

**Salhut v Fischer**

2020 NY Slip Op 33472(U)

October 21, 2020

Supreme Court, New York County

Docket Number: 153581/2016

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.



Defendant submitted a report from Dr. Sean Lager, the independent medical examiner, who observed the plaintiff on December 27, 2017 and opined that there was no restriction in her range of motion of her cervical spine. Dr. Lager determined that the plaintiff's cervical sprain/strain and left knee sprain/strain were resolved. Dr. Lager also opined that the plaintiff's MRI of the cervical spine was essentially negative and only showed loss of lordosis, and the MRI of plaintiff's left knee was negative. In addition, the defendant argues that plaintiff was only confined to her bed for two to three days after the accident and that there were no activities that she could not do because of the accident.

In opposition, plaintiff proffers that the medical reports and the opinions of plaintiff's and defendants' doctors differ and thus, raise issues of fact. Plaintiff contends that she had never injured her neck or left knee in the past. Plaintiff was physically examined by Dr. Chee Gap Kim and started receiving treatment at the therapy center, which consisted of massages, electrical stimulation and exercises, for one year. On January 5, 2016, Dr. Kim conducted a range of motion test on plaintiff's cervical spine, which showed percentages of loss in range of motion. On February 18, 2020, Dr. Benjamin Chang examined the plaintiff-infant and conducted range of motion tests. Dr. Chang's range of motion tests indicated a loss of range of motion for both plaintiff's cervical spine and left knee. In his report, Dr. Chang opined that, to a reasonable degree of medical certainty, that the plaintiff's injuries to her cervical spine and left knee are causally related to the accident on December 19, 2015. Dr. Chang concluded in his report that the injuries resulted in a reduction in the normal range of motion and that the plaintiff-infant's injuries are permanent. In addition, Dr. Chang indicates that because of plaintiff's current conditions, she has difficulty performing her usual and customary daily activities without experiencing pain.

Defendants argue in their reply, *inter alia*, that the records of Dr. Chee Gap Kim are unsigned, unsworn and not in admissible form and that plaintiff's counsel offers no explanation for same. It is well settled that in personal injury actions arising out of a motor vehicle accident, an unsworn doctor's report was not proof in admissible form that could defeat defendant's motion for summary judgment on grounds that plaintiff did not sustain serious injury within the meaning of Insurance Law. *McKinney's Insurance Law §5102(d)*; see also, *Fernandez v. Shields*, 223 A.D.2d 666, 637 N.Y.S.2d 185 (1996). Here, however, plaintiff also submits Dr. Chang's report, which still contradicts the reports of defendant's IME doctor, thus raising issues of fact.

“In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility.” *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep't 1992), citing, *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dep't 1990). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. See, *Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979).

Therefore, the motion by plaintiff for summary judgment on the counterclaim and the motion by defendant for summary judgment are both denied because there are issues of fact. Here, there are conflicting medical reports pertaining to the loss in range of motion as to the plaintiff's cervical spine and left knee. There are also issues as to the permanency of plaintiff's injuries.

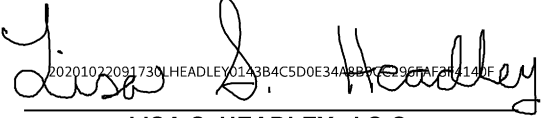
Accordingly, it is

**ORDERED** that the motion for summary judgment by plaintiff on the counterclaim and the motion for summary judgment by defendant to dismiss the complaint on the ground that the plaintiff's claimed injuries do not satisfy the “serious injury” threshold under *New York Insurance Law §5102(d)* are both denied; and it is further

**ORDERED** that any relief sought not expressly addressed herein has nonetheless been considered and is hereby expressly denied; and it is further;

**ORDERED** that within 30 days of entry, defendants shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.

<u>10/21/2020</u> <b>DATE</b>	 <small>20201022091730LHEADLEY0143B4C5D0E34A8B7C3967AF24140F</small> <b>LISA S. HEADLEY, J.S.C.</b>	
<b>CHECK ONE:</b>  <b>APPLICATION:</b>  <b>CHECK IF APPROPRIATE:</b>	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> DENIED  <input type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER  <input type="checkbox"/> REFERENCE