

Chen v Caroprese

2012 NY Slip Op 31142(U)

April 12, 2012

Sup Ct, NY County

Docket Number: 104907-2010

Judge: George J. Silver

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. George J. Silver
Justice

PART 22

CHEN, HUEI-YING

INDEX NO. 104907-2010

- v -

MOTION DATE _____

CAROPRESE, FRANCESCA

MOTION SEQ. NO. 001

The following papers, numbered 1 to 7, were read on this motion for _____

Notice of Motion/ Order to Show Cause – Affirmation – Affidavit(s) – Exhibits ----- No(s). 1, 2

Notice of Cross-Motion – Affirmation – Affidavit(s) – Exhibits – Memorandum of Law ----- No(s). 3, 4, 5

Replying Affirmation – Affidavit(s) – Exhibits ----- No(s). 6, 7

FILED
APR 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, defendant Francesca Caroprese (“defendant”) moves pursuant to CPLR § 3212 for an order granting her summary judgment and dismissing the complaint of plaintiffs Huei-Ying Chen (“Chen”) and Tzu-Yuan Chin (“Chin”) (collectively “plaintiffs”) on the grounds that plaintiffs did not sustain a “serious injury” as defined by New York Insurance Law § 5102 [d]. Plaintiffs’ cross-move for summary judgment on “serious injury” and liability.

In the verified bill of particulars, Chin alleges that, as a result of a December 3, 2009 accident, she sustained, *inter alia*, right and left L5-S1 radiculopathy, hip contusion, lower back pain, bilateral hip pain, lumbar injuries, and hip injuries. Chen alleges that, as a result of the same accident, she sustained, *inter alia*, a right hip anterior labral tear, shoulder injury, right-sided L4-L5 herniation/bulge, right side S1 radiculopathy, lumbar radiculopathy and herniated/bulged discs, and concussion.

Under New York Insurance Law § 5102 [d], a “serious injury” is defined as a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a 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 substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a “serious injury” (*see Rodriguez v Goldstein*, 182 AD2d 396 [1992]). Such evidence includes “affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], *quoting Grossman v Wright*, 268 AD2d

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. Check as appropriate: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

79, 84 [1st Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1st Dept 2010], citing *Pommells v Perez*, 4 NY3d 566 [2005]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 2009 NY Slip Op 43 [1st Dept]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*). Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]). In support of the motion, defendant submits affirmed expert reports by Dr. Daniel Feuer, a neurologist, and Dr. S.W. Bleifer, an orthopedist.

Dr. Feuer examined Chen on November 8, 2010. The neurological examination of the cervical spine showed that it was nontender with no spasms, with normal range of motion. The lumbosacral spine was nontender with no spasms and with normal range of motion. The doctor's impression was that plaintiff Chen's neurological examination was within normal limits with no clinical findings to support a diagnosis of right S1 radiculopathy.

Dr. Bleifer examined Chen on December 14, 2010. The examination of her shoulders, lumbosacral spine/back, hip, and knees revealed normal range of motion in each body part. Dr. Bleifer diagnosed Chen as having sustained bilateral shoulder sprain/strain, lumbosacral sprain, bilateral hip sprain/strain, and bilateral knee contusions, all of which were resolved. Additionally, Dr. Bleifer opined that Chen's examination revealed no functional disability.

Dr. Feuer examined Chin on November 22, 2010. The neurological examination of the cervical spine showed that it was nontender with no spasms, with normal range of motion. The lumbosacral spine was nontender with no spasms and with normal range of motion. The doctor's impression was that Chin's neurological examination was within normal limits with no clinical findings to support a diagnosis of right lumbosacral radicular dysfunction.

Dr. Bleifer examined Chin on November 23, 2010. The examination of her lumbosacral spine/back, hip, and knees revealed normal range of motion. Dr. Bleifer diagnosed Chen as having sustained a lumbosacral sprain, bilateral hip contusions, and right knee contusion, all of which had been resolved at the time of the examination. Additionally, Dr. Bleifer opined that Chin's examination revealed no functional disability.

With respect to plaintiffs' permanent consequential and significant limitations claims, defendant's expert's affirmations satisfy defendant's burden of establishing prima facie that plaintiffs did not suffer a serious injury (*Yagi v. Corbin*, 2007 NY Slip Op 7749 [1st Dept]; (*Duran v Jeong Hoy*, 2011 NY Slip Op 8213 [1st Dept]). The burden therefore shifts to plaintiffs to demonstrate that a serious injury was sustained through the presentation of nonconclusory expert evidence causally linking the serious injury to the accident in question. (*Grossman v. Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

In opposition to defendant's motion, the following expert reports are submitted with respect to plaintiff Chen: Gabriela Grygus' certification of plaintiff's hospital records; Dr. Douglas A. Schwartz's

affirmation and medical reports from each of Chen's eight visits; neurologist Dr. Nagendra's affirmation and report dated January 6, 2010; chiropractor Dr. Jerome Greenberg's affidavit and medical reports for Chen's multiple visits; physical therapy records from NYU Hospital for Joint Diseases; radiologist Dr. Karl Hussman's affirmation and MRI reports, dated December 16, 2009 and December 29, 2009.

Chin submits the following reports in opposition to defendant's motion: Gabriela Grygus' certification of plaintiff's hospital records; Dr. Douglas A. Schwartz's affirmation and medical reports from each of her six visits; neurologist Dr. Nagendra's affirmation and report dated January 6, 2010 and March 3, 2010; chiropractor Dr. Jerome Greenberg's affidavit and medical reports for her multiple visits; physical therapy records from NYU Hospital for Joint Diseases; radiologist Karl Hussman's affirmation and MRI report dated December 9, 2009.

Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore inadmissible (*Quinones v Ksieniewicz*, 2011 NY Slip Op 270 [1st Dept]). The physical therapy records from NYU Hospital for Joint Diseases are unsworn and not affirmed under the penalties of perjury. Thus, these records are not sufficient to defeat a motion for summary judgment. Additionally, Dr. Hussman's affirmations pertaining to plaintiffs' MRIs do not affirm the actual interpretation of the MRI film and therefore the MRI reports are not in admissible form. The chiropractic records of Dr. Greenberg are also inadmissible in that Dr. Greenberg's affidavit does not lay a proper foundation for the admission of the documents into evidence as business records.

On December 10, 2009, Dr. Schwartz examined plaintiff Chen for her initial examination and found range of motion deficiencies of the lumbar spine, left lateral, right lateral, and bilateral hips. Dr. Schwartz found left lumbosacral radiculopathy, herniated discs and bilateral hip derangements with labral tears. On the follow-up examination on January 19, 2010, Dr. Schwartz found similar range of motion deficiencies and diagnosed Chen with lumbosacral radiculopathy with right-sided L4-L5 herniation causing severe displacement right L5 nerve roots, focal central L5-S1 herniation, left hip derangement, and right hip derangement with right-sided anterior labral tear. On her most recent re-evaluation on October 4, 2010, Dr. Schwartz diagnosed Chen with left lumbosacral radiculopathy with right sided L4-L5 herniation causing severe displacement right L5 nerve roots, focal central L5-S1 herniation, left hip derangement, and right hip derangement with right-sided anterior labral tear. Dr. Schwartz opines that the injuries sustained by plaintiff Chen are causally related to the accident. Dr. Schwartz also opines that the persistence of these symptoms for over a year indicate that Chen sustained a substantial injury to her lower back and hip and that these conditions have become chronic and permanent in nature.

Dr. Shan Nagendra examined Chen on January 6, 2010 and found restricted range of motion of the lumbar spine with tenderness and muscle spasms, as well as a positive Kemp Test on the right side. Dr. Nagendra diagnosed Chen with lumbar disc herniation at L4-L5 and L5-S1, lumbar radiculopathy, and bilateral hip pain. On a follow-up visit on March 3, 2010, Dr. Nagendra performed an EMG test, which revealed right side S1 radiculopathy. Dr. Nagendra opines that the injuries sustained by Chen are causally related to the accident. Additionally, Dr. Nagendra opines that the persistence of these symptoms for over a year indicate that Chen sustained a substantial injury to her lower back and hip and that these conditions are chronic and permanent in nature.

On December 10, 2009, Dr. Schwartz examined Chin and found range of motion deficiencies of the lumbar spine, left lateral and right lateral. Dr. Schwartz found left lumbosacral radiculopathy and herniated discs. On the follow-up examination on January 19, 2010, Dr. Schwartz found similar range of motion deficiencies and diagnosed Chin with lumbosacral radiculopathy with right-sided L5-S1 herniation displaces right S1 nerve root posteriorly. Dr. Schwartz opines that the injuries sustained by Chin are causally related to the accident and that the persistence of her symptoms for over a year indicate that she sustained a substantial injury to her lower back and hip. Dr. Schwartz further opines that these conditions are chronic and permanent in nature.

Dr. Shan Nagendra examined Chin on January 6, 2010 and found that she sustained lumbar disc herniation at L5-S1, lumbar radiculopathy, lower back pain, and bilateral hip pain. On the follow-up visit on March 3, 2010, Dr. Nagendra found that Chin's lumbar spine range of motion was restricted and painful with tenderness and muscle spasms. At this visit, Dr. Nagendra performed an EMG test, which revealed right side S1 radiculopathy. Dr. Nagendra opines that the injuries sustained by Chin are causally related to the accident and that the persistence of her symptoms for over a year indicate that she sustained substantial injuries to her lower back and hip. Dr. Nagendra also opines that these injuries are chronic and permanent in nature.

The admissible medical reports submitted by plaintiffs in opposition to defendant's motion are sufficient to raise a triable issues of fact regarding plaintiffs' permanent consequential and significant limitation claims (*Hernandez v Rodriguez*, 63 AD3d 520, 520-521 [1st Dept 2009]; *Colon v Bernabe*, 65 AD3d 969 [1st Dept 2009]).

With respect to plaintiffs' claims under the 90/180 day category of the Insurance Law, defendant has failed to establish her prima facie entitlement to summary judgment. Because defendant's experts did not examine plaintiffs during the relevant statutory period and because their reports address plaintiffs' conditions as of the time of the examinations, the reports are insufficient to sustain defendant's burden of establishing that plaintiff did not sustain a serious injury by reason of having been incapacitated from performing substantially all of her customary and daily activities for 90 of the 180 days following the accident (*Toussaint v Claudio*, 23 AD3d 268 [1st Dept 2005]).

In support of their cross-motion, plaintiffs argue that are entitled to summary judgment on their significant limitation claims and their claims under the 90/180 day rule. For the reasons discussed above, the conflicting medical evidence submitted by the parties raises questions of fact as to whether plaintiffs' sustained significant range of motion limitations that must be resolved by jury. With respect to plaintiffs' 90/180 day claims, plaintiffs must establish that they sustained a medically determined injuries or impairments of a non-permanent nature which prevented them from performing substantially all of the material acts which constituted their usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment (Insurance Law § 5102 [d]). Plaintiffs medical evidence does not establish that any doctor found plaintiffs to be totally disabled or that they were instructed by any doctor to substantially restrict their day to day activities (*compare Jean-Louis v Gueye*, 2012 NY Slip Op 02612 [1st Dept]). In the absence of proof of a medically determined injury or impairment, plaintiffs are not entitled to summary judgment on this claim.

Plaintiffs' cross-motion for summary judgment on the issue of liability is also denied. Plaintiffs' submission establishes that plaintiffs were crossing the street, within the crosswalk, with the light in their favor, when they were struck by defendant's vehicle, which was making a left turn (*Beamud v Gray*, 45 AD3d 257 [1st Dept 2007]).

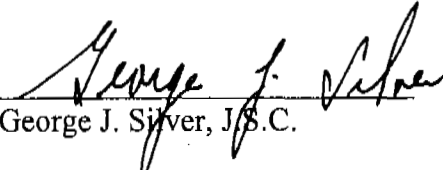
In opposition, defendant argues that triable issues of fact exist with respect to plaintiffs' comparative negligence. In her deposition, defendant testified that she heard plaintiffs advise the responding police officer that they were not paying attention because they were busy talking with each other. Additionally, defendant testified that she had a conversation with both plaintiffs during which they told her they never saw defendant making the turn. These admissions raise questions of fact as to whether plaintiffs kept a proper lookout for traffic (*Thoma v Ronai*, 82 NY2d 736, 621 NE2d 690, 602 NYS2d 323 [1993]; *Hernandez v New York City Tr. Auth.*, 2008 NY Slip Op 5562 [1st Dept]). "A motion for summary judgment as to liability by a negligence plaintiff who cannot eliminate an issue as to his or her own comparative fault should simply be denied" (*Calcano v Rodriguez*, 2012 NY Slip Op 110 [1st Dept]).

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment is denied; and it is further

ORDERED that defendant is to serve a copy of this order, with notice of entry, upon plaintiffs within twenty days of entry.


George J. Silver, J.S.C.

GEORGE J. SILVER

Dated: APR 19 2012
New York County

FILED

APR 27 2012

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