

**Jeffries v Simmons**

2007 NY Slip Op 32305(U)

July 24, 2007

Supreme Court, Suffolk County

Docket Number: 0016184/2004

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 2-23-07  
ADJ. DATE 4-20-07  
Mot. Seq. # 001 - MG; CASEDISP

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GLINDA JEFFRIES,	:	BORDA, KENNEDY, ALSEN & GOLD, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	1805 Fifth Avenue
	:	Bay Shore, New York 11706
- against -	:	
	:	JAMES P. NUNEMAKER, JR. & ASSOCS.
RICHARD T. SIMMONS, JR.,	:	Attorneys for Defendant
	:	P.O. Box 9040
Defendant.	:	Jericho, New York 11753-9040

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Upon the following papers numbered 1 to 9 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 5 - 6; Replying Affidavits and supporting papers 7 - 9; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendant for summary judgment dismissing the complaint for failure to satisfy the serious injury threshold set forth in Insurance Law § 5102(d) is granted.

Plaintiff seeks to recover damages for personal injuries allegedly sustained in a motor vehicle accident on October 20, 2003, which occurred at the intersection of Hempstead Turnpike and Merritts Road in Farmingdale, New York. Defendant argues that plaintiff's injuries are pre-existing conditions and degenerative in nature. In support of his motion for summary dismissal of the complaint, defendant submits, *inter alia*, the pleadings, a transcript of plaintiff's November 7, 2005 deposition testimony, the affirmed reports of Joseph P. Stubel, M.D., Richard A. Pearl, M.D., and Stephen W. Lastig, M.D., as well as medical records and reports of plaintiff's previous injuries.

In her complaint as amplified by her bill of particulars, plaintiff alleges that as a result of the subject accident, she sustained serious injuries to her neck, back and shoulders. Specifically, plaintiff alleges that she sustained, among other injuries, multiple cervical disc herniations, lumbar spine disc bulges and myofascial pain syndrome of the shoulders which prevented her from working and performing substantially all of her usual and customary activities for 90 of the 180 days immediately after the accident, and resulted in a permanent loss, permanent consequential limitation of use, and significant limitation of use of parts of her body. Plaintiff also alleges that the subject accident aggravated a prior neck and back injury.

Questioning during plaintiff's deposition revealed that prior to the subject accident, she sustained injuries to her neck, back, shoulders and wrists in multiple work related accidents which occurred in 1990, 1997, 1998, 2001 and 2003. Pertinently, plaintiff testified that on November 15, 2001, while driving a school bus in the course of her employment, she was rear-ended, sustaining injuries to her neck and back. She was treated by her company's doctor through Worker's Compensation coverage and thereafter, on June 25, 2002 sought treatment with a chiropractor, Dr. Dominic Fitzsimmons.

In his narrative report, Dr. Fitzsimmons indicates that he performed a physical examination of plaintiff at which time he found, among other things, a decreased range of motion in plaintiff's cervical and lumbosacral spine, muscle spasms and trigger points over her lumbosacral spine, and positive Kemp's and leg raise tests. On June 25, 2002, Dr. Fitzsimmons diagnosed, "cervical neurospinal compression syndrome with associated dysfunction and myofascial syndrome with attending vertebrogenic encephalgia; and a lumbosacral neurospinal compression syndrome with associated dysfunction and myofascial syndrome." Dr. Fitzsimmons also noted that, at that time, plaintiff had a moderate, partial disability. Plaintiff continued treating with Dr. Fitzsimmons for the injuries sustained in the November 15, 2001 motor vehicle accident until approximately the Spring of 2003.

On June 18, 2003, plaintiff was involved in another motor vehicle accident while driving a school bus and again sought treatment with Dr. Fitzsimmons. Based on Dr. Fitzsimmons' narrative report dated June 23, 2003, plaintiff's range of motion showed increased limitations in her cervical and lumbosacral spine, muscle spasms and trigger points over the cervical and lumbosacral spine, and the Kemp's and Soto-Hall's tests were positive. Again, Dr. Fitzsimmons diagnosed "cervical neurospinal compression syndrome with associated radiculopathy, dysfunction and myofascial syndrome with attending vertebrogenic encephalgia; and a lumbosacral neurospinal compression syndrome with associated radiculopathy, dysfunction and myofascial syndrome" and concluded that she was totally disabled. Dr. Fitzsimmons referred plaintiff to Ahmed E. Elemam, M.D., a physiatrist, who examined plaintiff on June 24, 2003. Dr. Elemam found similar limitations in plaintiff's range of motion in her cervical and lumbar spine, muscle spasms, and positive Soto-Hall's and Kemp's tests.

An MRI conducted on June 24, 2003 revealed straightening of the cervical spine and degenerative changes at C3-C4, C4-C5 and C5-C6. A subsequent MRI conducted on July 14, 2003 revealed straightening of the cervical spine suggestive of muscular spasm, and bulging discs at C3-C4 and C5-C6; there was no evidence of focal disc herniation. A July 15, 2003 MRI of the lumbar spine revealed small disc bulges at L3-L4 and L4-L5 without focal disc herniation, and no significant degenerative changes.

On August 8, 2003, at the request of plaintiff's no-fault carrier, an independent orthopedic examination was performed by Stephen G. Zolman, M.D. The examination revealed that plaintiff had a 50% restriction of movement in the cervical and lumbar spine and moderate spasms in the lumbar spine. Dr. Zolman opined that plaintiff had a moderate partial disability and diagnosed cervical and lumbar sprains causally related to the June 18, 2003 motor vehicle accident, superimposed upon preexisting cervical and lumbar injuries sustained in the November 2001 motor vehicle accident.

With respect to the subject accident of October 10, 2003, on February 1, 2006, Dr. Stubel, hired by defendant's, performed an orthopedic evaluation of plaintiff, at which time plaintiff complained of

neck and back pain. Dr. Stubel reports that he could not establish a causal relationship to the subject accident as plaintiff, other than stating that she hurt her neck and back in a car accident on October 20, 2003 and that she had epidural steroid injections, would not provide any information as to how the accident happened, her treatment history or elaborate on her employment history. Dr. Stubel attests that plaintiff's physical examination, which included performing objective tests of the neck and back, the results of which are quantified in his report, was normal. Dr. Stubel diagnosed neck and back sprains and concluded that based on his review of medical reports and his physical examination findings, there is no sign of disability or need for further orthopedic or physical therapy treatment.

Dr. Pearl, defendant's physician, affirms that on February 22, 2006, he performed a neurological evaluation of plaintiff and reviewed numerous hospital records, doctors' reports and treatment notes and records. Dr. Pearl affirms that plaintiff provided a history which included a neck injury sustained in 1993 during the course of her employment as an ambulette driver for which she was out of work; a neck and low back injury sustained on November 15, 2001 when the school bus she was driving was hit in the rear; carpal tunnel surgery, the date of which she could not recall; and neck and low back injuries sustained on June 18, 2003 while driving a school bus for which she was seen by numerous physicians and out of work until September 2003. Dr. Pearl measured plaintiff's range of motion in her cervical and lumbar spine, quantified the results, all of which were within the normal range, and opines that there are no objective findings to indicate a neurological injury or disability. Dr. Pearl also opined that plaintiff sustained a cervical and lumbosacral sprain for which there is no need for neurological healthcare or testing. Dr. Pearl noted that plaintiff had a significant preexisting history of injuries to her cervical and lumbosacral spine and suggested that a radiologist review the MRIs.

Dr. Lastig, a radiologist hired by defendant, reviewed the November 21, 2002 MRI studies of plaintiff's cervical and lumbar spine. Dr. Lastig's impression was plaintiff had multilevel degenerative disc disease and degenerative spondylosis. No focal herniations were identified on the cervical spine. Dr. Lastig opined that the annular bulges seen at C5-C6 and C6-C7 are degenerative in origin and unrelated to the subject accident of October 20, 2003. Similarly, Dr. Lastig's impression of the lumbar spine MRI was that plaintiff had multilevel mild disc desiccation which is consistent with a mild degree of degenerative disc disease. No focal disc herniations or annular bulges were identified in the lumbar spine region. Dr. Lastig opined that the lumbar spine MRI was within normal limits. Dr. Lastig concluded that overall there were no findings on the cervical spine and lumbar spine MRIs which are causally related to the October 20, 2003 accident. Significantly, Dr. Lastig's opinion is consistent with the treatment plaintiff was receiving shortly after the subject accident. Notes from plaintiff's treating physician dated November 11, 2003 and December 2, 2003 indicate that plaintiff was being treated for degenerative disc disease which rendered her, during that time, totally disabled.

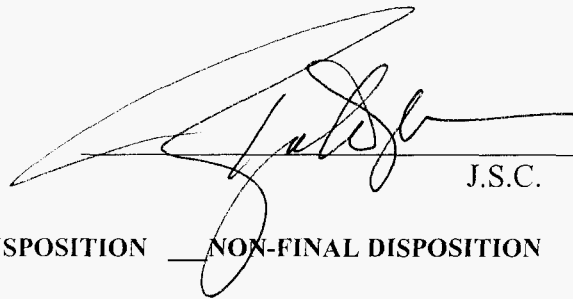
It is indisputable that plaintiff's alleged injuries are not "total" and, thus, do not constitute a serious injury under the permanent loss of use category set forth in Insurance Law § 5102(d) (*see, Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 278 [2001]). Additionally, based on the evidence proffered, defendant has established that plaintiff's neck and back injuries are not causally related to the October 20, 2003 accident, are degenerative in nature, and existed prior to the subject accident, and thus, do not satisfy the serious injury threshold under § 5102(d) (*see, Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyles*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Passaretti v Ping Kwok Yung*, 39 AD3d 517, 835 NYS2d

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224 [2007]; *Moore v Sarwar*, 29 AD3d 752, 816 NYS2d 503 [2006]; *Bycinthe v Kombos*, 29 AD3d 845, 815 NYS2d 693 [2006]). Therefore, to survive summary dismissal, the burden shifts to plaintiff to present competent evidence based upon objective medical findings and diagnostic tests adequately explaining how her current injuries were the result of the October 20, 2003 accident rather than a degenerative condition and her prior accidents (*Moore v Sarwar, supra; Bycinthe v Kombos, supra*). Plaintiff has failed to satisfy this burden. Indeed, other than an attorney's affirmation, no medical evidence has been submitted to rebut defendant's prima facie showing.

Accordingly, the defendant's motion for summary judgment is granted and the complaint is hereby dismissed.

Dated:       JUL 24 2007      

  
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J.S.C.

  X   FINAL DISPOSITION           NON-FINAL DISPOSITION