

Eatman v Kimball

2007 NY Slip Op 31301(U)

May 16, 2007

Supreme Court, Suffolk County

Docket Number: 0024006/2004

Judge: Emily Pines

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INDEX No. 04-24006
CAL. No. 06-01946-MV

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

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 1-8-07
ADJ. DATE 3-8-07
Mot. Seq. # 001 - MotD
002 - XMotD

-----X	
CARRIE EATMAN, SENAYE GREEN and	:
JAMIELYA CURRY,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
LENORE F. KIMBALL and THOMAS J.	:
LEMONDA,	:
	:
Defendants.	:
	:
-----X	

FLANZIG AND FLANZIG, LLP
Attorneys for Plaintiffs
323 Willis Avenue, P.O. Box 669
Mineola, New York 11501-0669

LEWIS JOHS AVALLONE AVILES, LLP
Attorneys for Defendant Kimball
425 Broad Hollow Road
Melville, New York 11747

JOHN W. HOBBS, ESQ.
Attorney for Defendant Lemonda
18 First Street, P.O. Box 420
Riverhead, New York 11901

Upon the following papers numbered 1 to 36 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 16; Answering Affidavits and supporting papers 17 - 27; 28 - 34; Replying Affidavits and supporting papers 35 - 36; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by defendant Lenore F. Kimball pursuant to CPLR 3212 and Insurance Law §5102(d) for an order granting summary judgment dismissing the complaint of plaintiffs Carrie Eatman, Senaye Green and Jamielya Curry, asserting plaintiffs' injuries do not meet the serious injury threshold, opposed by plaintiffs, is granted to the extent the complaint is dismissed as to Carrie Eatman and Jamielya Curry. The cross claim against Thomas Lemonda and counter claim asserted by defendant Kimball as they relate to the injuries claimed to have been sustained by Carrie Eatman and Jamielya Curry are dismissed. As to plaintiff, Senaye Green, defendant's motion (001) is denied. It is further

ORDERED that this motion (002) by defendant Thomas J. Lemonda pursuant to CPLR 3212 and Insurance Law §5102(d) for an order granting summary judgment dismissing the complaint of plaintiffs Carrie Eatman, Senaye Green and Jamielia Curry, asserting plaintiffs' injuries do not meet the serious injury threshold, opposed by plaintiffs, is granted to the extent that the complaint is dismissed as to Carrie Eatman and Jamielya Curry, and the cross claim against Lenore Kimball and counter claim asserted by defendant Lemonda, as they relate to the injuries claimed to have been sustained by Jamielya Curry and Carrie Eatman, are dismissed. As to plaintiff, Senaye Green, defendant's motion (002) is denied.

This is an action sounding in negligence arising out of a multi-vehicle automobile accident which occurred on April 17, 2004, on Broadway-Greenlawn Road at or near its intersection with Stuyvesant Road, County of Suffolk. Carrie Eatman was the operator of the vehicle in which Senaye Green and Jamielya Curry were passengers at the time of the accident (defendant Kimball, exhibit A). Lenore Kimball served an answer dated November 24, 2004 (defendant Kimball, exhibit B) wherein a cross claim was asserted against co-defendant Thomas Lemonda asserting entitlement to judgment over against co-defendant in whole or in part as to any sum awarded to plaintiff for injuries caused by co-defendant Lemonda; and a counterclaim against plaintiff Carrie Eatman for judgment over against plaintiff in whole or in part as to any sum awarded plaintiffs against defendant Kimball for injuries caused in whole or in part by plaintiff. Thomas Lemonda served an answer dated February 8, 2005 wherein a cross claim was asserted against co-defendant Kimball for judgment over against defendant Kimball for any liability caused by the negligence of Kimball and a counterclaim against plaintiff Carrie Eatman to hold her liable for judgment in favor of plaintiffs for any damages caused by negligence of plaintiff Eatman.

Carrie Eatman has claimed in her bill of particulars she sustained scapulothoracic myositis, abrasion over the right eye, multiple contusions, cervical strain with significant limitation of motion and tenderness, and headaches.

Senaye Green has claimed in her bill of particulars she sustained paravertebral muscle spasms in the thoracic area with considerable restriction bilaterally in the thoracic spine with side bending T6-T8, thoracic and lumbar spine musculature, and musculoskeletal pain.

Jamielya Curry has claimed in her bill of particulars she sustained cervicalgia with exquisitely tender debilitating severe cervical spasm, upper trapezius and left levator, positive left side trigger point, and TMJ positive clicking on the left on opening and closing.

Defendants claim entitlement to an order granting summary judgment dismissing the complaint, asserting plaintiffs did not sustain serious injury sufficient to meet the threshold pursuant to Insurance Law of the State of New York §5102(d).

In support of motion (001), defendant Kimball has submitted, inter alia, copies of the summons and complaint; answer; plaintiffs' verified bill of particulars; unsigned, unsworn copies of the deposition transcripts of plaintiffs Carrie Eatman, Senaye Green and Jamielya Curry; and copies of the reports of orthopedist Arthur M. Bernhang, M.D., each dated July 19, 2006 for the examinations of Carrie Eatman,

Eatman v Kimball
Index No. 04-24006
Page No. 3

Senaye Green and Jamielya Curry (defendant Kimball, exhibits G,H,I).

In support of motion (002), defendant Lemonda has submitted, inter alia, copies of the pleadings and various discovery demands; copies of the same reports of the examining orthopedist, Arthur M. Bernhang, M.D., submitted by defendant Kimball; and three pages of the deposition transcript of Lenore Kimball, unsigned and unsworn.

Insurance Law §5102(d) provides in pertinent part that “ ‘[s]erious injury’ means a personal injury which results in 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 medical 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 term “significant,” as it appears in the statute, has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570).

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 “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 (*see, 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 Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]).

The report of Dr. Bernhang concerning the medical examination of Carrie Eatman on July 19, 2006 (defendant Kimball, exhibit G) indicates Carrie Eatman was the seat belted driver of a car making a left hand turn when the car was rear ended and rear ended a second time when a third car impacted the second car. Dr. Bernhang elicited complaints of pain in the neck, mid and lower back and left shoulder from plaintiff Eatman. Upon completing his examination of plaintiff Eatman, Dr. Bernhang opined he

found no objective orthopaedic evidence of any residual of causally related injuries said to have occurred to the cervical spine, thoracic spine, lumbar spine or left shoulder. It was Dr. Bernhang's further opinion that whatever soft tissue injuries she may have sustained as a result of the motor vehicle accident of April 17, 2004 have resolved without residual.

In her testimony at her examination before trial (defendant Kimball's exhibit D), Eatman testified she was bleeding from her forehead, and hurt her neck, back and right shoulder. She followed up with an orthopedist who referred her for physical therapy, which she received three times a week for about a month and a half, then once a week for about two months. She claims she stayed out of work for about two months for which she received disability through her job. The physical therapy treatment helped alleviate her symptoms and when she stopped physical therapy, she was feeling better. There are no activities that she could do before the accident that she cannot do now.

Dr. Bernhang did not examine plaintiff until more than a year after the accident and not during the statutory period of 180 days following the accident, thus rendering defendant physicians' affidavit insufficient to demonstrate entitlement to an order granting summary judgment and dismissing the complaint on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (*Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]). However, based upon plaintiff's testimony, it is determined that defendants have demonstrated prima facie entitlement to an order granting summary judgment on the issue of whether plaintiff Eatman sustained serious injury within the meaning of Insurance Law §5102(d).

In opposing defendants' motions, plaintiff Eatman has submitted, inter alia, uncertified copies of her medical exams by Bennie White, M.D., dated April 20, 2004, May 14, 2004, June 14, 2004; and an uncertified copy of a Gold Coast Physical Therapy & Sports Training record. There is no sworn report, statement or affirmation by any treating physician to raise material issues of fact concerning the negative findings and opinion by Dr. Bernhang that there was no objective orthopaedic evidence of any residual of causally related injuries said to have occurred to the cervical spine, thoracic spine, lumbar spine or left shoulder, and that whatever soft tissue injuries she may have sustained as a result of the motor vehicle accident of April 17, 2004, have resolved without residual. Based upon the foregoing, plaintiff Eatman has not met her burden of demonstrating either serious or permanent injury or that she was unable to perform substantially all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days following the accident.

Accordingly, defendants' motions (001) and (002) for summary judgment on the issue of whether plaintiff sustained serious injury within the meaning of Insurance Law § 5102(d) is granted and the complaint of the action by Carrie Eatman is dismissed against both defendants, as are the cross claim and counter claim as they relate to any injuries claimed by plaintiff Eatman.

In support of motions (001) and (002) as to plaintiff Senaye Green, defendants have submitted the sworn report of Arthur Bernhang, M.D., dated July 19, 2006, concerning his examination of Senaye Green (defendant Kimball, exhibit H). The history obtained by Dr. Bernhang indicates plaintiff Senaye Green was the unrestrained back seat passenger of a car that was waiting to make a left hand turn and

was rear ended twice, causing her to sustain injuries to her mid and lower back. His review of the x-ray reports provided were found to be normal and within normal limits, and revealed no fractures. Upon examination, Dr. Bernhang found no objective orthopaedic evidence of any residual of causally related injuries said to have occurred to her cervical spine, lumbar spine, or thoracic spine. She is working full time at her former occupation as a bus driver, and whatever soft tissue injuries she may have sustained as a result of the accident appear to be resolved.

At her examination before trial (defendant Kimball's exhibit E), Senaye Green testified as a result of the accident, her chest hit the seat in front of her. When she arrived at Huntington Hospital, she complained her chest, back were hurting, and her neck a little bit. Thereafter, she followed up with her general practitioner, Dr. Yambo who referred her to an orthopedist, who in turn referred her for physical therapy, which she attended two or three times a week for about four months for therapy to her neck and back. She stated she still has some pain in her mid back. She had a previous neck and back injury in 1998 or 1999 when involved in a car accident for which she treated for about a year with Dr. Fluhr, a chiropractor. She missed about two weeks from work as a result of this accident. She testified she has no restriction of movement in her back as a result of this accident, and her neck is a little bit sore sometimes, with no restriction of motion.

Dr. Bernhang did not examine plaintiff until more than a year after the accident and not during the statutory period of 180 days following the accident, thus rendering defendant physicians' affidavit insufficient to demonstrate entitlement to an order granting summary judgment and dismissing the complaint on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (*Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]). However, based upon plaintiff's testimony at her examination before trial, defendants have demonstrated prima facie entitlement to an order granting summary judgment on their motions.

In opposition to defendants' motions, plaintiff Green has submitted, inter alia, her uncertified physical examination records by Edward M. Yambo, M.D., dated April 20, 2004, April 27, 2004, May 18, 2004, September 7, 2006, and January 11, 2007, in both the opposition and supplemental opposition; copy of a signed, but unsworn letter from Alexander S. Finger, M.D. to Dr. Yambo dated April 22, 2005 with annexed report; uncertified physical therapy records from Southside Hospital; the uncertified physical therapy record of Paul Arena, M.S., P.T.; uncertified copies of the physical therapy physical evaluation and records from Southside Institute for Physical Therapy for Senaye Green; and an affirmation from Edward Yambo, M.D. (plaintiffs' exhibit J of the supplemental affirmation in opposition). In reviewing the same, it is determined that only the affirmation of Dr. Yambo is in admissible form.

Dr. Yambo treated Senaye Green from April 20, 2004 through January 11, 2007. It was his diagnosis that plaintiff Green was suffering from a cervical and lumbar sprain/strain as well as muscle spasm. Dr. Yambo wrote plaintiff Green a disability note instructing her employer that as a result of her injuries, she would be unable to resume her duties as a bus driver until May 3, 2004. She attended physical therapy on July 24, 2004, August 3, 2004, August 12, 2004 and August 17, 2004. On April 22, 2005, it was recommended she resume a course of physical therapy. It is Dr. Yambo's opinion upon

Eatman v Kimball
Index No. 04-24006
Page No. 6

examination on January 11, 2007, that she was still suffering from low back pain and spasms for which he recommended she continue with physical therapy. Dr. Yambo related the injuries to the automobile accident of April 17, 2003 and opined that since her symptoms have been consistent and persisted for close to three years, that her injuries are permanent, and that the injury of the lumbar and thoracic spine sprain/strain, muscle spasm and limited range of motion constitute a significant limitation. Based upon the affirmation of Dr. Yambo, it is determined that plaintiff has come forward with sufficient admissible evidence to raise a triable issue of fact as to whether or not plaintiff has sustained serious or permanent injury within the meaning of Insurance Law §5102(d).

Accordingly, defendants' motions (001) and (002) are denied as to plaintiff Senaye Green.

Turning to those parts of defendants' motions (001) and (002) concerning whether plaintiff Jamielya Curry sustained serious injury within the meaning of Insurance Law §5102(d), defendants have submitted the sworn report of Dr. Arthur Bernhang (defendant Kimball exhibit I), dated July 19, 2006, concerning his examination of plaintiff Curry on July 14, 2006. This report, which is in admissible form, indicates the emergency room records from Huntington Hospital on April 17, 2006 x-ray report of plaintiff Curry's cervical spine says in part "...a lateral view of the cervical spine is grossly intact with no obvious fracture or subluxation." Of the lumbosacral spine, "there is normal curve. There is no evidence of fracture. The bodies are intact. The disc spaces are maintained. The sacroiliac joints are normal. The pedicles and transverse processes are within normal limits." His report indicates plaintiff Curry says she gets "spasms" on the left side of her neck once every two weeks and it occurs if she holds one of her sons too long. There were no activities that had to be modified or from which she had to abstain as a result of the injuries sustained in this accident. She was not gainfully employed at the time of the accident and is now employed as a telemarketer. Objective testing results were set forth, and it was Dr. Bernhang's opinion that there was no objective orthopaedic evidence of any residual of causally related injuries said to have occurred to the cervical spine, and whatever soft tissue injuries the examinee had sustained as a result of the accident appear to have resolved without residual.

At her examination before trial, Jamielya Curry testified after the accident she saw her doctor, Dr. White, who referred her for physical therapy. However, she had too much pain in her neck with physical therapy so she stopped going. She complained she still gets headaches at least once a month, for which she takes Tylenol or something, and if that doesn't work, she goes to the hospital for a shot. She testified they assume it is migranes as a they did not find anything with a CT. She was supposed to go to a neurologist, but never went. She was not working at the time of the accident, but started work in June, 2004 after the accident.

Dr. Bernhang did not examine plaintiff until more than a year after the accident and not during the statutory period of 180 days following the accident, thus rendering defendant physicians' affidavit insufficient to demonstrate entitlement to an order granting summary judgment and dismissing the complaint on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (*Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]). However, based upon plaintiff's testimony at her examination before trial, it is determined that defendants have demonstrated prima facie entitlement to an order granting summary

Eatman v Kimball
Index No. 04-24006
Page No. 7

judgment on the issue of whether plaintiff Curry sustained serious injury within the meaning of Insurance Law §5102(d).

In opposition to defendants' motions, plaintiff Curry has merely submitted, inter alia, only two pages of her unsigned and unsworn deposition transcript and an uncertified physical therapy record from Huntington Hospital for her treatment (plaintiffs' exhibit I). The physical therapy record is not in admissible form and therefore cannot defeat defendants' showing of entitlement to an order granting summary judgment. No affidavit, sworn report or affirmation from her physician has been submitted. Therefore, in opposing defendants' motions, plaintiff Curry has not met her burden of submitting evidence in admissible form to raise any material, triable issues of fact on the issue that she sustained either serious or permanent injury or that she was unable to perform substantially all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days following the accident.

Accordingly, defendants' motions (001) and (002) are granted and the complaint is dismissed as to plaintiff Jamielya Curry on the issue of whether plaintiff Curry sustained an serious injury within the meaning of Insurance Law §5102. The cross claims and counterclaims as they relate to any injuries claimed by plaintiff Jamielya Curry are dismissed as well.

Dated: 5/16/07

Emily Pines
J.S.C.

 FINAL DISPOSITION

 X NON-FINAL DISPOSITION