

Remy v Town Fleet Fin. Corp.

2007 NY Slip Op 31966(U)

June 26, 2007

Supreme Court, Kings County

Docket Number: 0021584/2002

Judge: Laura Lee Jacobson

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At Part 21 of the Supreme Court
of the State of New York, County of Kings
located at 360 Adams Street, Brooklyn,
New York on the 26th day of June 2007

PRESENT:

HON. LAURA L. JACOBSON
Justice

CELILIEU REMY AND JUDITH REMY,

Plaintiffs,

-against-

Decision/Order

TOWN FLEET FINANCING CORP., BUDGET RENT
A CAR AND DARRAN E. DIGGS, INNOVA
MARKETING,

Defendants.

Index No.:21584/2002

The following motions are consolidated for disposition.

The following papers numbered 1 to 8 read on this motion :

Papers	Numbered
Notice of Motion and Affirmations Annexed	1-4
Affirmation in Opposition	5-6
Reply	7-8

Defendants Town Fleet Financing Corp. (hereinafter "Town Fleet") and Budget Rent a Car (hereinafter "Budget") move for an order pursuant to CPLR section 3212 granting summary judgment and dismissing the complaint in as much as said plaintiffs fail to meet the serious injury threshold requirement mandated by Insurance Law Section 5102(d). Defendants Darren E. Digs and Innova Marketing (hereinafter "Innova") move for the same relief. Plaintiffs commenced this action for personal injuries allegedly sustained on March 30, 2002, when plaintiffs' vehicle collided with defendants' vehicle at or near Troy Avenue at the intersection with Eastern Parkway in Brooklyn, New York.

Plaintiff Celilieu Remy

Plaintiff Celilieu Remy was 50 years old at the time of the accident. In their bill of particulars, plaintiffs alleged that as a result of the accident plaintiff Celilieu Remy sustained serious injuries including: traumatic and severe tendinosis, characterized by heterogenous signal in the supraspinatus tendon; traumatic and severe neck pain and stiffness radiating to the right shoulder; traumatic and severe numbness and weakness in the right arm and hand; traumatic and severe right shoulder, arm forearm and hand pain with numbness and tingling; traumatic and severe impingement tear of rotator cuff of the right shoulder with instability which on June 6, 2002 required arthroscopic surgery of the right shoulder; lumbar derangement with herniated disc and radiculopathy; traumatic sprain of the lumbar spine; traumatic radiculitis of the lumbosacral spine; traumatic derangement of the lower back with tearing of the tendons; ligaments, muscles of the lower back and spine; traumatic myositis of the lumbosacral spine; traumatic sciaticneuritis with radiation of pain into both lower extremities; traumatic deviation of the normal lordotic curve; traumatic arthritis of the lumbosacral spine and the lower back, which, upon information and belief will worsen in time; plaintiff upon information and belief, has developed and/or will develop post-traumatic osteoarthritis and osteoporosis of the lumbosacral spine, which will worsen in time; traumatic derangement and tearing of the ligaments, tendons, muscles and nerves of the cervical spine; traumatic sprain of the cervical spine; traumatic radiculitis and injury to the nerves and nerve roots of the cervical spine; traumatic myositis of the cervical spine; traumatic cervico-occipital neuralgia; traumatic deviation of the normal lordotic curve; traumatic arthritis of the cervical spine, which, upon information and belief, will worsen in the course of time; upon information and belief, post-traumatic osteoarthritis and osteoporosis of the cervical spine which will worsen in time; cerebral concussion with post-concussion syndrome of unconsciousness, headaches, dizziness, weakness, faintness, diminution of intellectual and memory abilities and other symptoms reflecting cerebral damage and traumatic and severe Palmer Class "B" tear in the triangular fibrocartilage of the right wrist. Plaintiffs alleged that all of the injuries were permanent in nature. Plaintiff alleges that he was confined to bed for six months as a result of the subject accident. Plaintiffs also contends that as a result of his injuries plaintiff, Celilieu Remy was prevented from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days following the first one hundred eighty days immediately following the accident.

In support of their threshold motion, defendants Diggs and Innova submitted the duly affirmed medical report of neurologist Edward M. Weiland, MD. Dr. Weiland examined plaintiff Celilieu Remy on August 26, 2005. Dr. Weiland noted that at the time of the exam, plaintiff complained of pain in the region of his right shoulder with weight bearing activities. He also reported that plaintiff no longer complains of any head pain, headache or neck discomfort. Although Dr. Weiland noted that plaintiff had well-healed scars in the region of the right shoulder consistent with a previous arthroscopic surgery, he reported that

no surgical procedures were performed on plaintiff relating to the injuries sustained in the accident. Dr. Weiland conducted range of motion testing of plaintiff's cervical spine, lumbar spine, and shoulders. He quantified his results and compared them to normal standards. All were within normal limits. Dr. Weiland's diagnosis was cervical sprain/strain-resolved; history of contusion right shoulder and status-post right shoulder arthroscopy and plaintiff had a normal neurologic examination. In Dr. Weiland's opinion, there is no evidence of any lateralizing neurological deficits at the present time, no neurologic disability and no finding of any neurologic permanency or residual.

Defendants Town Fleet and Budget submitted the aforementioned duly affirmed affirmation of Dr. Weiland, as well as the medical affirmations of JF. Kalangie, M.D. Board certified in Physical Medicine and Rehabilitation, Orthopedic surgeon Edward A. Toriello, M.D. and radiologist Sondra J. Pfeffer, M.D. Dr. Kalangie examined plaintiff Celilieu Remy on May 21, 2002 and again on September 4, 2003. However, although Dr. Kalangie performed range of motion tests on plaintiff's, lumber spine, cervical spine and shoulders, the doctor failed to quantify the results and compare them to normal standards. Consequently, Dr. Kalangie's reports have no probative value (see *Qu v. Doshna*, 12 AD3d 578 [2nd Dept. 2004]). Dr. Toriello examined plaintiff on August 23, 2005. Dr. Toriello noted that plaintiff was taken to Brookdale Hospital on the day of the accident and was treated and released and subsequently underwent arthroscopic surgery on his right shoulder in 2002. Dr. Toriello reported that plaintiff received 3 months of therapy and then stopped. At the time of the examination, plaintiff continued to complain of occasional weakness of the right hand. Dr. Toriello performed range of motion testing on plaintiff's cervical spine, shoulders, elbows, wrists and hands. He quantified his results and compared them to normal standards. All were within normal limits. Dr. Toriello's impression was that plaintiff's examination revealed evidence of a resolved cervical hyperextension injury, resolved right shoulder strain and resolved right wrist contusion. In Dr. Toriello's opinion, there was no evidence of disability from any orthopaedic injury sustained in the accident. Dr. Pfeffer, reviewed the MRI of plaintiff's right shoulder taken on 04/15/02, and found rotator cuff tendinosis in conjunction with humeral head osteochondral degeneration. In Dr. Pfeffer's opinion, these findings are almost invariably caused by chronic subacromial impingement and cannot be attributed to a single accident. Dr. Pfeffer also reviewed the MRI of plaintiff's right wrist taken on 05/09/02. Dr. Pfeffer noted that the trauma is unremarkable and there are no MRI findings for acutely sustained 940-day old internal derangement.

Defendants Diggs and Innova have made a prima facie showing through competent medical evidence that plaintiff Celilieu Remy did not sustain serious neurological injury (see *Mahabir v. Ally*, 26 AD3d 314 [2nd Dept. 2006]). Defendants Town Fleet and Budget have made a prima facie showing of entitlement to summary judgment by establishing that plaintiff Celilieu Remy did not sustain serious neurological or orthopedic injury as a result of the subject accident (*Mahabir v. Ally*, supra). However, in response, plaintiff submitted

an affirmation from plaintiff's treating orthopedist Joseph L. Paul, M.D., who performed arthroscopic surgery on plaintiff's right shoulder on June 7, 2002. Dr. Paul contends that the surgery confirmed that plaintiff sustained a tear of the anterior labrum, with some degree of synovitis and a tear of the supraspinatus tendon at its insertion into the head. Dr. Paul performed a debridement of the labrum and synovectomy, in addition to a debridement and synovectomy of the anterior labrum, and he removed the bursa and performed a subacromial decompression in the right shoulder, with debridement of the antero inferior aspect of the acromial are of the shoulder. Dr. Paul performed follow-up examinations of plaintiff on June 13, 2002, and August 1, 2006. On his most recent examination of plaintiff on January 23, 2007, he found quantifiable limitations in the range of motion of plaintiff's right shoulder. In Dr. Paul alleges that plaintiff Celilieu Remy has a 25 per cent loss of use of the right shoulder which he believes is permanent in nature. In Dr. Paul's opinion, with a reasonable degree of medical certainty, plaintiff's injuries are causally related to the subject accident. Dr. Paul's findings are sufficient to create a question of fact as to whether plaintiff sustained "serious injury to his right shoulder as a result of the motor vehicle accident (see *Zeyger v. Litman*, 250 AD2d 841 [2nd Dept. 1998]; *Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). Moreover, the fact that Dr. Pfeiffer's findings differ from the findings of plaintiff's radiologist Mark Shapiro, M.D., creates questions of fact that require a jury determination (see *Garcia v Long Island MTA*, 2 AD3d 675 [2nd Dept. 2003]). Furthermore, contrary to defendants assertions, plaintiff has sufficiently explained the gap in treatment (see *Williams v. New York City Trans. Auth.*, 12 AD3d 365 [2nd Dept. 2003]). Moreover, defendants have failed to establish that defendant Celilieu Remy's injuries did not prevent him from performing him usual and customary daily activities for a period of not less than 90 days following the 180 days immediately following the accident (see *Pijuan v. Brito*, 35 AD3d 829 [2nd Dept. 2006]).

Plaintiff Judith Remy

Plaintiff Judith Remy was 23 years old at the time of the accident. In their bill of particulars, plaintiffs allege that plaintiff Judith Remy sustained serious injury including the following: traumatic and severe tear of the posterior horn of the medial meniscus of the right knee; traumatic and severe joint effusion of the right knee; traumatic and severe synovitis of the right knee; traumatic chondromalacia type IV involving the medial facet of the patella; traumatic and severe medial and lateral joint tenderness of the right knee; traumatic and severe internal derangement of the right knee which on June 7, 2002, required arthroscopic surgery of the right knee; traumatic and severe tearing of the ligaments, tendons muscles and nerves of the right knee; multiple traumatic contusions and abrasions of the right leg and right knee region, which contusions have resulted in massive swelling, ecchymosis and hematoma thereat, plaintiff has developed or will develop traumatic osteoarthritis and osteoporosis of the lower extremity and the right knee and adjacent parts; traumatic and severe bulging disc of the C5-C6 disc level; traumatic and

severe cervical radiculopathy, traumatic derangement and tearing of the ligaments, tendons, muscles and nerves of the cervical spine; traumatic sprain of the cervical spine; traumatic radiculitis and injury to the nerves and nerve roots of the cervical spine; traumatic myositis of the cervical spine; traumatic cervico occipital neuralgia; traumatic deviation of the normal lordotic curve; traumatic and severe posterior neck pain and stiffness to the left and right side; traumatic and severe upper and lower back pain and stiffness aggravated by lifting, bending, changing position; traumatic and severe shooting pain along the posterior-lateral aspect of both hips; traumatic arthritis of the cervical spine, which, upon information and belief, will worsen in the course of time; plaintiff has developed or will develop, upon information and belief, post-traumatic osteoarthritis and osteoporosis of the cervical spine which will worsen in time. Plaintiffs alleged that all of the injuries were permanent in nature. Plaintiff alleges that she was incapacitated from work for one month. Plaintiffs also contend that as a result of her injuries plaintiff Judith Remy was prevented from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days of the first one hundred days immediately following the accident.

In support of their threshold motion, defendants Diggs and Innova submitted the duly affirmed medical report of Dr. Weiland who examined plaintiff Judith Remy on September 16, 2005. Dr. Weiland noted that at the time of the exam, plaintiff complained of pain in the region of her right knee with weight bearing maneuvers and at times, complaints of stiffness and muscle spasm in her lower back. Dr. Weiland noted that these symptoms appear to be provoked with flexion and extension movements of the lower torso. Although Dr. Weiland noted that well-healed scars were seen in the region of plaintiff's right knee that were consistent with a previous arthroscopic surgery, he reported that there were no medical procedures performed related to the injuries sustained from the accident. Dr. Weiland performed a neurological examination that included range of motion tests on plaintiff's lumbar spine, cervical spine and shoulder. He quantified his results and compared them to normal standards. All were within normal limits. Dr. Weiland also noted that plaintiff's knees had full range of motion. However, since Dr. Weiland failed to quantify his results, his findings as to plaintiff's knees has no probative value. Dr. Weiland's impression was cervical sprain/strain-resolved; lumbosacral sprain/strain- resolved; history of contusion right knee and status post right knee arthroscopy. Dr. Weiland noted that plaintiff had a normal neurologic examination. In Dr. Weiland's opinion, there is no evidence of any lateralizing neurological deficits at the present time, no neurologic disability and no finding of any neurologic permanency or residual.

Defendants Town Fleet and Budget submitted the aforementioned duly affirmed affirmation of Dr. Weiland, as well as the medical affirmations of Dr. Kalangie, Dr. Toriello, and Dr. Pfeffer. Dr. Kalangie examined plaintiff Judith Remy on May 21, 2002. Dr. Kalangie performed range of motion tests on plaintiff's, lumbar spine, cervical spine,

thoracic spine and knees. However, here, again the doctor failed to quantify the results and compare them to normal standards. Consequently, Dr. Kalangie's reports has no probative value (see *Qu v. Doshna*, supra). Dr. Toriello examined plaintiff on September 13, 2005. Dr. Toriello noted that plaintiff saw a private physician two days after the accident and was treated and released and subsequently underwent arthroscopic surgery on her right knee in 2002. Dr. Toriello reported that plaintiff received several months of therapy and then stopped. At the time of the examination, plaintiff continued to complain of right knee pain. Dr. Toriello performed range of motion testing on plaintiff's cervical spine, shoulders, elbows, wrists, hands and knees. He quantified his results and compared them to normal standards. All were within normal limits. Dr. Toriello's impression was that plaintiff's examination revealed evidence of a resolved cervical hyperextension injury, resolved low back strain and resolved right knee contusion. In Dr. Toriello's opinion, there was no evidence of disability from any orthopaedic injury sustained in the accident. Dr. Pfeffer, reviewed the MRI of plaintiff's cervical spine taken on 04/16/02, and found early albeit pre-existing degenerative disc disease at C5-6, i.e. mild disc desiccation with minor posterior annular bulging. She reported that there is no cord or nerve root compression to account for any alleged long-term neurological deficits or disabilities. In Dr. Pfeffer's opinion, there are no discal or vertebral injuries causally related to the subject accident. Dr. Pfeffer also reviewed the MRI of plaintiff's right knee taken on 05/02/02. Dr. Pfeffer noted that the trauma is unremarkable save for early, pre-existing intrameniscal intrasubstance degeneration. Dr. Pfeffer noted that notwithstanding such, no medial or lateral meniscal tears, ligament sprains, fractures, dislocations, bone contusions, joint effusions, or subcutaneous soft tissue injuries are apparent.

Defendants Diggs and Innova have made a prima facie showing through competent medical evidence that plaintiff Judith Remy did not sustain serious neurological injury. Moreover, defendants Town Fleet and Budget have made a prima facie showing of entitlement to summary judgment by establishing that plaintiff Judith Remy did not sustain serious neurological or orthopedic injury as a result of the subject accident (*Mahabir v. Ally*, supra). In response, plaintiffs submitted affirmation from plaintiff's treating orthopedist Joseph L. Paul, M.D., who performed arthroscopic surgery on plaintiff Judith Remy's right knee on June 7, 2002. Dr. Paul contends that the surgery confirmed that plaintiff sustained a horizontal tear involving the posterior horn of the medial meniscus, as well as synovitis in this area. He also found that there was also synovitis in the lateral compartment, some fimbriation, and a radial tear of the lateral meniscus. Dr. Paul performed a lateral release, chondroplasty patellar shaving mainly of the medial facet and synovectomy of the medial and lateral compartments. He also removed the medial meniscus and performed a debridement of the lateral meniscus. Dr. Paul performed follow-up examinations of plaintiff on June 13, 2002, and August 1, 2006. On his most recent examination of plaintiff on January 23, 2007, he found quantifiable limitations in the range of motion of plaintiff's cervical spine and knee. Dr. Paul alleges that the injuries that plaintiff Judith Remy

sustained to her right knee as well as the injuries to her cervical spine including a disc bulge at C5-C6 are permanent in nature. In Dr. Paul's opinion, with a reasonable degree of medical certainty, plaintiff's injuries are causally related to the subject accident. Dr. Paul's findings are sufficient to create a question of fact as to whether plaintiff sustained "serious injury to her right knee and cervical spine as a result of the motor vehicle accident (see *Zeyger v. Litman*, 250 AD2d 841 [2nd Dept. 1998]; *Toure v. Avis Rent A Car Systems, Inc.*, supra). Moreover, the fact that Dr. Pfeffer's findings differ from the findings of plaintiff's radiologist Mark Shapiro, M.D., creates questions of fact that require a jury determination (see *Garcia v Long Island MTA*, supra). Furthermore, contrary to defendants assertions, plaintiff has sufficiently explained the gap in treatment (see *Williams v. New York City Trans. Auth.*, supra). Moreover, defendants have failed to establish that plaintiff Judith Remy's injuries did not prevent her from performing her usual and customary daily activities for a period of not less than 90 days following the 180 days immediately following the accident (see *Pijuan v. Brito*, supra).

Accordingly, defendants' motions for summary judgment are denied as to plaintiff Celilieu Remy's injuries regarding his right shoulder and with respect to his allegations that he was disabled for 90 of the first 180 days following the accident; and they are denied as to plaintiff Judith Remy's injuries regarding her right knee and cervical spine injuries and her allegations that she was disabled for 90 of the first 180 days following the subject accident. The motions are granted in all other respects.

This constitutes the decision and order of this court.

ENTER:



LAURA L. JACOBSON, JSC

HON. LAURA JACOBSON