

Thompson v Chorny
2022 NY Slip Op 33160(U)
September 19, 2022
Supreme Court, Kings County
Docket Number: Index No. 513176/2019
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

HONORA THOMPSON,

Plaintiff,

-against-

**VITALII CHORNYI, MD MIZANUR RAHAMAN
and ERIC SERVICE CORP.,**

Defendants.

DECISION/ORDER

**Index No. 513176/2019
Motion Seq. No. 5 & 6
Date Submitted: 5/20/2022**

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motions for summary judgment.

Papers	NYSCEF Doc.
Notices of Motion, Affirmations, Affidavits, and Exhibits Annexed....	<u>64-83; 84-86</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>90-99; 100-108</u>
Reply Affirmations.....	<u>109</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising from an automobile accident that occurred on August 14, 2018 on First Avenue, at or near the intersection with East 14th Street in New York, New York. At the time of the accident, plaintiff was a passenger in a taxi owned by defendant Eric Service Corp. and operated by defendant, MD Mizanur Rahaman, when it came into contact with the livery vehicle owned and operated by defendant Vitalii Chorny. The plaintiff testified that First Avenue in the area where the accident occurred is a one-way street with more than two lanes for moving traffic, and that when the impact occurred, both vehicles were traveling on First Avenue. Plaintiff testified that she does not know what parts of the cars came into contact, but she felt the impact, which she claims caused her right knee and right hand to come into contact with the taxi's partition.

Plaintiff was transported by ambulance to the emergency room at Lenox Hill/Northwell in Greenwich Village, where she complained of pain and soreness in her right shoulder, right knee and right hand. She testified that they gave her painkillers and took either x-rays or MRIs of her right knee and right shoulder. She did not recall if they took x-rays or an MRI of her wrist while at the hospital.¹ Plaintiff testified that following her release from the hospital, she sought further medical treatment approximately one week later at Physical Medicine and Rehabilitation of New York, where she complained that she injured her right shoulder, right knee and right wrist. She further testified that she was initially receiving physical therapy five times per week, which was then eventually reduced to three times per week, and then, after a few more months, her treatment was reduced to one to two visits per week. Plaintiff testified that she treated at Physical Medicine and Rehabilitation of New York for approximately eight months, then she stopped going because “there was nothing else they could do.” During her course of treatment, plaintiff had MRIs of her right knee and right shoulder. She was unsure what imaging had been done to her wrist. Plaintiff also had injections to her right shoulder for pain.

In her bill of particulars, the plaintiff claims that, as a result of the accident, she injured her right knee and right shoulder. At the time of the accident, the plaintiff was 37 years old. At her deposition, she testified that she was employed at the time of the accident by the City of New York, working for the Administration for Children Services. As a result of the accident, the plaintiff claimed that she missed time from work, but was

¹ The ER records are at Doc 106 and indicate that she had a CT of her cervical spine and of her brain, and x-rays of her right shoulder and right wrist.

unable to state the exact amount of time, testifying that “it could be five months or more. I’m not sure when I went back” [Page 14].

Defendant Chorny moves for summary judgment dismissing the complaint [MS #5]. Co-defendants MD Mizanur Rahaman and Eric Service Corp. also move the court, in a motion which is incorrectly designated as a cross-motion (the motion is not made against the moving party), for an order granting them summary judgment and dismissing the complaint [MS #6]. In both motions, the defendants contend that the plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102(d). In support of his motion, defendant Chorny submits an attorney’s affirmation, copies of the pleadings, the plaintiff’s bill of particulars, the plaintiff’s deposition transcript, an affirmed report from Dr. Jeffrey Guttman, an orthopedist, [Doc 81] who examined the plaintiff on behalf of defendant Chorny, and an affirmed report from Dr. Scott Springer, a radiologist, who reviewed the MRI of the plaintiff’s lumbar spine [Doc 83].

Defendants MD Mizanur Rahaman and Eric Service Corp. join in co-defendant Chorny’s application, essentially adopting and repeating what was presented and argued in the co-defendant’s motion. They do not submit any additional evidence.

Dr. Guttman examined the plaintiff on October 22, 2021, more than three years after the accident [Doc 81]. He tested the range of motion in the plaintiff’s right shoulder and right knee, and reports that the plaintiff had range of motion deficits, both in the internal rotation of her right shoulder and with flexion of the right knee. Specifically, Dr. Guttman notes that the plaintiff’s range of motion in her right shoulder, upon internal rotation, was only to 65 degrees, when the normal measure is 80 degrees. Likewise, when Dr. Guttman measured the plaintiff’s range of motion in her right knee, he notes that, upon flexion, the plaintiff’s range of motion was only to 130 degrees, when the

normal measure is 150 degrees. In his report, he states that the only document he reviewed was the plaintiff's bill of particulars, but no medical records. He incorrectly states that the plaintiff was not taken to the emergency room, when she testified that she was, [Doc 77, P. 25] and the ER records are at Doc 106. He states that the plaintiff has been working since the date of the accident, but the plaintiff testified that she missed approximately five months from her job working for The New York City Administration for Children Services [Doc 77, p. 14]. His impression was that the plaintiff had sustained an "[a]lleged injury to the right shoulder" and an "[a]lleged injury to her right knee" both of which are "resolved." Finally, he opines that the "decreased range of motion noted on examination is clinically insignificant, as it is on a voluntary basis, unsupported by the objective examination findings." He offers no opinion on the plaintiff's claim that, as a result of the accident, she sustained tears of the anterior cruciate ligament in her right knee and in the posterior horn of the lateral meniscus in her right knee, or of her claim of a tear in the supraspinatus tendon in her right shoulder. The court also notes that he offers no opinion on the issue of causation.

The defendants' radiologist, Dr. Springer, did not examine the plaintiff. He only reviewed the MRI film of the plaintiff's lumbar spine, but not the MRIs of the plaintiff's right knee or right shoulder [Doc 83]. He concludes that the lumbar spine MRI was an "[u]nremarkable lumbar spine MRI" with "[n]o fracture, subluxation or disc herniation" and "[n]o post traumatic changes causally related to the 8/14/2018 incident."

With regard to the 90/180-day category of injury, as previously indicated, the plaintiff's deposition testimony was that she missed approximately five months from work [Doc 77]. The plaintiff also testified that she has pain when sitting, walking and climbing stairs, she has shoulder pain when in bed, and she can no longer lift anything

heavy. The plaintiff further testified that she had never been in any other accidents, nor has she previously injured her right knee or right shoulder. Neither the defendants nor their examining doctors offer any evidence to the contrary.

The court finds that defendants have not made a *prima facie* showing of their entitlement to summary judgment with regard to any of the applicable categories of injury. (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]).

As the court previously noted, Dr. Guttman found deficits in the plaintiff's range of motion in both her right shoulder and right knee. Dr. Springer only reviewed the MRI of the plaintiff's lumbar spine, despite the fact that she also had MRIs of her right shoulder and right knee, and she claims she injured those parts of her body, not her lumbar spine. As he did not review the MRIs of the plaintiff's right shoulder and right knee, the plaintiff's claims that she sustained tears of the anterior cruciate ligament and the posterior horn of the lateral meniscus in her right knee, and a tear in the supraspinatus tendon in her right shoulder, were not addressed by the defendants' radiologist or their orthopedist.

As such, the court finds that the reports of Dr. Guttman and Dr. Springer are insufficient to establish that the plaintiff did not sustain a serious injury to her right knee or to her right shoulder, as defined in Insurance Law § 5102(d).

When a defendant has failed to make a *prima facie* case with regard to all of the plaintiff's claimed injuries and all of the applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d

1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Even if the defendants had met their prima facie burden for summary judgment, plaintiff would have been found to have overcome the motions. There are issues of fact raised by plaintiff's doctor's affirmations, which create a "battle of the experts" sufficient to overcome the motion. In particular, Dr. Gautam Khakher, plaintiff's treating physiatrist, who last examined the plaintiff in March of 2022, notes in his affirmed report [Doc 98] that, when compared to normal, the plaintiff's range of motion in her right knee and right shoulder are both still reduced. He opines that the injuries are causally related to the accident, are permanent, and that her prognosis "remains poor."

Accordingly, it is **ORDERED** that the defendants' motions are denied.

This constitutes the decision and order of the court.

Dated: September 19, 2022

ENTER:



Hon. Debra Silber, J.S.C.