

Chang v Carpenter

2011 NY Slip Op 30233(U)

January 19, 2011

Supreme Court, Nassau County

Docket Number: 22023/08

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

KYUNG KOOK CHANG,

Plaintiff,

- against -

ROBERT D. CARPENTER and ZOE A.
CARPENTER,

Defendants.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 22023/08

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendants move for summary judgment pursuant to CPLR 3212 because the plaintiff did not sustain a "serious injury" under Insurance Law § 5102 (d). The underlying personal injury action raises from a November 4, 2008 Nassau County motor vehicle accident. That accident followed a Queens County October 6, 2008 motor vehicle accident where the plaintiff commenced another lawsuit in that adjoining venue. The defense points to the April 9, 2009 verified bill of particulars where the plaintiff claims damages to the cervical spine, lumbar spine, multiple meniscal tears, partial tear anterior cruciate ligament of the *right knee*, partial tea supraspinatus, tendon with encroachment

syndrome, subdeltoid and subcoracoid bursal effusions, complete tear subscapularis tendon, and joint effusion of the left shoulder. The defense points to a January 23, 2009 verified bill of particulars in the Queens County lawsuit where the plaintiff claims damages to his neck, lower back, right shoulder and *left knee*. The defense asserts a comparison of the January 23, 2009 and the April 9, 2009 verified bills of particulars show the plaintiff sustained aggravations of the neck and back with respect to the November 4, 2008 Nassau County motor vehicle accident, but not statutory “serious injury”. The defense also maintains the plaintiff withdrew claims regarding the plaintiff’s right knee in a January 18, 2010 letter which conceded the Queens County October 6, 2008 motor vehicle accident caused that injury.

The defense also points to the affirmation by John C. Killian, M.D., a board certified orthopedic surgeon, who examined the plaintiff on February 16, 2010, and reviewed various reports from other health care providers, including MRIs, the initial consultation report by Dr. Bhatt and records from the Queens Surgi-Center about the surgery done by Dr. Bhatt. Dr. Killian stated he inspected a copy of the police accident report for the November 4, 2008 accident, as well as a legal document containing a list of the plaintiff’s alleged injuries.

Dr. Killian spoke to the then 53 year old plaintiff about his employment history as livery driver, and his missing three weeks of work after the *right knee* surgery. Dr. Killian states the plaintiff told him about the November 4, 2008 accident, and the plaintiff

claimed he had immediate pain in his right knee and left shoulder; exited his vehicle without assistance; walked; and did not seek immediate medical attention after the November 15, 2008 accident. Dr. Killian and the plaintiff also talked about other aspects involving the history of the injuries and treatment regarding the November 15, 2008 accident. Dr. Killian states the plaintiff spoke about the October 6, 2008 motor vehicle accident where the plaintiff said he was in an automobile struck in the rear, and injured his right shoulder and left knee resulting in chiropractic treatment, but initially seen by Jong Won Yom, D.C., LAC, a chiropractor and acupuncturist, for complaints involving the neck, low back, right shoulder and right knee.

Dr. Killian performed range of motion tests on both of the plaintiff's knees, and concluded there were well healed arthroscopic portals on both sides of the *right knee*, but otherwise the normal bony and soft tissue contours of both knees were maintained without evidence of atrophy, asymmetry, deformity, swelling or discoloration. Dr. Killian also performed range of motion tests on the plaintiff's shoulders, and cervical, thoracic and lumbar spine regions. Dr. Killian opined the plaintiff was under treatment for injuries from the October 6, 2008 motor vehicle accident on November 15, 2008. Dr. Killian opined there was no restriction of motion, crepitus, instability or other objective evidence of impairment regarding the *right knee*, and the plaintiff did not complain of tenderness nor pain with the motions. Dr. Killian opined there was no asymmetry in the plaintiff's gait nor the functional activities.

Dr. Killian opined the MRIs showed both shoulders and knees demonstrated similar abnormalities with changes in the menisci of both knees interpreted as tears, although it is common to see early degenerative tears of the menisci in individuals in their 50's. Dr. Killian opined the MRIs showed both shoulders with minor abnormalities which are commonly seen incidentally, and any shoulder problems resolved given the plaintiff no longer complains of pain in his left shoulder. Dr. Killian opined the MRIs of the plaintiff's neck and back showed various disc abnormalities, although the plaintiff did not describe injuries to his neck and back, and the plaintiff no longer complained about pain in those areas.

Dr. Killian concluded the plaintiff's shoulders and spine were normal, and confirmed a full recovery from any alleged injuries to those areas. Dr. Killian stated as an opinion the plaintiff recovered fully from the problems with the right knee and left shoulder after treatment for the injuries from the November 15, 2008 accident. Dr. Killian opined the minor scars over the right knee of the plaintiff are of no functional significance, and there is no evidence of impairment. Dr. Killian concluded the minor abnormalities on the MRIs were not caused by the injuries resulting from the November 15, 2008 accident. Dr. Killian opined the plaintiff requires no further orthopedic evaluation, followup or treatment for the injuries from the November 15, 2008 accident. Dr. Killian opined further the plaintiff is capable of working at his normal capacity, and performing all of his usual activities of daily living without restrictions due to the injuries

from the November 15, 2008 accident.

The plaintiff opposes the motion, and contends there was never a withdrawal of the right knee injury allegedly caused by the instant November 15, 2008 Nassau County motor vehicle accident.

The plaintiff's counsel points to the undated affirmation by Marc J. Rosenblatt, D.O., an osteopathist, who initially examined the plaintiff on November 15, 2008, an undated affirmations by Ayoob Kiiodadadi, M.D., a physician, who reviewed the January 20, 2009 MRI film of the plaintiff's left shoulder, and the January 6, 2009 MRI film of the plaintiff's right knee, unsworn, undated statements by Richard A. Heiden, M.D., a board certified radiologist, who performed the January 6, 2009 and January 20, 2009 MRI films of the plaintiff's right knee and left shoulder, but whom Dr. Kiiodadadi states he is willing and able to testify to the MRI reports of Dr. Heiden, and an October 15, 2010 affidavit by the plaintiff.

Dr. Rosenblatt states the plaintiff was unable to continue treatment after March 25, 2009 because no fault coverage ceased, even though treatment was necessary to relieve pain. Dr. Rosenblatt performed range of motion tests on the plaintiff's left shoulder and right knee on November 15, 2008 and September 8, 2010. Dr. Rosenblatt opined the results were positive, and the plaintiff's condition is permanent, and any medical treatments for the plaintiff would be palliative. Dr. Rosenblatt stated the plaintiff has not had any prior nor subsequent injuries to his left shoulder and right knee. That time frame

would be prior to the November 15, 2008 examination and tests, and subsequent to March 25, 2009, to the September 8, 2010 examination. Dr. Rosenblatt opines the plaintiff's injuries from the November 4, 2008 Nassau County motor vehicle accident prevent the plaintiff from performing many of the material acts which constitute the plaintiff's usual and customary daily activities. Dr. Rosenblatt opines the plaintiff's injuries are not only permanent in nature, but are all casually related to the November 4, 2008 Nassau County motor vehicle accident, and not from degenerative diseases. Dr. Rosenblatt further opines the plaintiff's injuries from the November 4, 2008 Nassau County motor vehicle accident resulted in the permanent consequential limitation of and a significant limitation of the use of the plaintiff's left shoulder and right knee.

The defense replies to the plaintiff's opposition. The defense claims learning about the plaintiff's February 28, 2009 right knee surgery by Harshad Bhatt, M.D. at the plaintiff's September 28, 2009 deposition, where the plaintiff withdrew claim for the cervical sprain and lumbar sprain. The defense adds the plaintiff's counsel indicated, at that September 28, 2009 deposition, the defense would be provided with a supplemental verified bill of particulars regarding additional medical treatment. The defense indicates the plaintiff's counsel stated, at subsequent certification conferences at the courthouse and in correspondence to the defense, plaintiff's counsel would provide the defense counsel with a supplemental verified bill of particulars regarding the plaintiff's right knee. The plaintiff counsel's December 5, 2009 letter referenced the November 17, 2009

certification conference, and added the September 28, 2009 surgery was connected to the October 6, 2008 motor vehicle accident. The defense points out that December 5, 2009 correspondence made no mention of the right knee injury nor right knee surgery related to the November 4, 2008 accident, and the plaintiff's counsel provided an October 1, 2009 supplemental verified bill of particulars from the Queens County lawsuit. The defense counsel indicates confusion which lead to a December 14, 2009 letter to the plaintiff's counsel seeking clarification whether there would be an aggravation claim or any claim about the plaintiff's right knee in the Nassau County lawsuit. The defense counsel requested a supplemental verified bill of particulars for such claims in Nassau County so an independent medical examination of the plaintiff could be scheduled. The plaintiff counsel's sent a January 13, 2010 supplemental verified bill of particulars regarding the Nassau County lawsuit which amplified pleading was identical to the October 1, 2009 supplemental verified bill of particulars from the Queens County lawsuit except for the caption of the personal injury action.

The defense concluded, based upon discovery, surgery was performed by Dr. Bhatt, but it appeared there was no right knee injury for the November 4, 2008 Nassau County motor vehicle accident. The defense points to Dr. Bhatt's January 5, 2009 affirmation, a corrected initial consultation report concerning the plaintiff, which showed the plaintiff sustained injury to the left shoulder and right knee which were causally related to the October 6, 2008 motor vehicle accident, and not the November 4, 2008

Nassau County motor vehicle accident. The defense notes Dr. Bhatt's January 29, 2009 affirmation about a followup examination of the plaintiff which referred to the plaintiff's left shoulder and right knee injuries; this doctor's recommendation of arthroscopic surgery to the plaintiff's left shoulder and right knee. Dr. Bhatt opined again these injuries were causally related to the October 6, 2008 motor vehicle accident.

The defense asserts Dr. Rosenblatt made no reference to the October 6, 2008 motor vehicle accident in this doctor's sworn statement. The defense avers Dr. Rosenblatt gave no indication of knowledge about the October 6, 2008 motor vehicle accident nor reviewing the plaintiff's medical records. The defense adds Dr. Rosenblatt's report conflicts with Dr. Bhatt's reports regarding the causation of the plaintiff's left shoulder and right knee injuries.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. Dr. Killian tested the ranges of motion of the plaintiff's both shoulders, both knees, the cervical, thoracic and lumbar spine spines, and found that they were normal. In addition, Dr. Killian set forth the details of his measurements as well as the norms against which he measured them. The defendants met their *prima facie* burden of showing the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). In opposition, the plaintiff failed to raise a triable issue of fact. It appears the

plaintiff may have seriously injured his left shoulder and right knee in the October 6, 2008 Queens County motor vehicle accident prior to the November 4, 2008 accident in Nassau County, and the plaintiff was out of work following that October 6, 2008 accident, yet Dr. Rosenblatt did not indicate he reviewed the medical records arising from that October 6, 2008 accident, and Dr. Bhatt opined the plaintiff sustained injury to the left shoulder and right knee which were causally related to the October 6, 2008 motor vehicle accident, and not the November 4, 2008 Nassau County motor vehicle accident. Hence, Dr. Rosenblatt's conclusion the plaintiff's injuries and limitations were caused solely by the November 4, 2008 Nassau County motor vehicle accident are highly speculative (*Cantave v. Gelle*, 60 A.D.3d 988, 877 N.Y.S.2d 129 [2nd Dept, 2009]).

Accordingly, the motion is granted.

So ordered.

Dated: **January 19, 2011**

ENTER:

J. S. C.

NOT FINAL DISPOSITION

FINAL DISPOSITION

ENTERED
 JAN 24 2011
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE