

Thomas v City of New York

2010 NY Slip Op 33879(U)

August 23, 2010

Supreme Court, Bronx County

Docket Number: 21275/2004

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.

L.W.

PART 19

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

THOMAS, MARGARET, et ano

Index No. 0021275/2004

- against -

Hon. LUCINDO SUAREZ,
Justice.

CITY N.Y., et al

The following papers numbered 1 to 21 read on this motion, SUMMARY JUDGMENT DEFENDANT
Noticed on May 20, 2010 and duly submitted as No. 37 on the Motion Calendar of July 9, 2010

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3, 4, 5, 6	
Notice of Cross-Motion - Exhibits and Affidavits Annexed	8, 9, 10	
Answering Affidavit and Exhibits	11, 12, 13, 14, 15, 16, 17, 18, 19, 20	
Replying Affidavit and Exhibits	21	
Sur-replying Affidavit and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law	7	

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BRONX COUNTY CLERK'S OFFICE
AUG 24 2010

Upon the foregoing papers, defendant Ahmad Aftab's motion and defendant the City of New York's cross-motion for summary judgment are granted in part, in accordance with the annexed decision and order.

Dated: August 23, 2010

Hon. LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX: I.A.S. PART 19

-----X

MARGARET THOMAS, MARVIN THOMAS and
 CHRISTAL BERKELEY,

DECISION AND ORDER

Plaintiffs,

Index No. 21275/2004

- against -

THE CITY OF NEW YORK, NEW YORK CITY
 POLICE DEPARTMENT, GUNHILL CAR SERVICE
 and AHMAD AFTAB,

Defendants.

-----X

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated April 20, 2010 of defendant Ahmad Aftab and the affirmation, physicians' affirmed reports (3), exhibits and memorandum of law submitted in support thereof; the notice of cross-motion dated April 28, 2010 of defendant the City of New York and the City of New York s/h/a New York City Police Department and the affirmation and exhibit submitted in support thereof; the affirmation in opposition dated June 29, 2010 of plaintiff, and the affirmation, physician's affirmed reports (2), physicians' affirmations (5), and exhibits annexed thereto; the reply affirmation dated July 7, 2010 of defendant Ahmad Aftab; and due deliberation; the court finds:

Defendant Ahmad Aftab moves and defendants the City of New York and the City of New York s/h/a New York City Police Department ("NYPD") cross-move for summary judgment on the basis that plaintiffs Margaret Thomas ("Thomas") and Christal Berkeley ("Berkeley") have not sustained a "serious injury," as the phrase is defined in Insurance Law § 5102(d).

Thomas alleges in her amended Verified Bill of Particulars that she sustained a partial tear of the anterior horn of the lateral meniscus in her left knee requiring surgery, left knee derangement, chondrolmalacia and synovitis, along with derangement of her cervical spine. She also alleges that

the accident aggravated all pre-existing conditions.

In support of his motion, Aftab submits the affirmed report of orthopedic surgeon Gregory Montalbano, M.D., who examined Thomas on August 7, 2009. Dr. Montalbano found normal ranges of motion and noted no spasms or tenderness in tests he conducted on Thomas' cervical, lumbar and thoracic spine. Tests performed upon Thomas' right knee showed no detectable effusion, tenderness or pain and a full range of motion. As to Thomas' left knee, Dr. Montalbano attributed the loss of range of motion due her surgery performed two weeks prior to the examination.

While Dr. Montalbano's medical affirmation found no objective evidence tending to support Thomas' claims of serious injury, *see Peprah v. McDonald*, 63 A.D.3d 450, 881 N.Y.S.2d 54 (1st Dep't 2009), he failed to disclose the testing methods he used to determine that plaintiffs' ranges of motion were essentially normal, *see Linton v. Nawaz*, 62 A.D.3d 434, 879 N.Y.S.2d 82 (1st Dep't 2009); *Beazer v. Webster*, 70 A.D.3d 587, 895 N.Y.S.2d 755 (1st Dep't 2010).

However, based on his review of the records, Dr. Montalbano does establish that Thomas' injuries were not caused by the accident and attributed her injuries to a prior injury to her left knee that required two surgeries. *See Valentin v. Pomilla*, 59 A.D.3d 184, 873 N.Y.S.2d 537 (1st Dep't 2009); *Pommells v. Perez*, 4 N.Y.3d 566, 830 N.E.2d 278 (2005); *Linton v. Nawaz*, *supra*. Aftab submits the records from plaintiff's emergency room visit, notes from Dr. Andrew S. Rokito, the findings of the Medical Board Police Pension Fund Article II, the MRI report of Dr. Andrew Khoury, the operative report of Dr. Stuart Springer in support of Dr. Montalbano's conclusion. While these reports are unaffirmed, it is evident that Dr. Montalbano relied on these reports. *See Amamedi v. Archibala*, 70 A.D.3d 449, 895 N.Y.S.2d 42 (1st Dep't 2010), *Thompson v. Abbasi*, 15 A.D.3d 95, 788 N.Y.S.2d 48 (2005).

The records from Dr. Rokito, who examined plaintiff's left knee six weeks after the accident,

showed no discoloration, effusion or obvious swelling. Plaintiff's straight leg raise test was negative, and she exhibited a range of motion from 0 to 130 degrees of flexion. X-rays performed on her left knee were negative. The Medical Board review revealed that plaintiff had been diagnosed with joint effusion in her knee in 1997 and chondromalacia and synovitis in 1998. Upon reading plaintiff's left knee MRI taken September 17, 2003, Dr. Khoury observed a small chronic partial tear of plaintiff's anterior cruciate ligament with intra-articular effusion, but no meniscal tear.

Aftab also submits the affirmed report of radiologist Howard Hirsch, M.D. who reviewed plaintiff's left knee MRI taken September 17, 2003. Dr. Hirsch observed degeneration in the posterior horns of the medial and lateral menisci and concluded that the image revealed normal cruciate and collateral ligaments with no evidence of a meniscal tear or internal derangement or other post-traumatic injury.

In opposition, Thomas submits the affirmed report of Alberto Villafuerte, M.D. and the affirmed reports of several of her treating doctors. Dr. Villafuerte performed a medical examination of Thomas on May 28, 2010. Dr. Villafuerte does not refute Dr. Montalbano's opinion that Thomas' cervical and lumbar spine injuries had healed. His findings that plaintiff sustained decreases in the range of motion of her left knee, though, are too remote in time to warrant an inference that they were caused by the accident. *See Clemmer v. Drah Cab Corp.*, 2010 NY Slip Op 5659 (1st Dep't June 24, 2010). Similarly, his conclusion that the injuries plaintiff sustained were causally related to this accident is suspect in light of the fact that he conducted his examination only after defendants had moved for summary judgment. *See Shaw v. Looking Glass Assocs., LP*, 8 A.D.3d 100, 779 N.Y.S.2d 7 (1st Dep't 2004).

Thomas also fails to raise an issue of fact as to whether the accident caused her a "serious injury." *See Valentin v. Pomilla, supra*. Dr. Gregg Cavaliere, who examined plaintiff the week after

the accident, observed full active extension with moderate effusion in her left knee, and x-rays taken showed no evidence of arthritis or fractures. Dr. Douglas Padgett, who examined plaintiff four months after the accident, found no complete tear of plaintiff's anterior and posterior cruciate ligaments or menisci and no evidence of degenerative arthritis, although he did determine that plaintiff had sustained an impact injury to her left knee that prevented her from returning to full field work as a police officer.

Further, Dr. Stuart Springer's post-operative report from 2004 indicates a tear of the lateral meniscus, but he does not state that it was caused by the accident. *See Dembele v. Cambisaca*, 59 A.D.3d 352, 874 N.Y.S.2d 72 (1st Dep't 2009). Dr. Fred Cushner's finding in 2009 that plaintiff suffered from a degenerative arthritis in her knee is also too remote in time to be linked to the accident. *Id.*

Thomas does raise an issue of fact as to whether the accident aggravated the pre-existing injury to her left knee, *see Henry v Peguero*, 72 A.D.3d 600, 900 N.Y.S.2d 49 (1st Dep't 2010), specifically chondromalacia and synovitis, which is supported by the affirmed reports and records she submits from her treating doctors. Dr. Padgett and Dr. Springer each diagnose Thomas with traumatic chondromalacia of the left knee and reference her two prior surgeries, and Dr. Cavaliere specifically notes that plaintiff "has had a residual problem with her knee since the injury on June 26." The records of Dr. Richard Gasalberti also show that plaintiff had been diagnosed previously with chondromalacia and synovitis of her left knee in 1998 and 1999 and that after her third surgery in 2004, Thomas was diagnosed with Grade III chondromalacia.

Defendants are entitled to summary judgment on Thomas' claim that she sustained a medically determined condition that prevented her from performing substantially all of the material acts constituting their usual and customary daily activities for a period of not less than ninety (90) of the first one hundred eighty (180) days following the accident. Thomas testified that she returned to her job as a police officer two weeks after the accident, and she was last employed as a bookkeeper. Moreover,

plaintiff's testimony that she can no longer walk for long periods of time, run, wear high heels or go dancing is insufficient to constitute a loss of all of her daily activities. *See Dembele v. Cambisaca*, 59 A.D.3d 352, 874 N.Y.S.2d 72 (1st Dep't 2009). The medical report to the NYPD's Pension Board relates solely to plaintiff's ability to fully perform her duties as a police officer, and does not show that she sustained a "serious injury" within the meaning of Insurance Law § 5102(d).

Defendants also move for summary judgment dismissing Berkeley's complaint, and Aftab submits the affirmed report of Dr. Montalbano as well as plaintiff's deposition transcript. Berkeley alleges in her Verified Bill of Particulars that she sustained severe derangement of both her knees and right ankle with loss of range of motion, spurs in her right foot, derangement of her cervical and lumbosacral spine, C5-C6 disc space narrowing, sprains, strains, and aggravation of present injuries.

Aftab submits the affirmed report of Dr. Montalbano, who conducted an independent medical examination of Berkeley on August 7, 2009. Dr. Montalbano concluded that the injuries to plaintiff's back and neck had healed, and that she had regained full ranges of motion to her neck, spine, shoulders, hips, knees and ankles. Aftab also submits the unaffirmed records from plaintiff's emergency room visit, the x-ray report from Dr. Charles Drocea, the results from a physiatric evaluation performed by Dr. Villafuerte, the MRI report of Dr. Victor Todisco, and the x-ray report of Dr. Allan Keil.

Although Dr. Montalbano failed to disclose the testing methods used to determine that Berkeley's ranges of motion were essentially normal, *see Linton v. Nawaz, supra*, he did conclude that plaintiff's ankle pain was a result of her prior surgery in 2002 based on a review of her medical records. While these reports are unaffirmed, it is evident that Dr. Montalbano relied on these reports in coming to his conclusion. *See Amamedi v. Archibala, supra*.

Dr. Villafuerte evaluated Berkeley three weeks after the accident and found pain but no swelling or bruising to her right ankle and knee. He also noted some tenderness to Berkeley's cervical and thoracolumbar spine. Dr. Keil noted no abnormalities to plaintiff's lumbar spine, but he did observe

a C5-C6 intervertebral disc space narrowing and a plantar calcaneal spur in plaintiff's right ankle. Dr. Todisco's reading of plaintiff's right ankle MRI revealed the normal appearance of the peroneal, posterior tibial and Achilles tendons. There was normal signal intensity within all bony structures and a normal amount of fluid in the joint.

Berkeley fails to rebut Dr. Montalbano's findings that the her present injuries were not caused by the accident. Plaintiff submits the affirmed report of Dr. Villafuerte, who performed a second medical examination of plaintiff on August 7, 2009. Dr. Villafuerte found decreases in ranges of motion of plaintiff's cervical and lumbar spine, right knee, left knee and right ankle that were all causally related to the accident, and determined that Berkeley had suffered partial permanent disability. However, his findings are too remote in time to warrant an inference that they were caused by the accident. *See Clemmer v. Drah Cab Corp., supra.*

Nor do the affirmed records plaintiff submits from Dr. Carmen Martinez, Dr. Chai Kulsakdinum and Dr. Kevin Trapp raise a triable issue of fact as their notes mainly report plaintiff's complaints of pain. *See Lloyd v. Green*, 45 A.D.3d 373, 846 N.Y.S.2d 29 (1st Dep't 2007). Dr. Kulsakdinum's notes reveal that an MRI of plaintiff's ankle appeared normal and Dr. Martinez did not conclusively state that the injuries to plaintiff's neck, back and head were caused by this accident. Dr. Trapp's records also do not show a causal link between the accident in 2003 and the results of any CT or x-rays taken of plaintiff's cervical spine, knees, and right ankle finding a calcaneal spur. Moreover, the medical report to the NYPD's Pension Board relates solely to plaintiff's ability to fully perform her duties as a police officer, and does not show that she sustained a "serious injury" within the meaning of Insurance Law § 5102(d).

Defendants are also entitled to summary judgment on Berkeley's claim that she did not sustain a medically determined injury that prevented her from performing substantially all of her daily activities for ninety (90) of the first one hundred eighty (180) days following the accident. Berkeley testified that

she returned to work two and one-half months after the accident, and she is currently employed as a substitute food service person. She testified that as a result of the accident she was unable to perform certain household chores, such as sweeping, mopping and preparing meals. However, Berkeley also testified that she was unable to perform these same activities after she injured her right ankle two years prior to the accident. Berkeley has not shown she was incapacitated from performing substantially all their daily activities as a result of this accident. *Beaubrun v. New York City Transit Auth.*, 9 A.D.3d 258, 259, 779 N.Y.S.2d 201 (1st Dep't 2004).

Accordingly, it is

ORDERED, that the motion of defendant Ahmad Aftab and the cross-motion of defendant the City of New York for summary judgment dismissing plaintiff Margaret Thomas' complaint are granted to the extent of dismissing Thomas' claim that she sustained "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;" and it is further

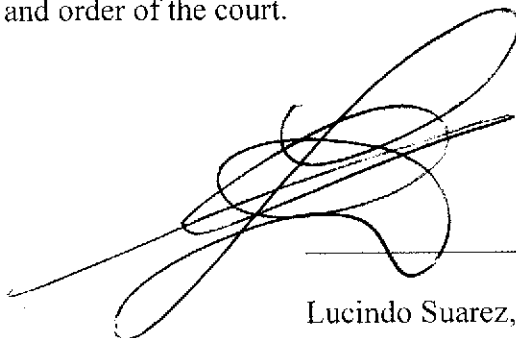
ORDERED, that the motion of defendant Ahmad Aftab and the cross-motion of defendant the City of New York for summary judgment as to plaintiff Christal Berkeley's complaint are granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants Ahmad Aftab and the City of New York dismissing plaintiff Margaret Thomas' claim that she sustained "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"; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants Ahmad Aftab and the City of New York dismissing plaintiff Christal Berkeley's complaint.

This constitutes the decision and order of the court.

Dated: August 23, 2010

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the left.

Lucindo Suarez, J.S.C.