

Stubbs v Bettman

2020 NY Slip Op 34637(U)

April 10, 2020

Supreme Court, Orange County

Docket Number: Index No. EF008348-2017

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
ANECHA STUBBS,
Plaintiff,

DECISION AND ORDER

INDEX NO.: EF008348-2017
Motion Date: 2/13/2020
Sequence No. 1

-against-

STEVEN BETTMAN and PATRICIA BETTMAN,

Defendants.

-----X
SCIORTINO, J.

The following papers numbered 1 to 32 were considered in connection with plaintiff's application for summary judgment on the issue of liability and the issue that plaintiff's injuries qualify as serious injuries:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Campbell)/Exhibits A-K	1 - 18
Affirmation in Opposition (McCusker)/Exhibits A-L	19 - 31
Reply Affirmation (Campbell)	32

Plaintiffs' motion is granted in part, and denied in part.

Background and Procedural History

This personal injury action arises out of a motor vehicle accident that took place on November 19, 2015 on the westbound ramp to East Main Street in the Village of Elmsford, New York. Plaintiffs commenced this action by filing a Summons and Complaint (Exhibit B to moving papers) on or about October 17, 2017. Defendants served a Verified Answer with Affirmative Defenses, together with discovery demands, on or about October 25, 2017. (Exhibit

C) Note of Issue was filed on November 5, 2019. (Exhibit G)

On or about December 18, 2017, plaintiffs served a Verified Bill of Particulars and authorizations. (Exhibit D) The Bill of Particulars alleged several injuries, including but not limited to: cervical spine sprain and/or strain; left cervical radiculopathy; compression fracture of the left humeral head; tear of the anterior, superior, inferior and posterior left labrum; partial tear of the left supraspinatus tendon; partial tear of the left subscapularis tendon; left shoulder rotator cuff tear; impingement syndrome left shoulder; sprain left shoulder; aggravation, activation and/or exacerbation of a prior left shoulder injury; posterior inferior right labral tear; right hip joint effusion.

All injuries were asserted to be permanent, progressive and arthritic-producing.

The Examination Before Trial of plaintiff was held on June 19, 2019 (Exhibit E).

Plaintiff's Deposition Testimony (Exhibit E)

On November 19, 2015, plaintiff had just exited off of Route 287 and was on the entrance ramp to turn right onto East Main Street (Exhibit E). Plaintiff testified that her vehicle was stopped at a stop sign for approximately 10 seconds when her vehicle was impacted in the rear by a vehicle operated by defendant Steven Bettman and owned by defendant Patricia Bettman. Plaintiff did not see defendant's vehicle behind her before feeling the impact and being thrown forward. Plaintiff felt her left shoulder hit the drivers' door and her right hip hit the middle console.

After the accident, plaintiff experienced pain in her left shoulder and right hip. She sought medical care at White Plains Hospital, was treated and released. Plaintiff then sought treatment with Dr. Gulfo on December 3, 2015, who referred her for MRI testing and physical therapy. He advised her to remain out of work. Dr. Gulfo referred plaintiff to Dr. Dassa, who

performed left shoulder surgery in March of 2016. Plaintiff remained out of work for nearly one year.

With respect to prior injuries, plaintiff testified that, prior to the accident, she suffered a left shoulder injury sometime in 2010 at work. That injury caused her to remain out of work for one week. She also suffered a left shoulder strain sometime between 2010 and 2015. Plaintiff testified that, at the time of the accident, she was not experiencing any pain or difficulty with her left shoulder.

Plaintiff also testified that she suffered a right hip injury due to the accident. She underwent physical therapy and was given a corticosteroid injection for pain. (Exhibit E)

Defendant Steven Bettman's Deposition Testimony (Exhibit F)

Defendant Steven Bettman testified that, prior to the accident, he was at a complete stop behind plaintiff's stopped car for approximately 15 seconds. While they were stopped, there was "not more than three feet" between the two vehicles (Exhibit F). Thinking plaintiff's vehicle was going to inch forward, defendant Steven Bettman accelerated and came into contact with plaintiff's vehicle. He further testified that nothing blocked him from observing that her vehicle was stopped in front of him prior to the accident, and that her red brake lights were lit.

Motion for Summary Judgment

Plaintiff moves for summary judgment on the issue of liability and on the threshold issue that plaintiff's injuries qualify as a serious personal injury pursuant to Insurance Law §5102.

Plaintiff points out that a rear-end collision establishes a *prima facie* case of negligence on the part of defendant. Vehicle & Traffic Law requires a driver to maintain a safe distance between his vehicle and the vehicle in front of him. McKinney's Veh. & Traffic Law §1129. Plaintiff counsel refers to Bettman's admission that, at the time of the impact, plaintiff's vehicle

was stopped. Counsel further argues that defendant has failed to offer a non-negligent explanation and, therefore, has failed to raise a triable issue of fact.

Plaintiff's also seeks summary judgment on the issue of damages, as a matter of law, arguing that plaintiff's injuries meet the serious injury threshold pursuant to Insurance Law §5102(d).

Insurance Law §5102(d) defines a "serious injury," in relevant part:

A "serious injury" is a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss 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.

In support of her motion, plaintiff offers MRI reports of plaintiff's left shoulder and right hip, the narrative report and certified records of Dr. Gulfo (Exhibits I and J), and the affirmed office records of Dr. Dassa (Exhibit K).

Plaintiff argues that the objective medical evidence demonstrates that she suffered multiple qualifying injuries as a result of the accident, leaving her with substantial limitations in ranges of motion in her shoulder and hip.

Dr. Gulfo

Dr. Vincent J. Gulfo, MD., in his report, states that he based his findings on various physical evaluations he has conducted; objective testing, including MRI films; and his review of the plaintiff's records of her clinical course of treatment and history.

Dr. Gulfo noted that plaintiff suffered a left shoulder injury on October 22, 2010 while working, as well as a left shoulder strain on January 17, 2014. Dr. Gulfo opined that “neither the injury on 10/22/10 nor the injury on 1/16/14 contributed in any way to the decreased functional use of her left non-dominant shoulder and the decreased functional use of her left shoulder is solely due to the injuries sustained in the motor vehicle accident that occurred on 11/19/15.” (Exhibit I) On December 3, 2015, Dr. Gulfo concluded that plaintiff remained totally disabled and unable to work due to injuries sustained in the motor vehicle accident that occurred on November 19, 2015. Dr. Gulfo maintained this conclusion in subsequent reassessments until October 27, 2016. On that date, he indicated that plaintiff “may return to work as a nurse in a full duty capacity with no restrictions as of November 1, 2016.” (Exhibit J)

Dr. Gulfo opined that plaintiff sustained a compression fracture of the humeral head, labral tear and rotator cuff tear of the left shoulder as a result of the accident. Dr. Gulfo further opined that plaintiff suffered a right hip injury with labral tear, with continued painful and restricted range of motion despite articular injection and extensive physical therapy, with gait abnormality (Exhibit I).

Dr. Gulfo found that plaintiff has sustained a permanent consequential limitation of use of her left shoulder, finding she has sustained a 40% decreased reduction in functional use of her left shoulder. He also found significant loss of use of her right hip, with a 30% decreased reduction in functional use of her right hip.

Dr. Dassa

Plaintiff also annexes the affirmed office records of Board Certified Orthopedic Surgeon Gabriel L. Dassa, DO, FAAOS (Exhibit K). Dr. Dassa’s report appears to be based on physical examination of the plaintiff. According to the initial orthopaedic evaluation dated February 23,

2016, Dr. Dassa notes the shoulder MRI taken on February 4, 2016, which documented impingement syndrome with anterior labral tear with soft tissue Bankart lesion and a compression fracture of the humeral head with a partial tear of the rotator cuff. Dr. Dassa's impression was that plaintiff suffered from left shoulder impingement syndrome with a tear of the labrum and Bankart lesion, left shoulder partial tear of the rotator cuff, left shoulder compression fracture of the humeral head. The report notes that "the symptoms and clinical findings are consistent with the above diagnosis and were directly caused by the accident." Dr. Dassa recommended continued physical therapy, continued pain medication, and left shoulder arthroscopic surgery and partial repair of the labrum and rotator cuff.

Arthroscopic surgery was performed on March 9, 2016. Dr. Dassa met with plaintiff for a follow-up orthopaedic evaluation on March 16, 2016. The follow-up evaluation report indicates "a limited range of motion to the left shoulder which is expected post-surgical management."

Defendant's Opposition

In opposition, defendants argue that (1) plaintiffs have failed to establish a "serious injury"; (2) a question of fact exists on the issue of the causal relationship between the subject accident and Dr. Dassa's left shoulder arthroscopy; and (3) a question of fact exists on the issue of the causal relationship between the subject accident and Dr. Gulfo's writing "total disability" pronouncements for nearly a year. Defendant's opposition does not address the issue of liability.

Defendants argue that plaintiff's own testimony proves that she was not, as a result of the accident, prevented from performing "substantially all" of her regular daily activities for at least 90 of the 180 days immediately following the occurrence. Defendants further argue plaintiff's testimony regarding the "couple of months" she claims she needed assistance doing laundry,

vacuuming, and sweeping, falls short of a “serious injury.”

Defendants argue that the medical evidence upon which plaintiff relies to substantiate a “series injury” upon a “90/180 day temporary impairment” claim must be credible and objective. A physician simply telling one to stay home from work is not sufficient where it cannot be determined if the direction was given in response to an objective medical problem related to the accident or simply in response to plaintiff’s complaints of pain. Dr. Gulfo held plaintiff out of work for nearly a year upon nothing more than her subjective complaints of pain; subjectively performed ranges of motion; hearsay, and, defendant argues, incorrect interpretation by the radiologist who originally interpreted plaintiff’s left shoulder and right hip MRI images.

Dr. Pfeffer

Defendants annex the affirmed reports of Board Certified Radiologist, Sondra Pfeffer, MD, detailing the professional conclusions and opinions she drew upon review of the plaintiff’s left shoulder and right hip MRI images. (Exhibit K to Opposition) Dr. Pfeffer opines, “Although the initial interpreting radiologist reported a compression fracture of the humeral head, there is clearly no evidence of such on review of the submitted left shoulder MRI examination. What the radiologist has characterized as a humeral head ‘fracture’ is in reality humeral head fibrocystic degeneration (the latter unrelated to the subject accident.)” Dr. Pfeffer also points out that there was no left shoulder fracture on the X-ray performed at White Plains Hospital on November 21, 2015, two days following the accident. Dr. Pfeffer opines that the other anatomic abnormalities visible on the images are all pre-existing, degenerative conditions, and the study “fails to reveal any evidence of conditions that might result from trauma,” such as displaced labral fragment, pathologic glenohumeral joint effusion, fracture, dislocation, bone bruising or subcutaneous soft tissue contusion.

Dr. Pfeffer further opines that, although the originally-reading radiologist reported the presence of a soft-tissue Bankart lesion, Dr. Dassa's operative report makes no mention of any Bankart lesion, and that the Type I SLAP tear reportedly seen by Dr. Dassa during arthroscopy is "conventionally considered to represent a fraying degenerative-type tear usually attributable to chronic over-use as opposed to acute trauma."

With respect to plaintiff's right hip, Dr. Pfeffer found the study "unremarkable, allowing for the possibility of synovitis (a nonspecific inflammatory process of indeterminate age/etiology based solely on MRI criteria). Specifically, there is no evidence for fracture, dislocation, bone bruising, acetabular labral tearing, tendon/ligament rupture, or subcutaneous soft tissue contusion." Dr. Pfeffer notes that, although the initial interpreting radiologist reported tearing of the posterior inferior acetabular labrum, this finding is not confirmed on review of the submitted right hip MRI examination.

Dr. Hendler

Defendants also annex the affirmed report of Board Certified orthopedic surgeon, Robert C. Hendler, MD, memorializing his review of the plaintiff's medical records; his examination of the plaintiff on September 17, 2019, and the professional conclusions and opinions he drew in consideration of the same. (Exhibit L)

Dr. Hendler suggests his orthopedic examination of the plaintiff produced normal findings. Dr. Hendler noted quantified active and passive ranges of motion throughout the cervical spine, left shoulder and right hip were "full and normal." Although plaintiff complained of pain on end range left shoulder motion, there was no atrophy of the shoulder girdle musculature; no palpable trigger zones, and no crepitus in either shoulder. Hawkins, Neer and O'Brien's tests were all negative, or normally, bilaterally, suggesting no evidence of injury or

impairment to substantiate plaintiff's subjective complaints.

Upon his review of plaintiff's medical records, his physical examination of plaintiff, x-rays taken in his office during her examination, and a history imparted to him by the plaintiff, Dr. Hendler concluded that plaintiff "may have sustained a mild contusion of the left shoulder at the time of the accident of record, which was resolved." Dr. Hendler further concluded that, plaintiff did not sustain "any significant injury to her left shoulder at the time of the accident of record to have necessitated the surgical procedure performed by Dr. Dassa... it also appears that she had a pre-existing problem with the left shoulder, which would account for the finding seen on the MRI." (Exhibit L)

Dr. Hendler also opines that plaintiff did not sustain any injury to the right hip at the time of November 2015 accident. Dr. Hendler notes that "although diagnostic testing did show a labral tear, there was certainly no mechanism of injury from the accident of record to have caused a labral tear." Dr. Hendler further noted that, based on a normal physical examination, there is no present disability, and plaintiff will have no permanent findings in her right hip causally related to the accident of record.

Dr. Hendler concludes that plaintiff may have sustained a mild cervical sprain in the subject accident. He also notes that, other than a cervical CT scan taken as part of plaintiff's emergency room visit two days after the accident, which was reported as showing no acute trauma, no other diagnostic testing or treatment was rendered to her cervical spine. (Exhibit L)

Reply

In reply, plaintiff's counsel notes that defendants concede liability for the underlying accident. Plaintiff's counsel also argues that the defense has failed to raise a factual issue with respect to the plaintiff's claim that she suffered an injury or impairment of a non-permanent

nature for 90 out of 180 days following the accident, due to the accident.

Plaintiff's counsel argues that defendants have failed to refute plaintiff's claim of having suffered a fracture as a result of the accident. Plaintiff argues that Drs. Gulfa and Dassa, as well as the radiologist who reviewed the MRI films, all noted a fracture of the humeral head.

Plaintiff's counsel argues Dr. Hendler's report offers no competent commentary on the issue of a fracture, as plaintiff claims that Dr. Hendler indicated that he reviewed the "MRI reports" only, and did not review the films himself.

Plaintiff's counsel also argues that this Court should reject Dr. Pfeffer's opinions, as they are improperly based. Plaintiff argues that Dr. Pfeffer's report indicates that she solely conducted a review of the MRI films, whereas her report makes reference to information, plaintiff argues, which was obtained from other records.

The Court has fully considered the submissions.

Discussion

For the reasons which follow, plaintiff's motion is granted in part and denied in part.

Summary judgment is a drastic remedy, and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996])

In order to prevail on her motion for summary judgment as to serious injury, plaintiff must present objective test results or other objectively qualified medical data offered to support her contentions. Conclusions, even of a treating doctor, that are unsupported by acceptable objective proof are insufficient to warrant an award of summary judgment on the “serious injury” threshold question. (*Espinal v. Galacia*, 290 AD2d 528 [2d Dep’t 2002]). Plaintiff has submitted the affirmed statements of Dr. Gulfo and Dr. Dassa in support of her application.

By plaintiff’s reliance on the affirmed reports of Drs. Gulfo and Dassa, both of which support the causal relationship between the hip and shoulder injuries and the accident, plaintiff initially met her *prima facie* burden of showing that she sustained a serious injury within the meaning of Insurance Law §5102(d) as a result of the accident. (See, *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002]; *Gaddy v. Eycler*, 79 NY 2d 955 [1992]) In light of plaintiff’s showing, the burden shifted to defendants to demonstrate, by admissible evidence, that her injuries failed to meet the “serious injury” threshold of Insurance Law §5012(d).

The findings of Drs. Pfeffer and Hendler and the findings of Drs. Gulfo and Dassa are in conflict regarding the causation of plaintiff’s injuries and the significance of limitation and the permanence of those limitations, if any. Each expert has presented results of objective testing in support of his or her conclusions; and none rely on mere conclusory observations unsupported by data. (Compare, *Paradizov v. Doan*, 46 AD3d 787 [2d Dep’t 2007]) (where experts’ opinions were not based on objective, evidentiary bases, they were insufficient to sustain summary judgment)

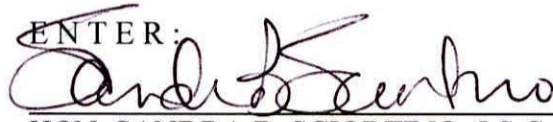
Conflicting expert opinions generally raise triable issues of fact. (*Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dep’t 2003]) In the instant matter, the question of the actual injuries

sustained and the causal relationship between the accident and plaintiff's injuries is for determination by the trier of fact. Accordingly, plaintiff's motion for summary judgment on the threshold issue of serious injury must be denied.

On the basis of the foregoing, plaintiffs' application for partial summary judgment on the issue of liability is granted and the application on the issue of serious injury denied.

This decision shall constitute the order of the Court.

Dated: April 10, 2020
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*