

**Bosman v Doughty**

2011 NY Slip Op 31815(U)

June 24, 2011

Supreme Court, Suffolk County

Docket Number: 09-17360

Judge: Thomas F. Whelan

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CAL. No. 10-02284MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 1-13-11 (#002,003)  
MOTION DATE 2-22-11 (#004)  
ADJ. DATE 3-21-11  
Mot. Seq. # 002-MG; CASEDISP  
# 003-XMG  
# 004-XMD

-----X

DOREEN L. BOSMAN and JOHN BOSMAN,  
JR.,

Plaintiffs,

- against -

SEAN C. DOUGHTY, MAUREEN DOUGHTY,  
JONATHAN M. ROSARIO and HECTOR L.  
ROSARIO.

Defendants.

-----X

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Upon the following papers numbered 1 to 64 read on these motions and cross motion for summary judgment: Notice of Motion; Order to Show Cause and supporting papers 1-17; 32 - 39; Notice of Cross Motion and supporting papers 18-20; Answering Affidavits and supporting papers 21- 29; 40 - 53; 54 - 59; Replying Affidavits and supporting papers 30 - 31; 60 - 62; 63 - 64; Other       ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (002) by the defendants Sean C. Doughty and Maureen Doughty for summary judgment and the motion (004) by the defendants Jonathan M. Rosario and Hector L. Rosario for summary judgment are consolidated for the purposes of this determination and decided together with the cross motion (003) by the defendants Jonathan M. Rosario and Hector L. Rosario for summary judgment; and it is further

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**ORDERED** that the motion (002) by the defendants Sean C. Doughty and Maureen Doughty for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint on the ground that the plaintiff Doreen L. Bosman did not sustain a serious injury as defined in Insurance Law § 5102 (d) is granted; and it is further

**ORDERED** that the cross motion (003) by the defendants Jonathan M. Rosario and Hector L. Rosario for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint on the ground that the plaintiff Doreen L. Bosman did not sustain a serious injury as defined in Insurance Law § 5102 (d) is granted; and it is further

**ORDERED** that the motion (004) by the defendants Jonathan M. Rosario and Hector L. Rosario for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them on the issue of liability is denied as moot.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by the plaintiff Doreen L. Bosman on September 12, 2008 at approximately 5:05 p.m. in a collision involving four vehicles. The accident occurred on Mastic Road at or near its intersection with Eleanor Avenue in the Town of Brookhaven, New York. The plaintiff's southbound stopped vehicle was struck on the front driver's side by a northbound vehicle owned by the defendant Hector L. Rosario and operated by the defendant Jonathan M. Rosario. The Rosario vehicle had been struck on its front passenger side by a vehicle owned by the defendant Maureen Doughty and operated by the defendant Sean C. Doughty that was exiting Eleanor Avenue. The plaintiffs allege that as a result of the subject accident, the plaintiff sustained injuries including, neck and back pain, spasm and tenderness in the paraspinal musculature and at the lumbosacral junction, restriction of motion of the lumbar and cervical spine, and annular tears at L4-5 and L5-S1. In addition, the plaintiffs allege that following said accident, the plaintiff received emergency room treatment at Brookhaven Memorial Hospital and was confined to bed and home for one day.

The defendants Sean C. Doughty and Maureen Doughty now move (002) and the defendants Jonathan M. Rosario and Hector L. Rosario now cross-move (003) for summary judgment in their favor dismissing the complaint on the ground that the plaintiff Doreen L. Bosman did not sustain a serious injury as defined in Insurance Law § 5102 (d). The submissions of the defendants Doughty include the summons and complaint, the answer, the plaintiffs' bill of particulars, the deposition transcripts of the plaintiffs, the defendants Doughty and the defendant Jonathan M. Rosario, and the affirmed reports of their examining orthopedic surgeon, William A. Healy, III, M.D. and their examining radiologist, Steven L. Mendelsohn, M.D. The defendants Rosario seek to incorporate by reference all of the facts, testimony, evidence, exhibits, law and arguments contained in the motion of the co-defendants Doughty.

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, the 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 “significant limitation of use of a body function or system” categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the “qualitative nature” of the plaintiff’s limitations, with an objective basis, correlating the plaintiff’s limitations to the normal function, purpose and use of the body part (see *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (see *Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos*, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff’s own deposition testimony and the affirmed medical report of the defendant’s own examining physician (see *Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Faroze v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Boone v New York City Trans. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, the defendants Doughty and the defendants Rosario met their 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 *Park v Shaikh*, 82 AD3d 1066, 918 NYS2d 887 [2d Dept 2011]). The affirmed report dated August 4, 2010 of Dr. Healy, based on his orthopedic examination of the plaintiff on said date, indicates that the plaintiff’s cervical spine range of motion for right lateral flexion was 5 degrees compared to 30-45 degrees normal, right rotation was 5 degrees compared to 80 degrees normal, the rest of her cervical spine range of motion testing was normal, and the plaintiff had no paraspinal spasm. With respect to her lumbar spine range of motion testing results, the plaintiff’s right and left lateral flexion and right and left rotation were 10 degrees compared to 30 degrees normal. Dr. Healy noted that the plaintiff had no significant lumbar paraspinal spasm but that she was tender to palpation along her right SI joint and had tenderness to palpation over the right greater tuberosity and pain with resisted abduction. Dr. Healy opined in conclusion that the plaintiff most certainly had pre-existing degenerative changes to her cervical and lumbar spine as noted on her MRI performed shortly after the accident. Specifically he noted right sided C4 and C5 joint of Luschka degenerative process that could account for the plaintiff’s range of motion limitation. In addition, Dr. Healy reported that the plaintiff had findings consistent with cubital tunnel syndrome that he could not relate to the accident. Regarding her lumbar spine, Dr. Healy opined that the plaintiff’s complaints and findings were consistent with her preexisting degenerative process of her lower back as evidenced by an annular tear at L4-5 and L5-S1 on her

radiographic studies. He also noted that the plaintiff's findings were consistent with trochanteric bursitis, right sacroiliac inflammation, and meralgia paresthetica, all of which he could not relate to the accident. Dr. Healy indicated that the plaintiff may have sustained a cervical and lumbar strain that should have reached full recovery at this juncture.

By his affirmed reports dated January 4, 2010, Dr. Mendelsohn indicates that he reviewed the plaintiff's cervical spine MRI from September 20, 2008 and her lumbar spine MRI from September 23, 2008. With respect to the plaintiff's cervical spine, Dr. Mendelsohn reported that the C5-6 disc revealed moderate desiccation and mild loss of height with mild to moderate eccentric degenerative bulging and mild to moderate eccentric osteophytic ridging; the C4-5 and C6-7 discs showed mild desiccation with minimal to mild circumferential degenerative bulging with accompanied mild eccentric osteophytic ridging; and that there was mild narrowing of the right C5-6 neural foramen due to osteophytic ridging. Dr. Mendelsohn concluded that there were mild to moderate multilevel cervical degenerative changes and that the cervical MRI showed no evidence of focal disc herniation or any abnormality causally related to trauma of September 12, 2008. Regarding the plaintiff's lumbar spine MRI, Dr. Mendelsohn indicated that the L4-5 and L5-S1 discs both revealed mild degenerative desiccation with combinations of mild circumferential degenerative bulging and small posterior annular tears with no accompanying herniations. He noted that the remaining lumbar discs maintained normal height, hydration signal and contour with no evidence of diffuse bulging or focal herniation. Dr. Mendelsohn concluded that the lumbar spine MRI showed posterior annular tears, L4-5 and L5-S1 discs, with accompanying mild chronic degenerative changes. Thus, the defendants demonstrated that the plaintiff's diminished range of motion in her cervical and lumbar spine and other symptoms were caused by degenerative disc disease unrelated to the subject accident (*see id.*; *see also Jilani v Palmer*, 83 AD3d 786, 920 NYS2d 424 [2d Dept 2011]). Notably, the plaintiff did not allege in her bill of particulars that the accident aggravated or exacerbated preexisting degenerative conditions in her cervical and lumbar spine (*compare Rabinowitz v Kahl*, 78 AD3d 678, 910 NYS2d 166 [2d Dept 2010]).

Finally, the defendants established that the plaintiff's alleged injuries did not prevent the plaintiff from performing substantially all of the material acts constituting her customary daily activities during at least 90 of the first 180 days following the accident (*see Dunbar v Prahovo Taxi, Inc.*, \_\_\_ AD3d \_\_\_, 921 NYS2d 911, 912 [2d Dept 2011]). The plaintiff testified at her deposition that she returned to work as a medical assistant a day or two after the subject accident and that her work, which involves mostly desk work, did not change and that her hours have increased (*see Bleszcz v Hiscock*, 69 AD3d 890, 891-892, 894 NYS2d 481 [2d Dept 2010]).

Once the defendants made their prima facie 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, the burden shifted to the plaintiffs to produce sufficient evidence to raise a triable issue of fact (*see Dantini v Cuffie*, 59 AD3d 490, 873 NYS2d 189 [2d Dept 2009], *lv denied* 13 NY3d 702, 886 NYS2d 93 [2009]).

In opposition to the motion, the plaintiffs argue that the plaintiff did sustain a serious injury as defined by Insurance Law § 5102 (d) as a result of said accident as evidenced by her continuing significant range of motion restrictions. In support of their opposition, the plaintiffs submit, among other things, an unsworn report dated February 17, 2011 of her treating orthopedic surgeon, Gus

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Katsigiorgis, D.O.; unsworn medical records dated September 17, 2008 and October 1, 2008 of her treating orthopedist, Stephen E. Borkow, M.D., dated November 13, 2008 of Dr. Katsigiorgis, and dated November 18, 2008 of Brett Silverman, D.O.; a report dated September 24, 2008 of plaintiff's MRI of the lumbar spine performed on September 23, 2008, affirmed by radiologist Robert Goodman, M.D. and a report dated September 22, 2008 of plaintiff's MRI of the cervical spine performed on September 20, 2008, affirmed by radiologist Michael Streiter, M.D.; and the plaintiff's affidavit dated March 1, 2011. The plaintiff's attorney explains that the orthopedic surgeon who first examined the plaintiff in September and October 2008, Dr. Borkow, is no longer associated with Island Musculoskeletal Care such that the plaintiff was recently examined by another orthopedic surgeon at the office, Dr. Katsigiorgis, whose report dated February 17, 2011 was submitted in support of the opposition.

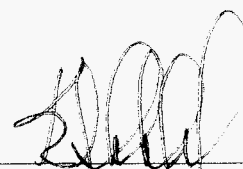
In opposition, the plaintiffs failed to raise a triable issue of fact (*see Singh v City of New York*, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]; *see also Kublo v Rzdkowski*, 71 AD3d 831, 899 NYS2d 250 [2d Dept 2010]). All of the submitted reports from the plaintiff's treating orthopedic surgeons, including the report dated February 17, 2011 of Dr. Katsigiorgis, are unsworn and cannot be considered by the Court (*see Yunatanov v Stein*, 69 AD3d 708, 893 NYS2d 569 [2d Dept 2010]). In any event, the recent report does not address the findings of Dr. Healy that the plaintiff's injuries and range of motion limitations were caused by preexisting degeneration (*see Nieves v Michael*, 73 AD3d 716, 716, 901 NYS2d 100 [2d Dept 2010]; *Barry v Future Cab Corp.*, 71 AD3d 710, 896 NYS2d 423 [2d Dept 2010]). The sworn report of the plaintiff's radiologist Dr. Goodman indicates that upon review of the plaintiff's lumbar spine MRI, he observed desiccation of the L4-L5 and L5-S1 discs, small annular tears along the posterior margin of said discs, and minimal endplate edema at L4-L5, which he opined was probably secondary to degenerative disease. He found no obvious herniations, no fracture or subluxation, and no evidence of spinal stenosis. In addition, the plaintiff's radiologist Dr. Streiter indicated in his sworn report that his review of the cervical spine MRI revealed degenerative changes and disc disease, spurring C4-5, C5-6, and C6-7. Moreover, the plaintiff's own affidavit was insufficient to raise a triable issue of fact (*see Singh v City of New York*, 71 AD3d at 1122).

Inasmuch as the claims on behalf of the plaintiff Doreen L. Bosman must be dismissed as against the defendants, the derivative cause of action on behalf of the plaintiff John Bosman, Jr. must also be dismissed as against them (*see Cabri v Park*, 260 AD2d 525, 688 NYS2d 248 [2d Dept 1999]).

Accordingly, the motion (002) by the defendants Doughty and cross-motion (003) by the defendants Rosario for summary judgment on the issue of damages are granted, the motion (004) by the defendants Rosario for summary judgment on the issue of liability is denied as moot, and the complaint is dismissed in its entirety.

Dated: \_\_\_\_\_

6/24/11



THOMAS F. WHELAN, J.S.C.