

Green v Jones

2014 NY Slip Op 33563(U)

October 1, 2014

Supreme Court, Bronx County

Docket Number: 302928/12

Judge: Mary Ann Brigantti

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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Brigantti

-----X
EVIDA GREEN,

Plaintiff,

-against-

DECISION / ORDER

Index No. 302928/12

KAREN JONES, et als.,

Defendants
-----X

The following papers numbered 1 to 5 read on the below motion noticed on April 30, 2014 and duly submitted on the Part IA15 Motion calendar of **July 30, 2014**:

<u>Papers Submitted</u>	<u>Numbered</u>
Defendants' Notice of Motion, Exhibits	1,2
Pl.'s Aff. In Opp., Exhibits	3,4
Defendants' Aff. In Reply	5

Upon the foregoing papers, the defendant Karen Jones ("Defendant") moves for summary judgment, dismissing the complaint of the plaintiff Evida Green ("Plaintiff") for failure to satisfy the "serious injury" threshold as required by New York Insurance Law §5012(d). Plaintiff opposes the motion.

I. Background

This matter arises out of an alleged motor vehicle accident that occurred on April 12, 2011. As a result of the accident, Plaintiff alleges that she sustained the following injuries, among others: labral tear and tendonitis of the left shoulder; a C3-C4, C4-C5, C5-C6, and C7-T1 herniation; lumbar herniations at L1-L2, L4-L5, and a bulging disc at L5-S1, along with lumbar radiculopathy; posterosuperior quadrant labral tear and tendonosis of the left shoulder, confirmed by MRI Defendant now move for summary judgment, arguing that Plaintiff's injuries fail to meet the "serious injury" threshold.

In support of the motion, Defendant submits affirmed reports from Dr. Audrey Eisenstadt, who reviewed the MRIs of Plaintiff's cervical spine, lumbar spine, and left shoulder. Regarding

the cervical spine MRI, taken 10 days after the accident, Dr. Eisenstadt found “extensive degenerative changes...which could not have occurred in ten days’ time.” The disc degeneration found is a process “over six months in development” and disc desiccation is “greater than three months in development and another manifestation of arthritis.” Dr. Eisenstadt opined that the disc bulges he found were “not a traumatic process.” The degenerative changes “strongly indicate” that Plaintiff’s cervical disc herniation is also degenerative in etiology. He found no annular tears to indicate any acute disc rupture. Dr. Eisenstadt also examined an MRI of the cervical spine taken on May 25, 2011. Again, he noted the existence of “extensive degenerative osseous, ligamentous, and intervertebral disc changes which clearly predate the incident.”

Dr. Eisenstadt also examined an MRI of Plaintiff’s lumbar spine, taken on May 25, 2011. His ultimate impression was “degenerative disc disease” with no focal disc herniations or annular tears. He states that these findings could not have occurred in the short time interval between the examination and this incident. Dr. Eisenstadt concludes that there are no post-traumatic changes causally related to this incident and no intervertebral disc herniations or tears to indicate any acute disc rupture. Dr. Eisenstadt further examined an MRI of Plaintiff’s left shoulder, taken on August 18, 2011. He observed no rotator cuff or labral tear or osseous injury. Instead, Dr. Eisenstadt found evidence of “longstanding, hypertrophic disease at the acromioclavicular joint” which were “months to years in origin.” Any changes were therefore degenerative in nature, and he found no evidence of post-traumatic changes.

Defendant also submits an affirmed report from Dr. John Buckner, who performed an independent orthopedic examination on February 25, 2013. Plaintiff told Dr. Buckner that she was a retired social worker and has not worked for several years. She reported pain in her neck, back, left shoulder, left leg, and left foot. Dr. Buckner reviewed Plaintiff’s medical records, and provided his own comments. Upon physical examination of the cervical spine, Dr. Buckner found that Plaintiff could tilt her head left to right at 45 degrees, backwards 20 degrees, and forward 30 degrees. Plaintiff exhibited some positive findings in her cervical spine consistent with either scoliosis or chronic paraspinal muscle denervation. Dr. Buckner measured Plaintiff’s range of motion in her shoulders and performed other objective testing. Plaintiff was able to bend forward and come within 12 inches of her toes. The muscles in her lumbar spine had

normal function with no tenderness or spasm. Regarding the lower extremities, Plaintiff had normal hip sway and heel-to-toe progression. Muscles were symmetrical in texture and done without fasciculation. Neurological examination was normal. Dr. Buckner does not ascribe any “normal” ranges of motion in his report, explaining that what constitutes “normal” varies from person to person. Regarding the claiming cervical injury, Dr. Buckner opined that Plaintiff has a mild disability based on the mechanics of the accident and her subsequent treatment. He concluded that Plaintiff “experienced either an exacerbation or aggravation” of a pre-existing cervical condition. As for the lumbar spine, Dr. Buckner concludes that Plaintiff did not sustain any injury to that body part since her examination was “normal.” With respect to the left shoulder, Dr. Buckner states that her “early complaint of left cervical and left shoulder pain is adequately explained by her cervical condition.” The MRI revealed no evidence of a recent shoulder injury.

Defendant submits an affirmed report of neurologist Dr. Rene Elkin. She noted that Plaintiff was disabled as a result of a seizure disorder secondary to a meningioma that was surgically removed in 2003. She also reported a motor vehicle accident from more than 20 years ago, with no injuries. Dr. Elkin reviewed Plaintiff’s medical records and offered comments. Dr. Elkin then performed a physical examination. Range of motion in the neck, upon right lateral rotation, was limited to 60 degrees (80 normal). Plaintiff had full range of motion in all other movements, and cervical compression test was negative. With respect to the lumbar spine, Plaintiff “was unable to forward flex (normal is 60 degrees), or bend more than 10 degrees (normal 25 degrees). She also reported tenderness and palpation of the thoracic and lumbar spine and lumbar muscles. Straight leg raising test was 70 degrees on the left side and associated with buttock and thigh pain (normal 90 degrees), and on the right side to 90 degrees.

Dr. Elkin, however, concluded that Plaintiff’s neurological examination was “entirely normal.” She concludes that “[h]er accident-related symptoms are consistent with cervical muscles sprain and thoracolumbar muscles sprain.” She opines that Plaintiff’s “pre-existing degenerative changes may be responsible for the reported persistent pain in her neck and lower back.”

At her deposition, Plaintiff testified that she was confined to her bed for a few weeks, and

her home for approximately two months, after the accident.

Plaintiff submits several affirmations and reports in opposition to the motion. She submits an affidavit from chiropractor James R. McGee, D.C., D.A.B.C.O., who initially examined her on May 4, 2011. Dr. McGee reviewed Plaintiff's medical records, including MRIs taken in the months prior. Upon a physical examination, he found restrictions in the lumbar and cervical spine in all directions. Dr. McGee prescribed MRIs, a course of physical therapy, and referred her to other treating physicians. Dr. McGee personally reviewed the MRI examinations of Plaintiff's cervical spine and concurred with the findings of the treating radiologist. April 23, 2011 MRI of the cervical spine, annexed to an affirmation of Samuel Mayerfield, M.D., revealed posterior disc herniations and bulging, among other findings. Dr. McGee continued to treat Plaintiff in 2011, 2012, and 2013. He notes that Plaintiff received injections into her lower back. In each examination, Plaintiff continued to demonstrate spasms and restricted movement in the cervical or lumbar regions. Upon a re-examination on May 29, 2014, Plaintiff had continued limitations in the cervical spine, notably upon right rotation (60 degrees, 80 normal), and left rotation (55 degrees, 80 normal). Plaintiff also demonstrated restrictions in the lumbar spine upon flexion (55 degrees, 90 normal), and extension (10 degrees, 20 normal). Dr. McGee affirms that the April 12, 2011 collision was the "competent producing cause" of Plaintiff's injuries, and that she has sustained a permanent neck and lower back injury.

Plaintiff submits an affirmation from Jeffrey Cohen, M.D., who first evaluated her on August 22, 2011. At the time, Plaintiff complained of burning and numbness in the left upper extremity and left lower extremity, along with pain in the neck and back. She had restricted range of motion in the lumbar spine. Dr. Cohen annexes records from further evaluations conducted in the following months. Dr. Cohen reviewed Plaintiff's MRIs. Later in 2011 and 2012, he performed a series of injections to the lumbar spine, and another doctor performed additional injections. In June 2014, Plaintiff continued to complain of neck and lower back pain, and demonstrated quantified range of motion restrictions. Dr. Cohen concludes that, based upon Plaintiff's medical history, clinical presentation, MRI/nerve examinations and most recent examination, her cervical and lumbar injuries are causally related to the accident.

Dr. Robert Marini, M.D., also provides an affirmation. He began treating Plaintiff on

May 25, 2012. Dr. Marini notes that Plaintiff's left shoulder range of motion measured 45 degrees in abduction and forward flexion, with diminished sensation. He reviewed Plaintiff's MRIs, as well as treatment records from other physicians. After further examination and treatment, he recommended a series of lumbar facet injections under fluoroscopic guidance. Months later, since Plaintiff continued to have complaints of pain, he performed a percutaneous decompression, discectomy of L4-L5. While improved, Plaintiff continued to exhibit diminished range of motion in the lumbar spine in 2013. Based on his treatment and other medical records, Dr. Marini opines that this accident was the competent cause of Plaintiff's cervical, lumbar, and left shoulder injuries.

Plaintiff has also provided sworn medical reports drafted by Drs. Michael Russ and Sumankumar Brahmhatt, who performed independent evaluations on June 26, 2012 and October 15, 2013, respectively. Dr. Russ notes that he first examined Plaintiff on September 13, 2011. Although he finds that Plaintiff's injuries are "resolved," he opines that they were causally related to this accident. Dr. Brahmhatt likewise opined that there "appears" to be a causal relationship between Plaintiff's injuries and this accident.

Plaintiff submits her own affidavit, detailing her medical treatment and how her injuries have impacted her daily life.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]).

Once a movant meets his initial burden, the 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 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

When a defendant seeks summary judgment alleging that a plaintiff does not meet the threshold required to maintain a lawsuit, the burden is on the defendant to first establish that plaintiff's injuries are not serious (*Franchini v. Plameri*, 1 N.Y.3d 536 [2003]; *Brown v. Achy*, 9 A.D.3d 30 [1st Dept. 2004], or to prove that the injuries are not related to the accident (see *Linton v. Nawaz*, 62 A.D.3d 434 [1st Dept. 2009], *aff'd*, 14 N.Y.3d 821 [2010]).

In this case, Defendant satisfied her burden on the issue of whether Plaintiff's cervical spine, lumbar spine, and left shoulder injuries were causally related to this accident. She accomplished this by submitting the affirmation of Dr. Eisenstadt, who opined in a non-conclusory manner that the MRI findings were degenerative or otherwise pre-existing conditions.

In opposition, however, Plaintiff raised a triable issue of fact as to causation. Plaintiff submitted affirmations from Drs. Cohen, Marini, and McGee, all of whom personally examined the plaintiff shortly after the accident, and opined that her injuries were related. While it is true that the doctors did not expressly address Dr. Eisenstadt's findings of non-traumatic degenerative conditions, all of the Plaintiff's experts reviewed the same MRI reports as Defendant's expert, and yet attributed the injuries to "a different, yet equally plausible cause," the motor vehicle accident (see *Grant v. United Pavers Co., Inc.*, 91 A.D.3d 499 [1st Dept. 2012], citing *Yuen v. Arka Memory Cab Corp.*, 80 A.D.3d 481, 482 [1st Dept. 2011]; *Linton v. Nawaz*, *supra*; *Kone v. Rodriguez*, 107 A.D.3d 537 [1st Dept. 2013.]; *Biascochea v. Boves*, 93 A.D.3d 548 [1st Dept. 2012], see also *Williams v. Tatham*, 92 A.D.3d 472 [1st Dept. 2012]). Defendant's orthopedist, Dr. Buckner, moreover opined that Plaintiff experienced either an exacerbation or aggravation of a cervical spine condition as a result of this accident. Under these circumstances, it cannot be

stated as a matter of law that Plaintiff's injuries and current limitations are unrelated to this accident. Plaintiff's expert affirmations, detailing contemporaneous and continued range of motion limitations in the cervical and lumbar spine (and confirmed by Defendant's experts), raise an issue of fact as to whether those alleged injuries are "serious" (see *Torain v. Bah*, 78 A.D.3d 588 [1st Dept. 2010]). Contrary to Defendant's contention in reply, Plaintiff's experts sufficiently detailed the various objective tests used to arrive at their conclusions (cf. *Gibbs v. Hee Hong*, 63 A.D.3d 559 [1st Dept. 2009]). Since Plaintiff has raised a material issue of fact as to the seriousness of her cervical and lumbar spine injuries, she may recover for all other injuries causally related to the accident -- i.e., her left shoulder injury -- even if it does not meet the serious injury threshold (*Perez-Hernandez v. M. Marte Auto Corp.*, 104 A.D.3d 489 [1st Dept. 2013][internal citations omitted]).

As to her "90/180" claim, however, Plaintiff failed meet her burden that she was prevented from performing his usual and customary activities for 90 of the 180 days following the incident. Plaintiff alleges in her verified bill of particulars, and testified at deposition, that she was only confined to her bed for three weeks, and to her home for two months, after the accident (see *Nelson v. Distant* , 308 A.D.2d 338, 340 [1 st Dept. 2003]).

IV. Conclusion

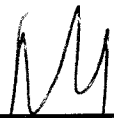
Accordingly, it is hereby

ORDERED, that the branch of Defendant's motion seeking dismissal of Plaintiff's "90/180" claim is granted, and it is further,

ORDERED, that the remaining branches of Defendant's motion for summary judgment are denied.

This constitutes the Decision and Order of this Court.

Dated: 10/1, 2014



Hon. Mary Ann Brigantti, J.S.C.