

**Pimental v Manhattan & Bronx Surface Tr.
Operating Auth.**

2008 NY Slip Op 32061(U)

July 3, 2008

Supreme Court, New York County

Docket Number: 0125606/2002

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

PIMENTAL, SORAYA

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, et. al.,
Defendants.

INDEX No. 125606/02

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL NO. _____

The following papers, numbered 1 to 3 were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1

Answering Affidavits- Exhibits _____

2

Replying Affidavits _____

3

CROSS-MOTION: _____ YES NO

FILED
JUL 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

Dated: 7/3/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 21

SORAYA PIMENTAL,

Plaintiff,

INDEX NO. 125606/02

-against-

MOTION SEQ. NO. 001

MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY and NEW YORK CITY
TRANSIT AUTHORITY,

Defendants.

FILED
JUL 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

MILLS, J.:

In this action, in which plaintiff Soraya Pimentel (plaintiff) alleges personal injuries as a result of a motor-vehicle accident, defendants Manhattan and Bronx Surface Operating Authority and New York City Transit Authority (collectively, defendants) move for summary judgment on the ground that plaintiff failed to meet the threshold requirements of the Insurance Law § 5102 (d) for "serious injury." In opposition, plaintiff argues that defendants failed to make a prima facie showing of entitlement to judgment as a matter of law. For the reasons that follow, defendants' motion is granted.

BACKGROUND

According to the notice of claim, on June 7, 2002, plaintiff operated a vehicle, which was hit by a bus owned by defendants, at or near the intersection of 214th Street and Tenth Avenue, New York, New York (the accident) (see Smith Aff., exhibit A). Following the accident, plaintiff was taken to an emergency room, where no x-ray tests were taken, and plaintiff was released the same day (plaintiff's deposition transcript, at 31-32, Brizel Aff., exhibit H). On June 17, 2002,

plaintiff sought the care of Dr. John Gavini of Elm Neurological Care, Bronx, New York (transcript of plaintiff's statutory hearing, at 13, Brizel Aff., exhibit F). As part of plaintiff's physical examination, Dr. Gavini performed a range of motion test of her cervical and lumbar spines and found deviations from the norm (see Dr. Gavini's unsworn Initial Medical Report, dated June 17, 2002, Smith Aff., exhibit D). Dr. Gavini preliminarily diagnosed plaintiff with, primarily, sprains and strains of her cervical, thoracic, and lumbar spines (id. at 5). Dr. Gavini ordered x-ray tests and an MRI study and prescribed physical therapy to plaintiff (id. at 5-6).

On June 26, 2002, Dr. Jeffrey Chess, M.D. (Dr. Chess), of Elm Neurological Care, P.C., prepared three reports interpreting x-ray tests of plaintiff's lumbosacral, cervical, and thoracic spines, which revealed straightening of the cervical lordosis and dextroscoliosis of the thoracic spine (see Dr. Chess' reports, Smith Aff., exhibit E). On June 27, 2002, Dr. Steven Brownstein, M.D. (Dr. Brownstein), of Park Radiology, P.C., prepared a report based on an MRI study of plaintiff's cervical spine, finding a "[d]iffuse bulging of the C5-C6 disc," "[s]traightening of the normal cervical curve consistent with muscular spasm," and "Arnold Chiari Type I malformation" (Dr. Brownstein's report, Smith Aff., exhibit E).

In her bill of particulars, dated July 27, 2006, plaintiff alleged that she

sustained personal injuries, as a result of the accident, all of which upon information and belief are permanent in nature, except for minor contusions and abrasions. Said injuries were accompanied by nervous shock, severe pain, weakness, swelling, tenderness, strain and sprain, restriction of motion and limitations of use.

The injuries were as follows:

- A. Diffuse bulging of the C5-C6 disc.
- B. Aggravation of Arnold Chiari Type I malformation to the cervical spine.
- C. Aggravation of dextroscoliosis of the thoracic spine.
- D. Cervical sprain and strain.

- E. Thoracic sprain and strain
- F. Lumbar sprain and strain
- G. Cervical radiculopathy

(plaintiff's bill of particulars, ¶ 7, Smith Aff., exhibit C). "Plaintiff was not confined to bed and home after the accident" (id., ¶ 8), and missed one day from work (see Dr. Michael P. Rafiy Report, at 2, Smith Aff., exhibit F).

At defendants' request, on June 28, 2007, Dr. Michael P. Rafiy, M.D. (Dr. Rafiy), a board-certified orthopedic surgeon, conducted an independent medical examination of plaintiff and produced a sworn report (Rafiy Report) (Smith Aff., exhibit F). Dr. Rafiy reviewed plaintiff's bill of particulars, emergency room records, Dr. Gavini's June 17, 2002 report, x-ray reports by Dr. Chess of the cervical, thoracic and lumbar spine, and the MRI study report of the cervical spine by Dr. Brownstein (id. at 2). Dr. Rafiy examined plaintiff's cervical spine, which revealed no tenderness to palpation and no muscle spasm, and performed a range of motion test of the cervical spine, which included flexion, extension, side bending, and rotation -- all of which were within the norm (id. at 2-3). Dr. Rafiy quantified in percentage degrees the results he found and stated in percentage degrees the normal ranges. Dr. Rafiy also examined thoracic spine and found no abnormalities (id. at 3). Finally, Dr. Rafiy examined plaintiff's lumbar spine and found no tenderness to palpation, normal lordotic posturing, and no muscle spasm (id.). Dr. Rafiy performed a range of motion test of the lumbar spine (flexion, extension, side bending, and rotation), quantified the results of each test in percentage degrees, stated normal ranges, and found no deviation from the norm (id.). Dr. Rafiy concluded that the "[c]ervical, thoracic and lumbar sprain/strain [were all] resolved [, and that plaintiff] can work and carry on her regular activities without any restrictions or limitations" (id.).

DISCUSSION

As plaintiff correctly points out (Brizel Aff., ¶ 20), defendants, as movants seeking summary judgment, have the burden of establishing “a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (see Winegard v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985] [citing, *inter alia*, Zuckerman v City of New York, 49 NY2d 557 (1980)]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*). The court’s function on the motion for summary judgment is limited to identifying the existence of material issues of fact, not determining them (see e.g. People v Grasso, 50 AD3d 535, 548 [1st Dept 2008] [citing Sillman v Twentieth Century-Fox Film, 3 NY2d 395, 404 (1957)]). “The substantive law governing a case dictates what facts are material, and only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment” (*id.* at 545 [quoting Anderson v Liberty Lobby, 477 US 242, 248 [1986] [internal quotation marks and brackets omitted]).

In this case, the relevant substantive law is New York State’s Insurance Law, which in section 5102 (d) defines “serious injury” as

a personal injury which results in [1] death; [2] dismemberment; [3] significant disfigurement; [4] a fracture; [5] loss of a fetus; [6] permanent loss of use of a body organ, member, function or system; [7] permanent consequential limitation of use of a body organ or member; [8] significant limitation of use of a body function or system; [9] or 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.

In her notice of claim, complaint, and bill of particulars, plaintiff does not specify which of the nine enumerated categories of “serious injury,” within the meaning of the Insurance Law § 5102 (d), she suffered as a result of the accident. However, based on the injuries alleged in plaintiff’s bill of particulars and plaintiff’s medical records, it is obvious that plaintiff does not, and cannot, allege to have suffered: death; dismemberment; a fracture; or loss of a fetus (see plaintiff’s bill of particulars, ¶ 7, Smith Aff., exhibit C).

Additionally, plaintiff does not, and cannot, claim that her daily activities were substantially curtailed for 90 days during the 180 days following the accident, the last category of “serious injury.” Specifically, plaintiff was not confined to bed or home following the accident (id., ¶ 8), and missed only one day of work (Raify Report, at 2) (see e.g. Licari v Elliott, 57 NY2d 230, 238 [1982] [where 24 days after the accident, plaintiff returned to work and resumed his usual schedule, the Court of Appeals held that “plaintiff was not prevented from performing substantially all of his daily activities during . . . 90 days following the occurrence of the injury”]). Although 10 days after the accident, plaintiff’s doctor, Dr. Gavini, instructed plaintiff not to perform “heavy work . . . until told so by me” (Dr. Gavini Initial Medical Report, at 5, Smith Aff., exhibit D), this statement alone is insufficient to create an issue of material fact as to whether plaintiff suffered a “medically determined injury” substantially curtailing her daily activities during the requisite period following the accident (see e.g. Alexander v Garcia, 40 AD3d 274 [1st Dept 2007]; Uddin v Cooper, 32 AD3d 270, 271 [1st Dept 2006]).

Therefore, plaintiff’s injuries may fall only under categories 3, 6, 7, or 8 of the Insurance Law § 5102 (d), which are: significant disfigurement; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body function or

system; or significant limitation of use of a body function or system, respectively.

To obtain summary judgment, defendants need to offer “evidentiary proof in admissible form” that would establish their defense “sufficiently to warrant the court as a matter of law in directing judgment in [their] favor” (Zuckerman, 49 NY2d at 562 [internal quotation marks and citations omitted]). In this case, defendants have the burden of showing that plaintiff’s injuries are not “serious” within the meaning of the aforementioned categories 3, 6, 7, 8 of Insurance Law § 5102 (d) (see e.g. Style v Joseph, 32 AD3d 212, 214 [1st Dept 2006]). Defendants have met their burden by way of offering Dr. Rafiy’s sworn report (Smith Aff., exhibit F).

Significant Disfigurement

“Significant disfigurement” is defined as a personal injury that renders a victim, from a reasonable person’s viewpoint, “unattractive, objectionable, or as the subject of pity or scorn” (Hutchinson v Beth Cab Corp., 204 AD2d 151, 151 [1st Dept 1994] [internal quotation marks and citation omitted]). The only injury that plaintiff claims in her bill of particulars that may be considered a “significant disfigurement” is “[a]ggravation of dextroscoliosis of the thoracic spine” (plaintiff’s bill of particulars, ¶ 7). Defendants’ expert, Dr. Raify, specifically addressed this claim by examining plaintiff’s thoracic spine and finding that “[t]he thoracic curvature [was] normal with no paraspinal spasm” (Raify Report, at 3). Additionally, plaintiff’s doctor, Dr. Gavini, who examined plaintiff 10 days after the accident, upon examination of the thoracic spine, only noted “tenderness . . . at levels T1-T12 with tenderness/spasm of right and left paraspinal structures” (Gavini Report, at 4). Dr. Gavini did not note that plaintiff’s thoracic curvature was abnormal (id.). Although a thoracic spine x-ray report by Dr. Chess, dated June 26, 2002, reveals “dextroscoliosis of [plaintiff’s] thoracic spine” (Smith Aff., exhibit E), it is

“unsupported by other competent medical evidence that” dextroscoliosis caused a significant disfigurement, or any other “serious injury” for that matter, within the meaning of the Insurance Law § 5102 (d) (see Uddin, 32 AD3d at 271). Accordingly, defendants have made a prima facie case that plaintiff did not suffer significant disfigurement as a result of the accident.

Permanent Loss of Use of a Body Organ, Member, Function or System

“[P]ermanent loss of use” is an injury, which causes a total, not partial, loss of an organ, member or system (see Oberly v Bangs Ambulance, 96 NY2d 295, 299 [2001]). Plaintiff here alleged injuries to her cervical, thoracic, and lumbar spines (plaintiff’s bill of particulars, ¶ 7). Dr. Rafiy examined plaintiff’s cervical, thoracic, and lumbar spines, performed, among other objective tests, a range of motion test of the cervical and lumbar spines, recorded the numerical value of the normal ranges of motion and the ranges of motion he found (Rafiy Report, at 2-3). All of the tests yielded normal results, and Dr. Rafiy concluded that plaintiff’s “[c]ervical, thoracic and lumbar sprain/strain [were] resolved” (Rafiy Report, at 3). Additionally, the reports of plaintiff’s doctors, Drs. Gavini, Chess, and Brownstein, did not reveal that plaintiff suffered a total loss in any of her organs, members or systems (Smith Aff., exhibits D, E). Accordingly, defendants made a prima facie case that plaintiff did not suffer permanent loss of use of a body organ, member or system as a result of the accident (see Oberly, 96 NY2d 295, supra; see also Hock v Aviles, 21 AD3d 786, 788 [1st Dept 2005] [failure to establish a total loss of use of plaintiff’s cervical spine disqualifies application of “permanent loss of use” category of “serious injury” within the meaning of Insurance Law § 5102 (d)]).

Permanent Consequential Limitation of, and Significant Limitation of, Use of a Body Organ, Member, Function or System

“Permanent consequential limitation” requires a showing of both “permanent” and

“consequential” injury (see e.g. Kordana v Pomellito, 121 AD2d 783, 784 [3d Dept 1986]).

“[C]onsequential” means “important” or “significant” (see id.; see also Toure v Avis Rent A Car Syst., 98 NY2d 345, 353 [2002] [“consequential” in this context means important]).

With respect to “significant limitation of use” category, “the word ‘significant’ as used in the statute . . . should be construed to mean something more than a minor limitation of use [, and] minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute” (Licari, 57 NY2d at 236).

The extent of “limitation” of both of these categories of “serious injury” “relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part” (Toure, 98 NY2d at 353 [internal quotation marks and citation omitted]).

In this respect, Dr. Rafiy performed both a quantitative and qualitative assessment of the plaintiff’s condition. Specifically, Dr. Rafiy performed, among other tests, the previously mentioned range of motion tests of plaintiff’s cervical and lumbar spines and a straight leg raising test, and found no abnormalities (Rafiy Report, at 2-3). Dr. Rafiy performed a neurological examination as well and found “no motor or sensory deficits in the upper [and lower] extremities” (id., at 3). Dr. Rafiy did not detect a “paraspinal spasm” in plaintiff’s thoracic spine, nor a muscle spasm in cervical and lumbar spines (id. at 2-3). Dr. Rafiy concluded that plaintiff “can work and . . . carry on her regular daily activities without any restrictions or limitations” (id. at 3). Plaintiff “complain[ed to Dr. Rafiy] of neck, mild back, bilateral shoulder and bilateral knee pain” (id. at 2). Additionally, the x-ray and MRI reports, which Dr. Rafiy reviewed, showed a bulging cervical spine disc, straightening of the cervical lordosis, Arnold Chiari Type I malformation, and

dextroscoliosis of the thoracic spine (id. at 2; see also Smith Aff., exhibit E). However, Dr. Rafiy's thorough examination of these body parts, which included objective tests, found no "requisite quantitative or qualitative limitations necessary to support a serious injury" (see Hock, 21 AD3d at 788). Therefore, defendants made a prima facie showing that plaintiff did not sustain a permanent consequential limitation of use of a body organ, member, function or system or a significant limitation of use of a body organ, member, function or system (see e.g. Perez v Hilarion, 36 AD3d 536 [1st Dept 2007]).

Plaintiff contends that defendants failed to make a prima facie showing of entitlement to judgment as a matter of law (see Brizel Aff., ¶¶ 3, 20-23). Specifically, plaintiff argues that Dr. Rafiy did not specify "which objective range of motion tests he used" with respect to the range of motion tests of plaintiff's cervical and lumbar spine (id., ¶ 18). Additionally, plaintiff alleges that Dr. Rafiy's "examination . . . failed to discuss plaintiff's neurological allegations and did not review plaintiff's radiological films" (id., ¶ 21).

Plaintiff cites Webb v Johnson (13 AD3d 54 [1st Dept 2004]), among other cases, in support of her position (Brizel Aff., ¶ 22). As defendants correctly point out (Smith Reply Aff., ¶ 10), the facts in Webb can be readily distinguished from the facts of this case. In Webb, the defendants' doctors, among other deficiencies, failed to review MRI films or reports, which revealed herniations and bulges in plaintiff's spine, and performed a range of motion test without "specif[ying] the degree of motion they found or what is considered normal" (see id. at 54). Contrary to plaintiff's argument, in Webb, the defendants doctors' affirmations and report were found to be deficient not because they failed to state which objective test they used in performing the range of motion test. Rather, the deficiency consisted of the doctors' failure to provide a

numerical value of normal ranges of motion and state a numerical value of the ranges of motion they actually found upon examination of the plaintiff (see id. at 54-55).

By contrast, here, Dr. Rafiy, reviewed plaintiff's x-ray reports prepared by Dr. Chess and the MRI report prepared by Dr. Brownstein (see Rafiy Report, at 2). Additionally, Dr. Rafiy, in conducting the range of motion tests of plaintiff's cervical and lumbar spines, specified in percentage degrees the ranges of motion that he found and stated the normal ranges of motion (see id. at 2-3). Furthermore, Dr. Rafiy did not have to review the actual films of plaintiff's x-ray tests and MRI study. His review of the x-ray and MRI reports was sufficient (see Webb, 13 AD3d at 54-55 [review of the MRI reports by the defendants' doctors would have been sufficient]). Dr. Rafiy found no "competent medical evidence" that the injuries stated in Drs. Chess and Brownstein's reports caused a requisite limitation to support "serious injury" (see e.g. Uddin, 32 AD3d at 271). Furthermore, contrary to plaintiff's contention, Dr. Rafiy did perform a neurological examination and found no limitations (Rafiy Report, at 3). Therefore, Dr. Rafiy's sworn report, based on his examination of plaintiff, provides sufficient evidence that demonstrates that plaintiff did not sustain the aforementioned categories 3, 6, 7, or 8 of "serious injury" within the meaning of Insurance Law § 5102 (d). Accordingly, defendants made a prima facie showing of entitlement to judgment as a matter of law (see e.g. Uddin, 32 AD3d at 271).

The burden thus shifted to plaintiff to raise a triable issue of fact, which plaintiff failed to do (see id.). Plaintiff offered no affirmation or report of plaintiff's recent medical examination. Additionally, the transcripts of plaintiff's statutory hearing and deposition, attached to plaintiff's opposition papers (Brizel Aff., exhibits F, G, H), do not reveal any testimony that would create an issue of material fact with respect to plaintiff's allegation of having suffered a "serious injury" as

a result of the accident. In fact, plaintiff does not even contend that she raised a triable issue of fact in her opposition papers. Plaintiff's sole contention - that defendants failed to make a prima facie showing of entitlement to summary judgment - was already addressed by the court and found without merit.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants Manhattan and Bronx Surface Transit Operating Authority and New York City Transit Authority's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 7/3/08

ENTER:

Donna M. Mills

J.S.C.

DONNA M. MILLS, J.S.C.

FILED
JUL 16 2008
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