

**Watson v Benoit**

2021 NY Slip Op 30303(U)

January 29, 2021

Supreme Court, Kings County

Docket Number: 520834/2017

Judge: Edgar G. Walker

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: IAS PART 90

PRESENT: HON. EDGAR G. WALKER, J.S.C.

-----X  
SHATIQUA WATSON and DARCELL BURTON,

Plaintiffs,

-against-

JUNIOR F. BENOIT,

Defendant.  
-----X

Decision and Order

Index No. 520834/2017

Defendant Junior Benoit’s motion for summary judgment, seeking dismissal of both of the plaintiffs’ actions based upon his contention that neither of the plaintiffs satisfy the threshold for serious injury pursuant to the Insurance Law is granted to the extent that both of the plaintiffs’ claims of permanent loss of use of a body organ, member, function or system, as well as plaintiff Watson’s claim of a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment, are dismissed. The remainder of the motion is denied.

Dr. Chandra M. Sharma, the neurologist who examined both of the plaintiffs on behalf of the moving defendant found that plaintiff Watson had full range of motion in the “cervicothoracic” and lumbar spine and concluded that plaintiff Watson sustained cervical, thoracic and lumbar sprains and strains, all of which are resolved, and found that the neurological examination was normal. Dr. Sharma opines that “a permanent injury has not been sustained” by plaintiff Watson, and that “despite Ms. Watson's subjective complaints, there were no objective findings to support them. She is capable of working and performing her activities of daily living

without any restrictions or limitations.”

In her report regarding the exam that she conducted of plaintiff Burton, Dr. Sharma noted that the plaintiff had reduced ranges of motion in every measure of the cervical spine, as well as losses of range of motion on extension and right and left flexion in the lumbar spine. Dr. Sharma opines that “[t]hese are subjective mechanical limitations due to perception of pain not confirmed on objective examination and do not represent neurological problems.” Dr. Sharma concludes that plaintiff Burton sustained cervical, thoracic and lumbar sprains and strains, all of which are resolved, found that the neurological examination was normal, and that plaintiff Burton’s injuries are not permanent.

The defendant also had Dr. Scott Springer, a radiologist, review the MRIs of both of the plaintiffs. Upon review of plaintiff Watson’s cervical and lumbar MRIs, Dr. Springer found a cervical bulge at the C5-6 level and a lumbar bulge at the L5-S1 level, but opines that bulges have no traumatic basis and that both are degenerative in origin. In his review of plaintiff Watson’s thoracic MRI, he opined that it was “unremarkable” and that there were no fractures, subluxations, disc bulges or disc herniations in the thoracic spine. Dr. Springer also notes loss of plaintiff Watson’s normal cervical and lumbar lordosis, but opines that “the loss is likely positional and related to the patient’s comfort level during the examination.” Finally, Dr. Springer opines that there are “[n]o posttraumatic changes causally related to the 8/25/2017 incident” in any of plaintiff Watson’s MRIs.

In his review of plaintiff Burton’s MRIs, Dr. Springer found a cervical disc bulge at the C6-7 level, as well as a “partially lumbarized” disc at the S1 level, disc bulges at the L3-4 and L4-5 levels, and a disc herniation at the L5-S1 level, which he opines is “chronic.” In his review

of plaintiff Burton's thoracic MRI, he opined that it was "unremarkable" and that there were no fractures, subluxations, disc bulges or disc herniations in the thoracic spine. Dr. Springer opines that bulges have no traumatic basis and that both are degenerative in origin and that the lumbar herniation is chronic in nature. Dr. Springer also notes loss of plaintiff Burton's normal cervical lordosis, but opines that "the loss is likely positional and related to the patient's comfort level during the examination." Finally, Dr. Springer opines that there are "[n]o posttraumatic changes causally related to the 8/25/2017 incident" in any of plaintiff Watson's MRIs.

With regard to the branch of the defendant's motion addressing plaintiff Watson's claim that she satisfies the 90/180 category, the defendant points to the plaintiff's deposition testimony wherein she testified that she was employed at the time of the accident and that she was not prevented from performing her usual, customary activities and that she missed no more than two days from her jobs.

With regard to the branch of the defendant's motion addressing plaintiff Burton's claim that she satisfies the 90/180 category, the defendant points to the portion of the plaintiff's deposition testimony wherein she testified that she was employed at the time of the accident, but only missed two weeks from her job, and contends that she was not prevented from performing her usual, customary activities.

Based on these findings, the Court finds that the defendant has made a prima facie showing of entitlement to summary judgment, thereby shifting the burden to the plaintiff.

In opposition to the motion, plaintiff Watson offers the affirmed narrative reports and records of Dr. Charles Kaplan, who first started treating the plaintiff shortly after the accident, and found then, as well as at a more recent exam, that the plaintiff continues to have pain and

reduced ranges of motion in her cervical and lumbar spine. He also stated that he reviewed the MRI films of the plaintiff's cervical, thoracic and lumbar spines, and found a cervical spine disc bulge at C5-6 impinging upon the thecal sac, thoracic spine disc bulges at T4-5, T5-6 and T6-7 which impinge upon the thecal sac, and a lumbar disc bulge at L5-S1, also impinging upon the thecal sac. He specifically addresses the findings and conclusions of the defendant's examining radiologist, and disagrees with his conclusions regarding the presence of bulging and/or herniated discs, as well as whether or not they are traumatically induced. Specifically, Dr. Livingston states that he is "in complete disagreement with Dr. Springer and find his conclusions to have no basis in medical or radiologic science." In addition to disagreeing with Dr. Springer's findings regarding the presence of bulges and/or herniations, Dr. Livingston also takes issue with and disagrees with Dr. Springer's conclusions regarding the loss of the plaintiff's spinal lordosis, opining that the comment is "disingenuous." Dr. Livingston opines that

"[t]o attribute this to patient discomfort without any documentation of the patient's experience during the procedure from either the patient or the technician is drawing an erroneous conclusion. This is a patient with documented complaints of back pain and spasm which are much more realistically the contributing cause of the loss of lordosis. Thus it is my opinion that this flippant comment and opinion from Dr. Springer is setting the course for his overall attention to this report."

Dr. Livingston further comments that attributing this 25 year-old's disc issues to degeneration is "simply incorrect." Dr. Livingston also states that he reviewed the plaintiff's neurological testing and agreed with the finding that plaintiff Watson has radiculopathy at the C6-7 level. Finally, Dr. Livingston concludes that "Ms. Watson's injuries as described above and contained within my reports, are traumatically induced, permanent in nature and causally related" to the subject accident.

In opposition to the portion of the motion seeking to dismiss her case, plaintiff Burton offers the affirmed narrative reports and records of Dr. Marc Ponzio, who first started treating the plaintiff shortly after the accident, and found then, as well as at a more recent exam, that the plaintiff continues to have pain and reduced ranges of motion in her cervical, thoracic, and lumbar spine. He also stated that he reviewed the MRI films of the plaintiff's cervical, thoracic and lumbar spine, as well as her neurological studies, and opines that "Ms. Burton sustained the following permanent injuries as a result of the motor vehicle accident that occurred on August 25, 2017: disc bulge at the C6-C7 level; right cervical radiculopathy involving the posterior rami; cervical spine strain; posterior disc bulges at the L3-4 and L4-5 levels; left L5-S1 disc herniation; left L5-S1 lumbar radiculopathy; lumbar spine strain." He further states that "[t]he steroidal trigger point injections administered by me on December 19, 2017, were causally related to the above injuries, sustained by Ms. Burton in the motor vehicle accident of August 25, 2017" and concludes that the injuries "are traumatically induced, permanent in nature and causally related to the accident."

Dr. Ponzio also disagrees and takes issue with the findings and conclusions of the defendant's examining radiologist, opining that

"the cause of disc bulge in the 30-year-old female based solely on looking an MRI cannot be determined. There are some clues can be used for inference on occasion in the setting of an MRI but there are no specific MRI findings that can confirm or deny the cause of an injury. Furthermore, he is claiming that this is due to ligamentous laxity and that the disc bulge is likely due to weakening of the outer ligamentous fibers. However, this is 30-year-old patient with no other degenerative-type findings in the neck. There is no facet hypertrophy, no loss of disc height; no desiccation or any one of a number of other findings that would indicate the patient has any sort of degenerative problems in the neck of an otherwise young and relatively healthy 30-yearold female. Dr. Springer's assessment of this situation is not a fair and accurate assessment."

Dr. Ponzio disagrees with Dr. Springer's conclusions regarding defendant Burton's lumbar MRI findings, opining that Dr. Springer

“attributed all of the injuries in his report to chronic disc herniations and chronic injury; however, I would say that it is completely unreasonable to determine causality by a single MRI. Furthermore, a chronic disc bulge is very unlikely in a 30-year-old individual with no other signs of disc disease. This patient has no facet hypertrophy, no loss of disc height, no lipping of the disc, no disc desiccation or other findings that typically accompany chronic disc disease. The patient, importantly, has no history of back pain prior to the motor vehicle collision in question. It is unreasonable to determine a chronic injury based on solely a single MRI that does not include a physical exam, a history, or any type of evaluation with the patient.”

Based upon the foregoing, the Court finds that plaintiff Watson has raised questions of fact regarding her claims of permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system. As such, the portion of the defendant's motion for summary judgment based upon his contention that plaintiff Watson fails to satisfy the threshold for serious injury, pursuant to the Insurance Law, is granted as to the permanent loss of use and 90/180 categories only, and the remainder of the motion as against plaintiff Watson is denied.

With regard to plaintiff Burton, the Court finds that she raises questions of fact regarding her claims of permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system, and of a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment. Despite the defendant's contention that plaintiff Burton does not satisfy the 90/180 category

because she only missed two weeks from her job, she also testified that since the accident she is unable to bend or lift anything greater than five pounds, and further testified that she is unable to go grocery shopping alone and requires assistance. Based on this testimony, the Court finds that the plaintiff has successfully raised a question of fact and that the issue of whether she satisfies the 90/180 category should be determined by a jury. As such, the portion of the defendant's motion for summary judgment based upon his contention that plaintiff Burton fails to satisfy the threshold for serious injury pursuant to the Insurance Law, is granted as to the permanent loss of use of a body organ, member, function or system category only, and the remainder of the motion as against plaintiff Burton is denied.

This constitutes the decision and order of the court.

ENTER,



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J. S. C.

MS # 002

Dated: January 29, 2021