

**Smith v Vohrer**

2008 NY Slip Op 33655(U)

April 2, 2008

Supreme Court, Bronx County

Docket Number: 6677/04

Judge: Mark Friedlander

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**NEW YORK SUPREME COURT - COUNTY OF BRONX  
PART IA-25**

DEBORAH ANNE SMITH,

Plaintiff,

-against-

**MEMORANDUM DECISION/  
ORDER**

Index No.6677/04

CLIFFORD C. VOHRER, LEASE PLAN USA, INC.,  
DANIEL SOTOMAYOR and LA MANADA AUTO CORP.,

Defendants.

HON. MARK FRIEDLANDER:

Defendants Clifford C. Vohrer and Lease Plan U.S.A., Inc. (hereinafter collectively referred to as Vohrer) move for an order renewing its trial motions made pursuant to CPLR 4401 and for an order, pursuant to CPLR 4404, setting aside the verdict and entering judgment notwithstanding the verdict, or, in the alternative, granting a new trial on the grounds that the verdict is against the weight of the credible evidence. That portion of Vohrer's application which relates to the question of whether plaintiff suffered a serious injury is decided hereinafter. All other aspects of Vohrer's application (contained in a separate motion folder) are addressed in another decision and order, issued simultaneously herewith.

The court will treat this portion of defendant Vohrer's motion as one made pursuant to CPLR 4404 only. A motion made pursuant to CPLR 4401 is made during the trial; a motion made pursuant to CPLR 4404 is made post-trial. As a post-trial motion, a CPLR 4404 motion often concerns issues raised at the time of trial, which is equivalent to what defendants term a "renewal" of defendants' trial motions made pursuant to CPLR 4401 (see Siegel, New York Practice, [Fourth Edition], p.685 ).

This is a personal injury action in which plaintiff alleges that she was injured as a result of a motor vehicle accident which took place at the intersection of Bruckner Boulevard and 138<sup>th</sup> Street, Bronx, New York on September 17, 2002. Plaintiff was a passenger in the vehicle owned by defendant La Manada Auto Corp

and operated by defendant Daniel Sotomayor, which came into contact with the Vohrer vehicle.

The trial of this action commenced on May 30, 2007 and the jury reached its verdict on June 7, 2007, finding, among other things, that plaintiff had “sustained a permanent consequential limitation of use of a body organ or member, specifically her left knee” and that she had “sustained a significant limitation of use of a body function or system, specifically her left knee”, thus finding that plaintiff had sustained a serious injury pursuant to Insurance Law § 5102(d).

Defendant argues that there was insufficient evidence for the jury to find that plaintiff had suffered a serious injury as a result of the accident. The only evidence presented consisted of plaintiff's testimony concerning her own injuries and the testimony of her treating physician, Dr. Steven Struhl. Defendant argues that, because she had no treatment for her knee from 2003 until 2007, there was a gap of treatment which would make summary dismissal appropriate (see Pommels v. Perez, 4NY3d 566 [2005]).

As to the injury itself, a torn meniscus of the left knee treated by surgery, defendant argues that this alone does not constitute a serious injury, citing Chan v. Casiano, 36 AD3d 580 [2<sup>nd</sup> Dept 2007] and Medley v. Lopez, 7 AD3d 470 [1<sup>st</sup> Dept 2004].

In Chan, summary judgment was granted to defendant. Although plaintiff's doctor in that case stated that plaintiff had suffered a meniscus tear, he also found that plaintiff had full range of motion of the knee and failed to indicate that the injury was caused by the accident. He also failed to explain a four and a half year gap in treatment.

In Medley, defendant was granted summary judgment. Plaintiff's doctor relied on an MRI report to determine that plaintiff suffered meniscal tears in the knee. However, there was nothing in the report to indicate that the cause of the tears was other than degenerative in nature. In addition, there was a “lengthy” unexplained gap in treatment.

Plaintiff argues that these cases are not on point. In the first instance, neither case involved surgery to

repair the meniscal tear, which is the situation here. Dr. Struhl operated on plaintiff on January 16, 2003.

Plaintiff cites Noriega v. Sauerhaft, 5AD3d 121 [1<sup>st</sup> Dept 2004] and Rangel-Vargas v. Vurchio, 289 AD2d 92 [1<sup>st</sup> Dept 2001] for the proposition that "evidence that plaintiff sustained a torn meniscus that required surgery... is sufficient to raise issues of fact as to whether she sustained serious injuries to her knee.." (Rangel-Vargas v. Vurchio at 92).

Regarding the gap in treatment, plaintiff argues that Dr. Struhl's testimony contains an explanation for plaintiff's failure to seek treatment after her surgery. Dr Struhl stated that, as a result of the loss of cartilage "one would expect an increased risk that she would develop degenerative arthritis in that part of the knee" (p. 151). As to what purpose would be achieved by plaintiff seeing a doctor after her surgery, he stated that the purpose of his seeing her. "(a)t four days I am making sure there is no infection. The wounds are healing nicely and at a month I want to know what their motion is . and they are not walking with a limp... (t)hey may go to therapy and they may not (p. 153). The context of Dr. Struhl's testimony makes clear that plaintiff would not have benefitted from further treatment.

Based on this statement, plaintiff argues that plaintiff's failure to seek treatment for four years does not represent a gap in treatment.

Although it was not raised by either attorney in the motion papers, the court takes note of the fact that there was a motion for summary judgment made by defendants prior to trial. In a decision by the Hon. Diane Renwick on November 30, 2005, the court found that defendants had not made out a *prima facie* case. The court went on to say, that in any event "(e)ven if defendants had met their burdens, they would not have been entitled to summary judgment since the proof submitted by plaintiff raises a triable issue of fact." The court found that, since plaintiff had submitted proof that she had sustained a torn meniscus in her left knee requiring surgery, this raised a triable issue of fact as to whether she sustained a serious injury, citing Rangel-Vargas v. Vurchio , supra.

In order to defeat a motion by defendant for summary judgment, plaintiff must show that there is sufficient evidence in admissible form to raise a triable issue of fact (Licari v. Elliot, 57 NY2d 230 [1982]). On a motion to set aside the jury's verdict and enter judgment notwithstanding the verdict, the test is whether there is a "valid line of reasoning and permissible inference which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (Cohen v. Hallmark Cards, 45 NY2d 493, 499). These two standards, as applied to this case, are one and the same (see Siegel, New York Practice [4<sup>th</sup> Edition] p. 691). In addition, Justice Renwick was aware of the cessation in plaintiff's treatment in 2003, and still found sufficient basis for concluding that plaintiff sustained a serious injury.

Therefore, the decision by Justice Renwick denying summary judgment is the law of the case. For this reason, and the reasons stated by plaintiff above, Vohrer's motion for an order setting aside the jury's verdict and entering judgment for defendant Vohrer is denied.

Defendant Vohrer also argues that the court should order a new trial on the grounds that the jury's verdict is against the weight of the credible evidence on the issue of serious injury. Defendant relies on the testimony of the physician, Dr. Stuart Remer, who examined plaintiff on his behalf. According to defendant's attorney, Dr. Remer found that the plaintiff had full range of motion of her left knee. In addition, he found that the arthritis in the knee pre-existed the surgery and that the cause of the meniscal tear was degenerative in nature. He based these findings on his review of the MRI films. While there was exacerbation of pre-existing arthritis, there was no traumatic tearing of the meniscus (p.334 of Dr. Remer's trial testimony).

In opposing defendant's argument as to causation, plaintiff relies on the testimony of Dr. Struhl, who performed the surgery on plaintiff. Dr. Struhl testified, based on his visual observations during surgery, that plaintiff suffered injuries caused by trauma. He came to this conclusion based on the fact that there was damage to one area of the articular cartilage in the knee, found in trauma cases, as opposed to a wearing down of the cartilage in a diffuse manner. In addition, he found that the complete tear of the medial meniscus, taken

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together with plaintiff's history of no problems with her knee prior to the accident and pain after the accident, were the basis for finding that the meniscal tear was traumatically induced.

In addition, as plaintiff points out, Dr. Remer testified that he had stated in his report that there was a causal relationship between the accident and the injury to plaintiff's knee.

Considering that the jury had before it the testimony of plaintiff's treating surgeon who saw plaintiff's injury directly and then repaired it, as opposed to the testimony of defendant's doctor who saw the knee only by means of an MRI, it was not unreasonable for the jury to rely on Dr. Struhl's testimony in reaching its verdict.

Accordingly, that portion of defendant's motion which seeks a new trial, on the basis that the jury finding of serious injury is against the weight of the credible evidence, is denied.

This constitutes the Decision and Order of the Court

Dated: 4/2/08

  
MARK FRIEDLANDER, J.S.C.