

**Broughal v Moss**

2011 NY Slip Op 30956(U)

April 4, 2011

Supreme Court, Nassau County

Docket Number: 022393/09

Judge: Thomas P. Phelan

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SCAN

**SHORT FORM ORDER**  
**SUPREME COURT - STATE OF NEW YORK**

**Present:**  
HON. THOMAS P. PHELAN,

*Justice*

TRIAL/IAS PART 2  
NASSAU COUNTY

LORETTA T. BROUGHAL,

Plaintiff(s),

ORIGINAL RETURN DATE: 12/09/10  
SUBMISSION DATE: 02/03/11  
INDEX No.: 022393/09

-against-

RICHARD S. MOSS,

Defendant(s).

MOTION SEQUENCE #1,2

The following papers read on this motion:

Notice of Motion.....	1
Cross-Motion.....	2
Answering Papers.....	3
Plaintiff's Memorandum of Law.....	4
Defendant's Memorandum of Law.....	5

Defendant's motion for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint based upon the ground that plaintiff failed to sustain a serious injury as required under New York Insurance Law § 5102(d) is granted. Plaintiff's motion for an order, pursuant to CPLR 3212, granting her summary judgment on the issue of liability is denied as academic.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If such a showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require resolution at trial (*Alvarez v. Prospect Hosp.*, 68 NY2d at 324).

RE: BROUGHAL v. MOSS

Page 2.

This is an action to recover damages for personal injuries allegedly sustained as a result of the negligence of the defendant in a motor vehicle accident which occurred on or about November 24, 2008.

It is submitted that the clinical findings of Dr. Sultan and the review of the MRIs by Dr. Lastig do not disclose the presence of a serious injury. To meet the threshold "significant limitation of use of a body function or system" or "permanent consequential limitation of a body organ or member" categories, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyley*, 79 NY2d 955 [1992]; *Licari v. Elliot*, 57 NY2d 230 [1982]).

Plaintiff's complaints, as alleged in her Bill of Particulars, consist of the following:

- Subligamentous Disc Herniation at C3-C4 with impingement upon the spinal cord;
- Central Disc Herniation at C4-C5;
- Central Disc Herniation at C5-C6;
- Cervicalgia;
- Cervical Facet Syndrome;
- Bilateral Cervical Radiculopathy;
- Bilateral Trapezius Tendonitis;
- Cervical Muscle Spasms;
- Severely restricted cervical range of motion;
- Straightening of the Cervical Lordosis;
- Cervical Contusion/Sprain/Strain;
- Bilateral Shoulder Pain

(Def's Ex. 3).

On September 15, 2004, plaintiff had consulted with Orlin & Cohen Orthopedic Associates, LLC for a follow up evaluation of her left knee. It was noted in the report of that date that plaintiff also complained of "some stiffness related to her known back and neck degenerative disc's" (Ex. 5). In the follow-up report of October 20, 2004, it was noted that plaintiff has "known cervical and lumbar arthritis" and "residual limitation cervical and lumbar spines" (Id.)

In his affirmed reports dated July 30, 2010, Dr. Lastig, a radiologist, states that he reviewed the cervical spine MRI studies of plaintiff performed at Radiology Associate Center on March 25, 2009, and January 12, 2010, as well as the x-ray study of the cervical spine on December 30, 2008. With regard to the cervical MRI performed on March 25, 2009, four months following the accident, Dr. Lastig's impression was: "Multilevel degenerative disc disease and degenerative spondylosis" (Ex. 7). He opines that the disc pathology at the C4-C5, C5-C6 and C6-C7 levels appears stable compared with the prior study of July 26, 2000, and concludes that this "represents a pre-existing condition and is, therefore, unrelated to the accident of 11/24/1008" (Id.). Dr.

Lastig further opined that the "left-sided uncinat formation at C3-C4 indicates the presence of a long standing degenerative bony process which, in my opinion, pre-exists the accident of 11/24/2008" (Id.).

Dr. Lastig's impression after comparing the March 25, 2009, study with the January 12, 2010, study, was: "Multilevel degenerative disc disease and degenerative spondylosis. . . . Compared with the prior study of 3/25/2009, there has been no significant change" (Id.). He opined that "there or no findings on this study which are casually related to the reported accident of 11/24/1008" (Id.). The x-ray study on December 30, 2008, also revealed degenerative disc disease associated with degenerative spondylosis.

Leon Sultan, M.D., an orthopaedic surgeon, notes in his report dated May 25, 2010, that examination reveals that there is low grade motion restriction of the cervical spine and shoulder. Measurements were compared with normal ranges of motion and obtained with goniometric measurement. Dr. Sultan concluded that: "Today's orthopedic examination in regard to this woman's shoulders reveals that he [sic] is orthopedically stable and neurologically intact. In regard to her cervical spine, she demonstrates low grade motion restriction as described above secondary to multilevel moderate degenerative spondylosis which predates the occurrence of 11/24/08" (Ex. 6).

Plaintiff testified at her deposition that on the day of the accident she consulted with her primary care physician, Dr. D'Sa. On March 29, 2009, Dr. D'Sa recommended that plaintiff see a spine doctor. Plaintiff testified that she made an appointment for sometime in April but cancelled it and made an appointment with Dr. O'Leary in the city. That appointment was also cancelled.

Where, as here, defendant has provided evidence demonstrating the lack of serious injury, the burden shifts to plaintiff to present sufficient evidence to defeat the motion (*see, Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Tabacco v. Kaster*, 229 AD2d 526 [2d Dept. 1996]). "To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial and must make his showing by producing evidentiary proof in admissible form (citation omitted)" (*Seyfeid v. Greenspan*, 92 AD2d 563, 564 [2d Dept. 1983]; *see, Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).

In opposition, plaintiff submits the affirmation of Harvey Orlin, M.D., a board certified orthopaedic surgeon; the affirmation of Arash D. Yadegar, M.D., a board certified physical medicine and rehabilitation doctor, with a specialty in pain medicine; and the affirmation of Dennis R. Rossi, M.D., a board certified radiologist, as well as the certified records of Peak Performance Physical Therapy Wellness & Fitness and plaintiff's affidavit.

Dr. Rossi affirms that he personally reviewed plaintiff's MRI scan films of March 25, 2009, and July 26, 2000. A comparison of both films revealed the following:

- “1. At C3-C4, there is a shallow left paracentral disc herniation which was not present in the July 26, 2000 films.
2. At C4-C5, the disc herniation demonstrated on the prior study of July 26, 2000 is more prominent in the March 25, 2009 study.
3. At C5-C6, there is more prominent spondylitic ridging and uncovertebral joint hypertrophy seen” (Ex. H).

Plaintiff first presented to the office of Harvey Orlin, M.D. on July 8, 2009, more than seven (7) months after the accident. Although Dr. Orlin noted that plaintiff had some pre-existing cervical spine disc herniations, he concluded that plaintiff's condition was acute and not related to the degeneration. Range of motion studies for her cervical spine showed restrictions. Dr. Orlin opined that plaintiff “sustained significant injuries to her neck, namely the aforementioned brand new disc herniation at C3-C4 and the exacerbation and aggravation of the pre-existing disc herniations at C4-C5 and C5-C6” (Ex. F, ¶14).

Although Dr. Orlin's affirmation reveals restrictions of motion, there is no indication of the method used to measure the range of motion. “[T]he failure of plaintiff's medical expert to demonstrate the objective tests performed to determine the loss of range of motion renders these [] findings insufficient to demonstrate serious injury” (*Parreno v. Jumbo Trucking, Inc.*, 40 AD3d 520 [1<sup>st</sup> Dept. 2007]).

Dr. Yadegar affirms that he has “been treating plaintiff for her November 24, 2008 car accident related injuries since August 5, 2009,” nine (9) months after the accident (Ex. G, ¶5). Dr. Yadegar opined that plaintiff “sustained cervicalgia, multiple herniated cervical discs and cervical facet syndrome as a direct result of her car accident of November 24, 2008” (*Id.*). Plaintiff was treated by Dr. Yadegar with the administration of cervical epidural steroidal injections and left upper cervical facet block injections. Dr. Yadegar determined diminished range of motion values through the use of an inclinometer.

“[P]laintiff failed to submit any admissible medical proof that was contemporaneous with the accident showing any initial range of motion restrictions” (*Ubri v. Monserrate*, 1 AD3d 429 [2d Dept. 2003]).

Plaintiff avers that she presented to Dr. D'sa on January 16, 2009, and was prescribed physical therapy. Plaintiff went five (5) times through February 4, 2009. According to plaintiff, following the car accident, her husband has had to perform the household chores. Plaintiff avers that although she experienced prior neck pain in 2002 and stiffness for a brief period in 2004, she was asymptomatic until the subject accident.

“[T]o constitute a serious injury, a disc bulge or herniation must be accompanied by objective evidence of the extent of alleged physical limitations resulting from the disc injury (citations omitted)” (*Kearse v. New York City Transit Auth.*, 16 AD3d 45, 49 [2d Dept. 2005]). Plaintiff's self-serving affidavit, as well as the submissions of her doctors who relied upon plaintiff's

RE: BROUGHAL v. MOSS

Page 5.

subjective representation that she was asymptomatic since 2004 until the time of the subject accident, are speculative (*Varveris v. Franco*, 71 AD3d 1128 [2d Dept. 2010]). Moreover, there is no evidence that the disc herniation at C3-C4 and the exacerbation of the pre-existing disc herniations at C4-C5 and C5-C6 were caused by the subject accident as opposed to the "natural progression" of plaintiff's long-standing cervical spondylosis (*Howard v. Espinos*, 70 AD3d 1091, 1092 [3d Dept. 2010]).

Based upon all of the foregoing, plaintiff's complaint is dismissed, without costs.

This decision constitutes the order of the court.

Dated: 4-4-11

HON THOMAS P. PHELAN  
Thomas P. Phelan  
THOMAS P. PHELAN, J.S.C. XXX

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**ENTERED**  
APR 06 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE