

<b>Greer v Lewandowski</b>
2007 NY Slip Op 31046(U)
April 23, 2007
Supreme Court, Suffolk County
Docket Number: 0008790/2005
Judge: Robert W. Doyle
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 11-14-06  
ADJ. DATE 1-30-07  
Mot. Seq. # 001 - MG; CASEDISP

-----X			
SUSAN GREER,	:	SIBEN & SIBEN, LLP	
	:	Attorneys for Plaintiff	
Plaintiff,	:	90 East Main Street	
	:	Bay Shore, New York 11706	
- against -	:		
	:	JOHN P. HUMPHREYS, ESQ.	
LISA A. LEWANDOWSKI and NICHOLAS	:	Attorneys for Defendants	
LEWANDOWSKI.	:	3 Huntington Quadrangle, Suite 102S	
	:	P.O. Box 9028	
Defendants.	:	Bay Shore, New York 11706	
-----X			

Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 16-22; 23-27; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on Waverly Avenue at or near its intersection with Route 27, Brookhaven, County of Suffolk, New York on April 2, 2004. The accident allegedly happened when the front end of the vehicle owned by defendant Lisa A. Lewandowki, and operated by defendant Nicholas Lewandowski, impacted the rear end of the vehicle operated by the plaintiff. The complaint alleges that plaintiff sustained a "serious injury" as defined in Insurance Law § 5102 (d), and economic loss in excess of basic economic loss within the meaning of Article 51 of the Insurance Law. Plaintiff opposes this motion, and defendant has filed a reply.

Insurance Law § 5102 (d) defines "serious injury" as "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

Greer v Lewandowski

Index No. 05-8790

Page No. 2

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of this motion, defendants submit, inter alia, the pleadings; plaintiff's verified bill of particulars; the unaffirmed report of plaintiff's treating radiologist, Albert Zilkha, M.D.; the affirmed report of defendants' examining orthopedist, Isaac Cohen, M.D.; the affirmed report of defendants' examining neurologist, Ravi Tikoo, M.D.; and the plaintiff's deposition testimony.

Plaintiff claims in her bill of particulars that she sustained bilateral carpal tunnel syndrome; an exacerbation of degenerative disc disease of the cervical spine; and a permanent limitation of motion of the cervical spine. Plaintiff also claims that she received emergency room treatment at Brookhaven Memorial Hospital on April 2, 2004, and that she was thereafter confined to her bed and home until April 7, 2004. Plaintiff further claims that she was incapacitated from her employment for two days on April 5 and 6, 2004. The court construes these allegations to mean that plaintiff claims a serious injury in the categories of a permanent consequential limitation and a significant limitation.

In his report dated June 15, 2004, Dr. Zilkha states that he performed MRI studies of the plaintiff's cervical spine on June 14, 2004, and his findings include disc desiccation from C2 to C5, and a spinal cord of normal size and signal intensity. He also observed that there were no herniated discs.

Dr. Zilkha opined that these studies showed degenerative disc disease from C2 to C5.

In his report dated July 20, 2006, Dr. Isaac Cohen states that he performed an independent orthopedic examination of the plaintiff on that date, and his findings include a normal cervical curvature with no evidence of muscle spasms or trigger points; no evidence of muscle atrophy; equal and symmetrical reflexes of the upper extremities; medial, ulnar and radial nerves that were normal; and no swelling or effusion of the wrists. He also noted that plaintiff's range of cervical spine and wrist motion were each satisfactory and normal. Dr. Cohen opined that plaintiff had sustained a mild cervical strain which had resolved and that there was no evidence of acute carpal tunnel syndrome or active symptomatology in the cervical spine. He also concluded that there was no evidence of residual disability or permanency related to this accident.

In his report dated July 24, 2006, Dr. Tikoo states that he performed an independent neurological examination of the plaintiff on July 20, 2006, and his findings include deep tendon reflexes that were "1-2+" throughout; normal muscle strength; and an intact sensory system. While he found that there was mild tenderness of the cervical spine, he also noted that there was no associated spasm or fasciculations. Furthermore, he noted that plaintiff had a history of cervical strain and soft tissues injuries to her arms bilaterally. Dr. Tikoo opined that there was no significant clinical evidence of neuropathy, radiculopathy or disc herniation and he concluded that plaintiff's neurological exam was normal. He further concluded that plaintiff's diagnosis of carpal tunnel syndrome was incidental to and not causally related to the accident. In any event, Dr. Tikoo concluded that plaintiff is not neurologically disabled.

Plaintiff testified to the effect that she was transported from the accident scene to the emergency room at Brookhaven Memorial Hospital. She missed several days from work after the accident. About two days later, she went to a walk-in care facility where she received treatment. She then underwent a course of physical therapy for her neck and arms for about three months. Plaintiff also treated with a neurologist who advised her that she needed surgery to remedy her carpal tunnel syndrome. Presently, she has numbness and difficulty grasping objects in both hands, however, the symptoms are worse in her right upper extremities. As a result of her injuries, plaintiff is no longer able to bike ride or drive any great distance, however, her ability to perform her job has not been affected. Plaintiff further testified that in one of her recent, previous employment positions she typed narratives on her computer on a daily basis.

By their submissions, defendants made a prima facie showing that plaintiff did not sustain a serious injury (see, *Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Teodoru v Conway Transp. Svc.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Willis v New York City Trans. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]; *Grant v Heli Trucker, Inc.*, 294 AD2d 538, 742 NYS2d 874 [2d Dept 2002]). Defendants' examining orthopedist found that plaintiff's range of cervical spine and wrist motion were each satisfactory and normal. He also found that there were no muscle spasms or trigger points about the cervical spine, and no swelling or effusion of the wrists. Defendants' examining neurologist found that plaintiff had normal muscle strength in the upper extremities as well as an intact sensory system. Further, defendants' examining experts each opined that plaintiff's injuries had resolved and that she was not disabled. Defendants' remaining evidence, including plaintiff's deposition testimony, also supports a finding that she did not sustain a serious injury. As defendants

Greer v Lewandowski

Index No. 05-8790

Page No. 4

have met their burden as to all categories of serious injury alleged, the Court turns to plaintiff's proffer (*see, Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to this motion, plaintiff submits the affirmed report of plaintiff's treating neurologist, Daniel H. Cohen, M.D., and the plaintiff's personal affirmation. Initially, the Court notes that Dr. Cohen's report which has been submitted by the plaintiff is deficient to the extent that he has not submitted copies of the MRI and other diagnostic reports upon which he was relying (*see, Shay v Jerkins*, 263 AD2d 475, 692 NYS2d 730 [2d Dept 1999]; *Merisca v Alford*, 243 AD2d 613, 663 NYS2d 853 [2d Dept 1997]). To the extent, however, that he relied upon his own observations of the plaintiff, and to the extent that the reports referred to by him were submitted by the defendant in support of the motion, his opinion was considered.

In his report dated November 30, 2006, Dr. Daniel H. Cohen states that he performed an initial neurological examination of the plaintiff on April 29, 2004, and his findings include a mild limitation of left lateral cervical flexion to about 80% of normal; mild left paracervical tenderness upon palpation; a negative Tinel's sign at the wrists and elbows; a negative Phalen's sign at the wrists; and normal strength. Dr. Cohen opined this exam was entirely normal, but that plaintiff may have been suffering from myofascial pain. During his follow-up exam on June 10, 2004, Dr. Cohen found that there was a mild limitation of plaintiff's cervical spine motion with palpation tenderness, but opined that this was an otherwise normal neurological exam. On March 3, 2006, he found that plaintiff had a full and painless range of motion of the cervical spine with no palpable tenderness. He noted that plaintiff had reported to him that she was doing a lot of physical labor in her employment position, and that she had pain and burning in the right arm particularly while working. While he noted a positive Phalen's sign at the right wrist and a negative one on the left, he opined that her neurological exam was normal. During his next two exams on April 14 and June 16, 2006, he again noted that plaintiff's neurological exam was normal even though she had complaints with respect to her wrists. During his April 14, 2006 exam, he noted that plaintiff had no complaints concerning her neck. On November 16, 2006, Dr. Cohen observed that there were positive Tinel's and Phalen's signs at plaintiff's right wrist, but that her strength, sensation and reflexes were normal. During his last examination on November 15, 2006, Dr. Cohen found that plaintiff's carpal tunnel syndrome was severe on the right and mild on the left. He opined that plaintiff's symptoms of carpal tunnel syndrome was only partially causally related to the accident as it worsened two years later when she was performing physical labor regularly.

In her personal affirmation, plaintiff avers she presently works in a full-time employment position in which she is sometimes required to lift heavy objects. In order to avoid exacerbating her condition, she tries to recruit co-workers to help with lifting. She no longer rides her bicycle because she cannot put pressure on her hands. She is also unable to lift anything weighing more than twenty pounds and has trouble tying her shoe laces. Additionally, she has difficulty writing long-hand as well as sleeping. Plaintiff further avers that she stopped her medical treatment after a period of time because she was not getting any better and because she could no longer afford to pay her medical providers' co-pays.

Plaintiff has provided insufficient medical proof to raise an issue of fact that she sustained a serious injury under the no-fault law (*see, Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [2d Dept

Greer v Lewandowski

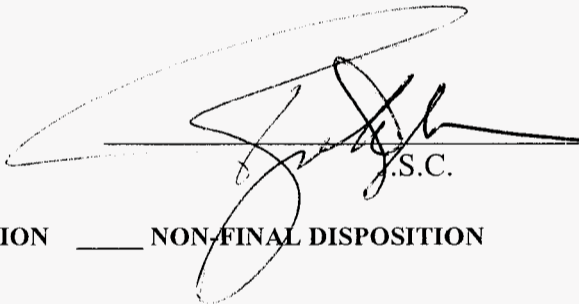
Index No. 05-8790

Page No. 5

1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]; ***Paton v Weltman***, 23 AD3d 895, 804 NYS2d 129 [3d Dept 2005]; ***Sothiros v Pinello***, 209 AD2d 687, 619 NYS2d 319 [2d Dept 1994]). Initially, plaintiff's treating orthopedist noted, upon his examinations conducted in March and April 2006, that she had no complaints with respect to her cervical spine at that time. With respect to plaintiff's claims of bilateral carpal tunnel syndrome, the objective testing performed by her orthopedist shortly after the accident, shows that whatever injuries she may have sustained to her wrists were minor as there was no weakness or positive testing signs (*see, Gonzalez v Green*, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Additionally, while Dr. Cohen noted some positive test signs at the wrists during his most recent examination, he also noted that plaintiff's strength, sensation and reflexes were normal. Furthermore, Dr. Cohen's report is devoid of any objective, quantitative evidence with respect to a diminished range of motion, or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see, Paton v Weltman, supra*). In any event, plaintiff's admitted twenty-one month gap in treatment was, in essence, a cessation of treatment which is not addressed by her medical expert (*see, Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]), and the record reflects that she did not seek additional treatment until her employment position became more physically demanding, correlating with her complaints of a recent exacerbation. Moreover, plaintiff's subjective complaints of pain to her health care providers do not constitute a significant injury within the meaning of the statute (*see, Feliz v New York City Tr. Auth.*, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; ***Ali v Vasquez, supra***).

Moreover, since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, her claim in this regard must also be dismissed (*see, CPLR 3212 [b]; see, Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, this motion for summary judgment is granted and the complaint is dismissed.

Dated: APR 23 2007

  
 \_\_\_\_\_  
 J.S.C.

FINAL DISPOSITION       NON-FINAL DISPOSITION