

Cheng v Lowe

2019 NY Slip Op 34421(U)

July 11, 2019

Supreme Court, Orange County

Docket Number: Index No. EF001368/18

Judge: Robert A. Onofry

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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

HUENG W. CHENG,

Plaintiff,

- against -

SANJAYA C. LOWE,

Defendant.

-----X To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF001368/18

DECISION AND ORDER

Motion Date: May 1, 2019

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The following papers numbered 1 to 3 were read and considered on a motion by the Defendants, pursuant to CPLR §3212, for summary judgment dismissing the complaint on the ground that the Plaintiff did not suffer a serious injury within the meaning of section 5102 of the Insurance Law.

Notice of Motion - Gaztambide Affirmation- Exhibits A-L 1-3

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is denied.

Introduction

The Plaintiff Hueng W. Cheng alleges that she suffered serious injuries as the result of a motor vehicle accident with the Defendant Sanjaya C. Lowe that occurred on January 12, 2016.

The Defendant moves to dismiss the complaint on the ground that the Plaintiff did not suffer a "serious injury" within the meaning of section 5102 of the Insurance Law.

The motion, notwithstanding it has not been opposed, is denied.

Factual/Procedural Background

In her bill of particulars, the Plaintiff alleged the following injuries:

CERVICAL SPINE

- Straightening of the normal cervical spine curvature.

LUMBAR SPINE

- Radiculopathy lumbar and lumbosacral;
- Spinal stenosis;
- Intervertebral disc order with lumbosacral radiculopathy;
- L3-L4 disc herniation;
- L4-L5 disc herniation;
- Intervertebral disc herniation L3-L4, L4-L5, L5-S1.

LEFT SHOULDER

- Derangement;

KNEES/LEG

- Tear posterior horn medial meniscus;
- Contusion of left knee and right knee;
- Right knee effusion;
- Left knee effusion;
- Sprain of knee/leg;
- Osteoarthritis of right ankle;
- Osteoarthritis of right foot;
- Enteropathy of right foot.

At an examination before trial, the Plaintiff testified as follows.

During the accident, the airbags in her vehicle deployed and her body moved forward (Exhibit "C ", Transcript p.-27). She did not lose consciousness, and was not bleeding as a result of the impact (T-27, 29). She did not speak to the police at the scene of the accident, but complained of body pain when she was in the ambulance (T-31). She was transported to the hospital where they took x-rays of her head and back before discharging her (T-31-34). Two weeks later, she sought medical treatment at Dolson Avenue Medical (T-37 -38). She complained of neck and back pain (T-39). X-rays of her neck, back and knees were taken (T-39). Her treatment consisted of physical therapy, acupuncture and massages (T-40). She also received physical therapy three times a week for about one year (T-41-42). Her symptoms improved with physical therapy (T-42)

The Plaintiff testified that she also sought medical treatment from an orthopedic doctor, Dr. Wen Song Li (T-43-44). He gave her injections in her left knee for pain (T-45-46). Dr. Li found improvement in her knee and her pain diminished (T-47). She also received pain injections in her lower back (T-48). Dr. Li told her she was improving, but she still had pain (T-52).

The Plaintiff testified that she worked as a hostess and a cashier at a restaurant owned by her husband up until the day of the accident(T-7-8). The restaurant closed and moved to a new location, but she did not work at the new location because she had pain (T-8-9). She could also no longer take long walks or lift anything heavy (T-62). She could take only short walks (T-62).

The Defendant, in support of her motion to dismiss the complaint, submits an affirmation from counsel, Elliot Gaztambide.

In relevant part, Gaztambide argues that the evidence reveals that the Plaintiff did not suffer a “serious injury” as a result of the accident at issue. Rather, he asserts, her medical records may be summarized as follows.

After the accident, the Plaintiff was transported to Orange Regional Medical Center (hereinafter “ORMC”) by ambulance. She complained of chest pains. Otherwise, she was found to be alert and without abnormalities, she was not in acute distress, and she had a full range of motion in her neck. She denied having a headache, or neck and back pain. Further, a C-spine CT scan showed no acute evidence of fracture, subluxation or prevertebral soft tissue swelling, and a chest CT scan showed no acute post traumatic sequelae. She was discharged that day.

Gaztambide notes that records from Middletown Physical Therapy and Pain Management indicate that the Plaintiff complained of bilateral shoulder and left knee pain, and was treated with therapeutic exercises. She performed shoulder pulleys for two minutes and a bicycle ergometer for ten minutes, and weight bar exercises and hip adduction/abduction. Her treatment was two to three times a week for four to six weeks.

In addition, he notes, an x-ray of the Plaintiff’s cervical spine conducted at Middletown Medical showed straightening of the normal cervical curvature; that the prevertebral soft tissues were normal; and that there was no evidence of acute fracture, subluxation or dislocation.

The Plaintiff was also treated by David S. Spina, D.C., from ChiroCare, for neck, lower back and mid-back pain. Dr. Spina noted her cervical and lumbar range had improved, and that she was responding well to treatment and experiencing a slight lessening of her symptoms.

Gaztambide notes that an MRI of the Plaintiff’s lumbar spine showed disc degeneration at several levels. Spinal alignment was anatomic, and the vertebral body heights and

intervertebral disc spaces were preserved. There were mild degenerative changes of facet joints. The conus medullaris was normal in signal intensity and configuration at the L1-L2.

An MRI of the Plaintiff's right knee, ordered by Dr. Herbert Garcia on April 2, 2016, revealed small joint effusion and abnormality in the posterior horn of medial meniscus on fat saturated proton density imaging that suggested a tear, but was not definitive of a tear. The menisci were otherwise unremarkable.

An MRI of the Plaintiff's left knee on April 2, 2016, revealed the anterior and posterior cruciate ligaments, the medial and lateral collateral ligaments, and the quadriceps and patellar tendons were all intact. A small joint effusion and an oblique tear were noted in the posterior horn of the medial meniscus extending to infra-articular surface.

An MRI of the Plaintiff's right ankle showed that the osseous structures of the ankle appeared intact with no cortical offset or fracture found. The ligaments and the achilles are intact.

X-rays of the Plaintiff's shoulders on January 15, 2016, revealed no evidence of acute fracture or dislocation. Nor was there evidence of any intrinsic bony or soft tissue abnormality.

Further, the Plaintiff's treating physician, Dr. Wen Song Li, on March 27, 2017, noted that the Plaintiff's pain was controlled well with the injections and that her activities and sleep had improved. Dr. Li found the Plaintiff's cervical range of motion limited due to pain; and that her bilateral lumbar paravertebral had tenderness at midlevel. The bilateral SLT and Patrick test were negative. Her walk gait was normal. Her extremities were documented as to normal range of motion.

Further, Gaztambide notes, the Plaintiff was examined on behalf of the Defendant by Dr. Robert C. Hendler on November 19, 2018. It was Dr. Hendler's expert opinion that the Plaintiff

may have sustained cervical and lumbosacral sprains, but that such injuries had resolved.

Otherwise, Gaztambide notes, Dr. Hendler found no present disability nor any permanent findings causally related to the subject accident.

Gaztambide argues that Dr. Hendler's medical report is *prima facie* evidence that the Plaintiff did not suffer a serious injury from the accident.

In further support of the Defendant's motion, the Defendant submits the affirmed report of Dr. Hendler.

Dr. Hendler notes that he reviewed her medical records and examined the Plaintiff in his office on November 14, 2018.

The Plaintiff presented as a 54 year old female with complaining of problems with her lower back, both knees and neck.

Dr. Hendler notes that, according to the emergency room records from ORMC, the Plaintiff complained of chest wall pain from a possible seat-belt injury. She did not complain about back or neck pain. A precautionary CAT scan of her cervical spine was reported as being a normal study.

The Plaintiff was subsequently referred to Dolson Avenue Medical, which is also known as Physical Medicine & Diagnostic Testing, P.C., ChiroCare and Middletown Physical Therapy & Pain Management. She underwent a significant amount of diagnostic testing, to wit: Dr. Garcia ordered MRI studies of both knees, which were performed on April 2, 2016. The studies revealed a "questionable tear" of the posterior horn of the medial meniscus of the right knee, and an oblique tear in the posterior horn of the medial meniscus of the left knee.

Also, multiple x-ray studies were performed at ChiroCare, including of the cervical spine,

the thoracic spine and the lumbar spine on January 18, 2016.

She was also treated with physical therapy and chiropractic care, and with trigger point injections by Dr. Charles Bagley, a neurologist.

In addition, he notes, the Plaintiff was treated by Dr. Wen Song Li, whom she described as a pain management physician. Dr. Li initially evaluated her on May 9, 2016, at which time she complained of pain in both knees and her lower back from a motor vehicle accident. Dr. Li obtained the following additional diagnostic studies: an X-ray of her lumbar spine on October 24, 2016, which reportedly showed no acute changes; x-rays of her sacrum and coccyx on October 24, 2016, which showed no acute fractures; and an MRI of her lumbar spine on November 21, 2016, which showed multiple disc abnormalities at L3-L4, L4-L5 and L5-S1.

The treatment for the same to date had been physical therapy, chiropractic care and PRP treatment on three (3) occasions.

The Plaintiff was still seeing Dr. Li for pain management.

She was also still seeing Dr. Spina for chiropractic treatment two (2) times per week.

Other than the above, Dr. Hendler asserts, the Plaintiff underwent no other significant orthopedic treatment.

The Plaintiff denied any orthopedic injuries prior to the accident.

Dr. Hendler notes that the Plaintiff's current complaints include fairly frequent aches and pain in her back, with radiation of the pain to her left leg more than her right leg, that goes down to her ankles.

She also reported numbness and paresthesias.

Coughing and sneezing increased her symptoms, while lying down relieved them.

She also complained of intermittent pain in her knees, with the pain in the right knee greater than left, and reported swelling of both knees, but with no locking or buckling.

The Plaintiff also complained of pain in her neck and her anterior chest area, but with no radiation into her upper extremities.

Upon his examination, the Plaintiff appeared alert, well oriented and cooperative.

He found her "range of motion values are in accordance with the AMA Guide to the Evaluation of Permanent Impairment, 68 Ed., and were determined with use of a goniometer, inclinometer and tape measure." Dr. Hendler found:

There was full range of motion of the cervical spine with normal values of flexion to 60 degrees, extension to 60 degrees, right rotation to 80 degrees, left rotation to 80 degrees, right lateral side bending to 45 degrees, and left lateral side bending to 45 degrees. No spasm of the cervical paravertebral musculature or any atrophy in of the muscle groups of the upper extremities was noted. All joints of the upper extremities had a full range of motion. Grip strength was 5+ and equal bilaterally. All motor groups tested in the upper extremities were 5+ and equal bilaterally. Neurologic examination revealed the following: triceps jerk 2+, biceps jerk 1+ and brachial radialis 1+, and all were equal bilaterally. There was a normal sensory examination to pin prick testing. No pain was elicited on palpation of cervical spine area.

Physical examination of the lumbar spine was performed. The following tests were used to determine range of motion. There was full range of motion of the lumbar spine with normal values being 80 degrees flexion, 25 degrees extension, 25 degrees left and right lateral bending, and 45 degrees right and left thoracolumbar rotation. There was no palpable spasm of the lumbar paravertebral musculature. No pain in either sciatic notch was evidenced on palpation. Straight leg raising was found to be negative at 90 degrees bilaterally. Bragard's test was negative bilaterally. Deep tendon reflexes of the lower extremities revealed a normal active and equally symmetrical knee and ankle jerk. Extensor halluc longus muscle had a bilaterally equal strength of 5+. On testing of the muscle groups in the lower extremities, they were found to be 5+ and symmetrical without detection of any atrophy. No deficit to pin prick was elicited on sensory examination of the legs. She walked with a normal gait and stood on tiptoes and heels without difficulty.

Examination was performed of both knees. Range of motion was full with normal values of 0- 140 degrees bilaterally. Neither knee had any joint line tenderness. There was no

effusion present in either knee. There was no ligamentous laxity to valgus or vatus stress testing bilaterally. Anterior and posterior drawer and Lachman's tests were negative bilaterally. There was no atrophy of either thigh or calf musculature. There was a negative McMurray's test bilaterally. There was no pain on palpation of either patella. There was no crepitus on range of motion. She walked with a normal gait. X-rays were taken in my office on 11/14/18 as follows: Lumbar Spine: X-ray findings show mild degenerative joint disease. The disc spaces are fairly well maintained. There is no evidence of any spondylolysis or spondylolisthesis.

Both Knees: X-ray findings show the joint spaces to be well maintained. There is no evidence of any fractures or dislocations. Articular surface of the patella appears to be free of any arthritic or degenerative change bilaterally. There is no evidence of any soft tissue calcifications present in either knee.

In sum, Dr. Hendler asserts, based on his physical examination of the Plaintiff, and his review of her "rather extensive medical records," it was his opinion that, at the time of the accident, the Plaintiff "may have sustained a chest wall contusion, and possibly cervical and lumbosacral sprains, which have resolved."

Otherwise, he avers, physical examination of her neck and back was completely normal, and there were "no positive objective tests, such as a neurologic deficit, asymmetric reflex or decreased sensation in ardermatomal type pattern, that would clinically correlate with any ongoing herniated disc in the neck or low back, or a cervical or lumbar radiaciopathy." Rather, "essentially on a normal physical examination," it was his opinion that there was no disability, and that the Plaintiff will have no permanent findings in her neck or low back that would be causally related to the accident at issue.

Further, he notes, she may have also sustained mild contusions to her knees, in that she described both of her knees as hitting the dashboard of her vehicle at the time of the accident. However, he opines, "this has certainly resolved."

Otherwise, he asserts, physical examination and x-rays at this time were completely

normal and it was his opinion that there was no present disability, and that there will be no permanent findings, as to either knee that would be causally related to the accident.

Rather, it was his opinion that the Plaintiff had fully recovered from any reported orthopedic injuries from the accident at issue.

The Plaintiff did not submit opposition to the motion.

Discussion/Legal Analysis

Under New York's No-Fault regulatory scheme, a party may commence an action to recover non-economic loss only in the event of a "serious injury," which is defined as:

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.

Insurance Law § 5102(d). The legislative intent underlying the No-Fault Law is to weed out frivolous claims and limit recovery to significant injuries. As such, the courts have required objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold.

Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002). Subjective complaints of pain and limitations will not suffice unless supported by competent, admissible medical evidence, based on a recent examination and objective findings, that such subjective complaints of pain and limitation have a medical basis. *Perl v. Meher*, 18 N.Y.3d 208 (2011); *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 (2002); *Oliva v Gross*, 29 AD3d 551 [2nd Dept. 2006].

To prove the extent or degree of physical limitation, an expert's designation of a numeric

percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. 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. *Perl v. Meher*, 18 N.Y.3d 208 (2011). To tests used must have an objective basis. They cannot be simply a recording of the patients' subjective complaints. *Perl v. Meher*, 18 N.Y.3d 208 (2011).

A plaintiff need not necessarily demonstrate evidence of a restricted range of motion contemporaneous to the accident at issue. However, such evidence may be important to proving causation. *Perl v. Meher*, 18 N.Y.3d 208 (2011). Where causation is proved, the severity of the injuries may be measured at a later time. Indeed, injuries can become significantly more or less severe as time passes. *Perl v. Meher*, 18 N.Y.3d 208 (2011). Finally, the burden as to causation is not met with evidence of a preexisting degenerative condition causing plaintiff's alleged injuries. *Perl v. Meher*, 18 N.Y.3d 208 (2011).

An expert who examines a plaintiff for range of motion must set forth the range of motion found as compared to what is normal. *Pupko v. Hassan*, 149 A.D.3d 988 [2nd Dept. 2017].

The two "limitation of use" categories of the statutory definition require some significant, permanent impairment. *Perl v. Meher*, 18 N.Y.3d 208 (2011). Whether a limitation of use or function is "significant" or "consequential" (*i.e.*, important) for purposes of the No-Fault Law relates to medical significance, and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002). Some injuries can be so minor, mild or slight as to be considered insignificant within the meaning of the No-Fault Law. *Toure v.*

Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002).

In general, the mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration. *Catalano v Kopmann*, 73 AD3d 963 [2nd Dept. 2010]; *Stevens v Sampson*, 72 AD3d 793 [2nd Dept. 2010].

A defendant moving for summary judgment must demonstrate, *prima facie*, that the plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345; *Paul v. Weatherwax*, 146 A.D.3d 792 [2nd Dept. 2017].

Here, this burden was not met.

In so concluding, the Court is compelled to note that in “threshold motions”, the failure of the Plaintiff to respond or oppose the motion is typically viewed as a concession, either explicit or implicit, that a “serious injury” does not exist. However, that is not the standard.

Since the granting of a motion for summary judgment is a drastic remedy and deprives the litigant of his or her day in court, it should only be granted in instances where there is no doubt as to the absence of material triable issues of fact. *Kolivas v. Kirchoff*, 14 A.D.3d 493 [2nd Dept. 2005]; *Castlepoint Insurance Company v. Command Security Corporation*, 144 A.D.3d 731 [2nd Dept. 2016]. The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *Stukas v. Streiter*, 83 A.D.3d 18 [2nd Dept. 2011]. Furthermore, in assessing whether material issues of fact exist, the record must be viewed in the light most favorable to the non-moving party. *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335 (2011); *Stukas v. Streiter, supra*; *Pearson*.

v. *Dix McBride, LLC*, 63 A.D.3d 895 [2nd Dept. 2009].

The Plaintiff's medical records reveal that she complained of pain in her back and of various herniations, and that she was found to have limited ranges of motion. Further, as noted by Dr. Hendler, prior testing revealed "multiple disc abnormalities at L3-L4, L4-L5, and L5-S1."

Here, Dr. Hendler did not clarify the nature of such abnormalities, or opine either that such abnormalities did not constitute serious injuries within the meaning of the no-fault law, or were not caused by the subject accident.

Moreover, to the extent he did so opine, based on his conclusion that the Plaintiff had a normal range of motion, Dr. Hendler did not set forth his range-of-motion findings as compared to what is normal. *Paul v. Weatherwax*, 146 A.D.3d 792 [2nd Dept. 2017]; *Mirochnik v. Ostrovskiy*, 35 A.D.3d 413 [2nd Dept. 2006]. Thus, such an opinion was merely conclusory.

In addition, Dr. Hendler also noted that prior MRI studies revealed a "questionable tear" of the posterior horn of the medial meniscus of the right knee, and an oblique tear in the posterior horn of the medial meniscus of the left knee, but did not expressly opine either that such tears did not in fact exist, or that neither constituted a serious injury within the meaning of the no-fault law, or that neither was caused by the subject accident. Furthermore, given such, he failed to explain how he concluded that the Plaintiff had sustained no more than "mild contusions to her knees" which had "certainly resolved."

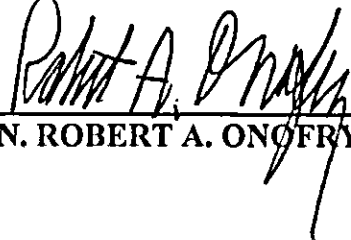
Finally, the Court notes, the Plaintiff testified that she was essentially unable to get out of bed for the first 90 days after the accident (Exhibit C, p. 9) and was unable to work. This potential category of serious injury was never addressed by Dr. Hendler or in the remainder of the Defendant's moving papers.

Accordingly, and for the reasons cited herein, it is hereby,
 ORDERED, that the motion is denied; and it is further,
 ORDERED that the parties are directed to appear for a pre-trial conference on
 Wednesday, August 14, 2019, at 9:15 a.m., at the Orange County Surrogate's Court House, 30
 Park Place, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: July 11, 2019
 Goshen, New York

ENTER


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