

<b>Broughton v Flaherty</b>
2012 NY Slip Op 31665(U)
June 22, 2012
Supreme Court, Wyoming County
Docket Number: 40369
Judge: Mark H. Dadd
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At a term of the Supreme Court held in and for the County of Wyoming, at the Court-house in Warsaw, New York, on the 22<sup>nd</sup> day of June, 2012.

PRESENT: HONORABLE MARK H. DADD  
Acting Supreme Court Justice

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF WYOMING

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DARLENE J. BROUGHTON  
*Plaintiff*

v.

MEGAN R. FLAHERTY and  
JOHN J. HACKEMER

*Defendants*

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ORDER

Index No. 40369

The defendants having moved, by notice of motion dated May 27, 2011, for an order pursuant to CPLR 3212 directing that summary judgment be entered herein in their favor dismissing the complaint on the grounds that the action has no merit because the plaintiff has not suffered a serious injury as defined by Insurance Law §5102(d), and said motion having duly come on to be heard.

NOW, upon reading the pleadings of the parties, and on reading and filing the notice of motion dated May 27, 2011, supported by the affidavit of George W. Collins, Esq., attorney for the defendants, sworn to on May 27, 2011, together with the annexed exhibits; and the opposing affirmation of Scott C. Printup, Esq., attorney for the plaintiff, dated September 22, 2011, accompanied by the affidavit of Dawn M. Daniels, D.C., licensed chiropractor, sworn to on September 22, 2011; and the reply affirmation of George W. Collins, Esq., dated October 11, 2011; and after hearing George W. Collins, Esq., in support of the motion, and Scott C. Printup, Esq., in opposition thereto, and due deliberation having been had, the following decision is rendered.

The matter arises from an automobile accident that occurred on April 29, 2006, near the intersection of Route 19 and Curtis Road in the Town of Warsaw, New York. The plaintiff, operating her vehicle in the northbound lane of Route 19, had stopped along with two

other cars behind a vehicle waiting to make a left-hand turn onto Curtis Road when she was rear-ended by a vehicle driven by defendant, Megan Flaherty. According to the plaintiff's Bill of Particulars, the plaintiff claims as a result of the accident to have sustained qualifying "serious" injuries pursuant to Insurance Law §5102(d) under the following categories: significant disfigurement; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and 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 support of their contention that the plaintiff suffered no serious injury as a result of the collision, the defendants submit, in addition to the plaintiff's deposition testimony, the affirmed reports of Andrew R. Miller, M.D., Christopher S. Ferrante, D.C., David S. Krasner, D.C., and John J. Leddy, M.D. In her deposition testimony, the plaintiff described the medical problems that she attributes to the accident. Her primary continuing complaints are: pain and limitation of motion in her right shoulder, neck, mid back and lower back. She admitted that she suffered from pain, limitation and disc degeneration in her lower back prior to the accident, but she indicated that she believes that the accident exacerbated those lower back problems.

Dr. Miller, who examined the plaintiff on July 20, 2006, at the behest of her insurance company in order to determine the need for the payment of no fault benefits, reported that the plaintiff had suffered "strain[s]" to her cervical spine, dorsal spine, lumbar spine and right shoulder. In his opinion, the "strain[s]" were all "resolved" at the time of his examination, and, with respect to her lower back problems, he declared that "there is no probable causal relationship between the claimant's reported symptomatology due to pre-existing lumbar strain." He found that the plaintiff was "not disabled at this time."

Dr. Ferrante, also conducting an exam for the plaintiff's insurance company, concluded on July 20, 2006, that the "sprain[s]/strain[s]" to the plaintiff's cervical spine, thoracic

spine and lumbar spine were in the process of “resolving” and that the plaintiff had “a mild disability at this time.” Dr. Krasner, examining the plaintiff for the insurance company on November 29, 2007, noted, based upon radiological reports that he reviewed, that the plaintiff had pre-existing degenerative disc disease in her lumbar region. He concluded that there was no current “objective evidence of causally related impairment of the cervical, thoracic, or lumbar regions of the spine, which would preclude the claimant pursuing her normal duties ...”

Dr. Leddy, who saw the plaintiff on February 16, 2011, based his report on a review of the plaintiff’s medical records, her deposition testimony and a physical examination. From his examination he concluded that the plaintiff now exhibited “normal” ranges of motion in her shoulder, mid back and lower back. With regard to her neck, he observed that “[c]ervical spine range of motion is subjectively reduced by 50% in extension, 50% in left rotation and 30% in right rotation,” while “[f]lexion is full.” In his opinion, however, all of the “sprains” attributable to the accident “are not serious injuries,” and “[t]here is no objective medical evidence of ongoing symptoms, limitation, disability, permanency or the need for future medical treatment related to the healed sprains sustained on April 29, 2006.”

With the evidence submitted, the defendants have met their burden upon the motion to make a prima facie showing that the plaintiff’s action is precluded because her injuries are not “serious” injuries (Insurance Law §§5102(d), 5104). In response to the motion, however, the plaintiff has submitted the affidavit of Dawn Daniels, D.C., a chiropractor who has been treating the plaintiff since July 21, 2006. According to Dr. Daniels, the plaintiff has suffered significant and permanent losses of range of motion in her neck and back caused by the accident. She bases her opinion on her examination and continuing treatment of the plaintiff, as well as on her review of two MRI reports. In her affidavit, Dr. Daniels quantifies the plaintiff’s range of motion losses with references to goniometer tests that she performed during her initial examination of the plaintiff.

The Court finds that Dr. Daniels’s affidavit is sufficient to demonstrate that questions of fact remain to be determined with regard to whether the plaintiff sustained

“serious” injuries to her back and neck within the categories of “permanent consequential limitation of use” and “significant limitation of use” (Perl v. Meher, 18 N.Y.3d 208 [2011]; Roll v. Gavitt, 77 A.D.3d 1412 [4<sup>th</sup> Dept., 2010]; Burke v. Moran, 85 A.D.3d 1710 [4<sup>th</sup> Dept., 2011]). Contrary to the argument of the defendants, the fact that the quantitative range of motion measurements made by Dr. Daniels date from July of 2006 does not render them valueless (see, Perl, supra). Furthermore, the defendants are incorrect in asserting that Dr. Daniels, in her affidavit, “does not consider the plaintiff’s current condition . . .” Moreover, the Court notes that Dr. Leddy, in his February 2011 examination of the plaintiff, confirms that the range of motion in her neck “is subjectively reduced by 50% in extension, 50% in left rotation and 30% in right rotation” – although he disagrees with Dr. Daniels with regard to whether these recent symptoms are attributable to the accident.

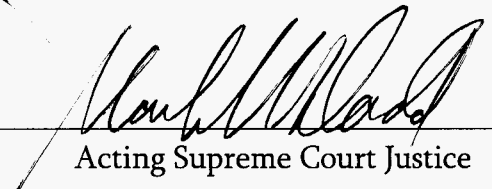
The plaintiff has failed to raise any triable issues of fact with regard to her claims to have suffered “serious” injuries under the categories of “significant disfigurement” or “a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially 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.” The Court accordingly will grant the defendants’ motion with respect to these categories of injuries. The plaintiff has also failed to raise any triable issues of fact with regard to her claim to have suffered a “serious” injury to her right shoulder under the categories of “permanent consequential limitation of use” and/or “significant limitation of use.” Therefore, the Court finds that the defendant’s are entitled to summary judgment on the issue of whether the plaintiff sustained a qualifying injury to her right shoulder. Because, however, the plaintiff has succeeded in showing that factual questions remain to be determined with regard to her claims to have sustained in the accident qualifying injuries to her lower back, mid back and neck under the categories of “permanent consequential limitation of use” and “significant limitation of use,” the Court must deny the defendants’ motion with respect to those claimed injuries.

NOW, THEREFORE, it is hereby

ORDERED that the defendants' motion for summary judgment is partially granted in that the Court hereby dismisses so much of the plaintiff's action as is based upon her claim to have sustained a qualifying "serious" injury to her right shoulder and upon her claims to have sustained a significant disfigurement and/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; and it is further

ORDERED that the defendants' motion for summary judgment is in other respects denied.

Dated: June 22, 2012

  
Acting Supreme Court Justice

