

Oginsky v Rasporskaya
2010 NY Slip Op 32251(U)
August 12, 2010
Supreme Court, Richmond County
Docket Number: 104463/08
Judge: Philip G. Minardo
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF RICHMOND

ANNETTE OGINSKY,

Plaintiff(s),

-against-

DIMITRY RASPORSKAYA,

Defendant(s).

DCM PART 6

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No. 104463/08

Motion No. 1192 - 003

The following papers numbered 1 to 3 were fully submitted on the 24th day of June, 2010.

	Papers Numbered
Notice of Motion for Summary Judgment by Defendant DIMITRY RASPORASKAYA, with Supporting Papers, Exhibits and Memorandum of Law (dated April 1, 2010) _____	1
Affirmation in Opposition by Plaintiff, with Exhibits (dated June 17, 2010) _____	2
Reply Affirmation of Defendant DIMITRY RASPORASKAYA, (dated June 23, 2010) _____	3

Upon the foregoing papers, the motion for summary judgment of defendant DIMITRY RASPORSKAYA is granted.

Plaintiff commenced this action to recover damages for injuries she sustained when the vehicle she was driving was allegedly struck by a vehicle owned and operated by defendant DIMITRY RASPORSKAYA. As a result of said accident, plaintiff claims to have sustained,

OGINSKY v. RASPORSKAYA

inter alia, lumbar and cervical disc herniations with impingement on the thecal sac; radiculopathy; exacerbation/aggravation of pre-existing injuries that were asymptomatic at the time of the accident; muscle spasm; loss of flexion and motion; and the possibility of requiring spinal surgery in the future due to her injuries. Plaintiff further claims to have suffered various injuries to her left knee, *e.g.*, joint effusion; possible underlying tear of the posterior horn of the medial meniscus; loss of motion and flexion; and difficulty ambulating. According to plaintiff, these injuries involve damage to the surrounding muscles; tendons, ligaments and tissues, as well. They also cause plaintiff to suffer pain, deformity, disability, stiffness, tenderness, tingling sensations, weakness and other limitations that have prevented her from enjoying the normal fruits of her activities, including but not limited to social, economic and educational. Plaintiff's injuries are alleged to be permanent or long lasting in nature and duration; have a potential for growing progressively worse in their effects; and will likely cause and/or accelerate traumatic and /or osteoarthritis and/or other conditions connected and related to the aging process. Finally, plaintiff claims that she was confined to bed and home for one month following the accident; missed approximately three weeks of work; and has been limited in performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

In moving for summary judgment on the ground that plaintiff did not sustain a "serious injury" under Insurance Law §5102(d), defendant has submitted the affirmation of an orthopedic surgeon, Dr. Gregory Montalbano, who examined the plaintiff and reported a completely normal orthopedic examination. Dr. Montalbano states that he found normal cervical and lumbar

OGINSKY v. RASPORSKAYA

lordosis; no tenderness; no paraspinal spasm; and that plaintiff exhibited full range of motion upon quantitative testing in all these areas. This doctor also found it significant that while plaintiff claims to have suffered two disc herniations as a result of the subject accident, she received no significant treatment in the emergency room following same. In his diagnosis, Dr. Montalbano opined that plaintiff has fully recovered from a sprain of the cervical spine, and that there is no evidence to support a claim of acute injury to the lumbar spine as a result of the subject accident. He further opines that plaintiff has a pre-existing degenerative disc disease which is unrelated to the subject accident and noted that the MRI reporting disc herniations also reveal degenerative morphologic changes evident throughout the spine as demonstrated by the multiple levels of disc bulging. It was also stated that any continuing complaints of pain are likely related to plaintiff's degenerative condition and have no relation to the subject accident.

With regard to the right knee, Dr. Montalbano stated that plaintiff did not sustain any substantial or permanent injury to that joint as a result of the accident. Rather, his examination revealed a pre-existing condition of degenerative joint disease and patellofemoral chondromalacia which is unrelated to the accident in question. Quantitative testing revealed a mildly diminished range of motion in flexion, and increased girth of the right knee with no joint effusion. He also noted that when she presented to the emergency room following the accident, there were no reported signs of contusion, abrasion or joint effusion to suggest an acute injury, and that she offered no complaint with regard to her right knee until two weeks after the accident, when she first reported knee pain, greater in the left knee as compared with the right. According to the doctor's affirmation, an MRI performed on plaintiff's right knee more than three months

OGINSKY v. RASPORSKAYA

following the accident revealed moderate effusion; a tear of the medial meniscus and suprapatella; and medial patella plica. When plaintiff subsequently underwent arthroscopic surgery, the findings included grade II/III chondromalacia of the patella femoral compartment, and grade III chondromalacia of the medial femoral condyle with associated medial meniscus tear and degenerative fraying/tearing of the lateral meniscus. In Dr. Montalbano's opinion, chondromalacia is a pre-existing degenerative condition, and noted that at the time of the surgery, it was at least moderate in nature. He also stated that with this amount of degenerative cartilage change, one would typically expect to encounter degenerative tearing of the menisci. Thus, the doctor opined that any surgery performed on plaintiff's right knee was necessitated by the need to treat a pre-existing and degenerative condition and that any current complaints are related to this pre-existing condition rather than the subject accident.

As for the left knee, Dr. Montalbano states that there was no report of tenderness, joint effusion, contusion or diminished range of motion immediately following the accident in any of the emergency room records. In addition, he notes that these records do not reflect any documented complaints about the right knee, and no diagnosis was given relative thereto. It was not until two weeks after the accident that mild effusion and severe joint line tenderness was noted in plaintiff's left knee.

Upon his examination of plaintiff's left knee, Dr. Montalbano found no detectable effusion; an absence of tenderness; and no pain upon patella compression. However, patellofemoral crepitus was noted. Plaintiff's stability examination was reported as normal, with negative Lachman, negative anterior and posterior drawer, no varus or valgus instability, and a

OGINSKY v. RASPORSKAYA

negative McMurray Test. According to this doctor, plaintiff suffers from patellofemoral chondromalacia of the left knee, which, again, is a pre-existing degenerative condition.

In addition to Dr. Montalbano's affirmation, defendant submits the affirmed report of a radiologist, Dr. Stanley Sprecher, who reviewed MRIs of the plaintiff's knees and spine, and found pre-existing degenerative disc changes and no post-traumatic abnormalities of the right or left knee. In addition, Dr. Sprecher reported that plaintiff exhibited long-standing degenerative bulges of the cervical and thoracic spine that are not casually related to the subject accident. The MRIs also indicated disc degeneration of the lumbar spine with no fractures.

Finally, defendant notes that plaintiff returned to work only three weeks following the accident. He therefore maintains that she did not sustain any injury that prevented her from performing her usual and customary activities for 90 days out of 180 days immediately following the accident.

In opposition to defendant's motion, plaintiff has offered the affirmation of Dr. Ludwig Licciardi, who documents the treatment rendered to her right and left knees, and opines that the MRIs of her knees confirm the presence of medial meniscus tears. In spite of conservative treatment, including physical therapy and anti-inflammatory medication, the doctor reported that plaintiff's pain is persistent and sufficient to interfere with her normal life. As a consequence, plaintiff underwent surgical intervention. The post-operative diagnosis was right knee medial meniscal tear, lateral meniscal tear/fraying, chondromalacia of the patella, trochlea grade 2/3, and medial femoral condyle grade 2/3. Dr. Licciardi concluded that given the nature and duration of plaintiff's complaints and symptoms, she had sustained a permanent consequential limitation of

OGINSKY v. RASPORSKAYA

the use of both her knees, as well as a significant limitation of the use thereof, all of which was causally related to the subject motor vehicle accident.

On a defendant's motion for summary judgment in a personal injury action arising out of motor vehicle accident, the movant is required to make a prima facie showing that plaintiff did not sustain a serious injury as a result of the underlying collision. This accomplished, the burden shifts to plaintiff to come forward with sufficient evidence to raise a triable issue of fact that he or she did, in fact, sustain a serious injury (*see Gaddy v. Eyer*, 79 NY2d 955).

Here, it is the opinion of this Court that defendant successfully met his evidentiary burden through the affirmed report of Dr. Montalbano, an orthopedic surgeon who both examined plaintiff and reviewed her medical records before concluding that there was no orthopedic disability to her cervical or lumbar spine or either of her knees as a result of the subject motor vehicle accident, as well as the affirmed report of his radiologist. Together, these experts agree that plaintiff suffers from pre-existing degenerative conditions of both the spine and her knees.

In opposition, the proof submitted by plaintiff is insufficient to successfully rebut defendant's prima facie showing, as it fails to contain objective medical evidence sufficient to raise a triable issue of fact regarding her claims of serious injury.

In this regard, it must first be noted that plaintiff failed to allege in her complaint or either of her bills of particulars that she suffered any injury to her right knee as a result of the subject accident. In addition, while MRI reports of plaintiff's right knee confirm the existence of a tear of the meniscus, the affidavit by plaintiff's treating orthopedic surgeon, Dr. Ludwig Licciardi, fails to refute the degenerative findings indicated by defendant's expert (*see Carrasco v. Mendez*,

OGINSKY v. RASPORSKAYA

4 NY3d 566 [2005]). As a result, Dr. Licciardi's opinion must be regarded as speculative at best (*see e.g.*, Giraldo v. Mandanici, 24 AD3d 419).¹ Accordingly, the proof presented by plaintiff is insufficient to raise triable issues of fact regarding her claims of serious injury under both the significant limitation of use and permanent consequential limitation of use categories of injury set forth in Insurance Law §5102(d) (*see generally* Toure v. Avis Rent A Car Sys., 98 NY2d 345). Moreover, this conclusion is not affected by plaintiff's EBT testimony indicating that she continues to experience persistent pain in her right knee which has prevented her from performing many of her usual daily activities.

With regard to plaintiff's claims of neck and back injury, although there are MRIs which indicate that plaintiff suffers from herniated and bulging discs, such injuries do not, in and of themselves, constitute a serious injury (*see* Noble v. Ackerman, 252 AD2d 392, 394). In fact, defendant's expert attributed this condition to degenerative disc disease. In response, the affidavit by plaintiff's expert relates solely to the condition of her knees. Thus, there is no competent medical proof, whether by physician's affidavit or the results of objective testing, to negate defendant's proof that plaintiff's neck and back injuries are degenerative in nature rather than the result of the subject motor vehicle accident, and that any pain which plaintiff continues to suffer from such neck and/or back injuries are unrelated to this collision. To the contrary, since Dr.

¹ Despite the existence of a single Supreme Court case suggesting that the cited case has been abrogated by the 2009 decision of the Second Department in Sinfelt v. Helms Bros. (62 AD3d 983) (*see* Warren v. Byun, 25 Misc3d 953, 957-959 [Sup Ct Queens Co 2009]), the Giraldo case continues to be cited regularly by the Second Department in support of the proposition noted above (*see e.g.* Rodriguez v. Grant, 71 AD3d 659 [2010] and cases cited therein).

OGINSKY v. RASPORSKAYA

Licciardi's affidavit focuses *solely* on plaintiff's knee condition, it is insufficient, as a matter of law, to raise a triable issue in support of her claims of injury to her neck and back.

Finally, plaintiff has failed to present competent medical evidence sufficient to create issues of fact as to whether she has suffered a "serious injury" under the "90/180" category set forth in Insurance Law §5102(d).

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R,

s/ Philip G. Minardo
J.S.C.

Dated: August 12, 2010