

Clark v Kazdan

2007 NY Slip Op 31610(U)

June 8, 2007

Supreme Court, Richmond County

Docket Number: 0100546/2005

Judge: Philip G. Minardo

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MONICA CLARK,

Plaintiff,

- against -

ALEXANDER KAZDAN, A&J TIRE REPAIR, INC.,
LINDA HAITH, NEW YORK CITY TRANSIT
AUTHORITY and THE METROPOLITAN
TRANSPORTATION AUTHORITY,

Defendants.

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The following papers numbered 1 to 5 were used on these motions the 3rd day of May, 2007.

Papers
Numbered

Notice of Motion for Summary Judgment by Defendants Alexander Kazdan and A&J Tire Repair, Inc., with Supporting Papers and Exhibits (dated December 27, 2006).....	1
Notice of Motion for Summary Judgment by Defendants New York City Transit Authority, The Metropolitan Transportation Authority and Linda Haith, with Supporting Papers and Exhibits (dated December 22, 2006).....	2
Affirmation in Opposition to Both Motions by Plaintiff Monica Clark, with Exhibits (dated April 25, 2007).....	3
Affirmation in Reply by Defendants New York City Transit Authority, The Metropolitan Transportation Authority and Linda Haith (dated April 30, 2007).....	4
Affirmation in Reply by Defendants Alexander Kazdan and A&J Tire Repair, Inc. (dated May 1, 2007).....	5

Upon the foregoing papers, the motions for summary judgment are decided as follows.

Defendants Alexander Kazdan and A&J Tire Repair, Inc. (hereafter collectively "Kazdan") move by notice of motion for an order granting them summary judgment and dismissing the complaint

as against them on the ground that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law § 5102(d). Co-defendants the New York City Transit Authority, the Metropolitan Transportation Authority and Linda Haith (hereafter "NYCTA") seek the same relief or, in the alternative, an order compelling plaintiff to provide authorizations to obtain her W-2 statements for two years prior and all years subsequent to the accident date, as well as her school records from Metropolitan College. Plaintiff Monica D. Clark opposes both motions in their entirety.

This litigation devolves from an intersection collision which occurred on Staten Island on January 28, 2004, at approximately 9:30 a.m., between a bus owned by the NYCTA and driven by Linda Haith, and 1998 Ford Explorer owned by A&J Tire Repair, Inc. and operated by Alexander Kazdan. Plaintiff, Monica D. Clark, was a passenger on the bus, and alleges that she sustained serious personal injuries as a result of the accident. She commenced this action on or about February 22, 2005 by the filing and service of a summons and complaint upon each of the defendants. Issue was joined on or about April 22, 2005 by the service of answers with cross claims, and on July 29, 2005, this case was joined for trial with three other actions arising out of the same occurrence. The note of issue in this action was filed on November 6, 2006.

In her bill of particulars, plaintiff alleges that she sustained the following injuries: disc bulges at C3-C4, C4-C5 and C5-C6; straightening of the cervical lordosis; cervical pain radiating into the left shoulder; precipitation of latent

degenerative changes of the left acromioclaviular joint; pain in the left shoulder; and knee, thoracic and lower back pain and muscle spasms. In addition, plaintiff claims that her injuries prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see Rotuba Extruders v Ceppos, 46 NY2d 223; Herrin v Airborne Freight Corp., 301 AD2d 500. On a motion for summary judgment, the function of the court is issue finding, not issue determination (see Weiner v Ga-Ro Die Cutting, 104 AD2d 331, *affd* 65 NY 732). In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion (see Glennon v. Mayo, 148 AD2d 580). In order to prevail, the moving party must present *prima facie* evidence of its entitlement to judgment as a matter of law (Alvarez v Prospect Hosp., 68 NY2d 320, 324). Upon its failure to do so, the motion will be denied. Once a *prima facie* showing has been made, however, the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of

triable issues of fact (Zuckerman v City of New York, 49 NY2d 557, 562). In this regard, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue (*id.* at 562). Thus, summary judgment, which operates to deprive a party of his or her day in Court, is only warranted where the movant's initial burden of proof has been satisfied, and the opposing party has failed to adduce competent evidence demonstrating the presence of a genuine issue of material fact (see Persaud v Darbeau, 13 AD3d 347).

Insofar as is applicable, the Insurance Law provides that there shall be no right to recover damages for personal injuries sustained in a motor vehicle accident unless said injuries are "serious" within the meaning of section 5102(d) thereof (see Insurance Law §5104[a]). Accordingly, upon a prima facie showing by a moving defendant that plaintiff did not sustain a "serious injury", the latter's failure to raise a triable issue as to the "seriousness" of his or her injury will result in the dismissal of the complaint (see Toure v Avis Rent A Car Sys., 998 NY2d 345). Section 5102(d) of the Insurance Law defines a "serious injury" as follows: "a personal injury which results in death; dismemberment; significant disfigurement; a fracture, loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of body organ or member; significant limitation of use of a body function or system;

or a medically determined injury or impairment of a nonpermanent 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 their respective motions defendants Kazdan and the NYCTA rely upon affirmations of their attorneys, the affirmed medical reports of Dr. Michael Carciente and Dr. Robert Israel, as well as the plaintiff's own deposition testimony.

According to her deposition testimony (Kazdan's Exhibit "D"), the last time that plaintiff received any treatment for the injuries allegedly sustained in the subject accident was May 2, 2004, when she underwent her final treatment by Dr. Anthony Madrekia, the chiropractor who had treated her since February of 2004. Accordingly, her course of treatment had lasted approximately three months. Plaintiff also underwent an MRI of her shoulder and neck in March of 2004, but did not see any other health care providers. Neither had she discussed the MRI results with her family physician, Dr. Cammarata. Plaintiff testified that there were no physical activities in which she could no longer engage, but stated that they had become harder to perform and required that she take breaks to get up and stretch.

On March 21, 2006, Robert Israel, M.D., a diplomate of the American Board of Orthopedic Surgery, conducted a thorough orthopedic examination of plaintiff, which included her cervical, thoracic and lumbar spines, as well as her left shoulder and knee. His examination of the cervical spine revealed normal lordosis, with no spasm present upon palpitation. Plaintiff's range of motion was found to be normal when compared to the stated norms; her muscle strength was normal; and the grasping power in both of her hands was firm. As to her left shoulder, the doctor detected no deltoid atrophy; and the results of her range of motion testing were consistent with the stated norms. Plaintiff's drop arm, Yergason, apprehension and speed tests were all negative; her thoracic spine revealed normal curvature with no paraspinal spasm; and her sensation was found to be intact. As for plaintiff's lumbar spine, no spasm was detected upon palpation; both her sitting Laseque's and straight-leg testing were found to be normally negative; and her range of motion testing revealed normal flexion and extension as compared to the accepted standards. Muscle strength in this area was found to be normal, with no atrophy or radiation of pain, numbness or tingling. With respect to her left knee, the doctor concluded that no joint line tenderness or effusion was present; she exhibited normal muscle tone; and her range of motion was consistent with the stated norms. In addition, plaintiff's McMurray, Lachman and anterior/posterior

draw tests were all negative. Based upon these findings and a review of plaintiff's medical records and history, Dr. Israel opined that any injuries which plaintiff may have suffered as a result of the accident had resolved, and that any allegations of continued injury were unsupported. From an orthopedic viewpoint, Dr. Israel opined that plaintiff exhibited no evidence of disability.

On March 21, 2006, plaintiff underwent a neurological examination by Dr. Michael Carciente. At that time, plaintiff who stands 5'1" tall and weighed 202 pounds, was both alert and orientated. Her cranial nerves were found to be normal; she exhibited no facial asymmetry; and her visual fields were reported "full". Upon motor examination, there was no sign of atrophy, fasciculation or pronator drift. Her handgrip was found to be strong bilaterally, with normal motor strength in all of the major muscle groups of her upper and lower extremities. There was no spasticity, and neither ankle clonus or Hoffman's sign was present. Plaintiff also exhibited normal sensation to pinprick, cold temperature and vibration, with no "finger-to-nose" dysmetria. She walked normally and without apparent difficulty. An examination of her cervical, thoracic and lumbrosacral spines revealed neither tenderness nor paraspinal spasm, and her straight-leg maneuver was negative. Based upon these findings and his review of plaintiff's medical records and history, Dr. Carciente concluded that there was

no objective evidence of any neurological disability, and opined that any disc bulges that might be detected in plaintiff were completely asymptomatic. According to the doctors, all of these findings would be considered normal.

Based upon the foregoing evidence, both Kazdan and NYCTA have made a "prima facie" showing that plaintiff did not sustain a "serious injury" as a result of this accident. Thus, the burden has shifted to plaintiff to raise a triable issue of fact as to the seriousness of her injuries.

In attempting to meet this burden, plaintiff has submitted an affidavit by Angelo DiMaggio, D.C., dated February 6, 2007¹, as well as a personal affidavit. The Court notes that plaintiff's personal affidavit completely contradicts parts of her deposition testimony, and appears to have been patently tailored to meet the exigencies of her case. In it, she claims for the first time that upon returning to work after eleven weeks, she found that full time employment and her household duties left her both physically exhausted and in excruciating pain. In addition, she now claims that she stopped seeing Dr. Madrekia after *five* (rather than three) months because (1) her no-fault benefits expired; and (2) she was advised that her condition was permanent and would not improve with

¹Although plaintiff characterizes Dr. DiMaggio as her treating chiropractor, it appears that she first saw him on January 31, 2007, some 33 months after she had ceased treating with Dr. Madrekia.

further treatment. Regrettably, plaintiff does not identify the source of this advice. According to plaintiff, she can no longer sit or stand for long periods of time, and shopping for groceries causes her pain in her back and neck. As a result, most household chores, e.g., washing dishes and doing laundry, have now fallen to her husband and three children. Finally, plaintiff claims that she is interested in resuming treatment for her injuries now that she has obtained health insurance, while simultaneously stating that she was informed by Dr. DiMaggio following her January 31, 2007 examination that she has already made as much progress as can be expected.

As for Dr. DiMaggio, he opines based on computerized testing performed in his office by a technician from Professional Healthcare Services, P.C. on January 31, 2007, that plaintiff is suffering from a permanent partial disability which is causally related to the accident of January 28, 2004. More specifically Dr. DiMaggio observes in his attached narrative report that plaintiff's movements were noted to be guarded, stiff and restricted, and that she was found to be positive bi-laterally in lumbar orthopedic tests. These tests purportedly included "Double leg raiser, Kemp, Ely's, Laseque and Broggards" tests. In addition, plaintiff's lumbar range of motion were stated to reveal deficits in flexion, extension and rotation when compared to normal. The chiropractor's final diagnosis was one of lumbar subluxation, dysfunction and radiculopathy, with knee sprain/strain. His prognosis is guarded. According to Dr. DiMaggio, plaintiff is now stable, and will

experience no further significant improvement even with continued therapy. In sum, the doctor opines that plaintiff has suffered a permanent partial impairment "as a direct result of the traumatic injury ... of January 28, 2004", which he inexplicably attributes to a 'non-existent' *motorcycle accident*.

On these papers, the Court concludes for a variety of reasons that plaintiff has failed to meet her burden of proof. Plaintiff's self-serving affidavit is belied by her deposition testimony and appears to have been tailored to thwart summary judgment. Moreover, the conclusions of Dr. DiMaggio are improperly based upon the results of tests and reports prepared by others (see Moore v Sarwar, 29 AD3d 752), while his final diagnosis does not rise to the level of a statutory "serious injury". "[M]inor, mild or slight limitation[s] of use" do not suffice (Gaddy v Eyler, 79 NY2d 955; see Licari v Elliott, 57 NY2d 230). In addition, plaintiff has failed to present any competent medical evidence of restrictions in her range of motion that are contemporaneous with the accident (see Borgella v D&L Taxi Corp., 38 AD3d 701), nor has she proffered competent medical evidence showing that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days following the subject accident (see Ramirez v Parache, 31 AD3d 415, 416). Finally, the Court cannot but help note that Dr. DiMaggio's narrative report dated January 31, 2007 inexplicably attributes plaintiff's injury to result of a *motorcycle accident*. As no such accident is alleged to have taken place, this Court can only infer that said report was

adapted from an earlier report prepared for another individual as part of a route office practice. Such reports do not inspire confidence.

For all these reasons, the motion is granted and the complaint is dismissed.

Accordingly, it is

ORDERED that defendants' motions for summary judgment are granted, and the complaint dismissed; and it is further

ORDERED that the balance of the motion by defendant New York City Transit Authority, et al. is denied as academic; and it is further

ORDERED that this action is severed from the actions previously joined for trial; and it is further

ORDERED that the Clerk enter judgment in accordance herewith.

E N T E R,

s/ Philip G. Minardo
J.S.C.

Dated: June 8, 2007