

Ehresman v Lincoln

2007 NY Slip Op 31490(U)

May 31, 2007

Supreme Court, Suffolk County

Docket Number: 0011433/2004

Judge: Robert W. Doyle

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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 2-28-07
ADJ. DATE 4-18-07
Mot. Seq. # 003 - MotD

-----X	
VANESSA EHRESMAN and RALPH	:
EHRESMAN,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
SEAN A. LINCOLN,	:
	:
Defendant.	:
-----X	

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Upon the following papers numbered 1 to 24 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 - 24; Replying Affidavits and supporting papers ____; Other ____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant for summary judgment pursuant to CPLR 3212 dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is determined to the extent indicated below.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred at the intersection of Route 454 and Lakeland Avenue, Bohemia, County of Suffolk, New York on September 16, 2003. The accident allegedly occurred when the vehicle owned and operated by defendant impacted the right passenger side of the vehicle owned by plaintiff Ralph Ehresman and operated by plaintiff Vanessa Ehresman, his daughter. The first cause of action in the complaint claims that Ms. Ehresman sustained a serious injury resulting in basic economic loss and non-economic loss as defined by Section 5102 of the Insurance Law. The second cause of action sets forth a claim for property damage for the loss of Mr. Ehresman's car in the sum of approximately \$7,281.30. Defendant now moves for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint on the grounds that Ms. Ehresman did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiff opposes this motion.

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 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 Eyley*, 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, defendant submits, inter alia, the pleadings; the plaintiffs’ verified bill of particulars; the affirmed report of defendant’s examining neurologist, Richard A. Pearl, M.D.; the affirmed report of defendant’s examining orthopedist, Arthur M. Bernhang, M.D.; the affirmed report of defendant’s examining radiologist, Melissa Sapan Cohn, M.D.; and plaintiff’s deposition testimony. Plaintiffs claim in their bill of particulars that Ms. Ehresman sustained a right elbow contusion; a sprain/strain of the lumbar spine; lumbar disc bulges/herniations; and lumbar radiculopathy. Plaintiffs also claim that Ms. Ehresman was confined to her home and bed for approximately one week. Additionally, plaintiffs claim that Ms. Ehresman was totally disabled for a period of approximately one week and that she remains partially disabled to date. Plaintiffs further claim that Ms. Ehresman sustained a serious injury in the categories of a permanent consequential limitation and a significant limitation. Lastly, contrary to the claims in their complaint, plaintiffs claim that Ms. Ehresman did not sustain economic loss greater than basic economic loss.

In his report dated August 8, 2006, Dr. Pearl states that he performed an independent

neurological examination of Ms. Ehresman on that date, and his findings include a normal motor examination that was "5/5" in all extremities; DTR's that were "2+" and symmetrical; an intact sensory system with no atrophy or fasciculations; and a normal gait. He also observed that plaintiff had a normal range of motion of the lumbar spine, as well as a negative straight leg raising test. Dr. Pearl opined that plaintiff had sustained a lumbosacral sprain and that there were no objective findings to indicate a neurological injury.

In his report dated August 21, 2006, Dr. Bernhang states that he performed an independent orthopedic examination of Ms. Ehresman on that date, and his findings include symmetrical reflexes at the elbows, knees and ankles; and a normal straight leg raising test at 85/85 degrees, with normal being 55/55 degrees and above. Dr. Bernhang also observed that plaintiff's cervical flexion, extension, lateral flexion and rotation were 70, 45, 35/45 and 65/80 degrees, with the average ranges being 38, 38, 43/43 and 45/45 degrees. While he noted that plaintiff reported some tenderness to palpation of the right trapezius muscle, he also found that there were no palpable trigger points. Additionally, Dr. Bernhang noted that plaintiff, who was 5' 7" tall and weighed 197 pounds, was able to maintain both extended legs off the examining table. In connection with his findings, Dr. Bernhang opined that there were no objective findings to indicate any orthopedic injuries to plaintiff's cervical or lumbar spine. Moreover, he concluded that plaintiff was not disabled and that she could return to her pre-injury activity levels without limitation.

In her report dated December 7, 2006, Dr. Sapan Cohn states that she performed an independent radiological review of the MRI studies dated December 3, 2006 of Ms. Ehresman's lumbar spine, and her findings include normal disc spaces with no evidence of disc herniation or bulging, and a mild loss of normal lumbar lordosis. She opined that the mild loss of normal lumbar lordosis may be the result of positioning of plaintiff within the diagnostic equipment, and that this configuration was commonly seen with stand-up MRIs. Dr. Sapan Cohn also opined this was essentially a normal MRI of the lumbosacral spine.

Ms. Ehresman testified at her deposition to the effect that after the accident she was taken to the emergency room at Brookhaven Memorial Hospital where she was treated and then released. Approximately three days later, she followed-up with her family physician. Thereafter, plaintiff underwent chiropractic treatment for about six or seven months. She then continued home treatment with a TENS machine because no-fault discontinued payment and because she did not have any health insurance. At the time of her deposition, plaintiff had no scheduled appointments for treatment for any of her injuries sustained in the accident. In 2005, she had some back pains while she was pregnant with her daughter who was born in December of that year. In June 2006, she was employed full time at Tutor Time and was commencing an LPN Program at BOCES in Bellport at night. Prior to the accident, she weighed about 145 pounds, and she now weighed approximately 165 pounds. Plaintiff further testified that she has difficulty sitting and standing for long periods of time and that she is unable to work out in the gym to the same extent as she was prior to the accident.

By his submissions, defendant made a prima facie showing that Ms. Ehresman did not sustain a serious injury (*see, Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teodoro v Conway Transp. Serv.*, 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]). Defendant's examining neurologist found, upon examination, that plaintiff had a normal gait and an intact sensory system with no atrophy or fasciculations. Similarly, defendant's examining orthopedist found that plaintiff had a normal straight leg raising test as well as symmetrical reflexes at the elbows, knees and ankles. Furthermore, both of defendant's examining experts concluded that plaintiff had no ongoing impairments secondary to the subject accident. Defendant's remaining evidence, including Ms. Ehresman's deposition testimony, also supports a finding that she did not sustain a serious injury. As defendant met her burden as to all categories of serious injury alleged, the Court turns to plaintiffs' 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, plaintiffs submit on behalf of Ms. Ehresman, inter alia, the affirmed report of plaintiff's treating radiologist, Robert Diamond, M.D.; the two affirmed reports of plaintiff's treating neurologist, Cecily Anto, M.D.; the affirmed report of plaintiff's treating orthopedist, Izhar U. Haque, M.D.; the unsworn report and the personal affidavit of plaintiff's treating chiropractor, Michael W. Smith, D.C.; and Ms. Ehresman's personal affidavit. Initially, the unsworn report dated August 5, 2004 of Dr. Smith, that was submitted by defendant with his moving papers, has been considered as it is admissible (*see, Kearsse v NY City Transit Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

In his report dated October 30, 2003, Dr. Diamond states that he performed MRI studies of Ms. Ehresman's lumbar spine on October 29, 2003, and his findings include kyphosis and levoconvex scoliosis; posterior disc bulges/herniations; and intervertebral discs that were unremarkable in height, alignment and signal. In her report dated January 14, 2004, Dr. Anto states that she performed an initial neurological examination of Ms. Ehresman on that date, and her findings include a supple neck; reflexes that were symmetrically "2+"; a normal sensory system; and a negative straight leg raise. While she found that plaintiff's lumbar flexion was limited to 45 degrees, and that there was spasm in the paraspinal muscles of the lumbar spine, she also noted that motor power that was "5/5" in all extremities without fasciculations. Dr. Anto opined that her exam showed buckling of the right leg. In her report dated February 19, 2004, Dr. Anto states that she performed an EMG/NCV studies of plaintiff's lower extremities on that date and her findings include chronic denervation changes in the distal muscles of the left lower extremities. Dr. Anto opined that these studies showed left L5 radiculopathy.

In his report dated March 14, 2007, Dr. Haque states that he performed an initial orthopedic examination of Ms. Ehresman on September 22, 2003, and his findings include stiffness along the cervical spine; tenderness along the C-4/5 and C-6 levels; a full range of cervical flexion; a normal range of cervical spine flexion; and mild paravertebral muscle spasms in the lumbar spine. On December 15, 2003, he saw plaintiff to discuss the results of her cervical x-rays dated December 9, 2003 and her MRIs dated October 29, 2003. Although plaintiff did not show up for her May 1, 2004 appointment, she returned for a follow-up appointment on October 4, 2004 after obtaining private health insurance. Dr. Haque next saw plaintiff on December 27, 2004, and he noted her complaints of back pain upon sitting for long periods of time. During his most recent exam on February 1, 2007, Dr. Haque found that there was a normal curvature of plaintiff's lumbar spine with tenderness and mild paravertebral muscle spasm. While he observed that plaintiff could not bend forward more than 60 degrees out of a normal range of 90 degrees due to complaints of pain, he also noted that her DTRs were normal at the knees/ankles bilaterally and that there was no sensory loss or motor dysfunction, Dr.

Haque opined that plaintiff had continued myofascial pain related to her lumbar disc herniations/bulges that were causally related to the accident and that her condition was permanent.

In his report dated August 5, 2004, Dr. Smith states that performed a chiropractic examination of Ms. Ehresman on that date and his findings include a positive seated straight-leg raising test. He also observed that plaintiff's lumbar flexion, extension, left/right lateral flexion and right rotation were to 60, 10, 20/20 and 20 degrees compared with the normal ranges of 90, 30, 30/30 and 30 degrees. Dr. Smith opined that plaintiff had sustained a lumbar sprain/strain with associated radiculitis bilaterally. In his personal affidavit, Dr. Smith avers that he last saw plaintiff on May 5, 2004, at which point she stopped treating with him as her no-fault benefits were denied. Plaintiff was subsequently re-examined on February 7, 2007 in connection with her symptoms of spastic pain in the low back, and his findings include lumbar flexion, extension, left/right lateral flexion and left rotation to 60, 15, 15/15 and 20 degrees, with the normal ranges being 90, 30, 30/30 and 30 degrees. Dr. Smith opined that plaintiff sustained a permanent loss of motion of the lumbar spine which has resulted in a permanent partial disability. He also concluded that plaintiff's disability and symptoms preclude her from carrying out the activities of daily living such as bending forward, sitting and lifting.

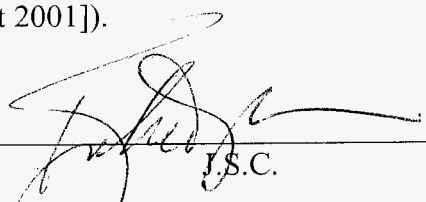
In her personal affidavit, Ms. Ehresman avers she has difficulty sleeping, bending or sitting for extended periods of time due to her back pains which are a result of her injuries. She also avers that she was unable to continue her medical treatment after her no-fault benefits were denied on January 26, 2004 as she had no other health insurance. Additionally, plaintiff avers that she no longer participates in any type of gymnastics or workouts.

Plaintiff has provided insufficient medical proof to raise an issue of fact that Ms. Ehresman sustained a serious injury under the no-fault law (*see, Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). Initially, the Court notes that the reports of Dr. Anto, which are based upon an examination and/or diagnostic testing performed more than two years prior to the filing of the motion, are without probative value to the extent that she attempts to project a significant limitation or a permanent consequential limitation (*see, Marziotto v Striano*, __AD3d__, 831 NYS2d 551 [2d Dept 2007]; *Tudisco v James*, 28 AD3d 536, 813 NYS2d 482 [2d Dept 2006]). While the report of Dr. Smith references a recent exam, he failed to set forth the objective tests that he performed during his examination of plaintiff to measure her alleged range of lumbar motion (*see, Springer v Arthur*, 22 AD3d 829, 803 NYS2d 170 [2d Dept 2005]; *Herman v Church*, 276 AD2d 471, 714 NYS2d 87 [2d Dept 2000]; *compare, Garner v Tong*, 27 AD3d 401, 811 NYS2d 400 [1st Dept 2006]; *DeLeon v J & J Towing, Inc.*, 32 AD3d 986, 822 NYS2d 120 [2d Dept 2006]; *Sclafani v City of New York*, 22 AD3d 827, 803 NYS2d 182 [2d Dept 2005]). Even though the report of Dr. Haque references a recent exam, his diagnosis of lumbar myofascial spine pain is not explained, or defined in any manner connected to plaintiff's limitations, symptoms or loss of functions, and its significance is not delineated (*see, Davis v Evan*, 304 AD2d 1023, 758 NYS2d 203 [3d Dept 2003]). Furthermore, the reports of plaintiff's treating providers tend to show that her injuries were mild, minor or slight (*see, Gonzalez v Green*, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]; *Moore v County of Suffolk*, 6 AD3d 408, 774 NYS2d 375 [2d Dept 2004]). In any event, doctors Smith and Haque have not adequately explained the approximate two-year gap in treatment between the conclusion of plaintiff's medical/chiropractic treatment in 2004,

and their most recent examination of her in February 2007, shortly after the filing of defendant's motion (see, *Chan v Casinno*, 36 AD3d 580, 828 NYS2d 173 [2d Dept 2007]; *Pimentel v Mesa*, 28 AD3d 629, 813 NYS2d 517 [2d Dept 2006]). Plaintiff's approximate two-year gap in medical treatment, was in essence, a cessation of treatment that is not sufficiently addressed by competent proof (see, *Bycinthe v Kombos*, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]; *Neugebauer v Gill*, 19 AD3d 567, 797 NYS2d 541 [2d Dept 2005]; compare, *Black v Robinson*, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]). With respect to this issue, the Court notes that plaintiffs' submissions are devoid of any specific evidence of plaintiff's recent employment history, finances, or the period of time that she was allegedly without health insurance coverage. 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]).

Accordingly, defendant's motion is granted solely to the extent that the first cause of action is dismissed. As defendant's moving papers are silent as to Mr. Ehresman's claim for property damage to his vehicle, the second cause of action is severed and continued for trial (see, CPLR 3212 [e], [1]; *Yaraghi v Zeller*, 286 AD2d 765, 730 NYS2d 517 [2d Dept 2001]).

Dated: MAY 31 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION