

**Blisard v Segal**

2010 NY Slip Op 31454(U)

June 4, 2010

Supreme Court, Nassau County

Docket Number: 2221/06

Judge: Daniel R. Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

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**MARGARET E. BLISARD and HUGH BLISARD,**

**TRIAL TERM PART: 45**

**Plaintiffs,**

**INDEX NO.: 2221/06**

**-against-**

**MOTION DATE: 9-24-08  
SUBMIT DATE: 5-27-10  
SEQ. NUMBER - 001**

**BORIS D. SEGAL and MIKHAIL SEGAL,**

**Defendants.**

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**The following papers have been read on this motion:**

- Notice of Motion, dated 8-5-08.....1**
- Affirmation in Opposition, dated 5-19-10.....2**

This motion by the defendants pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that the plaintiff Margaret E. Blisard has not sustained a "serious injury" as that term is defined by the Insurance Law is granted and the complaint is dismissed.

Initially, the Court notes that the case had been stayed as of November, 2008 because of a bankruptcy filing by defendant Mikhail Segal, but by order dated April 26, 2010 this Court vacated that stay upon plaintiff's presentation of an order of the Bankruptcy Court permitting a recovery against him in the present matter up to the limits of a stated insurance policy.

In this motor vehicle accident case the plaintiff was allegedly injured as a result of a collision that occurred on August 17, 2005. Defendants now move for summary judgment on the ground that the plaintiff cannot meet the so-called No-Fault threshold, which requires that the plaintiff have suffered a “serious injury” before she may prosecute an action for personal injuries. Insurance Law § 5104.

“Serious injury” is defined by § 5102(d) of the New York Insurance Law as follows:

“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 persons’ usual and customary daily activities for not less than ninety days during one hundred and eighty days immediately following the occurrence of the injury or impairment.” (Ins. Law § 5102(d)).

In her bill of particulars the plaintiff in effect alleges that she sustained a “permanent consequential limitation of use of a body organ or member” and/or a “significant limitation of use of a body organ or member.” The foregoing is based on her claim that the following resulted from the accident: disc herniations at L2-3, 3-4, 4-5 and L5-S1, and disc bulges at C3-4 and 4-5, with impingement; cervical and lumbar radiculopathy; spondylosis L3-4; neck pain radiating to bilateral shoulders; lower back pain radiating to bilateral buttocks; ulnar neuropathy; myofasciitis; muscle spasm; carpal tunnel syndrome; left 4<sup>th</sup> and 5<sup>th</sup> digit pain; loss of strength; numbness; weakness; and injuries to the blood vessels, tendons, ligaments and nerves in and about the injured area. Permanency is claimed with respect to all injuries,

except those with a superficial nature. She also claims limitation of motion with respect to all injuries except those of a superficial nature, in particular injuries to the back and neck, with left hand numbness.

The Court finds that the defendants have made out their *prima facie* case that the plaintiff did not sustain a "serious injury". At the outset, it should be noted that although not claimed in her bill of particulars, the defendants demonstrated by reference to her deposition that she could not satisfy the "90/180" category, and this is unrebutted.

With regard to the other, claimed categories, defendants present the affirmed reports of Edward M. Weiland, M.D., a neurologist, S. Farkas, M.D., an orthopedist, and Audrey Eisenstadt, M.D., a radiologist. The plaintiff was examined by Drs. Weiland and Farkas in November and December, 2007, respectively.<sup>1</sup> Each reviewed relevant records and performed an examination. Each conducted range of motion and other objective testing, comparing their findings to what is normal, with no decrease in range of motion from normal ranges found. Dr. Farkas concluded that plaintiff had resolved cervical and lumbar sprains. Dr. Weiland diagnosed cervical sprain/strain, and exacerbation of preexisting cervical and lumbar myofascial pain disorder.<sup>2</sup> He noted some subjective reports of pain when he palpated the base of plaintiff's neck and left suprascapular area. However, he also stated

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<sup>1</sup> As noted earlier, this case was stayed because of the bankruptcy filing by one of the defendants. The motion was made on August 6, 2008, returnable September 24, 2008, but because of the stay there was a delay in submitting this motion of over 1 ½ years.

<sup>2</sup> Plaintiffs have not pleaded exacerbation of any preexisting condition, nor do they claim it here, and thus no recovery on that theory is available in any event. *Rodgers v New York City Trans. Auth.*, 70 AD3d 917 (2d Dept. 2010).

that he found no primary neurologic disability, nor any permanency, in any area, including the digits of plaintiff's left hand, concerning which she complained of numbness.

Dr. Eisenstadt's report is dated July, 2007. She reviewed MRI films of the spine taken five weeks after the accident. She found no fractures, but did find degeneration and desiccation of disc material of the lumbar spine. Her stated impression, among other things, was widespread degenerative disc disease throughout the lumbar spine, with osteophyte formation at the L1-2, 2-3, 3-4, and L5-S1 levels. She states that, "There is no evidence of bony injury attributable to the accident. There is no evidence of intervertebral disc abnormalities, recent or post-traumatic in origin. No annular tears or disc herniations are seen. An incidental bone hemangioma is seen at the L5 level, a finding without clinical significance or traumatic basis. No post-traumatic changes are noted."

Based on the foregoing, the Court finds that moving defendants have established a *prima facie* showing that they are entitled to summary judgment in their favor based on the absence of a "serious injury," thereby shifting the burden to the plaintiff to come forward with proof placing this in issue. *See, e.g., Gaddy v Eyer, 79 NY2d 955, 957 (1992)*. They have demonstrated that she sustained no more than strains and sprains. In view of the medical evidence presented, the reports of pain and numbness made to Dr. Weiland are insufficient. *Scheer v Koubek, 70 NY2d 678, 679 (1987)*.

In response, the plaintiff submits medical records and the affirmations of her treating physician, Teymuraz Datikashvili, M.D., one dated October 29, 2007, and a later one, undated, but which refers to an evaluation of plaintiff on November 23, 2009.

In the 2007 statement Dr. Datikashvili describes the following: positive findings for Spurling's, Soto Hall, Shoulder Depressor, and noted "marked cervical paravertebral muscle spasm" in the bilateral upper trapezius muscles. He performed range of motion testing on the cervical and lumbar spines, but his reporting is, typically, "45/50 deg. with pain" and does not specifically indicate whether the second number is a statement of what is a normal value.

In his more recent statement, Dr. Datikashvili recites that he has been treating Ms. Blisard since September 1, 2005 for injuries sustained in the accident. On September 30, 2005 he reviewed the MRI films taken on September 20, 2005, and noted disc bulges at C3-4 and C4-5, with impingement on the anterior aspect of the spinal canal, herniations at L2-3, L3-4, L4-5 and L5-S1, with degeneration and spondylosis at L3-4. He contends these are "objective evidence of injury" (emphasis in original). He further states that an EMG was performed on the plaintiff's upper extremities, revealing carpal tunnel syndrome. He also notes a subsequent accident on October 10, 2007, but contends that upon a comparison of the MRI of the lumbosacral spine taken on February 5, 2008 and one taken on September 20, 2005, no new injury is found. He therefore states that the disc herniations stem from the 2005 accident.

Dr. Datikashvili reports that he evaluated the plaintiff from September 1, 2005 through November 23, 2009, and describes her medical management, and states that plaintiff has damaged ligamentous tissue which has been replaced with adhesions, which are thinner and more prone to reinjury and pain. He concludes by stating that from the August, 2005

accident she is suffering from multiple lumbar disc herniations, lumbar radiculopathy, cervical bulges with impingement, and carpal tunnel syndrome.

The Court finds that the plaintiffs' proof is insufficient to stave off this motion. Even assuming that the range of motion testing performed by plaintiff Margaret Blisard's treating physician revealed significant restrictions, the report in which they are found dates from October, 2007 and there is no repeat of those tests noted in the 2009 statement. This is crucial to establish permanency under either of the two "serious injury" categories set forth in Insurance Law § 5102(d) upon which plaintiffs rely, as the "the existence of a herniated or bulging disc is not evidence of serious injury in the absence of objective medical evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration." *Albano v Onolfo*, 36 AD3d 728 (2d Dept. 2007); *Yakubov v CG Trans Corp.*, 30 AD3d 509 (2d Dept. 2006); *Kearse v New York City Tr. Auth.*, 16 AD3d 45 (2d Dept. 2005).

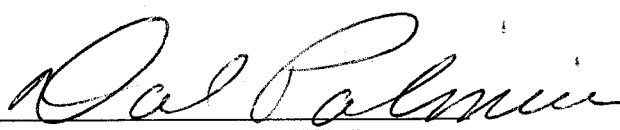
Further, he does not in either statement address the findings of Dr. Eisenstadt regarding degenerative disease of the lumbar spine, which leaves un rebutted her explanation that the herniations and bulges were not the result of the accident. This is a preexisting condition which, without sufficient opposing proof, renders any claim that the accident caused the problems complained of without force, and renders the complaint subject to dismissal. See, *Pommells v Perez*, 4 NY3d 566, 579-580 (2005); *Lopez v American United Transp., Inc.*, 66 AD3d 407 (1st Dept. 2009); *Mullings v Huntwork*, 26 AD3d 214, 216 (1st Dept. 2006). Finally, there no recent medical evidence presented in the 2009 report regarding the alleged carpal tunnel syndrome which would serve to establish permanency, or a causal link to restrictions of use of the affected area.

Accordingly, the Court concludes that the defendants have proved that the plaintiff has not suffered a "serious injury" as claimed by the plaintiffs, and the plaintiffs have been unable to demonstrate the existence of issues of fact in that regard. Accordingly, the complaint must be dismissed, including the derivative claim asserted by Hugh Blisard. *Johnson v County of Suffolk*, 55 AD3d 875 (2d Dept. 2008).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 4, 2010

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

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**ENTERED**  
JUN 09 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE