

**Jenkins v Aaron**

2008 NY Slip Op 30393(U)

February 6, 2008

Supreme Court, Queens County

Docket Number: 0027328/2005

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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PHYLLIS JENKINS,	No. 27328/05
Plaintiff,	Motion
-against-	Date November 20, 2007
	Motion
RICHARD AARON, OMAR RAMIREZ	Cal. No. 16
AND OSCAR EDUARDO LOPEZ,	
	Motion
Defendants.	Seq. No. 2
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PAPERS  
NUMBERED

Notice of Motion-Affid-Exhib....	1-4
Cross-Motion-Ans. Aff-Opp-Exhib.	5-13
Reply.....	14-16
Stip-Letter.....	17-18

Plaintiff commenced this action seeking to recover damages for personal injuries alleged to have been sustained due to a motor vehicle accident on April 27, 2005 at the intersection of 36<sup>th</sup> Avenue and 13<sup>th</sup> Street, in the County of Queens, City and State of New York.

Defendant Richard Aaron (Aaron) moves for an order pursuant to CPLR 3212 for summary judgment dismissing the complaint due to plaintiff's failure to meet the threshold limits of Insurance Law §§ 5102 and 5104.

Defendants Omar Ramirez and Oscar Eduardo Lopez cross-move for an order dismissing the complaint on the same ground.

On November 20, 2007, via a stipulation form, the cross-motion was withdrawn on behalf of defendant Omar Ramirez. By letter dated February 1, 2008, the cross-motion on behalf of defendant Oscar Eduardo Lopez was also withdrawn.

Contentions of the Parties

Defendant Aaron annexes plaintiff's verified bill of particulars which alleges the following injuries: "disc bulge C4-5, C5-6 with cervical radiculopathy and myofascial pain syndrome; disc bulge L4-5 with disc herniation L5-S1 with lumbar radiculopathy and myofascian pain syndrome."

Defendant Aaron submits the affirmed medical report of Dr. Robert J. Orlandi, an orthopedic surgeon, who examined plaintiff on March 19, 2007. As to the cervical spine and shoulders, his examination revealed no abnormality of the spine's resting posture. Cervical lordosis was normal at 40 degrees. There was no fixed paraspinal spasm. Range of motion was within specified normal ranges. As to the lumbar spine, the low back revealed a mild increase in lumbar lordosis to 50 degrees where normal is 40 degrees. There was no fixed paraspinal spasm. Flexion and extension were normal. The patella reflexes were normal as was the Achilles reflexes. Straight leg raising and certain other objective tests were negative. As to a lumbar MRI scan report dated June 1, 2005, he stated that there was no indication that the doctor performed the study with T2 as well as T1 sequences. T2 sequences are very sensitive and would have detected a tear in the annulus and, therefore, a recent disc herniation. In fact, 98 percent of disc herniations are in individuals who are not experiencing back pain. The incidental occurrence of this disc herniation is further confirmed by the fact that the claimant is not claiming radiating pain into either lower extremity. He diagnosed cervical symptoms and lumbar strain resolved. There was no disability.

Plaintiff was also examined by Dr. Monet G. Basson, a neurologist, on April 12, 2007. Testing showed full range of motion within specified normal degrees except as to the lumbar spine which showed a decreased range of motion. There was no muscle spasm, focal tenderness or sciatic knotch tenderness. Straight leg raising was normal. There was a slight decrease in skilled movements in the left hand. Deep tendon reflexes show hyperflexia throughout with bilateral Babinski's. Dr. Basson did not find any objective abnormalities relative to the motor vehicle accident. Plaintiff seems to have a mild form of cerebral palsy. The doctor would have liked to see previous medical records, the MRI report and emergency room records, but found no objective abnormalities and no need for neurologic tests or treatments, household help, ambulatory services or medical

equipment. While there is a causal relationship between the accident and the leg and back symptoms, there are no objective findings to substantiate this. Defendant Aaron also submits the deposition testimony of plaintiff. He argues that, based upon the recent examinations by the orthopedic surgeon and the neurologist as well as plaintiff's deposition testimony, plaintiff did not sustain a serious injury.

In opposition to the motion, plaintiff asserts that she testified at her deposition nearly two years after the accident that she still could not bend over and continued to suffer debilitating back pain with difficulty sitting for extended periods of time. Disc fusion surgery was indicated and she is deciding whether to undergo such procedure. Plaintiff asserts that defendant's neurologist Dr. Basson agrees that two years after the accident plaintiff's lumbar range of motion was significantly reduced. Dr. Orlandi's report fails to set forth range of motion findings for all planes of the lumbar spine. Plaintiff's evidence shows that she could not work for a continuous period of at least fourteen months following the accident.

Plaintiff submits the affirmation of Arden M. Kaisman, M.D. He first saw plaintiff on June 18, 2005. Objective measurements resulted in significantly reduced lumbar spine range of motion findings with specific degrees of loss relative to normal. Left and right lateral bending were also significantly limited as was left and right lateral rotation. Upon palpation of the lumbar spine, he felt spasm on the left much greater than the right at the L3-S1 levels. There was decreased sensation in the L4, L5 and S1 distribution and dermatomes to pinprick and touch. There was decreased patella reflexes on the left knee. The Achilles tendon reflex was decreased on the left compared to the right. Subsequent visits by the plaintiff continued to result in findings of decreased loss of range of motion in specified amounts. He reviewed the MRI films of the plaintiff's lumbar spine and found a posterior disc herniation at the L4-L5 level impinging upon the thecal sac and narrowing the neural foramina bilaterally. He agrees with the report of June 1, 2005 issued by the radiologist Thomas M. Kolb, M.D. The plaintiff continued to visit his office every month or so through September 24, 2007. It is his opinion that plaintiff suffers from herniated discs at L4-L5 with radiculopathy and myofascial pain syndrome with significant limitations of lumbar motion. Such injuries were caused by the subject accident and are permanent in

nature particularly in the lumbar spine.

In reply, defendant Aaron asserts that the medical report of Dr. Kaisman indicates that he first examined plaintiff on June 18, 2005 about seven weeks post accident. However, he later indicates that plaintiff returned to his office on June 9, 2005 and the discrepancy is not explained. Dr. Kaisman also indicates that despite ongoing therapy, plaintiff was not gaining enough range of motion to place her in the position she was in prior to the April 27, 2006 accident when, in fact, the subject accident occurred on April 27, 2005. Even assuming mere typographical errors, plaintiff's doctor's statement are speculative as he has not offered any proof that he examined plaintiff prior to the accident nor did he review any of her medical records prepared prior thereto. None of his medical records, copies of the MRI reports or EMG reports have been annexed to the opposition papers. No corroborating evidence has been submitted to support plaintiff's assertion that she was unable to work for about fourteen months after the accident.

#### Decision of the Court

The motion by defendant Richard Aaron is denied. The cross-motion on behalf of defendants Omar Ramirez and Oscar Eduardo Ramirez was withdrawn.

"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 the instant case, defendant Aaron has sustained his initial burden of establishing his entitlement to judgment as a matter of law. Toure v. Avis Rent-A-Car Sys., 98 NY2d 345; Gaddy v. Eyler, 79 NY2d 955. The affirmed medical reports of Dr. Orlandi and Dr. Basson set forth specific objective tests concerning plaintiff's range of motion in the cervical and lumbar spine and shoulders. Except for one

finding of decreased range of motion by Dr. Basson, all results were within specified normal ranges. Dr. Basson indicates her medical opinion that plaintiff has what can be considered a mild form of cerebral palsy but with no objective abnormalities relevant to the subject accident.

In opposition to the motion, plaintiff has submitted the affirmation of plaintiff's treating physician who examined and treated plaintiff on an almost monthly basis starting about one month or so after the accident. Numerous range of motion tests were taken of plaintiff from June of 2005 through May 2007 with the last examination taking place on September 24, 2007. Dr. Kaisman sets forth the specific objective tests performed which resulted in the specified degrees of loss of range of motion. Spasm was detected at all examinations. He also read plaintiff's MRI films finding herniated discs at the L4-L5 level impinging upon the thecal sac and narrowing the neural foramina bilaterally. He diagnosed herniated discs L4-L5 with radiculopathy and myofascial pain syndrome with significant limitations of lumbar motion. He sets forth his opinion that the injuries were the result of the subject accident and that the conditions are permanent in nature particularly in the lumbar spine. Questions of fact are, therefore, raised with respect to the issue of whether plaintiff sustained a serious injury as defined by Insurance Law §§ 5102 and 5104 which warrant denial of the motion. Pommells v. Perez, 4 NY3d 566.

Accordingly, the motion by defendant Richard Aaron is denied. The cross-motion on behalf of defendants Omar Ramirez and Oscar Eduardo Lopez was withdrawn.

Dated:February 6,2008

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**HON. DAVID ELLIOT**