

O'Brien v Brower

2010 NY Slip Op 31368(U)

May 24, 2010

Supreme Court, Suffolk County

Docket Number: 08-4537

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

P R E S E N T :

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-23-09
ADJ. DATE 3-11-10
Mot. Seq. # 002 - MG; CASE DISP

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BETH A. O'BRIEN and DANIEL R. O'BRIEN,	:	CAVALIER & ASSOCIATES, PC
	:	Attorneys for Plaintiff
Plaintiff,	:	144-1 Remington Boulevard
	:	Ronkonkoma, New York 11779
- against -	:	
	:	BRAND GLICK & BRAND, P.C.
BEVERLY J. BROWER and ANNE M. BROWER,	:	Attorneys for Defendants
	:	600 Old Country Road, Suite 440
Defendants.	:	Garden City, New York 11530
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Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 24 - 25; Replying Affidavits and supporting papers 26 - 31; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is granted.

The instant action arises from a motor vehicle accident which occurred on November 9, 2006 on Expressway Drive South at or near its intersection with Route 454 in Islandia, New York. The accident purportedly occurred when a vehicle owned by the defendant Anne M. Brower and operated by the defendant Beverly J. Brower ran a red light and collided with a vehicle operated by the plaintiff Beth A. O'Brien. 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 that the plaintiff sustained serious and permanent injuries including lumbar trauma, lumbar pain, loss of the full range of motion of the lumbar spine in all planes, right L5 radiculopathy, the need for lumbar spine surgery on December 10, 2007 and April 9, 2007, the need for right L5 lumbar spine epidural steroid injections on February 15, 2007 and November 22, 2006, cervical trauma, cervical pain, disc bulges at C5-6, C6-7, restricted range of motion in the cervical spine in all planes, thoracic trauma, thoracic pain, disc herniation at T10-11, right knee trauma, and right knee pain. It alleges that

the plaintiff was confined to bed for approximately three weeks, home for approximately 4 weeks, and was incapacitated from employment for approximately 12 weeks as a result of the subject accident. Lastly, the bill of particulars alleges that the injuries sustained were serious within the meaning of the Insurance Law as the plaintiff sustained a permanent loss of the use of a body organ, member, function, or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; a significant disfigurement; 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 or 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, Daniel R. O'Brien.

The defendants now move for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury within the meaning of Insurance § 5102(d) as a result of the subject accident.

The proponent of a summary judgment motion 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 (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). 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*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see, Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

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]).

The defendants met their *prima facie* burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see, Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *DiFilippo v Jones*, 22 AD3d 788, 802 NYS2d 756 [2005]; *Casella v N.Y. City Transit Auth.*, 14 AD3d 585, 787 NYS2d 883 [2005];

Petropoulos v N.Y. City Transit Auth., 11 AD3d 522, 782 NYS2d 797 [2004]; *Hodges v Jones*, 238 AD2d 962, 661 NYS2d 159 [1997]; *Nigro v Penree*, 238 AD2d 908, 661 NYS2d 137 [1997]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). In support of their motion for summary judgment the defendants submitted, *inter alia*, the plaintiff's deposition testimony, MRIs of the plaintiff's lumbar spine performed on January 10, 2005, October 30, 2006, and January 5, 2007, MRIs of the plaintiff's cervical spine performed on January 5, 2007 and March 3, 2003, medical records and reports prepared by the plaintiff's treating physicians Paul Schulman, M.D., Arthur P. Rosiello, M.D. and Mehren Golpariani, M.D., operative reports prepared with respect to the plaintiff's surgeries on April 9, 2007 and December 10, 2007, the affirmed independent medical evaluation report of J. Torres Gluck, M.D., and an affirmed addendum report prepared by J. Torres Gluck, M.D.

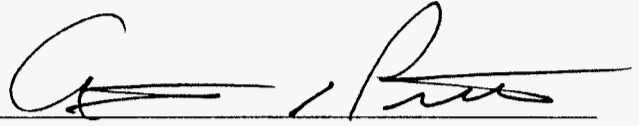
This evidence established, as a matter of law, that all of the injuries purportedly sustained by the plaintiff were long standing, chronic, and/or degenerative conditions existing prior to the date of the accident (*see, Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Gentilella v Board of Educ. of Wantagh Union Free School Dist.*, 60 AD3d 629, 875 NYS2d 128 [2009]). In this regard, the plaintiff's medical records are replete with evidence that she had been seeking medical treatment since December 2005 for, among other things, bursitis, fibromyalgia, diffuse osteoarthritis, and right knee pain. Records from December of 2005 indicate that the "primary joints" affected were the plaintiff's lumbar spine, cervical spine, right shoulder, elbows, hands, and right knee. The operative reports, prepared by Dr. Rosiello, during the plaintiff's lumbar surgery note the plaintiff's history of lower back pain and degenerative disc disease. The lumbar spine MRI reports, performed prior to the accident date, indicate the presence of the bulges and herniations complained of, in addition to degenerative disc disease. Moreover, the affirmed report and addendum of defendants' medical expert aver that the plaintiff's lumbar spine surgeries were necessitated by progressive degeneration and were not causally related to the subject motor vehicle accident. He affirms that there is no evidence of neurological disability or permanency related to the subject motor vehicle accident. Based on his review of the diagnostic studies, he concludes that there was no objective evidence of neurological disability or permanent injury to the plaintiff's cervical spine causally related to the subject motor vehicle accident. In this regard, he asserted that any limitations found in the plaintiff's cervical spine could be related to her preexisting degenerative disease. Furthermore, and notably, during her deposition, the plaintiff admitted to regularly seeing a rheumatologist for two or three years prior to the accident in order to treat her arthritis and neck and back pain. She admits being diagnosed with fibromyalgia prior to the accident and that she had suffered "sore points" in her shoulders, hips, elbows, knees, and ankles. She admits visiting an orthopedic doctor prior to the accident with complaints about her knee pain and, probably, her back pain. She states that this doctor recommended she have surgery on her knee prior to the time of the accident. In addition, the plaintiff admits that one month prior to the accident she was "living on" anti-inflammatory pain medication and Vicodin. Lastly, the plaintiff testified that she missed only approximately two to three weeks from work immediately following the accident.

In opposition to the defendants' prima facie showing, it was incumbent upon the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she did sustain a "serious" injury as a result of the instant accident, or that there are questions of fact as to whether she sustained such an injury as a result of the subject accident (*see, Toure v Avis Rent A Car Sys.*, *supra* at 350; *Charley v Goss*, *supra*). The plaintiff failed to meet this burden.

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In opposition to the defendants' prima facie showing, the plaintiff has failed to submit any medical proof sufficient to show that she suffered a serious injury that is causally related to the accident (see *Knoll v Seafood Express*, 5 NY3d 817, 803 NYS2d 25 [2005]; see also, *Milosevic v Mouladi*, __AD3d__, 2010 NY Slip Op 3420 [2d Dept Apr. 27, 2010]). In fact, the plaintiff's sole opposition to the motion consists of an attorney affirmation. Accordingly, the motion by the defendants for summary judgment dismissing the complaint is granted.

Dated: May 24, 2010



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION

