

Lee v M & M Auto Coach, Ltd.
2011 NY Slip Op 30667(U)
March 7, 2011
Sup Ct, Nassau County
Docket Number: 015511/08
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 18

JOYCE R. LEE,

Plaintiff,

-against

Index No.: 015511/08
Motion Sequence...01
Motion Date...11/12/10

M & M AUTO COACH, LTD. and GREGORY
J. BORIS,

Defendants.

Papers Submitted:
Notice of MotionX
Affirmation in Opposition.....X
Reply Affirmation.....X

Upon the forgoing papers, the Defendants' motion, pursuant to CPLR § 3212, seeking an order granting summary judgment and dismissing the Plaintiffs' complaint on the grounds that the Plaintiff, JOYCE R. LEE's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d), is decided as hereinafter provided.

This action arises out of a motor vehicle accident that occurred on August 20, 2005 on Glen Cove Road at or near its intersection with Hoagsland Lane, Village of Old Brookville, County of Nassau. On August 20, 2005, the Plaintiff was the operator of a vehicle traveling on Route 107 when it was "rear-ended" by a vehicle owned by the

Defendant, M&M AUTO COACH, LTD., and operated by the Defendant, GREGORY J. BORIS. The Plaintiff commenced this action by the filing of a Summons and Verified Complaint on or about August 19, 2008. Issue was joined by the service of the Defendants' Verified Answer on January 9, 2009. The Defendants' move for summary judgment alleging that the Plaintiff did not sustain a "serious injury" as defined by New York's Insurance Law.

The Plaintiff claims in her Verified Bill of Particulars, dated May 22, 2009, Amended Verified Bill of Particulars, dated October 14, 2009 and Further Amended Verified Bill of Particulars, dated June 4, 2010, the following injuries:

Disc herniation at L4-L5 with thecal sac compression; disc herniation at L5-S1 with thecal sac compression; right S1 radiculopathy; lumbar spine sprain/strain; pain, tenderness and restricted/limited/decreased range of motion in the lumbar spine; disc bulge at C3-C4; disc bulge at C4-C5; straightening of the cervical lordosis; cervical spine strain/sprain; pain/tenderness and restricted/limited/decreased range of motion in the cervical spine; thoracic spine sprain syndrome; thoracic radiculitis; cerebral concussion; post concussion syndrome; headaches; dizziness; contusion and sprain of the left elbow; right ankle sprain.

See Plaintiff's Verified Bill of Particulars, Amended Verified Bill of Particulars and Further Amended Verified Bill of Particulars are attached to the Defendants' Notice of Motion as Exhibit "D".

In support of their motion for summary judgment, the Defendants rely on the emergency room records of New York Hospital Queens from the day after the accident, the negative x-ray results taken of the Plaintiff's cervical and lumbosacral spine, the Plaintiff's

deposition conducted on February 8, 2010 and the findings of the Defendants' orthopedic surgeon, Dr. Isaac Cohen and the Defendants' radiologist, Dr. Melissa Sapan Cohn.

The Defendants state that the Emergency Room records from New York Hospital Queens reflect that the attending physician, Dr. Joon Chang, examined the Plaintiff. *See* Emergency Room Report, dated August 21, 2005, attached to the Defendants' Notice of Motion as Exhibit "E". Dr. Chang reported that, based on his clinical findings, the Plaintiff sustained a neck sprain and lumbar sprain. The Plaintiff was discharged the same day, prescribed Motrin and Flexeril and was given a work release form excusing her from work for one day. *Id.*

The Defendants submit the affirmed medical report of Dr. Isaac Cohen, an orthopedic surgeon. Dr. Cohen's examination of the Plaintiff's cervical spine revealed the following: flexion and extension of 55 degrees (normal 45-65 degrees), left and right lateral bending in the 45 degree range (normal up to 46 +/- 6.5) and rotational motion to the right and left is in the 80 degree range (normal up to 78 +/- 15). Range of motion testing of both shoulders, elbows and wrists were also found by Dr. Cohen to be within normal range with no numeric specificity. The examination of the Plaintiff's thoracolumbosacral spine revealed the following: flexion to 70 degrees (normal up to 66 +/- 15) extension to 30 degrees (normal up to 33 +/- 5.5) and right and left lateral bending to 25 degrees (normal up to 29 +/- 6.6); left and right rotational motion is possible to 30 degrees (normal up to 30). Dr. Cohen's examination of the Plaintiff's left elbow revealed flexion to 150 degrees (normal up to 150),

pronation to 90 degrees and supination to 90 degrees (normal up to 90).

Dr. Cohen concluded that the multiple soft tissue contusions to the Plaintiff's left elbow and right ankle were resolved. His diagnosis also reflected that the Plaintiff's cervical and thoracolumbosacral spine strains were resolved.

The Defendants also submit the affirmed reports of Dr. Melissa Sapan Cohn, a radiologist. Dr. Sapan Cohn's review of the Plaintiff's lumbosacral spine MRI revealed L4-L5 and L5-S1 disc herniations efface the ventral aspect of the thecal sac which she associates with underlying degenerative changes suggesting they are chronic in nature. She also found that there was no evidence of an acute trauma-related injury on the submitted study. Dr. Sapan Cohn also conducted a review of an MRI of the Plaintiff's cervical spine. Her impression, after a review of same, was straightening of the normal cervical lordosis. Dr. Sapan Cohn attributed the straightening of the cervical lordosis to either a muscular spasm or the positioning of the patient's neck within the cervical coil necessary to perform the examination.

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the Plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102 (d). *Gaddy v. Eyster*, 79 N.Y.2d 955 (1992).

The Defendants failed to establish, *prima facie*, that the injured 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 N.Y.2d 345 (2002); *Gaddy v. Eyles*, 79 N.Y.2d 955 (1992); *Cassandra v. Dumond*, 31 A.D.3d 476 (2nd Dept. 2006).

Dr. Sapan Cohn's reports are insufficient to establish the Defendants' prima facie burden that the Plaintiff did not suffer from a serious injury as defined by New York's Insurance Law. The bare conclusory opinion of the Defendants' radiologist that the MRI findings are degenerative and chronic in nature, without more, is insufficient to meet their burden. *See Moore v. City of Yonkers*, 54 A.D.3d 397 (2nd Dept. 2008); *Bennett v. Genas*, 27 A.D.3d 601 (2nd Dept. 2006). Moreover, Dr. Sapan Cohn proffered two varying explanations for the finding that the Plaintiff sustained straightening of the normal cervical lordosis. Specifically, Dr. Sapan Cohn stated that the injury was either a result of (1) muscle spasm or (2) of the positioning of the patient's neck within the cervical coil necessary to perform the examination. The factual issue of whether this injury is related to the accident or whether Dr. Sapan Cohn's conclusion is accurate is an issue to be determined by the trier of fact.

Dr. Cohen's report is also insufficient to sustain the Defendants' prima facie burden. Dr. Cohen's comparative analysis of the Plaintiff's range of motion to the purported "normal" range of motion for the particular body part that was being tested lacked specificity in that he did not compare the purported limitation to a definitive "normal" reading. Rather, Dr. Cohen compared the results to a purported "normal" range which varied at times up to 20 degrees. When rendering an opinion with respect to the plaintiff's range of motion, the

orthopedist must compare any findings to those ranges of motion considered normal for the particular body part. *Qu v. Doshna*, 12 A.D.3d 578 (2nd Dept. 2004). Dr. Cohen references a “spectrum” of degrees that would qualify as a “normal” reading for a particular body part without indicating what other clinical components, unrelated to range of motion (i.e., age), may factor into the ultimate determination of where the normal reading should fall within that spectrum for that particular patient.

Further, it is well settled that a plaintiff’s treating physician’s examination that reported a 20% restriction of the cervical and/or lumbar spine after a recent examination and testing, would be sufficient to raise a question of fact as to whether the plaintiff’s injury was significant. *See Pagan v. Gondola Cab Corp.*, 235 A.D.2d 251 (1st Dept. 1997). Comparatively, Dr. Cohen’s examination revealed that, in most instances, up to a 20% range was considered a “normal” range of motion. The Court struggles to reconcile the two. Without taking any other clinical factors into consideration, Dr. Cohen’s findings that a varying range of up to 20 degrees is “normal” effectively eliminates the possibility that a patient with a limited range of motion of the cervical or lumbar spine within that spectrum has no significant injury. In this regard, the lack of specificity in Dr. Cohen’s report essentially creates an issue of fact with respect to determining whether the Plaintiff has a significant limitation of range of motion for a particular body part.

Since the Defendants failed to establish their prima facie burden, it is unnecessary to consider whether the Plaintiff’s opposition papers were sufficient to raise a


triable issue of fact. *See Tchjevskiaia v. Chase*, 15 A.D.3d 389 (2nd Dept. 2005).

Accordingly, it is hereby

ORDERED, that the Defendants' motion for summary judgment, pursuant to CPLR § 3212, seeking an order dismissing the Plaintiffs' complaint, is **DENIED**.

This constitutes the decision and order of the Court.

Dated: Mineola, New York
March 7, 2011



Hon. Randy Sue Marber, J.S.C.

ENTERED
MAR 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE