

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

MINAS IOANNOU and CHRYSTAL IOANNOU,

Plaintiff,

-against-

ALFRED G. OSBOURNE and BRIAN G. OSBOURNE,

Defendants.

TRIAL/IAS, PART 24
NASSAU COUNTY

Index No. #: 2982/03

Motion Seq. No.: 001

Motion Date: 08/20/04

The following paper read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, the motion by defendants, Alfred G. Osbourne and Brian G. Osbourne, for summary judgment on the grounds that the plaintiff, Minos Ioannou, failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d), is denied.

Plaintiffs commenced this action for personal injuries allegedly sustained by plaintiff, Minas Ioannou, in a motor vehicle collision that occurred on May 12, 2001 at 6:40 p.m. on Mill Road at / or near the intersection of Dubois Avenue, Valley Stream, N.Y. Plaintiff, Minas Ioannou, was the owner / operator of a vehicle he alleges was struck by a vehicle being operated by defendant, Brian Osbourne, and owned by defendant, Alfred G. Osbourne. The claim of plaintiff, Chrystal Ioannou, is a derivative one.

According to the bill of particulars, plaintiff, Minas Ioannou, alleges that he

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sustained injuries to his back including: “Broad-based disc herniation effacing the thecal sac at L4-L5; Disc degeneration and spondylosis” lumbar and cervical sprain and strain. Plaintiff also alleges injuries to his knees including: “Bilateral knee symovitis; Right knee pain and weakness”.

In support of their motion for summary judgment, defendants’ submit the affirmed reports of Dr. John C. Killian, an orthopedist, dated March 30, 2004, and of Dr. Scott S. Coyne, a radiologist, dated March 28, 2002 (who reviewed the June 15, 2001 Lumbrosacral Spine MRI Exam of plaintiff).

Dr. Killian’s report is based upon his examination of plaintiff on March 22, 2004 and his review of plaintiff’s unsworn medical reports (including a report of an MRI of plaintiff’s cervical spine on 6/15/01). Dr. Killian sets forth in his report, that based upon his examination of the plaintiff on March 22, 2004, he found plaintiff to have restricted motion in his cervical and lumbar spine. However, he opines that plaintiff’s restrictive spinal motion is strongly suggestive of age related degenerative disease as opposed to an injury. Dr. Killian further states that “[b]ased upon this examination I would conclude that Mr. Ioannou does have mild impairment of his spine due to age related degenerative disease and he has mild impairment of his right knee due to age related degenerative disease. I do not feel that he has any causally related impairment or disability from injuries from this accident.”

Dr. Coyne sets forth that he reviewed the lumbrosacral MRI examination and enclosed radiology record in this matter. Based upon that review he sets forth his impression that “The lumbrosacral spine MRI demonstrates advanced chronic degenerative disc and facet joint changes which are clearly long standing and are causally unrelated to the accident of May 12, 2001. Disc protrusions most frequently result from the degenerative disc process which is the most probable cause of this L4-5 disc protrusion. This MRI exam demonstrates no evidence of any osseous or soft tissue abnormality causally related to the accident of May 12, 2001.”

Defendants’ examining expert, Dr. Killian, found plaintiff to have restriction of motion in his back and knee but does not feel the restrictions are causally related to the accident. Similarly, Dr. Coyne, based upon his review of the MRI, does confirm that plaintiff has a disc protrusion (herniation) at L4-L5. However, he states that “Disc protrusions most frequently result from degenerative disc process which is the most probable cause of this L4-5 disc protrusion. This MRI exam demonstrates no evidence of any osseous, or soft tissue abnormality causally related to the accident of May 12, 2001.”

To the extent that defendants’ medical evidence may present a *prima facie* case shifting the burden to plaintiff (*Gaddy v Eyeler*, 79 NY2d 955, 957), plaintiff’s medical evidence, coupled with that of defendants, raises a triable issue of fact as to

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plaintiff's alleged "serious injury."

Plaintiffs' submit the affirmation of plaintiff's treating orthopedist, Dr. John L. Xethalis, dated July 30, 2004, wherein he concludes that plaintiff's back and knee injuries are causally related to the accident. Dr. Xethalis states that the plaintiff's "aches and pains, narrowing of the disc spaces... are a direct result of the accident of May 12, 2001. While there has been some degeneration, that condition has been aggravated by the injury resulting from the May 12, 2001 rear-end automobile collision. In my medical opinion, the injury persists to the lower back and right knee which are causing other difficulties with this patient."

Disc herniations and disc bulges may constitute a "serious injury" within the meaning of Insurance Law §5102(d) (see *Salomon v Hadco Aluminum & Metal Corp.*, 1 AD3d 426; see also *Trigg v Gradischer*, 6 AD3d 525). To survive a summary judgment motion in a case of a herniated and / or bulging disc, a plaintiff must provide proper medical evidence of the herniation and / or bulge, permanence, causation, and specify the degree of the resulting decreased range of motion (*Acosta v Rubin*, 2 AD3d 657) or provide a qualitative assessment of the plaintiff's condition (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345).

Here the submitted evidence does both. Defendants' doctors confirm the herniation and plaintiff's restriction of motion including specifying the resulting

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decrease in range of motion. That, coupled with plaintiff's evidence, is sufficient to raise a triable issue of fact (*Toure; Trigg; Salomon*). The conflicting evidence on causation presents a question of fact for the jury (*Kaplan v Gak*, 259 AD2d 736).

Based on the foregoing, defendants' motion for summary judgment dismissing the complaint on the threshold issue of "serious injury" must be denied.

This constitutes the decision and order of the court.

Dated: October 26, 2004

ENTERED

NOV 03 2004 JOSEPH COVELLO, J. S. C.

NASSAU COUNTY
COUNTY CLERK'S OFFICE