Garrett v Williams
2015 NY Slip Op 30791(U)
April 7, 2015
Sup Ct, Bronx County
Docket Number: 306509/2012
Judge: Betty Owen Stinson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
--X
CHARISSE L. GARRETT,

Plaintiff, INDEX № 306509/2012

-against- DECISION/ORDER

WAYNE A. WILLIAMS,

Defendant.
--X

HON. BETTY OWEN STINSON:

This motion by defendant for summary judgment dismissing the complaint is granted.

On August 26, 2011, plaintiff was the driver of her vehicle when it was struck from behind by defendant's vehicle. After the accident plaintiff went to work as she had planned and completed her shift. The next day she went to a hospital to seek treatment for the injuries suffered in the accident.

Plaintiff subsequently commenced this lawsuit against the driver and operator of the offending vehicle. After discovery in the case was complete, defendant herein made the instant motion to dismiss the complaint for plaintiff's failure to demonstrate that injuries she allegedly sustained in the accident were serious as defined by statute.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing the motion must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

In order to recover for non-economic loss resulting from an automobile accident under New York's "No-Fault" statute, Insurance Law § 5104, the plaintiff must establish, as a threshold matter, that the injury suffered was a "serious injury" within the meaning of the statute. "Serious injury" is defined by Insurance Law § 5102(d) to include, among other things not relevant here, 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" 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 constitutes such person's usual and customary activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

The initial burden on a threshold motion is upon the defendants to present evidence establishing that plaintiff has no cause of action, i.e.: that no serious injury has been sustained. It is only when that burden is met that the plaintiff would be required to establish *prima facie* that a serious injury has been sustained within the meaning of Insurance Law § 5102(d) (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Licari v Elliot*, 57 NY2d 230 [1982]).

To make out a *prima facie* case of serious injury, a plaintiff must produce competent medical evidence that the injuries are either "permanent" or involve a "significant" limitation of use (*Kordana v Pomelito*, 121 AD2d 783 [3rd Dept 1986]). A finding of "significant limitation" requires more than a mild, minor or slight limitation of use (*Broderick v Spaeth*, 241 AD2d 898, *lv denied,* 91 NY2d 805 [1998]; *Gaddy v Eyler*, 167 AD2d 67, *aff'd,* 79 NY2d 955 [1992]). Strictly subjective complaints of a plaintiff unsupported by credible medical evidence do not

suffice to establish a serious injury (*Scheer v Koubek*, 70 NY2d 678 [1987]).

To satisfy the requirement that plaintiff suffered a medically determined injury preventing her from performing substantially all of her material activities during 90 out of the first 180 days, a plaintiff must show that "substantially all" of her usual activities were curtailed (*Gaddy*, 167 AD2d 67). The "substantially all" standard "requires a showing that plaintiff's activities have been restricted to a great extent rather than some slight curtailment" (*Berk v Lopez*, 278 AD2d 156 [1st Dept 2000], *lv denied*, 96 NY2d 708).

Allegations of sprains and contusions do not fall into any of the categories of serious injury set forth in the statute (*Maenza v Letkajornsook*, 172 AD2d 500 [2nd Dept 1991]). Where surgery resolved the injury, with no permanent loss of use or limitation, there is no issue of permanent serious injury (*Fortune v Sacks & Sacks*, 272 AD2d 277 [1st Dept 2000]). "Absent an explanation of the basis for concluding that the injury was caused by the accident, as opposed to other possibilities evidenced in the record, an expert's 'conclusion that plaintiff's condition is causally related to the subject accident is mere speculation', insufficient to support a finding that such a causal link exists" (*Diaz v Anasco*, 38 AD3d 295 [1st Dept 2007], citing *Montgomery v Pena*, 19 AD3d 288 [2005]).

"Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommels v Perez*, 4 NY3d 566 [2005]). Nor is evidence of radiculopathy (*Casimir v Bailey*, 70 AD3d 994 [2nd Dept 2010]). A plaintiff's subjective complaints of pain are insufficient, without more, to establish that herniated discs constitute a serious injury (*Pierre v Nanton*, 279 AD2d 621 [2nd Dept 2001]).

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An unexplained gap in treatment is fatal to a plaintiff's claim of serious injury (*Colon v Kempner*, 20 AD3d 372 [1st Dept 2005]). Explanations for gaps in treatment must be proffered by doctors within medical reports or affidavits (*Pommels v Perez*, 4 NY3d 566 [2005]; *Farozes v Kamran*, 22 AD3d 458 [2nd Dept 2005]).

The defendant may rely on medical records and reports prepared by plaintiff's treating physicians to establish that plaintiff did not suffer a serious injury causally related to the accident (*Franchini*, 1 NY3d 536). Once the burden has shifted however, an affidavit or affirmation by the person conducting a physical examination of the plaintiff is necessary to establish a serious injury, unless plaintiff is offering unsworn reports already relied upon by the defendant (*Grossman v Wright*, 268 AD2d 79 [3rd Dept 2000]; *see also Zoldas v Louise Cab Co.*,108 AD2d 378 [1st Dept 1985]). The affirmation must set forth the objective medical tests and quantitative results used to support the opinion of the expert (*Grossman*, 268 AD2d 79). "An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (cite omitted)" (*Toure v Avis Rent A Car Systems*, 98 NY2d 345 [2002]). A conclusory affidavit of the doctor does not constitute medical evidence (*Zoldas*, 108 AD2d 3778; *see also Lopez v Senatore*, 65 NY2d 1017 [1985] [conclusory assertions tailored to meet statutory requirements insufficient to demonstrate serious injury]).

In support of the motion, defendant offered copies of the pleadings, the bill of particulars, affirmed reports by Dr. Marianna Golden, Dr. Robert Y. Pick, Dr. Jessica Berkiwitz, MRI reports and plaintiff's deposition testimony. Plaintiff's bill of particulars alleged that she suffered a left shoulder tear of her supraspinatus tendon, a labral tear, bursistis, a herniated disc at C5-6 and

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bulging discs at C3-4 and C5-6, all as a result of the subject accident. All of the listed injuries were alleged to be permanent with none having been pre-existing. Plaintiff alleged she was out of work and confined to her home for two weeks following the accident. She alleged a later period amounting to one week of absence from work due to convalescence after surgery.

Dr. Golden, a neurologist, examined plaintiff on January 14, 2014, finding a 5' 2" woman weighing 195 pounds. She complained of headaches and pain in her neck and left shoulder. Dr. Golden found full motor strength in all extremities, normal reflexes and normal sensory examination. Dr. Golden found no objective clinical evidence of radiculopathy or any neurologic permanency.

Dr. Pick, an orthopedic surgeon, examined plaintiff on January 14, 2014. She made the same complaints as those made to Dr. Golden. Plaintiff's cervical spine revealed no tenderness or spasm. Range of motion was full except for extension, measuring 55 degrees out of a normal 60 degrees, and bilateral rotation, measuring 70 degrees out of a normal 80. According to Dr. Pick, the decreased range of motion was the result of suboptimal effort due to plaintiff's subjective complaints. Cervical compression was negative and there was no radiation or pain on bending.

Thoracic and lumbar spine showed no spasm and there was normal range of motion expressed numerically and compared to normal numbers. There was no atrophy and straight leg raising was negative. All four extremities demonstrated full muscle strength.

There was no tenderness on palpation, effusion or crepitus noted in plaintiff's left shoulder. There were three healed arthroscopic portal scars on the left shoulder. Range of motion was full, expressed numerically and compared to normal numbers. There was no impingement sign. Dr. Pick's impression was cervical spine sprains and strains, resolved, and status post left

shoulder surgery, healed from an objective standpoint.

Dr. Berkowitz reviewed MRI studies of plaintiff's cervical spine, performed on September 30, 2011 and left shoulder MRI performed on December 4, 2011. Dr. Berkowitz saw no cervical disc bulges or herniations and no neural foraminal stenosis. Soft tissues were unremarkable. There was no evidence of acute traumatic injury such as fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma.

The left shoulder study revealed no joint effusion or fluid in the subacromial/subdeltoid bursa. Dr. Berkowitz saw no rotator cuff tear. There was no evidence of acute traumatic injury such as fracture, traumatic bone marrow edema or musculotendinous junction tear.

Plaintiff testified on December 12, 2013 that she weighed approximately 189 pounds at the time of the accident (deposition at 24). She was thrown forward by the impact when defendant's car hit hers in the rear (*id.* at 27, 42). Her air bags did not deploy, but the air bags in the car that struck hers did deploy (*id.* at 27, 44). When she saw the other car's air bags deploy, she "jumped out" of her car and went into the park because she did not want her own air bags to hit her (*id.* at 44-55). Police came to the scene and plaintiff saw that her trunk was pushed in (*id.* at 48, 52-3).

Plaintiff left the scene with the tow-truck driver and then went to work (*id.* at 57). She went to St. Luke's Hospital after her shift ended because her head, neck and left shoulder began to stiffen up (*id.* at 58). She was examined and released with prescriptions for medication (*id.* at 59). She went to Day & Night Medical two days later and began physical therapy treatment there to her neck, back and shoulder (*id.* at 62). She was supposed to go three times a week, but she only made it two times a week, and the last month once a week (*id.* at 74).

Plaintiff was referred to Dr. Katzman who performed outpatient surgery on her left

shoulder (*id.* at 68-70). He recommended rotator cuff surgery (*id.* at 70-71). Plaintiff has no further appointments (*id.* at 75). She could not drive for about one month after the accident (*id.* at 77). After that time, she did drive to work every day until her surgery (*id.*). She could not go to the park or play with her children for four months after the accident (*id.* at 78). For one year she could not lift anything heavy, hang curtains or move furniture (*id.* at 78-79). She could "barely" mop floors (*id.* at 78).

Presently, plaintiff has pain in her neck and left shoulder "every now and so often" (*id.* at 80). Her back stiffens when driving for two hours, but she has no more pain there (*id.* at 81). She has pain in her neck two to three times per week for which she takes Advil (*id.* at 81, 82-83). She has pain in her left shoulder when "pushing over the limit" (*id.* at 82).

In opposition to the motion, plaintiff offered plaintiff's affidavit, a letter by Dr. Cluny Lefevre, the Operative Note by Dr. Barry M. Katzman and his affirmation, the accident report, medical records from St. Luke's Emergency Department, records from Day & Night Medical, including an EMG-NCV report, x-ray and MRI reports. Plaintiff stated in her affidavit dated October 10, 2014 that she did not continue treatment after her no-fault benefits expired because she could not afford the co-payments required by her insurance.

The letter by Dr. Lefevre from Day & Night Medical was dated April 10, 2012 and stated plaintiff could return to work on the following day. She had experienced "great improvement" after surgery on March 29, 2012, but she should avoid heavy lifting and excessive pushing or pulling for six to eight weeks.

An EMG-NCV test performed on September 15, 2011 showed the absence of cervical spine radiculopathy. The impression by Dr. Delys St. Hill was "normal study".

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An x-ray of plaintiff's lumbar spine performed on August 30, 2011 showed "probable" facet degeneration from L4 through S1. The cervical x-ray performed the same day showed no disc space narrowing and unremarkable soft tissues. An x-ray of plaintiff's left shoulder, also performed on the same day, revealed no evidence of acute fracture or dislocation. The soft tissues were within normal limits. The impression was "negative exam".

The MRI of plaintiff's cervical spine performed by Dr. Harold M. Tice, radiologist, on September 30, 2011was reported to show a herniated disc at C5-6 and bulging discs at C3-4 and C5-6. The MRI report of plaintiff's left shoulder, also performed by Dr. Tice on December 4, 2011, found acromioclavicular hypertrophic changes consistent with impingement syndrome, subcoracoid bursa effusion, a partial tear of the rotator cuff without evidence of full thickness involvement, and signal changes compatible with degenerative or reactive etiology. Dr. Tice's final impression was partial tear of the rotator cuff with adjacent bursa effusion and hypertrophic changes.

The records from St. Luke's Emergency Department show that the 43-year-old plaintiff arrived at 7:34 A.M. the day after the accident. Plaintiff's complaint is listed as "neck is stiff" and the primary diagnosis was cervical spine strain. Left shoulder pain is mentioned only once in several pages of record. Plaintiff was discharged with instructions regarding cervical strain.

The records from Day & Night Medical by Cluny Lefevre, D.O., note that plaintiff's first visit was on August 29, 2011 where she showed unspecified decreased range of motion in her cervical spine, "full range of motion with tenderness" in her shoulders, full range of motion in her back and a positive straight leg raising test. The initial assessment was cervicalgia, headache, shoulder joint pain and low back pain.

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The Operative Note by Dr. Katzman, dated March 29, 2011, reports that he found a tear in the labrum that was debrided, but "did not need to be fixed". He also found a tear on the supraspinatus tendon "that did not need to be debrided". He did, however, make flat with a shaver a spur found on the acromion. This left "ample room now for the rotator cuff". Finding bursitis inflammation, he performed a bursectomy.

A post-surgery evaluation by Dr. Lefevre on April 10, 2012 found plaintiff had no muscle or joint pain, no stiffness, no neck/back/shoulder pain, no swelling or redness in her joints and "no limitation in motion", no muscle weakness, cramps, trouble walking or climbing stairs. The neurologic/physiatric assessment was "no weakness, no numbness, no tingling, no tremor".

In his affirmation dated October 9, 2014, Dr. Katzman stated that an MRI of plaintiff's left shoulder showed a partial tear of the rotator cuff and adjacent bursa effusion. His physical examination showed plaintiff had only 90 degrees in range of motion out of a normal 180 degrees, so surgery was performed. There were two follow-up visits. At the first follow-up visit on April 3, 2011, plaintiff's range of motion in her left shoulder had not changed from 90 degrees. At the second on September 16, 2014, plaintiff's range of motion in her left shoulder was 160 degrees out of a normal 180. No contemporaneous notes of either examination were offered.

Dr. Katzman concluded that plaintiff had sustained a traumatic injury to her shoulder, based on MRI findings among other things, but did not address the degenerative findings reported by Dr. Tice in his study of plaintiff's left shoulder. Dr. Katzman stated that a deficiency of 20 degrees in range of motion in plaintiff's left shoulder (an 11% deficiency) constituted "significant and consequential limitations of use of her left shoulder" which were "permanent" and "serious" and caused by the subject motor vehicle accident.

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Defendants have established their entitlement to summary judgment which plaintiff has not refuted with admissible medical evidence. Defendants met their burden of showing by admissible medical evidence that the plaintiff suffered from sprain injuries to her neck, back and left shoulder which have completely resolved.

Dr. Berkowitz reviewed the MRI studies of plaintiff's neck and left shoulder performed shortly after the subject accident and found them to be unremarkable with no evidence of traumatic injury. Dr. Pick and Dr. Golden found no orthopedic or neurologic disability. The decrease in two planes of cervical spine range of motion were, in Dr. Pick's opinion, entirely due to reduced effort on plaintiff's part. Plaintiff testified that she had no permanent pain in her low back, that she had neck pain only two to three times per week, for which she would take Advil, and that her left shoulder only hurt when she pushed it "over the limit".

Plaintiff returned to work three weeks after the accident, precluding a finding that she was prevented by a medically determined non-permanent injury from performing substantially all her customary activities for 90 out of the 180 days following the accident. Her claim of the additional time missed from work after her left shoulder surgery, which happened more than 180 days after the accident, is not relevant to this section of the statute. Even if it were, plaintiff denied in her bill of particulars the existence of non-permanent injuries suffered as a result of the accident.

Plaintiff's offerings in opposition did not raise an issue of fact. In the emergency room, plaintiff's main complaint was that her neck was stiff. Although there is one passing mention of a back and left shoulder complaint, they were apparently not important enough to require x-rays as the complaints of her neck and chest required. On discharge, her diagnosis was likely muscular strain.

At plaintiff's first evaluation for physical therapy, only three days after the accident, Dr. Lefevre found "decreased" range of motion in plaintiff's neck, but full range of motion in both her shoulders without tenderness. The unaffirmed MRI studies of Dr. Tice, even if admissible, expressed no opinion as to causation and did not disagree with Dr. Berkowitz' opinion that there were no findings to support traumatic injury. On the contrary, Dr. Tice saw hypertrophy and signal changes he found to be compatible with degenerative or reactive etiology in plaintiff's left shoulder study.

There is no evidence other than Dr. Tice's inadmissible findings of herniated and bulging discs in plaintiff's cervical and lumbar spine to support a claim of injury other than strain or whiplash in those areas. No sworn evidence was offered attributing such herniated or bulging discs to accident trauma. Furthermore, Dr. Lefevre's post-surgery evaluation of plaintiff dated April 10, 2012 reported "no muscle or joint pain, no stiffness, no neck/backache/shoulder pain, no swelling or redness in joints, no limitation in motion, no muscle weakness, no muscle cramps, no trouble walking or climbing stairs". As for her neurologic and physiatric condition, there was "no weakness, no numbness, no tingling, no tremor".

Dr. Katzman's Operative Note is silent as to causation, but found the reported labral tear to be so insignificant "[i]t did not need to be fixed". It required no more than debridement ("excision of devitalized tissue" per Stedman's Medical Dictionary, 28th Edition). The reported interstitial tear on the supraspinatus tendon did not need even so much as debridement. Only a bone spur associated with the adjacent inflammation of a bursa (bursitis) needed to be removed along with the bursa to correct any impingement of the rotator cuff. Furthermore, according to Dr. Katzman, all deficiencies found in plaintiff's left shoulders were corrected at the time of

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surgery (see *Fortune*, 272 AD2d 277 [surgery resolved injury therefore not permanent]).

Dr. Katzman's affirmation, the only sworn evidence offered attributing plaintiff's left shoulder operative findings to trauma, is conclusory and tailored to satisfy statutory language. He did not explain the basis for his conclusion that his findings were due to trauma. Even what he reported did not appear to be significant, with the possible exception of the bone spur and inflammation which was corrected at the time of the operation. Dr. Katzman did not at any time offer his examination notes to support his finding of an 11% deficiency in range of motion in plaintiff's left shoulder, nor would such a deficiency, even if established by admissible evidence, be considered more than "mild, minor or slight" (see *Broderick*, 241 AD2d 898).

Plaintiff's explanation for her failure to continue treatment of her alleged injuries is insufficient to raise an issue of fact (see *Pommels,* 4 NY3d 566 [gaps in treatment must be explained by medical affirmations of doctors]). In addition, plaintiff offered no details as to her employment status, salary, expenses or obligations to evaluate that bald statement. The more than three-year gap in treatment from her return to work on April 11, 2012 until October 9, 2014, when she was again examined by Dr. Katzman, is fatal to her claim of a serious permanent injury.

The complaint is, therefore, dismissed in its entirety. Movant is directed to serve a copy of this order with notice of entry on the Clerk of Court who shall enter judgment dismissing the plaintiffs' complaint.

This constitutes the decision and order of the court.

Dated: April 7 , 2015
Bronx, New York

BETTY OWEN STINSON, J. S.C..