Pomper v Singh
2007 NY Slip Op 32993(U)
September 4, 2007
Supreme Court, Suffolk County
Docket Number: 0028742/2005
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 05-28742
CAL. No. 07-00030-MV

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-30-07
ADJ. DATE 8-3-07
Mot. Seq. #007 - MG; CASEDISP

---X
MARIANNE POMPER and ARTHUR POMPER,

Plaintiffs,

- against -

JATINAER SINGH, B-1 TRUCKING, INC. and JESSICA MALFA,

Defendants.
---X

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Upon the following papers numbered 1 to 26 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 _____; Answering Affidavits and supporting papers 13 - 22 ; Replying Affidavits and supporting papers 23 - 26 ; Other___; (~~and after hearing counsel in support and opposed to the motion~~) it is.

ORDERED that this motion by defendants Jatinaer Singh and B-1 Trucking, Inc. for summary judgment dismissing the complaint on the ground that plaintiff Marianne Pomper did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted and the complaint is dismissed.

This is an action to recover damages, individually and derivatively, for serious injuries allegedly sustained by plaintiff Marianne Pomper as a result of a motor vehicle accident which occurred on the east bound lane of Sunrise Highway at its intersection with Albany Avenue, North Amityville, New York on September 23, 2005. The accident allegedly happened when the truck owned by defendant B-1 Trucking, Inc. and operated by defendant Jatinaer Singh collided with the vehicle owned and operated by co-defendant Jessica Malfa, and in which Mrs. Pomper was riding at the time. By order dated May 21, 2007 (Doyle, J.), plaintiffs were granted summary judgment on the issue of liability against defendants Singh and B-1 Trucking. By that order, co-defendant Jessica Malfa was also granted summary judgment on liability grounds against plaintiffs and co-defendants, and all claims against her were dismissed. Defendants Singh and B-1 Trucking now move for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

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 Eyler***, 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, the plaintiffs' verified bill and supplemental of particulars; the two affirmed reports of Mr. Pomper's treating orthopedist, Ira J. Chernoff; the affirmed report of defendants' examining orthopedist, Wayne Kerness; the affirmed report of defendants' examining neurologist, Sarasavani Jayaram; the two affirmed reports of defendants' examining radiologist, Richard A. Heiden, P.C.; and Mrs. Pomper's deposition testimony.

In their bill of particulars, plaintiffs claim that Mrs. Pomper sustained a herniated disc at C-2/3 with cord impingement; a "post-healing" fracture of the left shoulder; a "post-healing" stress fracture of the left foot; and a left shoulder impingement. Additionally, plaintiffs claim that Mrs. Pomper was caused to be out of work for one week following the accident and that she was unable to perform any household duties for three weeks. Plaintiffs further claim that Mrs. Pomper sustained a serious injury in the categories of a permanent consequential limitation, a significant limitation and a nonpermanent injury. In their supplemental bill of particulars, plaintiffs claim that Mrs. Pomper voluntarily consented to be laid off from her usual occupation as a car salesperson and that she last worked on October 12, 2005. Moreover,

plaintiffs claim that Mrs. Pomper sustained a total loss of earnings of approximately $50,000.

In his report dated October 24, 2005, Dr. Chernoff states that he examined Mrs. Pomper on that date in connection with her complaints of shoulder, neck and foot pain subsequent to the accident, and his findings include a normal sensory system; muscle strength that was "5/5"; and upper body reflexes that were "+2". In his report dated December 5, 2005, Dr. Chernoff states that he performed a follow-up examination of Mrs. Pomper on that date, and his findings include an ability to heel/toe walk and a "preserved" range of cervical motion.

In his report September 8, 2006, Dr. Kerness states that he performed an independent orthopedic examination of Mrs. Pomper on that date, and his findings include intact sensation; muscle strength that was "5/5"; a normal gait; and a normal range of motion of the cervical spine, and ankles. While he observed a decreased range of forward elevation/abduction of the left shoulder by about 30 degrees, he opined that this was due to her previous left shoulder injury. Dr. Kerness also observed that there was no cervical spasm, no swelling or tenderness of the left foot and no neurological deficits of the left lower extremity. Furthermore, Dr. Kerness noted that Mrs. Pomper reported fracturing her shoulder due to a fall on her driveway in 2004, and that her medical history included a stress fracture of the left foot. Moreover, he noted that she reported missing one-week from work and that she was subsequently laid off by her employer on October 12, 2005. Dr. Kerness opined that Mrs. Pomper sustained a left shoulder injury and sprains/strains of the cervical/lumbar spine which had resolved as well as a fracture of the left foot that had clinically healed. He also concluded that Mrs. Pomper had no disabilities and was capable of working without any restrictions even though she reported that she was not working.

In his report dated September 8, 2006, Dr. Jayaram states that he performed an independent medical examination of plaintiff on September 8, 2006, and his findings include an intact sensory system; normal reflexes; a supple neck; no spasm or tenderness of the cervical/thoracic spine; and negative test results for cervical/lumbar radicular pain. He also found that Mrs. Pomper had a mild limitation in the range of motion of her cervical spine which was self-imposed and that she was partially cooperative with testing procedures. Dr. Jayaram opined that Mrs. Pomper had sustained sprains/strains of the cervical and lumbar spine which were resolved and that she had no focal neurological deficits. He also concluded that Mrs. Pomper had was capable of performing the activities of her daily living and employment.

In his report dated November 13, 2006, Dr. Heiden states that he performed an independent radiological review of the CT studies of Mrs. Pomper's left shoulder dated June 10, 2004 and the radiographs of her left shoulder dated September 27, 2005. Dr. Heiden opined that the CT studies showed a fracture of the humeral head with edema of the soft tissues and that the radiograph studies showed advanced healing of an old fracture with no post-traumatic changes attributable to this accident. In his report dated December 8, 2006, Dr. Heiden states that he performed an independent review of the MRI studies of Mrs. Pomper's cervical spine dated October 26, 2005, and his findings include no subluxations or edematous changes; disc dehydration throughout the cervical spine; posterior spurs; and a left lateral C-2/3 disc herniation indenting the spinal cord. He opined that these studies, which were performed one month after the accident, showed long-standing degenerative spondylarthopathy, a process reflecting wear and tear, and no post-traumatic changes to the cervical spine.

Mrs. Pomper testified to the effect that she was treated in the emergency room at John T. Mather Memorial Hospital after the accident and then released. Sometime prior to the accident, she had sustained a stress fracture of her left foot as well as a left shoulder fracture. The shoulder injury was the result of a fall on her driveway and she missed about three months of work. As a result of her injuries from this accident, Mrs. Pomper initially missed one week of work but then returned full-time except for time off for physical therapy appointments. Eventually, she opted to be laid-off because she was very uncomfortable driving to and from her place of business. She now has difficulty performing housework that requires bending/lifting and requires the assistance of her husband. Mrs. Pomper further testified that her neck gets stiff during long automobile rides.

By their submissions, defendants made a prima facie showing that Mrs. Pomper 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]; ***Teoduro v Conway Transp. Serv***., 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; ***Khan v Hamid***, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Dr. Kerness found that Mrs. Pomper had a normal range of motion of the cervical spine and ankles. While Dr. Kerness observed a decreased range of forward elevation/abduction of the left shoulder, he opined that this was due to her previous left shoulder injury. He also observed that there was no cervical spasm and no swelling or tenderness of the left foot (*see*, ***Willis v New York City Trans. Auth***., 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). Additionally, defendants' examining neurologist found that plaintiff had a supple neck and that there was no spasm or tenderness of the cervical/thoracic spine. Furthermore, defendants' examining radiologist opined that there were preexisting degenerative changes to Mrs. Pomper's cervical spine which were long-standing in nature and unrelated to trauma (*see*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). Moreover, defendants' examining radiologist found, upon his review of the radiograph studies of Mrs. Pomper's left shoulder, that there were no recent fractures or soft tissue swelling (*see*, ***Harris v Carella***, __AD3d__, 839 NYS2d 886 [4th Dept 2007]). Defendants' remaining evidence, including Mrs. Pomper's deposition testimony, also supports a finding that she did not sustain a serious injury. As defendants have met their 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, inter alia, the unaffirmed report of Mrs. Pomper's treating neuroradiologist, Alvand Hassankhani, M.D.; the affirmed report of Mrs. Pomper's treating orthopedist, Ira J. Chernoff, M.D.; and Mrs. Pomper's personal affidavit. Initially, the Court notes that the unaffirmed report of Dr. Hassankhani is admissible as it was discussed in detail by defendants' examining radiologist in his report dated December 8, 2006 (*see*, ***Flores v Stankiewicz***, 35 AD3d 804, 827 NYS2d 281 [2d Dept 2006]; ***Kearse 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]), and as such it has been considered. The Court also notes, however, that the report of Dr. Chernoff, which is based upon two examinations, the last of which occurred on more than one and one-half years prior to the date of his report, and which attempts to project a permanent limitation, is without probative value in the absence of a recent examination (*see*, ***Elgendy v Nieradko***, 307 AD2d 251, 762 NYS2d 275 [2d Dept 2003]; ***McKinney v Lane***, 288 AD2d 274, 733 NYS2d 456 [2d Dept 2001]). In any event, Dr. Chernoff's report is deficient as to the other categories of serious injury claimed 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]).

In his report dated October 26, 2005, Dr. Hassankhani states that he performed MRI studies of Mrs. Pomper's cervical spine on that date, and his findings include a left paracentral disc herniation at the level of C-2/3 as well as mild to broad-based disc endplate spondylosis, facet arthrosis and osteophyte protrusions. He also observed that the broad-based osteophyte protrusion and endplate spondylosis at C6/7 resulted in mild canal narrowing, and that there was canal stenosis at the C-2/3 level along with deformity of the ventral subarachnoid space.

In her affidavit, Mrs. Pomper avers that she went back to work one week after the accident. She opted to be laid-off on October 12, 2005 and did not return to work until October 6, 2006. After the accident, she had pain and discomfort driving as well as difficulty standing for extended periods of time. Furthermore she still has difficulty bending, lifting and performing chores in the house. Mrs. Pomper further avers that she is currently employed as her new job is closer to her home and allows her to sit while working.

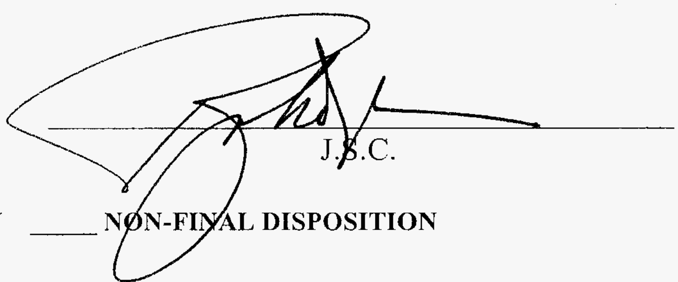
Plaintiffs have provided insufficient medical proof to raise an issue of fact that Mrs. Pomper sustained a serious injury in the categories of a permanent consequential limitation or a significant limitation (*see*, ***Burke v Galli***, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; ***Vidor v Davila***, 37 AD3d 826, 830 NYS2d 772 [2d Dept 2007]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). While a disc herniation may constitute a serious injury, the MRI report of Mrs. Pomper's treating radiologist is not probative for the purposes of demonstrating a serious injury because it contains no opinion as to causation (*see*, ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]), and does not establish the extent of any physical limitations resulting from the alleged disc injuries (*see*, ***Yakubov v CG Trans Corp***., 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]). Additionally, plaintiffs failed to submit sufficient medical proof addressing Mrs. Pomper's prior accident or her condition relative to this accident (*see*, ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]; ***Grant v Fofana***, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). Furthermore, plaintiffs failed to adequately address the pre-existing condition of Mrs. Pomper's left foot or the pre-existing degenerative condition of Mrs. Pomper's cervical spine as diagnosed by her own treating radiologist, and therefore, they have failed to establish that the alleged conditions were causally related to or exacerbated by the accident (*see*, ***Knoll v Seafood Express***, 5 NY3d 817, 803 NYS2d 25 [2005]; ***D'Alba v Choi***, 33 AD3d 650, 823 NYS2d 423 [2d Dept 2006]; ***Gomez v Epstein***, 29 AD3d 950, 818 NYS2d 101 [2d Dept 2006]). In the absence of an explanation by a treating medical provider as to the significance of Mrs. Pomper's pre-existing injuries and degenerative conditions, it would be sheer speculation to conclude that the subject accident was the cause of the her injuries (*see*, ***Lagois v Public Adm'r of Suffolk County***, 303 AD2d 644, 760 NYS2d 52 [2d Dept 2003]; ***Freese v Maffetone***, 302 AD2d 490, 756 NYS2d 70 [2d Dept 2003]). In any event, plaintiffs have not proffered any explanation by way of objective medical proof for the cessation of Mrs. Pomper's medical treatment to her cervical spine, left shoulder and left foot more than one and one-half years ago (*see*, ***Teodoru v Conway Transp. Serv.***, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; ***Vallejo v Builders for the Family Youth, Diocese of Brooklyn, Inc***., 18 AD3d 741, 795 NYS2d 712 [2d Dept 2005]).

Plaintiffs also failed to present any objective medical proof contemporaneous with the accident showing that Mrs. Pomper sustained a serious injury in the category of a fracture (*see*, ***Kaplan v Septama***, 38 AD3d 847, 834 NYS2d 206 [2d Dept 2007]; ***Schwartzman v Friedler***, 279 AD2d 517, 718 NYS2d 882 [2d Dept 2000]). Further, while plaintiffs' claim that Mrs. Pomper sustained a "post-healing" fracture of the left shoulder and a "post-healing" stress fracture of the left foot, and the defendants have chosen to address these allegations, notably absent is a specific claim in plaintiffs' bill of particulars that she sustained a serious injury in the category of a fracture (*see*, ***Robinson v Schiavoni***, 249 AD2d 991, 672 NYS2d 560 [4th Dept 1998]).

Further, plaintiffs failed to proffer any competent medical evidence that Mrs. Pomper was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the accident (*see*, ***Gavin v Sati***, 29 AD3d 734, 815 NYS2d 250 [2d Dept 2006]; ***Mercado v Garbacz***, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]; ***Omar v Goodman***, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]). While Mrs. Pomper avers that she has difficulty performing certain household activities, the record otherwise lacks objective proof of any substantial curtailment of her activities within the relevant time period after the accident (*see*, ***McNeil v Dixon***, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]; ***O'Neal v Cancilla***, 294 AD2d 921, 741 NYS2d 815 [4th Dept 2002]). Additionally, plaintiffs did not assert that Mrs. Pomper was advised by a medical practitioner to curtail her work or other activities (*see*, ***Ersop v Variano***, 307 AD2d 951, 763 NYS2d 482 [2d Dept 2003]; ***Monette v Keller***, 281 AD2d 523, 721 NYS2d 839 [2d Dept 2001]). In any event, Mrs. Pomper admitted during her deposition that she voluntarily oped to be unemployed for approximately one year as of October 2005 (*see*, ***Nelson v Distant***, 308 AD2d 338, 764 NYS2d 258 [1st Dept 2003]; ***Barbarulo v Allery***, 271 AD2d 897, 707 NYS2d 268 [3d Dept 2000]).

Moreover, since there is no evidence in the record demonstrating that Mrs. Pomper's alleged economic loss exceeded the statutory amount of basic economic loss, plaintiffs' claim in this regard must be dismissed (*see*, CPLR 3212 [b]; *see*, ***Watford v Boolukos***, 5 AD3d 475, 772 NYS2d 566 [2d Dept 2004]; ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Based upon the foregoing, Mr. Pomper's individual claims for loss of services and companionship also fail (*see*, ***Maddox v City of New York***, 108 AD2d 42, 487 NYS2d 354 [2d Dept 1985]; ***Cody v Village of Lake George***, 177 AD2d 921, 576 NYS2d 912 [3d Dept 1991]).

Dated: SEP 04 2007



J.S.C.

X FINAL DISPOSITION ____ NON-FINAL DISPOSITION