

**Culotta v Berger**

2011 NY Slip Op 32959(U)

November 1, 2011

Sup Ct, Nassau County

Docket Number: 018283/09

Judge: Thomas P. Phelan

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

**Present:**

**HON. THOMAS P. PHELAN,**  
*Justice*

TRIAL/IAS PART 2  
NASSAU COUNTY

ROSEMARY CULOTTA and RICHARD  
CULOTTA,

Plaintiff(s),

ORIGINAL RETURN DATE:06/21/11  
SUBMISSION DATE: 08/31/11  
INDEX No.: 018283/09

-against-

ROBERT BERGER,

MOTION SEQUENCE #4

Defendant(s).

The following papers read on this motion:

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Defendant's motion for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiffs' complaint based upon the ground that plaintiff, Rosemary Culotta, failed to sustain a serious injury as required under New York Insurance Law Section 5102(d) is granted.

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).

This is an action to recover damages for personal injuries allegedly sustained as a result of the negligence of defendant in the ownership and operation of his motor vehicle on or about July 18, 2007. Following the accident plaintiff was taken to Mercy Medical Center and thereafter discharged with a diagnosis of neck strain (Movant's Ex. E). The impression of the Department of Radiology was "Osteoarthritis and degenerative disc disease" (Id.). The following day plaintiff presented to Gary Jay Shore, M.D. whose diagnosis was muscle sprain (Ex. F). Thereafter plaintiff sought treatment from Samuel H. Kelman, D.O. at South Shore Medical & Rehabilitation, P.C. from July 25, 2007, through October 2, 2007, at which time plaintiff had sufficiently recovered to return to regular work duties on October 11, 2007 (Ex. J).

Defendant alleges that the affirmation of Daniel S. Rich, M.D. and the affirmed reports of Dr. Rich, Stanley Sprecher, M.D. and Beatrice C. Engstand, M.D., as well as the deposition testimony of plaintiff, do not disclose the presence of a serious injury arising out of the subject accident. It is submitted that plaintiff's injuries are soft tissue in nature and do not satisfy the definition of "serious injury." Defendant submits that it is clear that plaintiff does not suffer from permanent consequential limitations or significant limitations as a result of this accident.

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. Eycler*, 79 NY2d 955 [1992]; *Licari v. Elliot*, 57 NY2d 230 [1982]).

Plaintiff Rosemary Culotta's complaints, as alleged in the Bill of Particulars, consist of, among other things, cervical and lumbar disc herniations and bulges, disc hydration loss and anterolisthesis (Movant's Ex. B).

Stanley Sprecher, M.D. affirmed that he reviewed the radiographs performed at Mercy Medical Center on July 18, 2007, as well as the MRI films taken of plaintiff's cervical and lumbar spines on July 31, 2007, and right shoulder on August 2, 2007. His review revealed the following:

**Radiographs of the CERVICAL SPINE** . . . demonstrates the presence of disc space narrowing as well as anterior and posterior bony spondylosis noted at the C4-5 and C5-6 levels. . . . No post-traumatic abnormalities that could be linked to the accident of 7/18/07 are seen.

\* \* \*

**MRI scan of the CERVICAL SPINE** . . . The abnormalities noted involving the C4-5 and C5-6 disc spaces are consistent with long-standing, chronic degenerative process, which predates and is unrelated to the accident of 7/18/07, and which is unlikely to have developed in the thirteen-day interval between the accident and the scan of 7/31/07. . . . No post-traumatic abnormalities were seen that could be referred to the accident of 7/18/07.

\* \* \*

**MRI scan of the LUMBAR SPINE** . . . The presence of disc space narrowing at L2-3, L3-4 and L4-5 is a finding that is consistent with a long-standing degenerative process, which predates and is unrelated to the accident of 7/18/07, and which is unlikely to have developed in the thirteen-day interval between the accident and the scan of 7/31/07. . . . No post-traumatic abnormalities are seen that can be attributed to the accident of 7/18/07.

\* \* \*

MRI scan of the RIGHT SHOULDER . . . demonstrates the presence of bony and capsular hypertrophic degeneration involving the acromio-clavicular joint, which is a finding that is consistent with a long-standing degenerative process, predating and unrelated to the accident of 7/18/07. . . . No post-traumatic abnormalities are seen that could be referred to the accident of 7/18/07: ” (Movant’s Ex. F).

Review of follow-up MRI scans of the cervical and lumbar spines performed on April 15, 2009, and pre-operative radiographs of the cervical spine performed on September 9, 2009, demonstrated no significant changes. Review of the post-operative radiographs of the cervical spine performed on October 23, 2009, demonstrated that “the patient is status post C4-5 and C5-6 anterior cervical discectomy and decompression, anterior cervical interbody device placement, anterior cervical fusion, placement of demineralized bone matrix and anterior instrumentation C4 to C6” (Id.). Review of follow-up post-operative radiographs of the cervical spine performed on December 4, 2009, and February 23, 2010, demonstrated no significant interval change.

Dr. Rich, a board certified orthopedic surgeon, performed an orthopedic examination of plaintiff Rosemary Culotta on April 12, 2011. Range of motion testing was aided by the use of a goniometer. Dr. Rich related the following diagnosis:

- Status post cervical strain/sprain
  - Cervical degenerative disease - pre-existing
  - Status post anterior cervical discectomy and fusion C4 - 5; C5 - 6
  - Status post lumbar strain/sprain
  - Lumbar degenerative disease - pre-existing
  - Degenerative changes, right shoulder - asymptomatic
- (Exhibit A).

Dr. Rich opined that: “Degenerative disease of the spine is a progressive disorder. There is inadequate objective evidence to state with a reasonable degree of medical certainty that Ms. Culotta’s current symptoms and need for cervical spine surgery were caused by the accident of 7/18/2007” (Id.). He further opined that “‘hypertrophic change acromioclavicular joint.’ is degenerative in nature and not consistent with the accident of 7/18/2007. The ‘laterally down sloping acromion extending to abut the supraspinatus’ can be a normal variation of anatomy and in any case was not caused by the accident of 7/18/2007. Finally the ‘supraspinatus

and subscapularis tendinosis/tendinopathy' are consistent with degenerative changes" (Id.)

Based upon her examination of plaintiff Rosemary Culotta on April 6, , 2011, Dr. Engstrand, a neurologist, notes that Ms. Culotta exhibited full range of motion in her cervical and lumbar spines. Range of motion testing was measured by goniometer. Dr. Engstrand's final assessment was: "Cervical and lumbar sprain with pre-existing cervical and lumbar degenerative disc disease. Her degenerative disc disease is not causally related to this accident" (Movant's Ex. M). Dr. Engstrand opined that: "She is not disabled and is working full time. She is able to continue her activities of daily living" (Id.)

Where, as here, defendant has provided evidence demonstrating the lack of serious injury, the burden shifts to plaintiffs to present sufficient evidence to defeat the motion (*see, Gaddy v. Eyer*, 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, plaintiffs submit the unaffirmed report of Alfred E. Faust, M.D. This unaffirmed report is without any probative value (*Endzweig-Morov v. MV Transp., Inc.*, 50 AD3d 946, 947 [2d Dept. 2008]). Plaintiffs also submit an affirmation of counsel. "Such an affirmation by counsel is without evidentiary value and thus [is] unavailing" (*Zuckerman v City of New York*, 49 NY2d 557, 563)" (*Browne v. Castillo*, 288 Ad2d 415 [2d Dept. 2001]).

The only admissible evidence submitted by plaintiffs is the deposition testimony. "Plaintiff's own self-serving deposition testimony, [however] setting forth subjective complaints of pain, does not constitute medical evidence and cannot demonstrate the existence, extent, duration, or causation of an alleged serious injury, as required by law (citations omitted). 'It is well established that to satisfy the statutory serious injury threshold, plaintiff must have sustained an injury that is identifiable by objective proof' (citation omitted)" (*Edey v. Dreamon Limo Inc.*, 23 Misc.3d 1140(A) [Sup. Ct. Kings Co. 2009]). Plaintiffs' submissions have, therefore, failed to raise a triable issue of fact.

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Accordingly, plaintiffs' complaint is dismissed, without costs.

This decision constitutes the order and judgment of the court.

Dated: 11-01-11

HON THOMAS P. PHELAN  
THOMAS P. PHELAN, J.S.C.

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**ENTERED**  
NOV 04 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE