

Plummer v Chen Kamwing

2007 NY Slip Op 33940(U)

November 8, 2007

Supreme Court, Queens County

Docket Number: 0010438/2005

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

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SUSAN PLUMMER, MARJORIE GUY No. 010438/05
AND CLAUDIO BROOKS,

Plaintiffs, Motion
-against- Date August 14, 2007

CHEN KAMWING AND Motion
CHUNLIN QU, Cal. No. 22

Defendants. Motion
----- Seq. No. 1

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Plaintiffs commenced this action to recover damages for personal injuries alleged to have been sustained on October 17, 2004 due to a motor vehicle accident on the Long Island Expressway at or near its intersection with 108th Street, in the County of Queens, City and State of New York.

Defendants move for summary judgment dismissing the complaint of plaintiffs Susan Plummer (Plummer) and Marjorie Guy (Guy) on the grounds that said plaintiffs have not sustained a serious injury as defined in Insurance Law § 5102.

Contentions of the Parties

Defendants assert that the bill of particulars with respect to plaintiff Plummer sets forth the following injuries: posterior disc bulge impinging on the anterior aspect of the spinal canal, C3-C4; posterior disc bulge impinging on the anterior aspect of the spinal canal, C4-C5; disc bulge, L4-L5; cervical spine sprain; lumbar spine

sprain; right knee sprain.

Defendants submit the affirmed medical report of Dr. Ravi Tikoo, a neurologist, who examined her on December 13, 2006. He found, inter alia, mild tenderness of the cervical and lumbar spine. No associated spasm was noted. Straight leg raising was possible up to 90 degrees bilaterally in the sitting position where normal was 90 degrees. Cognitive, cranial nerve, motor, sensory and coordination examinations were normal. He also reviewed medical notes, cervical and lumbar spine reports and an x-ray report. He diagnosed history of cervical and lumbosacral strain and soft tissue injury. He found the neurological exam to be normal. Despite subjective complaints, there were no objective findings to support them. No further treatment or diagnostic testing was needed. Maximal medical improvement had been reached. She had no significant clinical evidence of neuropathy, radiculopathy or disc herniation. She is not disabled from a neurological basis and no permanent injury has been sustained.

Defendants also submit the affirmed report of Dr. Barry M. Katzman, an orthopedic surgeon, who examined plaintiff Plummer on December 14, 2006. As to the cervical spine and lumbar spine, objective tests showed degrees of range of motion within specified normal limits. As to both shoulders, there was voluntary restricted forward flexion to 90 degrees where normal is 180 degrees, internal and external rotation was normal. Objective tests were negative. As to the right knee there was full range of motion within stated normal ranges. Objective tests were negative. He diagnosed resolved cervical, lumbar and bilateral knee strain with voluntary restricted flexion. No further orthopedic treatment or testing was needed. While injuries to the neck, back and right knee appeared causally related, the shoulders were not causally related.

An affirmed report by Dr. Richard A. Heiden, a radiologist, was submitted. CT scans of plaintiff Plummer were reviewed. As to the cervical spine and lumbar spine, he found "bulging at C3-4 and C4-5. No fracture or subluxation is seen. No hemorrhage or edema is identified. No soft tissue abnormalities are present. Disc bulge at L4-5. No disc herniations are seen. No fracture or compression is identified. No soft tissue abnormalities are present." He opined that the bulging was "a manifestation of degenerative spondyloarthropathy, a process reflecting

wear and tear, which requires years to develop and which affects most people as they age." Such finding was degenerative in nature and not causally related to the subject accident.

As to plaintiff Guy, her bill of particulars asserts the following: posterior disc herniation with central canal stenosis and ventral cord impression, C3-C4; posterior disc herniation with central canal stenosis and ventral cord impression, C4-C5; posterior disc bulge, C2-C3; left foraminal narrowing, C4-C5; right maxillary sinusitis change; transitional lower intervertebral disc termed, L5-S1; posterior disc bulge, L2-L3; posterior disc bulge, L4-L5; intervertebral disc space narrowing with productive changes, C4-C5; thoracolumbar transitional vertebra, lumbar spine; cervical and lumbosacral myofascial pain syndrome; cervical and lumbosacral sprain and strain; cervical spine radiculopathy and headaches.

Defendants submit the affirmed report of Dr. Ravi Tikoo, a neurologist, who examined her on December 13, 2006. His report sets forth the same findings as set forth in his affirmed report for plaintiff Plummer except that there was no diagnosis of history of soft tissue injury.

Defendants submit the affirmed report of Dr. Robert J. Orlandi, an orthopedic surgeon, who examined plaintiff Guy on January 11, 2007. The cervical spine and lumbar spine revealed lordosis to a normal 40 degrees; there was no fixed paraspinal spasm and range of motion was set forth as to specific degrees which were within normal ranges. Certain objective tests resulted in negative findings. With respect to herniations claimed in the bill of particulars, he found that such were chronic and predated the subject accident. He diagnosed cervical and lumbar strains resolved.

Defendants also submit the affirmed report of Dr. Richard A. Heiden, a radiologist, who examined the MRI films of plaintiff Guy's cervical spine and lumbar spine. As to the cervical spine, he concluded that the findings of dehydration, discogenic changes and bulging are all manifestations of degenerative spondyloarthropathy, a process reflecting wear and tear which requires years to develop and which affects most people as they age. The findings are clearly degenerative in origin and in no way causally related to the subject accident. As to the lumbar spine, the MRI films were entirely normal. There were no post-traumatic abnormalities identified. No fractures,

compressions or subluxations were identified. There were no recent or post-traumatic injuries seen in the lumbar regions causally related to the accident. While the original radiologist mentioned certain bulging, if present, bulging is a degenerative process and would have no association or causal relation to the accident.

In opposition to the motion, plaintiffs assert that the defendants failed to meet their burden of proof as to plaintiff Plummer. Dr. Katzman's report indicated a positive finding and is not probative on plaintiff's disability for 90 out of the first 180 days. He found a 50% loss of motion in plaintiff's shoulders on forward flexion. His examination was conducted over a year after the accident.

Plaintiffs submit the affirmation of Dr. Guatam Khakar, a physiatrist. He examined plaintiff Plummer on April 5, 2007 and reviewed prior psychiatric evaluations, CT scans of the lumbar spine and cervical spine, x-rays of the right knee and electro diagnostic testing of the upper extremities. As to the cervical spine, there was painful range of motion with tenderness in the cervical paraspinal muscles and Spurling maneuver was positive on the left. The lumbar spine revealed painful flexion and extension with tenderness in the lumbar paraspinal muscles. Straight leg raise reproduced low back pain bilaterally. The right knee was non-tender with pain free range of motion. He sets forth specific degrees of loss of range of motion in the cervical spine and lumbar spine. He diagnosed disc bulges at C3-4, C4-5 and L4-5, left C5 radiculopathy and right knee sprain. He causally relates the injuries to the subject accident and states that she has sustained significant injuries to the cervical and lumbar spine which are permanent in nature.

Also submitted is an affirmation by Dr. Neil Morgenstern, who was a treating physician of plaintiff Plummer from October 22, 2004 through November 2, 2005. He states that annexed reports are true and accurate. He examined plaintiff on October 22, 2004. Her neck was positive for tenderness, flexion was 40/50, extension was 60/60, right rotation was 60/80 and left rotation was 70/80 and all were with pain. There was a positive bilateral Jackson's. The lumbar spine was positive for tenderness with flexion at 70/90, extension at 15/25, left and right lateral bending at 15/25 and all were with pain. There was positive straight leg raising bilaterally. As to the knee,

there was positive patella tenderness without any gross instability. His impression was of cervical spine, lumbar spine and knee sprain. On January 25, 2005, he found flexion at 80/90 and extension at 15/25 with pain as to the lumbar spine. His impression was of cervical spine radiculopathy and disc bulge and lumbar spine disc bulge. He examined her on April 5, 2005 and found flexion at 90/90 and extension at 20/25 of the lumbar spine.

Plaintiffs also submit the affirmation of Dr. Richard J. Rizzuti, a radiologist, who supervised the taking of plaintiff's CT scans of her cervical spine on November 1, 2004. He found posterior disc bulges at C3-4 and at C4-5 impinging on the anterior aspect of the spinal canal. The boney structures were normal with no evidence of spinal stenosis, fracture or abnormality of alignment.

Plaintiff Plummer submits her affidavit. She states that she was completely unable to work until the third week of December, 2004. She only went to therapy and stayed home. For about four months after the accident, she did no housework, shopping or helping with her daughter due to the pain. She started physical therapy on October 22, 2004 and continued until November 2, 2005. She stopped therapy because she wasn't getting any better.

As to plaintiff Guy, the affirmed report of Dr. Gautam Khakhar is submitted. He examined plaintiff Guy on April 3, 2007. He sets forth specific ranges of motion as compared to normal and finds percentages of loss as to the cervical spine and lumbar spine. He reviewed various records including past physiatric evaluations, MRI's of the cervical spine and lumbar spine and x-rays thereof. He finds the present injuries to be causally related to the subject accident and states that, based on positive diagnostic test results two and a half years post accident, she has sustained significant injuries to the cervical and lumbar spines.

The report of Dr. Morgenstern, with annexed progress notes, is submitted. His affirmation states that he was one of plaintiff Guy's treating physicians following the accident. He affirms that the contents of the report of his evaluations in 2004 and 2005 and the report of the EMG/NVC examination are true and accurate. His prior examinations showed positive bi-lateral Jackson's and straight leg raising produced pain bi-laterally in the lumbar spine.

The affirmation of Dr. Robert Diamond, a radiologist, is submitted. As to the MRI's of the lumbar spine, his impression was "transitional lower intervertebral disc termed L5/S1, L2/3 through L4/5 posterior disc bulges." As to the lumbosacral spine, his impression was of "C2/3 posterior disc bulge. C3/4 and C4/5 posterior disc herniations with central canal stenosis and ventral cord impression. C4/5 left foraminal narrowing, right maxillary sinusitic change."

The affirmation of Dr. Chaim B. Eliav states that he examined her on October 27, 2004. He found decreased flexion with specified degrees and a positive Spurling's as to the cervical spine. He found specified degrees as to the lumbosacral spine with positive straight leg raising.

Plaintiff Guy's affidavit states that she underwent physical therapy for over four months after the accident for three to four times a week until the insurance stopped. She sets forth various activities which she can no longer perform without pain. She has a list of home exercises given to her by Dr. Khakar who recently re-examined her.

Decision of the Court

The motion by defendants is denied.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

In this instance, the defendants met their burden. In support of their motion, the defendants submitted the sworn reports of orthopedic surgeons, neurologists and a radiologist with respect to plaintiffs Plummer and Guy. The orthopedic and neurologic reports showed full ranges of motion in the cervical spine and the lumbosacral spine and as to plaintiff Plummer's right knee. Based upon quantitative tests and other objective clinical tests, the

doctors concluded that both plaintiffs were orthopedically stable and neurologically intact. Green v Nara Car & Limo, 42 AD3d 430; Francovig v Senekis Cab Corp, 41 AD3d 643. Therefore, since the defendants submitted sufficient evidence to establish, prima facie, that said plaintiffs did not sustain a "serious injury," the burden shifted to the plaintiffs to raise a triable issue of fact by presenting "objective medical proof of a serious injury causally related to the accident...." Pommells v Perez, 4 NY3d 566, 574.

In opposition to the motion, plaintiffs Plummer and Guy submitted their affidavits and the sworn reports of their treating physicians and radiologists. Objective tests, performed shortly after the accident and recently, showed loss of range of motion in specified degrees as compared to normal ranges. Such injuries were found to be causally related to the accident. Green, 42 AD3d 430; Francovig, 41 AD3d 643; Privitera v Brown, 28 AD3d 733. The plaintiffs, in their affidavits, explained that the gap in treatment was due to a lack of further medical improvement as to Plummer and the lapse of insurance as to Guy. Francovig, 41 AD3d 643; Willams v New York City Tr. Auth., 12 AD3d 365. In light of the foregoing, the plaintiffs' opposition papers raised a triable issue of fact.

Accordingly, the motion is denied.

Dated: November 8, 2007

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HON. DAVID ELLIOT