

Johnson v Garcia

2010 NY Slip Op 33858(U)

August 18, 2010

Supreme Court, Bronx County

Docket Number: 8435/06

Judge: John A. Barone

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This opinion is uncorrected and not selected for official publication.

L.W.

PART 03

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

JOHNSON, AILEEN

Index No. 0008435/2006

-against-

Hon. LARRY S. SCHACHNER

GARCIA, FELIX E.

Justice.

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGEMENT DEFENDANT**
 Noticed on **January 13 2009** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this
 memorandum decision.


motion is decided in accordance with the annexed

FILED
 BRONX COUNTY CLERK'S OFFICE

AUG 27 2010

Motion is Respectfully Referred to:
 Justice: _____
 Dated: _____

Dated: 8/18/10

Hon. 
LARRY S. SCHACHNER, J.S.C.
 John A. Barone

AB

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: 1A-12

-----x
Aileen Johnson, Denise Giles and Marc Johnson,

Plaintiff(s),

- against -

INDEX. NO.: 8435/06

Felix E. Garcia,

Defendant(s).

-----x
HON. JOHN A. BARONE:

The motion by defendant Felix E. Garcia for an order pursuant to CPLR Sec. 3212 granting summary judgment in said defendant's favor and dismissing the complaint of Aileen Johnson and Denise Giles on the grounds that neither plaintiff has been able to prove that they suffered a "serious injury" under the New York State Insurance Law is granted as to plaintiff Denise Giles and her cause of action is dismissed and denied as to defendant Aileen Johnson.

The plaintiffs in this action are seeking damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on March 26, 2003 at approximately 9:13 a.m. on Park Avenue at or near its intersection with 170th Street, Bronx County, New York.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY 2d 320. Once movant meets his initial burden, then burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. Zuckerman v. City of New York, 49 NY 2d 557. The Court of Appeals has stated in the case of Friends of Animals v. Associated Fur Mfrs., 46 NY 2d 1065:

[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the Court as a matter of law in directing judgment' in his favor (CPLR 3212[b]) and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact'. Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case... .

New York Insurance Law Sec. 5104 (a) states that: "Notwithstanding any other law, in any action by or on behalf of a covered person against another covered for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state there shall be no right of recovery for non-economic loss, except in the case of serious injury..." The term "serious injury" is defined in N.Y. Insurance Law Sec. 5102 as :

A personal injury which results in death; dismemberment; significant disfigurement, a fracture, loss of fetus, permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing all of the material acts which constitute such persons usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The issue of whether a person has established a prima facie case of a serious injury is within the court's purview and can be decided as a matter of law. Licari v. Elliot, 57 NY 2d 230. In determining a motion for summary judgment defendant bears the initial burden to present competent evidence that the plaintiff has no cause of action Brown v. Achy, 9 AD 3d 30. If this initial burden is met by the defendant the burden then shifts to plaintiff to come forward with

evidence showing that a triable issue of fact exists as to whether plaintiff suffered a serious injury within the meaning of the Insurance Law. Shinn v. Catanzaro, 1 AD 3d 195.

In support of the motion defendant has provided the court with copies of the pleadings, plaintiff's Verified Bill of Particulars, affirmation of Dr. David Milbauer as to plaintiff Aileen Johnson, affirmation by Dr. Milbauer as to plaintiff Denise Giles, affirmation of Dr. Sarasavani Jayaram as to Aileen Johnson, affirmation by Dr. Sarasavani Jayaram as to Denise Giles, affirmation by Michael J. Katz as to Denise Giles, Independent Medical Review affirmation by Dr. Gregory Montalbano as to Aileen Johnson, the deposition of plaintiff Aileen Johnson, and the deposition of Denise Giles.

The court will deal first with the threshold question as to plaintiff Aileen Johnson. Dr. Avid L. Milbauer, a radiologist, conducted a review of the MRI of plaintiff Johnson's lumbar spine taken on May 7, 2003. Dr. Milbauer states that there were no findings to indicate that she suffered a traumatic injury to the lumbar spine as a result of the accident in question. He found that the disc bulging shown at L5-S1 was degenerative in etiology and pre-existed the accident. The L5-S1 degenerative changes were unrelated to the trauma of the accident. Dr. Milbauer's review of the left knee MRI showed no traumatic injury to the left knee from the subject accident. Post surgical changes that were noted pre-exist the accident. The review of the cervical spine MRI showed degenerative changes at C5-6 associated with a small posterior disc herniation is of indeterminate age and etiology. Dr. Sarasavani Jayaram conducted a neurological examination of plaintiff Aileen Johnson on May 30, 2007. He noted a prior history of injury to the left knee in 1998. His examination of the cervical spine showed that the Foraminal Compression, Spurling Test, Jackson's Compression Test, Shoulder Depression Test, Soto-Hall Test, Cervical Distraction Test and Valsalva Maneuver were all negative. No tenderness, spasm or trigger. Cervical range of motion was all normal when compared with the normal averages. Examination of the elbows showed that Tinel's signs were absent over the ulnar nerves bilaterally. The range of motion on the elbow was normal when compared to

average. Tinel's sign was also absent bilaterally over the median nerves. The thoracic spine had full range of motion. All tests were normal as to the lumbar spine, and the range of motion was normal when compared to the normal average. Dr. Jayaram found that it was a normal neurological evaluation with no focal deficits, and that there was a resolved cervical and lumbosacral sprain and strain. Dr. Wayne J. Kerness conducted an orthopedic examination of plaintiff Aileen Johnson on May 31, 2007. The cervical tests performed showed there was no spasm and the range of motion was normal when compared to the normal average. The thoracic spine demonstrated no tenderness and no spasm. As to the lumbar spine the Lasegue Test was negative as was straight leg raising and spasm. The lumbar spine had a normal range of motion when compared to the average. Dr. Kerness examined the left knee and effusion, McMurray Test, Apprehension Test, Anterior/Posterior draw sign, joint line tenderness, pain on patellofemoral compression, Patello-Femoral crepitus, and Varus Valgus instability were all found to be negative. The range of motion in the knees was normal. The doctor also noted full muscle strength and normal reflexes. The diagnosis was status post cervical, thoracic and lumbar sprain/strain resolved, and status post sprain/contusion of the left knee had also resolved. Dr. Gregory Montalbano reviewed Aileen Johnson's medical records and found that the pre-existing degenerative disc disease was unrelated to the accident, and that the accident caused no damage. As to the question of whether Aileen Johnson had been prevented from performing substantially all of her usual and customary activities for a period of not less than 90 out of the first 180 days immediately following the accident defendant states that it was not medically directed and the plaintiff Johnson testified in her deposition that she returned to work five days after the accident. Defendant has made a prima facie showing that defendant Aileen Johnson did not suffer a "serious injury".

In opposition to that portion of the motion dealing with Aileen Johnson plaintiff has submitted to the court, an affidavit by Aileen Johnson, Dr. Ginde's MRI report on the cervical spine, Dr. Solomon's affirmed MRI report on Ms. Johnson's lumbar spine, Dr. Houten's affirmed operative report dated March 29, 2007 for Lumbar Laminotomy and Discectomy,

affirmed report by Dr. Paul Lerner, affirmed medical reports on Ms. Johnson. Plaintiff Aileen Johnson saw John McGee, D.O. shortly after the accident. Dr. McGee's examination notes a loss in range of motion in the cervical spine as compared to the normal average, as well as a loss in range of motion in the lumbar spine. Dr. McGee repeated range of motion tests on April 2, 2003 and May 2, 2003 with similar results. Dr. McGee ordered MRI's of the cervical spine, lumbosacral spine and the left knee, as well as physical therapy. Plaintiff Johnson went to physical therapy for three months when the facility closed. Dr. Robert Solomon did an MRI of the lumbosacral spine and found a L5-S1 annular disc bulges with thecal sac compression. Dr. Ravindra V. Ginde performed an MRI of the cervical spine showing a cervical posterior herniation of discs noted at levels C5-C6 and C6-C7. Dr. John Houten performed a microscopic lumbar laminotomy and medial facetectomy and discectomy at L5-S1/ the pre and post operative diagnosis was of a L5-S1 disc herniation, left. Dr. Paul Lerner conducted an independent review of the MRI of plaintiff Johnson's lumbar spine. Dr. Lerner states that he disagrees with the findings of Dr. Milbauer's statement that it shows a degenerative condition and states that in his opinion there is a L5-S1 annular disc bulge with thecal sac compression in the lumbar spine. Dr. Lerner states that the subject accident was the cause of the injury. Dr. Lerner states that this is further shown in that the MRI had no osteophytes and spondylosis which would reflect long standing degenerative disease. Dr. Lerner also conducted a physical exam on Aileen Johnson and states that the range of motion in the cervical spine was when compared to the normal average. However, the lumbar spine showed a significant loss in range of motion when compared to the average. Dr. Lerner's impression was of cervical strain with the disc herniation, and a lumbar radiculopathy with disc herniation status post surgery. Dr. Lerner states that the injuries are permanent considering the time that has passed, and the lack of resolution with conservative treatment. It is his opinion to a reasonable degree of medical certainty that the conditions and associated impairments are causally related to the subject accident on March 26, 2003. Plaintiff's opposition has raised questions of fact as to whether the plaintiff's back conditions are from the accident or degenerative as stated by defendant, and whether the surgery performed was causally related to the accident.

The court turns next to the motion against plaintiff Denise Giles. In support of their motion defendant has provided the court with the pleadings, plaintiff's Verified Bill of Particulars, an affirmation by Dr. David L. Milbauer, an affirmation by Dr. Sarasavani Jayaram, an affirmation by Dr. Michael J. Katz, and the deposition of both plaintiffs.

Dr. Jayaram conducted a neurological examination of plaintiff Giles on May 30, 2007. As to the cervical spine, the Foraminal Compression, Spurling Test, Jackson's Compression Test, Shoulder Depression Test, Soto-Hall Test, Cervical Distraction Test, and Valsalva Maneuver were all found to be negative. There was no tenderness, spasm or triggers, and the range of motion was normal when compared to the average. Examination of the elbows showed Tinel's signs absent over the ulnar nerves bilaterally, and the range of motion was normal as compared to the average. The wrist showed a normal range of motion, and Tinel's sign was absent bilaterally over the median nerves, Phalen's sign was also absent. The range of motion in the thoracic spine was found to be normal. In the lumbar spine the forward flexion, Quick Test, Bechterew/Sitting Boot Test, and Hoover's Test were all negative. The range of motion was normal. Dr. Jayaram found that plaintiff Giles had no disability and was able to work. His diagnosis was of a normal neurological exam, resolved cervical and lumbosacral sprain and strain. No further treatment was found to be needed. Plaintiff Giles had full muscle strength, and no residual injury or permanency. No focal deficits and the lumbar sprain/strain was resolved. A MRI report on the left knee by Dr. Milbauer found no evidence of a meniscal tear. The cruciate ligaments, collateral ligaments and extensor tendons appeared intact. The conclusion was that there were no findings to indicate that a traumatic injury of the left knee was sustained in the accident of March 23, 2003. Dr. Michael J. Katz conducted an orthopedic examination of plaintiff Denis Giles on July 30, 2008. The examination of the cervical spine showed no tenderness no paravertebral muscle spasm. The cervical range of motion was normal as compared to the average. Adson's Test was negative. The examination of the thoracolumbosacral spine showed the gait to be normal without antalgic or Trendelenburg component. No paravertebral muscle spasm was present. Range of motion

was normal. The straight leg raising test was negative. Babinski was negative and there was no demonstrable clonus. Patrick was negative. Examination of the left knee showed a normal range of motion. The tests were negative for anterior/posterior instability. The Patellar Apprehension Test was negative, and the knee was stable to varus and valgus stress. His impression was of a cervical strain resolved, thoracolumbosacral strain resolved. Dr. Katz finds that she shows no signs or symptoms of permanence relative to the musculoskeletal system, and she is not disabled and capable of performing her activities of daily living. Defendant has shown through plaintiff Giles' deposition and the report of their doctors that she was not kept from her usual daily activities for 90 out of the 180 days following the injury.

In opposition plaintiff Denise Giles has provided the court with an affidavit by Ms. Giles, Dr. Gindes' MRI report, Dr. Golden's MRI reports, Dr. Harshad Bhatt's affirmed report, medical reports on Ms. Giles. The MRI of the cervical spine by Dr. Garcia is reported as misalignment with reversed lordosis, dessication with disc bulges at C4-C5 and C5-C6 with bilateral C6 nerve root impingement. Dr. Ginde performed an MRI of the left knee and reported a medial meniscal tear extending into the inferior surface of the posterior horn of the medial meniscus. Plaintiff Giles saw John McGee, D.O. shortly after the accident. Dr. McGee found that the cervical spine range of motion was restricted when compared to the average, and found the same when repeated a month later. The lumbar spine also showed restricted range of motion when compared to the average. Dr. McGee recommended an MRI of the cervical spine, lumbar spine, and left knee. Plaintiff Giles went to physical therapy for three months and stopped. Plaintiff Giles did not have treatment after that. On June 12, 2006 plaintiff Giles saw Dr. Harshad Bhatt. Dr. Bhatt found that her nervous system functions were within normal limits. Dr. Bhatt found that in the left knee joint that McMurray test was positive, Lachman Test negative, Pivotal Shift negative, Apley's Test positive, Ballotment Test positive and Ryer's sign negative. He found a slight decrease in range of motion when compared to the normal average. Dr. Bhatt finds that plaintiff Giles is partially disabled and states that it is causally related to the accident in question. In the affidavit of plaintiff Giles she

sets forth no further treatment, and since Dr. Bhatt did not see her for over three years from the accident he is not in a position to testify as to causality. Furthermore, plaintiff Giles has shown nothing to support her claim that she was unable to perform her customary and usual activities for 90 out of 180 days following the injury.

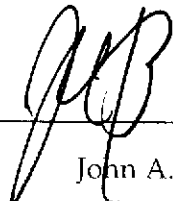
The motion is denied as to plaintiff Aileen Johnson.

The motion is granted as to plaintiff Denise Giles and the causes of action attributable to plaintiff Giles are dismissed.

This constitutes the decision of this Court.

Settle Order on Notice.

Date: 8/18/10



John A. Barone, JSC