

**Davis v Browne**

2019 NY Slip Op 34463(U)

September 30, 2019

Supreme Court, Orange County

Docket Number: Index No. EF004659/2017

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
**RUTHANN DAVIS,**  
Plaintiff,

**DECISION AND ORDER**  
Index No.:EF004659/2017

-against-

**Motion Date: 8/22/19**  
Sequence No. 1 & 2

**JAMES P. BROWNE and JOSEPHINE JACKSON,**  
Defendants.

-----X  
**SCIORTINO, J.**

The following papers numbered 1 to 9 were considered in the threshold motions dismissing the complaint submitted by both defendants, James P. Browne and Josephine Jackson<sup>1</sup>:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Aceste) Exhibits A-K	1 - 3
Notice of Motion/Affirmation (Rogers)/ Exhibits A-C	4 - 6
Affirmation in Opposition (Fagen)/ Exhibits A-D	7 - 8
Reply Affirmation (Weinberg)	9

For the reasons set forth below, the defendant’s applications are denied.

This personal injury action arises out of a motor vehicle accident that took place on April 29, 2016 on Route32 at the intersection of Powelton Road, located in the Town of Newburgh, Orange County, New York. Plaintiff commenced this action by filing a Summons and Complaint on June 21, 2017. Plaintiff alleges that she sustained serious injuries as defined in Insurance Law §5102(d). Specifically, plaintiff claims a right knee meniscus tear requiring surgery; cervical and lumbar disc

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<sup>1</sup> Although the motion submitted by defendant, Josephine Jackson is titled Cross-Motion (Motion Seq. #2), Ms. Jackson actually joins in with Mr. Brown’s motion. Ms. Jackson does not set forth her own arguments, but incorporates Mr. Brown’s motion in its entirety by reference as though fully set forth within her motion papers.

herniations and bulges. Plaintiff further claims that her injuries have triggered and/or aggravated previously asymptomatic arthritis and/or other degenerative conditions.

Defendants argue that plaintiffs have failed to establish a “serious injury” as that term is defined in Insurance Law §5102(d). That section provides, in relevant part, that:

A “serious injury” is a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss 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.

Plaintiff alleges injuries that resulted in a permanent, consequential limitation of use of a body organ, member, function or system; a significant limitation of use of a body function or system and a medically-determined injury or impairment of a non-permanent nature that prevented plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 of the 180 days immediately following the accident. Defendants assert, however, that plaintiff’s injuries were not causally related to the alleged accident. Where the evidence demonstrates plaintiff had pre-existing degenerative changes and/or that there were no objective limitations or disability, defendants make a *prima facie* showing that there was no serious injury. Here, defendants assert that their experts found that there was no orthopedic disability, and none of the injuries were causally related to the accident.

The defendants' motions are supported, among other things, by the report of the examining orthopedist, Robert C. Hendler, M.D., who examined the plaintiff on October 16, 2018, and by

diagnostic radiologist, Dr. John T. Rigney. Dr. Hendler reviewed plaintiff's emergency room records on the date of the accident and the MRI reports of plaintiff's lumbar spine, cervical spine and right knee taken subsequent to the accident. Dr. Hendler was not provided with any of plaintiff's medical records prior to the subject accident but was made aware of prior complaints through the emergency room records on the date of the accident and by plaintiff's counsel who, according to Dr. Hendler, listed such complaints in his cover letter to Dr. Hendler. Among the several complaints listed, there is only one complaint of right knee pain in 201. Several others, such as left knee pain, injury to left ankle and laceration on her right foot, are irrelevant to this action. Based upon this information, Dr. Hendler concluded that plaintiff had a significant prior history of right knee, neck and back problems prior to the accident of record.

Dr. Hendler found that the plaintiff may have sustained a cervical and lumbosacral sprain with temporary exacerbation of pre-existing degenerative joint disease and degenerative disc disease and a possible mild contusion to the right shoulder, all of which have resolved. With regard to her right knee, Dr. Hendler found that the plaintiff did not sustain any significant injury at the time of the accident. Without reviewing the MRI scan of plaintiff's right knee, Dr. Hendler opines that the MRI findings were ambiguous for a torn meniscus.

Upon physical examination, Dr. Hendler determined range of motion by visual measurement but failed to compare his finding, in each instance, to what is normal (*Walker v Public Adm'r of Suffolk County*, 60 AD3d 757 [2d Dept 2009]). It is well-established that proof under the significant limitation of use category requires "comparative determination of the degree or qualitative nature of the injury based on the normal function, purpose and use of the body part and must be supported by objective medical evidence." (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY 2d 345, 350-351

[2002]) As such, Dr. Hendler's report fails to sufficiently establish that plaintiff's actual range of motion fall within the normal range and thus, insufficient to show that plaintiff did not sustain a serious injury. (*Chang Ai Chung v. Levy*, 66 AD3d 946 [2d Dept 2009]) Of additional note is Dr. Hendler's failure to address the 90/180 claim.

Dr. Rigney opined that there is no evidence of any traumatic injury having been suffered as a result of the subject accident. Upon examination of the MRI scans of plaintiff's cervical and lumbar spine, Dr. Rigney did not confirm any finding of herniations and found that the appearance of her lumbar and cervical spine is that of a chronic multilevel degenerative/arthritis condition and not the result of a single recent traumatic event. Upon examination of the MRI scan of plaintiff's right knee, Dr. Rigney found no meniscal tear present. There is no indication that Dr. Rigney reviewed the operative report and/or intraoperative photographs of plaintiff's arthroscopic surgery performed on May 10, 2017 by Dr. Gabriel Dassa, which confirmed the finding of a lateral meniscus tear. Dr. Rigney merely disagrees with the findings of plaintiff's diagnosticians.

In that defendants have not met their *prima facie* burden to establish that plaintiff did not sustain a serious injury, the Court need not, and does not consider the sufficiency of plaintiffs' papers. (*Cuevas v. Compote Cab Corp.*, 61 AD3d 812 [2d Dept 2009])

That being said, the narrative reports of plaintiff's orthopedic surgeon, Dr. Gabriel Dassa, create issues of fact as to whether plaintiff sustained a "serious injury" as a result of the accident of April 29, 2016. Dr. Dassa first saw the plaintiff on June 15, 2016 after she was seen by her primary care doctor and pain management. An MRI of her cervical, lumbar and right knee were completed and plaintiff was referred to physical therapy and chiropractic treatment. Surgery to the right knee was performed on May 10, 2017, which was said to have revealed a torn lateral meniscus; synovitis,

chondral damage to the medial femoral condyle, lateral tibial plateau and joint adhesions. Dassa concluded that the plaintiff's injuries were caused by the April 29, 2016 accident based on the MRI reports of the cervical and lumbar spine taken June 2, 2016 and the MRI of the right knee taken on June 26, 2016. He also relied on objective clinical examination of plaintiff which revealed a painful and limited range of motion when compared to normal ranges.

The plaintiff has established triable issues of fact.

Accordingly, it is hereby

**ORDERED** that the summary judgment motions of defendants, James P. Browne and Josephine Jackson, are denied; and it is further

**ORDERED** that the parties shall appear for pre-trial conference on October 31, 2019 at 9:15 a.m.

This decision shall constitute the order of the Court.

Dated: September 30, 2019  
Goshen, New York

ENTER  
  
HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record Via NYSCEF*