she was examined, treated and released. In addition, x-rays were taken and pain medication was prescribed (p.74, L5). She complained of injury to her neck, back and right foot and leg (p.73, L2).

One or two days later (p.77, L10), she visited an orthopedist, Raymond A. Shebairo, M.D., who had initially treated her back following a 1991 bus accident (p.117, L7-13; p.118, L19). At that time, she saw him about every four months over the course of a year (p.80, L7) during which he prescribed medication (p.83, L10) and referred her to physical therapy (p.83, L20) and a neurologist, Dr. Dimanescu (p.84, L9), who she began seeing in 1994 (p.84, L12). She attended physical therapy for that injury for approximately two months (p.112, L10) and eventually underwent a laminectomy in 1998

to treat an unspecified herniated low back disc (p.85, L20; p.87, L13; p.85, L25; p86, L2).

After the surgery, she saw Dr. Dimanescu for another three to four years (p.90, L23) and underwent additional physical therapy (p.91, L14). Moreover, she also visited "a few" other physicians to treat her back prior to November 16, 2004 but was unable to recall their names (p.92, L19-22). After the 1998 surgery, she had "occasional" back pain before November 16, 2004 (p.98, L12). Her last visit to Dr. Dimanescu prior to this accident was sometime in 2004 (p.121, L19) when her back was "a little sore" (p.121, L24). Conversely, she did not recall any treatment to her neck before November 16, 2004 (p.98, L25).

She also injured her back during the course of her employment in 1984 (p.27, L19) and was out of work "on and off" for a "few months" (p.130, L4). Dr. Shebairo treated her on that occasion as well (p.128, L17) and she received workers' compensation benefits (p.129, L7). Finally, she began receiving social security disability sometime in 2004 before this accident (p.135, L12).

At the time of her deposition, she complained of an inability to ride her bike (p.131, L17), roller skate (p.144, L13), ice skate (p.144, L17) or enjoy other strenuous activities with her children (p.132, L19). She complained of pain to her neck, back and leg (p.136, L16) declaring "I'm just in pain all the time" (p.136, L22). However, she had no pending medical appointments (p.143, L11).

The defendants' motion, is premised upon the plaintiffs' deposition testimony, medical records and the September 5, 2007 and September 13, 2007 affirmations of a neurologist (Padmaja Aradhya, M.D.) and orthopedist (Hormozan Aprin, M.D.) ( see defendants' Exhibits D & E). Dr. Aprin avers, based upon a contemporaneous medical examination utilizing objectively measured criteria, inter alia, that Ms. Colvell's cervical and lumbosacral range of motion were normal and that she sustained a "contusion of the left knee, resolved" and "sprain/strain" of the cervical and lumbosacral spine "superimposed upon a pre-existing chronic neck pain [and back problem] due to osteoarthritis, spinal stenosis and [a] herniated disc". Similarly, Dr. Aradhya concluded, following a September 5,

2007 examination, that Ms. Colvell incurred an exacerbation of pre-existing cervical and lumbar "sprain/strain[s]". Those affirmations, coupled with the plaintiffs' testimony and medical records, are sufficient to establish a prima facie entitlement to summary judgment (see Toure v Avis Rent A Car Sys., 98 NY2d 345; Albano v Onolfo, 36 AD2d 728).

In opposition, Dr. Shebairo's May 27, 2008 affirmation (see plaintiffs' Exhibit E) opines, inter alia, that Ms. Colvell sustained "severe and significant injuries to her neck, and knees and a significant aggravation of her pre-existing lower back injury" (para.26). After only a cursory reference to "a severe pre-existing low back condition related to a work injury many years ago" and "problems on and off with her back throughout the years" (para.8), Dr. Shebairo opines that she presently suffers from an unspecified "decreased range of motion, pain and weakness" and requires "possible surgical intervention" (paras.29 & 30). Neither her prior surgery or the pre-existing social security disability award are, however, referenced.

The plaintiffs' failure to adequately address Ms. Colvell's pre-existing back condition and other medical problems (see Franchini v Palmieri, 1 NY3d 536,537) is insufficient to create a triable issue of fact (see Luciano v Luchsinger, 46 AD3d 634; Munoz v Koyfman, 44 AD3d 914, 915; Houston v Gajdes, 11 AD3d 514). Dr. Shebairo also impermissibly incorporates the findings of other physicians, i.e., whomever preformed her MRI examinations as well as Dr. Itzhak Haimovic's EMG report (see Porto v Blum, 39 AD3d 614; Umanzor v Pineda, 39 AD3d 539; Moore v Sarwar, 29 AD3d 845). Nor are the objective tests he performed to measure Ms. Colwell's unspecified "decreased range of motion" (para.30) identified.

Her conclusory and self-serving assertions are likewise inadequate to establish a triable issue of fact as to whether she was unable to perform substantially all of her daily activities for not less than 90 out of the first 180 days as a result of the November 16, 2004 accident (see Doyaga v Taleeba, Inc., 35 AD3d 798; Albano supra at 729).

Contrary to the plaintiffs' contention, the defendants' April 11, 2008 motion was also served within 90 days of the plaintiffs'

January 16, 2008 filing of a note of issue and is therefore timely (see plaintiffs' Exhibit B and Exhibit A to the defendants' June 4, 2008 reply affirmation).

Accordingly, the defendants' motion, pursuant to CPLR 3212, for an award of summary judgment dismissing the plaintiffs' complaint due to the plaintiff Donna Colvell's failure to sustain a serious injury, as defined by Insurance Law §5102(d), on November 16, 2004 is therefore granted.

Dated:           JUN 23 2008          

  
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A.J.S.C.

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**ENTERED**

JUN 25 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**