

**Pinnock v All County Ready Mix Corp.**

2012 NY Slip Op 32640(U)

October 15, 2012

Sup Ct, Queens County

Docket Number: 10638/2010

Judge: Robert J. McDonald

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time of the accident, the Pinnock vehicle, operated by Vinette Pinnock was struck by the cement truck owned by All Country Ready Mix and driven by defendant ONEIL J. CEPHAS. Plaintiff Valda Fuller was a front seat passenger on the Pinnock vehicle. Each plaintiff allegedly sustained physical injuries as a result of the accident.

The plaintiffs commenced the within action by service of a copy of a summons and complaint on April 28, 2010. Issue was joined by service of the defendants' answer with a counterclaim against Vinette Pinnock dated November 1, 2010. After a preliminary conference and compliance conference the plaintiff served a note of issue on October 28, 2011. On January 5, 2012, the parties stipulated that the action would be stayed pending completion of discovery and that motions for summary judgment could be made no later than 60 days after the expiration of the stay. This matter is now scheduled to appear on the calendar of the Trial Scheduling Part on October 23, 2012.

In her verified Bill of Particulars, Vinette Pinnock states that as a result of the accident she sustained, inter alia, a partial tear of the right shoulder, disc herniations at L3-4, L4-5, and disc bulges at C4-5, C5-6, C3-4, C6-7.

Plaintiff Valda Fuller, alleges in her bill of particulars that she sustained, inter alia, a torn posterior glenoid of the left shoulder and disc herniations at L4-5, L5-S1, C3-4, C4-5, C5-6 and C6-7.

The plaintiffs contend that they each sustained a serious injury as defined in Insurance Law § 5102(d) in that they sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute their 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.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing each plaintiff's complaint on the ground that the plaintiffs did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit an affirmation from counsel, William B. Stock, Esq; a copy of the pleadings; plaintiffs' verified bill of particulars; the affirmed medical reports of Dr. Marianna Golden a neurologist who examined both Vinette Pinnock and Valda Fuller; Dr. Thomas Nipper, an orthopedist who examined Vinette Pinnock and Valda Fuller; and Dr. Jessica Berkowitz, a radiologist, who reviewed the MRI studies of both Vinette Pinnock and Valda Fuller. Counsel also submits copies of the transcript of each plaintiff's examination before trial.

Dr. Marianna Golden, a board certified neurologist, examined plaintiff Vinette Pinnock on December 7, 2011. Ms. Pinnock told the doctor that she had initial complaints of pain in her mid-back, lower back, right shoulder right hand, right knee, left knee and right foot. At the time of the examination, the plaintiff still had complaints of pain in her lower back, right hand, right hip, right knee, right foot and left foot. She told DR. Golden that she missed six days of work as a result of the accident. As part of her physical examination, Dr. Golden performed objective and comparative range of motion testing. Dr. Golden found were no limitations of range of motion in the plaintiff's cervical spine and thoracolumbar spine. She found that the neurologic examination was normal and there was no objective evidence of neurological disability.

Ms. Pinnock was also examined by defendant's retained board certified independent orthopedist Dr. Thomas P. Nipper. Ms Pinnock presented with pain in her mid-back, lower back, right shoulder, right hip, right knee, right hand, right foot and left foot. Dr. Nipper performed objective and comparative range of motion testing and found that there were no significant limitations of range of motion of the cervical spine, thoracic spine, right shoulder, left shoulder, right wrist/ hand, right hip, right knee, left knee, right ankle/foot and left ankle/foot. However, he did find a 20 per cent limitation of range of motion of the plaintiff's lumbar spine. He states in conclusion that there was no objective evidence of orthopedic disability, no permanence and no residuals. He states that although there were decreased ranges of motion of the lower back, right shoulder and right knee, all of the objective clinical findings were normal. He states that there was a causal relationship between the injuries sustained and the subject accident.

The radiological reports of Dr. Berkowitz indicate that the Ms. Pinnock had a disc herniation at C3-4, and a disc bulge at C4-5. She also found disc desiccation at L5-S1. She states that

the findings are chronic and degenerative in origin and there is no causal relationship between the findings on the MRIs and the plaintiff's alleged accident.

Ms. Pinnock, age 51, testified at her examination before trial on October 21, 2011 that at the time of the accident she was employed as a nursing assistant at Terrace Health Care Center in the Bronx. She had just picked up her sister, Valda Fuller, at JFK Airport and was taking her to Brooklyn. She was traveling north on North Conduit right in front of Aqueduct Racetrack. When asked how the accident occurred, she stated that she was in the right lane proceeding towards Brooklyn when her vehicle was struck by a cement truck which came from the middle lane. Her vehicle was caused to spin around and she ended up in the opposite lane of traffic facing the traffic coming towards her. She stated that as a result of the impact, her knees hit the dashboard. She declined to be taken to the hospital by ambulance. Subsequently, she went to the emergency room at Brookdale Hospital where she had complaints of pain to her back, shoulder, knees and thumb. She was treated and released the same day. The day after being seen at the hospital, she was treated by Dr. Garcia who began her on a course of physical therapy treatments. Ms. Pinnock treated with Dr. Garcia for four months at the rate of three times per week. She stopped treating due to her no fault insurance being terminated. However, she treated for another three months in 2008. She also went for physical therapy again for twelve weeks in 2011, the cost of which was paid by her union insurance. She stated that as a result of the 2007 accident she lost approximately six weeks from work. She was confined to her bed for two or three days and confined home for about six weeks. Ms. Pinnock testified that she was involved in one prior motor vehicle accident in 2000 in which she injured her left knee and her back. After that accident she also underwent a course of physical therapy with Dr. Garcia.

Valda Fuller, age 48 testified at her examination before trial, taken on October 21, 2011, that she also works as a home health care worker. On the day of the accident, the plaintiff a resident of Jamaica, landed at JFK to begin a vacation in New York. She was seated in the front passenger seat wearing a seat belt. She said that as they were driving to Brooklyn she observed a cement truck which then impacted their vehicle on the side rear driver side of the vehicle. The impact caused the vehicle to spin out of control. She hit both shoulders and her right knee on the interior of the vehicle. Ms. Fuller testified that she also injured her back. She told the ambulance workers that she injured her shoulders, knee and back. She declined transportation in the

ambulance but later took a taxi to the emergency room at Brookdale Hospital. She told the hospital personnel that she injured her shoulders, right knee and back. She was released from the emergency room the same day and then the next morning went for an examination by Dr. Garcia. Plaintiff saw him for physical therapy four times a week for three or four months after which time she had no further treatment. She was referred for MRIs of her back and shoulders. She also saw orthopedist Dr. Dayan on two occasions. He told her that she had torn a ligament in her knee. After 2007 she went to the emergency room at North Shore Hospital for pain in her arm. In 2009 she stated that she experienced pain in her arm and went to the emergency room at Riverview Hospital in Red Bank New Jersey. She was given cortisone but she was not admitted to the hospital at that time. In November 2010 she began physical therapy with a chiropractor in New Jersey for pain in her leg and back. She continued for three months at that time. She testified that as a result of the accident she was confined to her home and her bed for two weeks.

Valda Fuller was also examined by Dr. Golden on December 7, 2011. Ms. Fuller told Dr. Golden that as a result of the accident she injured her lower back, left shoulder, right hip and right knee. Dr. Golden's range of motion testing revealed that there were no limitations of range of motion of the plaintiff's cervical spine and thoracic/lumbar spine. Dr. Golden states that the neurologic examination was normal. However, she states that "although the motor examination for the left upper extremity was decreased, this is attributed to poor effort due to left shoulder pain and all objective clinical examination findings were within normal limits. Dr. Golden states that Ms. Fuller's injuries are causally related to the accident of November 5, 2007.

Ms. Fuller was also examined on December 7, 2011 by orthopedist Dr. Nipper who was retained by the defendants. He states that she presented with pain in her lower back, left shoulder, right hip and right knee. His range of motion testing indicated that this plaintiff had no limitations of range of motion of the cervical spine, thoracic spine, left shoulder, right elbow, right hip and right knee. She did display limitations of range of motion of the lumbar spine. In this regard, Dr. Nipper states that "although there was decreased range of motion in the lower back, objective clinical examination findings were normal including straight leg raise." He concludes that there is no objective evidence of an orthopedic disability. He states that there will be no permanence or residuals and the prognosis is good.

Radiologist, Dr. Berkowitz reviewed the MRI studies of Ms. Fuller's cervical spine and lumbar spine. She found diffuse disc bulges at C4-5 and C5-6 and L5-S1 which she stated were chronic and degenerative and not related to the accident in question.

Defendants' counsel contends that the medical reports of Drs. Nipper, Golden and Berkowitz as well as the transcripts of the examinations before trial of each plaintiff are sufficient to establish, prima facie, that each plaintiff has not sustained a permanent consequential limitation or 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 nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute their 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.

Counsel for Ms. Pinnock on the counterclaim, Jaime Barone, Esq. submits a cross-motion for an order granting summary judgment to Ms. Pinnock against Ms. Fuller on the ground that Ms. Fuller has not established that she sustained a serious injury. Counsel states that she adopts the arguments and exhibits submitted by defendants in their motion for summary judgment.

In opposition, plaintiff's attorney, Cateline S. Mark, Esq., submits her own affirmation as well as the medical reports of Dr. Garcia, orthopedic surgeon, Dr. Dayan, radiologist, Dr. Parnes and neurologist, Dr. Macias, as well as the affidavits of plaintiffs Pinnock and Fuller.

Dr. Garcia, examined the plaintiffs both contemporaneously to the accident on November 6, 2007 and in a recent examination on March 19, 2012 (Pinnock) and March 24, 2012 (Fuller). Dr. Garcia states that he was aware of Ms. Pinnock's prior accidents. In all of his examinations he found that each plaintiff had significant limitations of range of motion of the cervical spine, lumbar spine and shoulders. He states that the injuries to each plaintiff are significant and permanent in nature.

Dr. Parnes found disc herniations in the MRI studies of Ms. Pinnock at L3-4 and L4-5 and disc bulges at C3-4 and C6-C7. Dr. Parnes found that Ms. Fuller sustained a tear of the glenoid of the left shoulder and disc herniations at L4-5 and L5-S1, as well as C3-4, C4-5, C5-6 and C5-7.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, it is defendant's initial obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

As stated above, the affirmed medical report of the defendants examining orthopedist, Dr. Nipper, relied on by the defendants, clearly set forth that upon his examination of each plaintiff he found significant limitation in the range of motion of each plaintiff's lumbar spine. Therefore, Dr. Nipper's reports are insufficient to eliminate all triable issues of fact with respect to the plaintiffs' injuries (see Katanov v County of Nassau, 91 AD3d 723 [2d Dept. 2012]; Artis v Lucas, 84 AD3d 845 [2d Dept. 2011]; Borras v Lewis, 79 AD3d 1084 [2d Dept. 2010]; Smith v Hartman, 73 AD3d 736 [2d Dept. 2010]; Leopold v New York City Tr. Auth., 72 AD3d 906 [2d Dept. 2020]; Catalan v G & A Processing, Inc., 71 AD3d 1071[2d Dept. 2010]; Croyle v Monroe Woodbury Cent. School Dist., 71 AD3d 944 [2d Dept. 2010]; Kim v Orourke, 70 AD3d 995 [2d Dept. 2010]; Kjono v Fenning, 69 AD3d 581[2d Dept. 2010]; Loor v Lozado, 66 AD3d 847 [2d Dept. 2009]). With respect to the limitations of range of motion of the lumbar spine, Dr. Nipper failed to explain or substantiate, with any objective medical evidence, the basis for his conclusions that all of the objective clinical findings with respect to each plaintiff were normal (see Iannello v Vazquez, 78 AD3d 1121 [2d Dept. 2010]; Granovskiy v Zarbaliyev, 78 AD3d 656 [2d Dept. 2010]; Quiceno v Mendoza, 72 AD3d 669 [2d Dept. 2010]; Bengaly v Singh, 68 AD3d 1030 [2d Dept. 2009]; Moriera v Durango, 65 AD3d 1024 [2d Dept. 2009]). Thus, the defendants failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the



meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851[1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

In any event, this Court finds that the plaintiffs raised triable issues of fact by submitting the affirmed medical reports of plaintiffs' treating orthopedist, Dr. Garcia, attesting to the fact that each plaintiff had significant limitations in range of motion of the lumbar spine and cervical spine both contemporaneous to the accident and in a recent examination, and concluding that the plaintiffs' limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the defendants' motion, for an order granting summary judgment dismissing each plaintiff's complaint, is denied, and it is further,

ORDERED that the motion for summary judgment by the plaintiff on the counterclaim, VINETTE PINNOCK, dismissing the complaint and all cross-claims of plaintiff, VALDA FULLER, is denied.

Dated: October 15, 2012  
Long Island City, N.Y.

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ROBERT J. MCDONALD, J.S.C.