

Gaubert v Lindy's Fleet Serv. Inc.

2016 NY Slip Op 31968(U)

June 23, 2016

Supreme Court, Suffolk County

Docket Number: 14648/2014

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Marie Gaubert and Yesult Joseph,

Plaintiffs,

Motion Sequence No.: 001; MD
Motion Date: 3/16/16
Submitted: 3/23/16

-against-

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Lindy's Fleet Service Inc. and Lakeem Burris,

Defendants.

Attorney for Plaintiffs:

Mitchell First, Esq.
233 Broadway, Suite 2201
New York, NY 10279

Lindy's Fleet Service Inc. and Lakeem Burris,

Third-Party Plaintiffs,

Attorney for Defendants
and Third-Party Plaintiffs:

-against-

Jean Thevenin,

Third-Party Defendant.

Baker, McEvoy,
Morrissey & Moskovits, P.C.
1 MetroTech Center
Brooklyn, NY 11201

Clerk of the Court

Attorney for Third-Party Defendant:

Cuomo, LLC
9 East 38th Street
New York, NY 10016

Upon the following papers numbered 1 to 31 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 13; Answering Affidavits and supporting papers, 14 - 29; Replying Affidavits and supporting papers, 30 - 31; it is

ORDERED that this motion by defendants/third-party plaintiffs, Lindy's Fleet Service Inc. and Lakeem Burris, for an order dismissing the complaint of plaintiffs, Marie Gaubert and Yesult Joseph, is denied.

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Plaintiffs commenced this action to recover damages for personal injuries allegedly sustained on June 6, 2014 when defendant's motor vehicle allegedly came into contact with a vehicle operated by non-party Jean Thevenin in which both plaintiffs were passengers. It is alleged in the bill of particulars that plaintiff Gaubert sustained a 9 mm tear of the distal supraspinatus tendon of the right shoulder, herniated discs in the cervical, thoracic and lumbar regions of the spine, and other soft tissue injuries. Plaintiff Joseph is alleged to have sustained a full thickness tear of the supraspinatus tendon of the right shoulder and a supraspinatus tendon tear of the left shoulder, herniated discs in the cervical, thoracic and lumbar regions of the spine, and other soft tissue injuries.

Plaintiff Gaubert testified at her deposition that at the time of the accident she was employed as a nursing assistant and that she returned to work on July 7, 2014. Defendants submitted the affirmed report of J. Serge Parisien, M.D., who examined plaintiff Gaubert on August 17, 2015. Ranges of motion of the cervical spine as measured with a goniometer were normal in all planes, and the foraminal compression, shoulder depression, Soto Hall, cervical distraction and Spurling tests were all negative. Examination of the thoracic region of the spine showed full range of motion. Examination of the lumbosacral spine revealed normal lumbar lordosis with no evidence of spasm, and range of motion was full. The Lasague's, straight leg raising, Waddell's and Kernig tests were negative. Range of motion of the shoulder was full, and impingement sign, Hawkin's test, apprehension test and supraspinatus test were negative with no sensory loss to pin prick. There was full range of motion of the hands, wrists, and thumbs. The doctor concluded that the plaintiff had no residual or permanent injury and could perform work and daily activities without restriction.

Defendants also submitted the affirmed medical report of Dr. Jean-Robert Desrouleaux, a neurologist who examined plaintiff on August 17, 2015. Range of motion of the cervical, thoracic and lumbar regions of the spine as measured with a goniometer was full with no spasm. Deep tendon reflexes, gait, and motor examination were normal and sensory examination was intact. The doctor concluded that the alleged injuries were resolved with no residual effects, and that the plaintiff had no functional restrictions.

The affirmed report of Mark Decker, M.D., who reviewed the MRI of plaintiff's lumbar spine that was taken on December 14, 2015, was also submitted. He found multi-level bulging and facet arthropathy with foraminal encroachment and central stenosis at lower lumbar levels, and central herniations at L4-5 and L5-S1, but no evidence of an acute traumatic injury. The radiologist concluded that the MRI showed degenerative and long-standing conditions that were not causally related to the underlying accident. Dr. Decker also reviewed the MRI of plaintiff's cervical spine that was taken on December 14, 2015, which reportedly showed multi-level diffuse degenerative disc disease with straightening of lordosis. There was multi-level bulging and spondylotic ridging with multi-level superimposed disc herniations flattening the thecal sac and anterior cord, but he concluded that the findings were all degenerative and not causally related to the underlying accident. In addition, Dr. Decker reviewed the MRI taken on July 14, 2014 of the plaintiff's right shoulder. The examination reportedly showed AC joint arthropathy with lateral acromial spur as well as a 12-mm high-grade articular and interstitial tear of the supraspinatus with mild muscle atrophy. There was also biceps and subscapularis tendinopathy with a small 4-mm traction cyst at the insertion. It

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was his opinion, however, that the findings were degenerative, long-standing and not causally related to the underlying accident.

Plaintiff Joseph testified that after the accident she was confined to bed for 3 days and stayed home for 1 month. She returned to work in August 2014 for two weeks. She had surgery to her left shoulder in November 2014, following which she was confined to bed for 15 days and confined to home for about 1 ½ months. She again returned to work in February 2015.

Defendants submitted the affirmed report of J. Serge Parisien, M.D., who examined plaintiff Joseph on August 17, 2015. There was full range of motion as measured with a goniometer of the cervical, thoracic and lumbar regions of the spine. The foraminal compression, shoulder depression, Soto Hall, cervical distraction and Spurling tests were negative. A normal lumbar lordosis was noted with no evidence of spasm, and the Lasegue's, straight leg raising, Waddell's and Kernig tests were negative. There was evidence of 3 healed arthroscopic scars over the left shoulder. Range of motion of both shoulders was full, and impingement sign, Hawkin's test, apprehension test and supraspinatus test were negative with no sensory loss to light touch or pin prick. The doctor concluded that the plaintiff had no residual or permanent injury and could perform work and daily activities without restriction.

Plaintiff Joseph was also examined by Dr. Jean-Robert Desrouleaux on August 17, 2015. His affirmed medical report indicates that range of motion, as measured with a goniometer, of the cervical, thoracic and lumbar regions of the spine was full with no spasm. Deep tendon reflexes, gait, and motor examination were normal and sensory examination was intact. The Soto Hall test, Spurling's test, cervical distraction and cervical compression tests, Laguere's test, Clonus test, bilateral straight leg raising test, Kernig's test, Patrick's test, Waddell's test and Phalen's test were all negative. The doctor concluded that the alleged injuries were resolved with no residual effects, and that the plaintiff had no functional restrictions.

A radiological review of the MRI of plaintiff's cervical spine taken on July 25, 2014 was conducted by Mark Decker, M.D. There was a loss of lordosis with diffuse multi-level degenerative disc disease, multi-level bulging and spondylotic ridging with disc osteophyte complexes contacting the spinal cord, and the finding were determined to be "all degenerative, longstanding, and not causally related to the date of the accident of 06/06/2014." Multi-level degenerative disc disease was also seen on the MRI of the lumbar spine dated August 14, 2014, and the doctor opined that the findings were not causally related to the underlying accident. Dr. Decker also reviewed the MRI of plaintiff's right shoulder dated July 14, 2014, which showed a 12-mm high-grade tear of the supraspinatus, but the findings were determined to be long-standing and not causally related to the accident.

The defendants met their initial burden of establishing, as a matter of law, that plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see McCauley v Ross*, 298 AD2d 506, 748 NYS2d 409 [2d Dept 2002]; *see also McKinney v Lane*, 288 AD2d 274, 733 NYS2d 456 [2d Dept 2001], citing *Gaddy v Eycler*, 79 NY2d 955, 591 NE2d 1176, 582 NYS2d 990;

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Licari v Elliott, 57 NY2d 230, 441 NE2d 1088, 455 NYS2d 570). The defendants submitted competent medical evidence establishing that the alleged injuries to each plaintiff's spinal regions and to each plaintiff's shoulder did not constitute serious injuries under the permanent consequential limitation of use, significant limitation of use or the 90/180 day categories of Insurance Law § 5102 (d). In addition, the defendants submitted competent medical evidence establishing that the alleged injuries to each of the plaintiffs were not causally related to the motor vehicle accident but, instead, were degenerative in nature (see *Schilling v Labrador*, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]).

In opposition to the motion, plaintiff Gaubert submitted her own affidavit in which she states that she was out of work following the accident of June 6, 2014 until July 9, 2014. She also denies having sustained any prior injuries to her back or neck, right shoulder or thumbs prior to the accident. Plaintiff also submitted an uncertified copy of the emergency room record from Good Samaritan Hospital.

The affirmed report of Nizarali Visram, M.D., of Perry Physical Medicine & Rehabilitation, P.C., indicates that when plaintiff Gaubert was seen on June 12, 2014, examination of the right shoulder revealed "deep spasm over the bicipital tendon, right mid trapezius" while active range of motion was "nearly complete". When measured with a goniometer, range of motion of the cervical region was flexion 32/50 degrees, extension 35/60 degrees, right rotation 35/80 degrees and left rotation 24/80 degrees. Range of motion of the lumbar region was flexion 64/90 degrees and extension 25/30 degrees. The doctor also opined that there was a causal relationship between the injuries and the underlying accident, and physical therapy was recommended. When she was seen again on July 3, 2014, plaintiff had reduced range of motion, as measured with a goniometer, of the cervical and lumbar regions of the spine with spasm. Forward flexion of the right shoulder was 100/150 degrees, and the Hawkins' test was positive. On July 31, 2016, examination of the cervical region revealed that flexion was 42/50 degrees, extension was 46/60 degrees, right rotation was 46/80 degrees and left rotation was 40/80 degrees. Spurling test was positive on the right. Flexion of the lumbar area was 68/90 degrees and extension was 25/30 degrees. Forward flexion of the right shoulder was measured at 122/150 degrees, with both Neer sign and Hawkins test being positive. At the examination on September 4, 2014, range of motion of the cervical region was improved with flexion 45/50 degrees, extension 50/60 degrees, right rotation 53/80 degrees, and left rotation 50/80 degrees. Flexion of the lumbar area was 70/90 degrees and extension was full. Forward flexion of the right shoulder was 135/150 degrees and abduction was "nearly complete." Passive range of motion was reportedly complete. The MRI report of the plaintiff's right shoulder was reviewed and plaintiff was diagnosed to have sustained post-traumatic right shoulder supraspinatus tear with impingement syndrome and other post-traumatic injuries.

Plaintiff also submitted the affirmed MRI reports of the cervical spine and the lumbar spine, and an affirmed report of the MRI taken of plaintiff's right shoulder on July 14, 2014, which reportedly indicates that plaintiff had a partial thickness 9 mm supraspinatus tendon tear and glenoid spurring with posteroinferior glenoid chondromalacia. Dr. Visram's report relating to her examination of plaintiff's neck, back and right shoulder on February 11, 2016 indicates that the

plaintiff demonstrated a 17% loss of range of motion in flexion of the lumbar spine. She was also noted to have sustained a 10% loss of range of motion in flexion, a 17% loss of range of motion in extension, a 44% loss of range of motion in right lateral rotation and a 31% loss of range of motion in left lateral rotation of the cervical spine. In addition, plaintiff had a 7-10% loss of range of motion of the right shoulder, which has been determined to be "insignificant" within the meaning of the no-fault statute (*see Cebron v Tuncoglu*, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013], citing *McLoud v Reyes*, 82 AD3d 848, 849, 919 NYS2d 32 [2011]). Nevertheless, Dr. Visram has opined that plaintiff sustained "post-traumatic lumbar spine internal derangement with disc herniations..." and "post-traumatic cervical spine internal derangement with disc herniations..." which are "essentially permanent." Plaintiff Gaubert raised a triable issue of fact as to whether she sustained a serious injury under the significant limitation of use and/or the permanent consequential limitation of use category of Insurance law § 5102(d) as a result of the subject accident (*see Chul Koo Jeong v Denike*, 137 AD3d 1189, 28 NYS3d 393 [2d Dept 2016]).

In opposition to the motion, plaintiff Joseph submitted her own affidavit in which she states that she was out of work following the accident of June 6, 2014 until July 7, 2014. She had surgery on November 25, 2014 and subsequently was unable to work for 3 months. She denies having sustained any prior injuries to her back, neck or shoulders. Plaintiff also submitted an uncertified copy of the emergency room record from Good Samaritan Hospital.

The affirmed report of Nizarali Visram, M.D., of Perry Physical Medicine & Rehabilitation, P.C., indicates that when plaintiff Joseph was seen on June 12, 2014, range of motion of the cervical region was flexion 24/50 degrees, extension 26/60 degrees, right rotation 25/80 degrees and left rotation 20/80 degrees, as measured with a goniometer. Range of motion of extension of the lumbar region was 16/30 degrees. Examination of the right shoulder showed forward flexion at 70/150 degrees and abduction at 52/150 degrees. The doctor opined that there was a causal relationship between the injuries and the underlying accident, and physical therapy was recommended. When she was seen again on July 3, 2014, plaintiff had reduced range of motion, as measured with a goniometer, of the cervical and lumbar regions of the spine with spasm. Forward flexion of the right shoulder was 100/150 degrees, abduction was 95/150 and the Hawkins' test and Neer's sign were positive. Examinations on August 14, 2014, September 18, 2014, October 23, 2014, and December 11, 2014 and January 15, 2015 showed continued loss of range of motion, although it was noted that there was some improvement in some areas. When the plaintiff Joseph was seen on February 19, 2015, forward flexion of the left shoulder after surgery in November 2014 was measured to be 95/150 degrees while abduction was 100/150 degrees. Forward flexion of the right shoulder was 122/150 degrees and abduction was 116/150 degrees, and it was noted that passive range of motion "did improve the range." Examination of the cervical spine showed flexion was 45/50 degrees, extension was 53/60 degrees, right rotation was 65/80 degrees and left rotation was 61/80 degrees. Range of motion of the lumbar region was flexion 70/90 degrees and extension 25/30 degrees. When seen on March 26, 2015, plaintiff Joseph continued to have reduced range of motion of the cervical and lumbar regions of the spine, and range of motion of the left shoulder was forward flexion 105/150 degrees and abduction 100/150 degrees. The right shoulder was measured at forward flexion 130/150 degrees and abduction 120/150 degrees. Motor power of the left shoulder

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forward flexor/abductors was 4/5, and the right shoulder was 4+/5. The plaintiff was diagnosed to have sustained post-traumatic left shoulder impingement syndrome with partial thickness tear status post arthroscopic surgery, post-traumatic right shoulder full thickness tear of the supraspinatus/subscapularis tendinopathy and other post-traumatic injuries, and it was recommended that she continue with physical therapy.

Plaintiff also submitted the affirmed MRI reports of the right shoulder, which showed a full thickness tear of the supraspinatus with distal anterolateral subscapularis tendinosis/tendinopathy, and the affirmed report of the lumbar spine and cervical spine. Plaintiff Joseph also submitted the affirmed report of the MRI of the left shoulder which showed bursal sided, low grade supraspinatus tendon tear (3x5 mm) with tendinitis at biceps tendon, intra-articular portion. In addition, Dr. Visram's report relating to her examination of plaintiff's neck, back and shoulders on February 11, 2016 indicates that the plaintiff demonstrated a 17-22% loss of range of motion of the lumbar spine. She was also noted to have sustained a 10-25% loss of range of motion of the cervical spine. In addition, plaintiff had a 27% loss of range of motion in forward flexion of the right shoulder, as well as a 33% loss of range of motion in abduction. Plaintiff also had a 30% loss of range of motion in forward flexion of the left shoulder, as well as a 33% loss of range of motion in abduction. It was Dr. Visram's diagnostic opinion that among the injuries sustained by the plaintiff Joseph as a result of the motor vehicle accident were "post-traumatic lumbar spine internal derangement including disc herniations...", "post-traumatic cervical spine internal derangement, with disc herniations...", "post-traumatic right shoulder internal derangement, with full thickness communicating separated tear of the supraspinatus, tendinopathy..." and "post-traumatic left shoulder internal derangement, with impingement syndrome, bursitis, and tears, status-post arthroscopic surgery, bursectomy and subacromial decompression". It was also the doctor's opinion that the injuries "essentially permanent." Plaintiff Joseph raised a triable issue of fact as to whether she sustained a serious injury under the significant limitation of use and/or the permanent consequential limitation of use category of Insurance law § 5102(d) as a result of the subject accident (*see Chul Koo Jeong v Denike, supra*, 137 AD3d 1189, 28 NYS3d 393 [2d Dept 2016]; *see also Dixon v Fuller*, 79 AD3d 1094, 913 NYS2d 776 [2d Dept 2010]).

Dated:

6/23/2016


HON. WILLIAM B. REBOLINI, J.S.C.

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