

Hyatt v Drayton
2012 NY Slip Op 33897(U)
March 21, 2012
Supreme Court, Bronx County
Docket Number: 300721/09
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----x
Tricia Hyatt

Index No. 300721/09

Plaintiffs,

-against-

Juneesha Drayton and
Sheila E. Mathis

DECISION/ORDER

Defendants
-----x

Plaintiff seeks recovery for injuries allegedly sustained on August 2, 2007 in a collision that occurred at the intersection of 198th Street and 118th Avenue, Queens, New York.

Issue was joined with the service of defendants' answer in June 2009. The answer asserts an affirmative defense alleging the lack of serious injury.

To date, no Note of Issue has been filed.

Motion

Defendants now moves for an award of summary judgment dismissing the complaint on the grounds that plaintiff has not sustained an accident-related serious injury within the contemplation of Article 51 of the Insurance Law.

In support, defendant submits the affirmed reports of recent independent medical evaluations (Exhibits J,K); contemporaneous medical records (Exhibits F-I), and the

transcript of plaintiff's 11/08/10 examination before trial (Exhibit D).

Verified Bill of Particulars¹

Plaintiff alleges that as a result of the motor vehicle accident she sustained the following permanent injuries: bilateral **tibial** nerve entrapment /neuropathy; **cervical** and **lumbar** myofascitis with radiculopathies; disc bulges at C2-3, C3-4, C4-5, C5-6, and C6-7; disc bulges at L2-3, L3-4, and L4-5 ; post-traumatic whiplash syndrome ; sacroiliac dysfunction and reversal of the normal curvature of the cervical spine [Verified Bill of Particulars ¶ 7].

It is alleged that these injuries constitute a serious injury pursuant to Insurance Law 5102(d) resulting in a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system, and a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury [Id. ¶11].

¹ Exhibit B

Independent Medical Evaluations

Plaintiff submitted to an **orthopedic** examination conducted by Michael J. Katz, M.D. on January 25, 2011.² She presented with complaints of occasional pain in the back when bending.

For purposes of his evaluation, Dr. Katz reviewed the reports of lumbar and cervical MRI studies conducted respectively on 09/28/07 and 10/12/07, and of an SSEP of the lower extremities [10/12/07], as well as the narrative report of the treating chiropractor dated 01/02/09.

Upon examination, Dr. Katz found³ full ranges of motion in all planes of the cervical and lumbar spine, both shoulders, elbows and wrists, and both knees. All findings were quantified and compared to normal readings. All tests administered, including Adson's, Babinski, Patrick's, and Straight Leg Raising, revealed negative findings.

The tests conducted for the upper extremities included Tinel's, Finkelstein's, and Phalen's, and all revealed negative findings.

Upon examination of the knees, there were negative findings on Lachman's, patellar apprehension, pivot shift, posterior drawer sign, and McMurray's.

² Exhibit K

³ The findings were made with the use of a goniometer.

Dr. Katz diagnosed plaintiff's injuries as lumbosacral and cervical radiculopathy "by history", and found that such injuries had resolved. He concluded that there were no clinical signs or symptoms of musculoskeletal permanence relative to the motor vehicle accident, and noted that it was "significant that the MRI reports reviewed of the cervical and lumbar spine indicate findings, which are degenerative in nature." ⁴

On February 17, 2011, plaintiff was examined by Daniel J. Feuer, M.D. for purposes of a **neurological** evaluation.

In addition to the report of the MRI study and the SSEP of the cervical spine, Dr. Feuer reviewed the report of a 01/02/09 consultation of Dr. Frishberg.

Plaintiff presented with complaints of recurrent neck and low back pain without radiation, or focal weakness, or numbness.

On examination, Dr. Feuer found full ranges of motion in every plane of the cervical spine as quantified and compared to normal readings. ⁵ The spine was not tender, nor was spasm observed.

The range of motion of the lumbar spine was full in every plane as quantified and compared to normal readings. Straight leg raising was negative bilaterally, in the sitting position.

⁴ Plaintiff was born on 10/25/77

⁵ The readings were made with the use of a goniometer in accordance with normal ranges of **motion per** AMA Guidelines, 5th ed.

There was normal bulk and tone, and 5/5 power in all muscle groups of the upper and lower extremities. Plaintiff was observed to be able to heel and toe walk as well as hop on both lower extremities without restriction.

Dr. Feuer concluded that it was a normal examination , and within a reasonable degree of medical certainty, opined that plaintiff did not demonstrate any objective neurological disability or permanency causally related to the 08/02/07 motor vehicle accident.

Contemporaneous Medical Records

Defendants submit the 01/02/09 narrative report of the treating chiropractor, Allen Frishberg, addressed to plaintiff's attorney. ⁶

The report indicates that plaintiff commenced chiropractic treatment on August 13, 2007 , and that she "has been improving with Chiropractic treatment and continues to improve." Finding of restrictions in range of motion of the cervical and lumbar spine upon the initial examination are included within the report, as are positive findings on some of the administered tests. The chiropractor concluded that plaintiff sustained post-traumatic whiplash, cerviobrachial syndrome, disc herniations at C4-5 , and bulges at L4-5 and L5-S1, myalgia/myofascitis , low back pain, and sacroiliac dysfunction as causally related to the motor vehicle accident.

⁶ Exhibit F

Although "affirmed" , the report, as all other of plaintiff's medical reports, are admissible on defendants' *prima facie* case as tendered.

The report of the 10/15/07 SSEP of the lower extremities is also tendered,⁷ and the report's finding is stated as "evoked potentials are within normal limits but the left L4 potential is significantly prolonged compare to the right L4 potential." Such findings were noted as being "suggestive of bilateral tibial nerve entrapment or neuropathy", a conclusive finding was deferred for further clinical correlation.

The final contemporaneous report tendered is that of the 10/15/07 NCV studies of the upper extremities, the findings of which revealed a "normal study."

Deposition Testimony

In pertinent part, plaintiff testified that she was a front-seated passenger in her vehicle when it sustained a "heavy" impact from another vehicle [HYATT EBT: 31]. The air bags did not deploy, and her seat belt held her in place, but she moved forward and back [Id. 31-33]. She declined to go to the hospital, but she accompanied her children, who were back-seat passengers from the scene to the emergency room of Mary Immaculate Hospital [Id. 38-40].

She went to the same hospital the following day because she was experiencing pain in her lower back and neck [Id. 41]. She was given a prescription for medication and was discharged the same day [Id. 42-43]. She consulted her personal physician the week after the accident. He performed a "sonogram", and told her everything looked okay, but he

⁷ Exhibit G

also told her "it'd be wise to get a chiropractor." [Id. 44: 20].

Plaintiff testified that she missed one day of work [Id. 10-11].

The same week, plaintiff commenced a three to four month course of treatment with a chiropractor, Dr. Frishberg [Id. 45]. The treatment included physical therapy, electric stimulation, and acupuncture [Id. 49]. Plaintiff ceased treatment because the insurance "stopped it", and because she learned that she was pregnant [Id. 52: 20-21]. She resumed chiropractic therapy in August-September 2010 due to pain in her lower back [Id. 53]. She stopped that treatment because she could not afford it [Id. 56], and since doing so, she experienced sharp non-radiating pain in the lower back [Id. 56]. Finally, plaintiff testified that there was nothing she could do before the accident that she could not now do [Id. 61].

Discussion and Conclusions

Upon review of the reports of the recent orthopedic and neurological examination, as well as the testimony of the plaintiff concerning both her return to work within days of the accident, and the lack of any current functional deficit, it is the finding of this court that defendants have met their initial burden to prove as a matter of law that the injuries alleged to have been sustained by plaintiff in the underlying motor vehicle accident were not serious within the contemplation of the statute. Specifically, defendant submits probative medical evidence which, upon objective clinical testing, revealed full ranges of

motion of the cervical and lumbar spines, and of the lower and upper extremities, and concluded the lack of any clinical indicia of accident-related permanent orthopedic or neurological residuals.

Clearly, there is no issue of fact that, as alleged, plaintiff sustained a permanent loss of use of either the cervical or lumbar spine (see, Oberly v. Bangs Ambulance, 96 NY2d 295, 299, 751 NE2d 457, 727 NYS2d 378 [2001]).

It is also submitted that the findings upon recent examination demonstrate as a matter of law that there is no issue of fact that plaintiff sustained either a permanent consequential limitation of use of a body organ or member, or a significant limitation of use of a body function or system.

Finally, there is no proof here that as a result of her injuries plaintiff was caused to curtail her customary daily activities during the immediate post-accident period to any significant degree.

Upon this showing, it is incumbent for plaintiff to come forward with probative medical evidence to raise an issue of fact that the accident-caused injuries she sustained are serious within the contemplation of the statute. Plaintiff fails to do so.

Opposition Papers

The "Chiropractic Affidavit" of Dr. Fishberg is not properly sworn, containing the following language: "I am licensed to practice in the state of New York, and I swear that

I specialize in the field of Chiropractic Care."

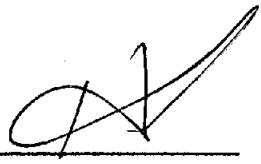
Also tendered are two copies of reports addressed to plaintiff's counsel as "affirmed" by the treating chiropractor and dated respectively, 08/29/11,⁸ and 01/02/09, the latter of which was submitted by defendants in support of the motion.

In light of the infirmities in proof submitted in opposition, there are no probative medical findings upon recent examination to raise an issue of fact to rebut defendants' showing that the injuries sustained in the motor vehicle accident have resolved without the conceded lack of functional disability, but without any residual orthopedic or neurological deficit.

Accordingly, it is ORDERED that the motion be and hereby is granted and it is further ORDERED that the cross-motion of plaintiff for an award of summary judgment on the issue of liability is denied as academic.

This constitutes the decision and order of this court.

Dated: March 21 2012


Howard H. Sherman

⁸ The copy of the report appears to bear a copy of a notary stamp, and a handwritten deletion of the word "affirm", and initials. The amendment, the complete name of the notary, and commission information are otherwise illegible. Plaintiff fails to come forward with any explanation for the tender of these reports in inadmissible form.