

Allen v MTA Long Is. Bus

2007 NY Slip Op 33882(U)

November 2, 2007

Supreme Court, Nassau County

Docket Number: 7664-06/

Judge: F. Dana Winslow

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SAW

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:

**HON. F. DANA WINSLOW,
Justice**

STALETA ALLEN,

Plaintiff,

-against-

**MTA LONG ISLAND BUS and ROBERT
GIOVI,**

Defendants.

**TRIAL/IAS, PART 9
NASSAU COUNTY**

MOTION DATE: 6/26/07

**MOTION SEQ. NO.: 001
INDEX NO.: 7664/06**

The following papers read on this motion (numbered 1-3):

- Notice of Motion.....1**
- Affirmation in Opposition.....2**
- Reply Affirmation.....3**

Defendants MTA Long Island Bus and Robert Giovi's motion for summary judgment pursuant to **CPLR §3212** is determined as follows.

Plaintiff Staleta Allen, age 49, alleges that on May 2, 2005 at approximately 11:30 a. m., she fell to the ground while a passenger in a bus owned and operated by defendant MTA Long Island Bus and driven by defendant Robert Giovi (the "2005 Accident"). The accident occurred on Hillside Avenue at or near its intersection with Merrick Boulevard, in the County of Queens. Defendants now move for an order dismissing plaintiff's complaint pursuant to **CPLR §3212**, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**.

Insurance Law §5102(d) provides that a "serious injury means a personal injury

which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7) or significant limitation of use of a body function or system (8). The Court finds that plaintiff has demonstrated a *prima facie* failure to prove a medically determined injury which prevented plaintiff from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of their motion for summary judgment, defendants submit an affirmed report of examination, dated February 22, 2007, of orthopedist Drew A. Stein, MD and an affirmed report of examination, dated February 22, 2007, of neurologist Naunihal Sachdev Singh, MD, covering examinations of that date. Defendants also submit an affirmed report of radiologist A. Robert Tantleff, MD, dated September 20, 2005, reviewing MRI films, dated June 9, 2005, of plaintiff's right shoulder.

Dr. Stein provides range of motion testing, comparing the results to normal, of the cervical spine, shoulders, and foot and ankle. Dr. Stein found normal range of motion testing in all these areas. With respect to the cervical spine, Dr. Stein noted normal alignment, negative tenderness, negative masses, normal skin, strength of 5/5, normal stability and negative Spurling's sign. With respect to plaintiff's shoulders, Dr. Stein found no tenderness or spasms or muscle atrophy, and normal muscle strength. Dr. Stein

also found normal testing of plaintiff's purportedly right foot and ankle. Dr. Stein diagnosed, "resolved cervical sprain/strain, resolved right shoulder sprain and resolved right ankle sprain."

Dr. Singh recorded normal range of motion, comparing the results to normal, of the cervical spine, lumbar spine, including normal straight leg raising test, and shoulder joints. In addition, Dr. Singh found no tenderness in any area, normal strength in all four extremities and normal sensory examination, reflexes, coordination and gait. Dr. Tantleff's review of plaintiff's MRI of her right shoulder revealed no evidence of a tear, contusion, fracture or dislocation. Rather, Dr. Tantleff concluded that plaintiff's MRI demonstrated evidence of chronic degenerative changes.

In addition, defendants submit deposition testimony of plaintiff conducted on September 14, 2006, and plaintiff's bill of particulars, dated January 12, 2006. Plaintiff testified that, as a result of the 2005 Accident, she injured her right ankle, knee and leg and right shoulder, for which she received treatment until on or about October, 2005. Based on statements made by plaintiff's examining orthopedist, plaintiff has purportedly abandoned her claims for injuries to her neck, back and knee. Plaintiff worked as a pre-operative assistant at North Shore University Hospital and allegedly missed one month of work as a result of the accident.

Plaintiff testified that she was involved in a subsequent motor vehicle accident on February 8, 2006 for which she received treatment for her neck and lower back, and in 2001, she was involved in a motor vehicle accident and injured her right shoulder (the "2001 Accident"). Plaintiff testified, however, that as of the date of the 2005 Accident, she was no longer experiencing pain or limitations of movement in her right shoulder although she is still experiencing pain in her neck and back as a result of the 2006 accident. With respect to her current activities, plaintiff testified that she cannot do things around the house, such as cleaning, cooking and laundry and can no longer wear "shoes, that I love to wear, with heels."

The Court finds that the reports of defendants' examining physicians, are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination, so as to satisfy the Court that an "objective basis" exists for their opinions. Accordingly, the Court finds that defendants have made a *prima facie* showing that plaintiff Staleta Allen did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. Consequently, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

Plaintiff submits affirmations of radiologist Robert Diamond, MD, all dated April 26, 2007, affirming various stand-up MRIs – an MRI of plaintiff's right shoulder performed on June 9, 2005, MRI of plaintiff's right ankle performed on June 24, 2005, MRI of plaintiff's lumbar spine performed on June 24, 2005 and MRI of plaintiff's cervical spine performed on July 12, 2005. With respect to the MRIs of the right shoulder and ankle which are the areas claimed to be injured as a result of the 2005 Accident, Dr. Diamond noted tears, among other findings. Dr. Diamond's impression with respect to the right shoulder contradicts the findings of Dr. Tantleff, that the MRI indicates degenerative changes, which is sufficient to raise an issue of fact.

Plaintiff also submits an affirmation of Osafradu Opam, MD, dated June 9, 2007, covering examinations of May 3, 2005 and April 21, 2007. The 2005 examination revealed restrictions in range of motion of the cervical spine, right shoulder and lumbosacral spine. Although range of motion testing was conducted on the knees and ankles, the results were in the normal range as provided by Dr. Opam. On April 21, 2007, Dr. Opam found restriction in range of motion of the right shoulder. Even though the results of Dr. Opam's range of motion testing of the right ankle fall within the normal range, the results of other tests performed by Dr. Opam create a question for the jury as to whether plaintiff's right ankle complaints constitute a serious injury.

Dr. Opam states that he treated her after the 2001 Accident and that plaintiff made a

full recovery from the injuries she sustained in that accident. Dr. Opam opines further that plaintiff made a full recovery from the 2005 Accident with respect to her neck and back so that “any present complaints to those body parts were related to her 2/8/06 accident.” The Court finds that, (i) Dr. Opam’s explanation that plaintiff fully recovered from any injuries caused by the 2001 Accident; and (ii) his opinion that the subsequent February 8, 2006 accident is not the cause of plaintiff’s shoulder or ankle injuries, is sufficient, although nominally, to raise an issue of fact as to whether the shoulder and ankle injuries claimed herein were caused by the 2005 Accident, including an issue of fact as to whether Dr. Opam had an adequate basis for his opinions. Consequently, the Court finds that plaintiff has created an issue of fact as to causation. *See Pommells v. Perez*, 4 NY3d 566

Likewise, Dr. Opam’s explanation for the gap in treatment between plaintiff’s treatment in 2005 and his subsequent examination in April 2007, is sufficient to raise an issue of fact. *See Pommells v. Perez, supra* at 577; *Green v. Nara Car & Limo, Inc.*, 42 AD3d 430; *Williams v. NYC Transit Authority*, 12 AD3d 365. Dr. Opam states that although plaintiff continued to be symptomatic in 2005, “it was my opinion that she would greatly benefit from home therapy which I prescribed so that my patient could continue her treatment to the affected parts. The home therapy consisted of home exercises, heating pad, TENS unit and whirlpool.”

The Court finds that plaintiff’s evidence as set forth in the reports of Drs. Opam and Diamond is sufficient to raise a triable issue of fact as to whether or not plaintiff’s injuries to her right shoulder and right ankle, only, constitute a permanent consequential limitation of use of a body organ or member (7) or significant limitation of use of a body function or system (8). *See Green v. Nara Car & Limo, Inc., supra*; *Francovig v. Senekis Cab Corp.*, 41 AD3d 643; *Hyun Jun Kim v. Collazo*, 38 AD3d 842; *Lim v. Tiburzi*, 36 AD3d 671. The Court finds however that plaintiff has failed to establish a causal connection between her alleged injuries to her neck and back and the 2005 Accident. Plaintiff’s own physician, Dr. Opam, states in his affirmation, that the 2005

Accident is not the cause of plaintiff's complaint with respect to these areas.

The Court has examined the parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

ORDERED, defendants MTA LONG ISLAND BUS and ROBERT GIOVI's motion for summary judgment dismissing the complaint of plaintiff STALETA ALLEN on the grounds that plaintiff STALETA ALLEN failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is denied.

Defendants shall serve plaintiff with a copy of this Order within 15 days after entry of this Order in the records of the Nassau County Clerk.

This constitutes the order of the Court.

Dated: *Nov 2*, 2007

ENTER:

[Handwritten Signature]
J.S.C.

ENTERED

NOV 29 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE