

Ventura v Bardales

2008 NY Slip Op 32152(U)

July 21, 2008

Supreme Court, Nassau County

Docket Number: 9183-07/

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x
REINA VENTURA

Plaintiff,

-against-

**MIGUEL A. BARDALES, CUBAN
TRANSPORTATION CORP.,
AND SHEKA J. ARUNA**

Defendant.

-----x

**TRIAL PART: 21
NASSAU COUNTY**

INDEX NO: 9183/07

MOTION SEQ. NO: 2,3,4

SUBMIT DATE: 6/19/08

The following papers having been read on this motion:

- Notice of Motion..... 1**
- Cross-Motion..... 2**
- Notice of Motion.....3**
- Opposition (Plaintiff)..... 4**
- Reply.....5,6**

Motion by defendants, Miguel A. Bardales and Cuban Transportation Corp., and identical cross-motion by defendant, Sheka J. Aruna, both, for an Order of this Court, awarding each of them summary judgment and dismissing the complaint on the grounds that plaintiff, Reina Ventura, has not satisfied the "serious injury" threshold requirement of Insurance Law §5102(d) is granted.

Motion by defendant, Sheka J. Aruna, for an Order of this Court, pursuant to CPLR §3212, granting him summary judgment and dismissing the complaint of the plaintiff on the grounds that there are no triable issues of fact as to liability is denied as moot.

This action arises out of a motor vehicle accident that occurred on February 21, 2007 at approximately 11:38 p.m. at the intersection of Peninsula Boulevard and Henry Street in Hempstead,

New York. Plaintiff, Renia Ventura, was a rear-seat passenger in a taxi cab owned by defendant Cuban Transportation Corp. and being operated by defendant Miguel A. Bardales. The accident occurred as the taxi cab in which plaintiff was traveling collided with a vehicle owned and being operated by defendant, Sheka J. Aruna.

At his examination before trial, defendant, Aruna testified that he pulled out of a gas station onto Peninsula Boulevard and intended to go across Henry Street. He stopped at a red traffic light at the intersection and when the light changed to green, he began to proceed into the intersection. Approximately 5 to 10 feet into the intersection, the accident took place. He stated that at the time of impact, his vehicle was proceeding at approximately 10 miles per hour. Aruna also testified that he never saw the subject taxicab at any time before the impact. Defendant, Aruna, described the impact as heavy.

Plaintiff testified that she was a passenger seated in the rear seat of the taxi cab when the accident occurred. She alleges that as a result of the heavy impact, her forehead, nose and left shoulder struck the center partition in the cab causing her to bleed from her nose and mouth. Plaintiff does not claim to know how the accident occurred. She was on her way home from work. She was not wearing her seat belt at the time of the accident. She was driven to the emergency room at Mercy Medical Center by a police officer where she presented with bleeding and complaints of a headache. She did not require stitches. X-rays were taken of her left arm and face. Nothing appeared to be broken or fractured. She reported to work the next day but left early. She was then absent from work again the following day and then resumed her regular full time work schedule the following week. At the time of the accident, plaintiff was employed as a cashier at a 7-11 store in West Hempstead. At the time of the accident, she was also a member of the gym. As a result of the accident, plaintiff alleges that she can no longer re-stock shelves, attend her gym, go out with her friends, shop or sleep

comfortably.

Plaintiff, 17 years old at the time of her accident, claims that as a result of the subject accident, she sustained, *inter alia*, injury to the facial area with abrasions and swelling to the nose; cervical sprain/strain, cervical derangement, cervical myofascitis with radiculopathy and nerve root compression with an MRI finding of focal bulge at C3-4; lumbar sprain/strain, lumbar derangement, lumbar myofascitis with radiculopathy and nerve root compression with an MRI finding of broad based disc bulges at L4-5 and L5-S1; internal derangement, sprain/strain of the left shoulder with an MRI finding of the tendinosis, characterized by heterogenous signal in the supraspinatus tendon; anterior chest contusion; contusion of the left hip; post-concussion syndrome with post-traumatic headaches with dizziness and nausea; anxiety, depression and nausea (*Bill of Particulars*, ¶11).

Plaintiff contends that the injuries she sustained as a result of this accident only fall within three of the nine categories of the serious injury statute: “permanent consequential limitation of use of a body organ or member;” “significant limitation of use of a body function or system;” and “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” (*Id.*, ¶20). Plaintiff does not claim that her injuries fall under any other category of Insurance Law §5102(d). Thus, any other category of serious injury other than those alleged will not be considered by this Court herein (*Melino v. Lauster*, 195 AD2d 653, 656 [3rd Dept. 1993] *affd* 82 NY2d 828 [1993]).

It is noted at the outset that in moving for summary judgment on the issue of serious injury, defendant Sheka Aruna, relies exclusively and entirely upon the proof supporting defendant Bardales's motion for summary judgment. Accordingly, this Court will consider both motion and

identical cross motion simultaneously.

Defendants, Bardales/Cuban Transportation Corp and by incorporation, defendant Aruna's motion and cross motion, respectively, for summary judgment dismissal of the complaint on the grounds that plaintiff has not satisfied the serious injury threshold of Insurance Law is granted.

In moving for summary judgment, defendants must make a prima facie showing that plaintiff did not sustain a "serious injury" with the meaning of the statute. Once this is established, the burden shifts to the plaintiff to come forward with evidence to overcome defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v. Perez*, 4 NY3d 566 [2005]; see also *Grossman v. Wright*, 268 AD2d 79, 84 [2nd Dept. 2000]).

In support of a claim that the plaintiff has not sustained a serious injury, defendants may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician (see *Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept. 1992]). However, unlike movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems*, 98 NY2d 345, stated that plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, 98 NY2d at 353 [2002]). However, the sworn MRI and CT scan tests and reports also must also be paired with the doctor's observations during his physical examination of the plaintiff (see *Toure v. Avis Rent A Car Systems*, supra). Unsworn MRI reports can also constitute competent evidence but only if both sides rely on those reports (see *Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept. 2003]).

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court

of Appeals held in *Pommels v. Perez*, *supra*, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, 4 NY3d 566).

To meet the threshold significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyer*, 79 NY2d 955 [1992]; *Licari v. Elliot*, 57 NY2d 230 [1982]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, *supra*; *see also Grossman v. Wright*, 268 AD2d 79, 83 [2nd Dept. 2000]).

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*see Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*see id.*).

To prevail under the "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" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non permanent nature" (Insurance Law §5102[d]) "which would have caused the alleged limitations on the plaintiff's daily activities (*Monk v. Dupuis*, 287 AD2d 187, 191 [3rd Dept. 2001]), and, furthermore, a curtailment of the plaintiff's usual activities "to a great extent rather than some slight curtailment" (*Licari v. Elliott*, supra at 236; see also *Sands v. Stark*, 299 AD2d 642 [2nd Dept. 2002]).

Unlike a claim of serious injury under "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system" categories, a gap or cessation in treatment is irrelevant as to whether plaintiff sustained a non-permanent medically determined injury which prevented the plaintiff from performing substantially all material acts which constituted such person's daily activities for not less than 90 days during the 180 days immediately after the accident (see *Gomez v. Ford Motor Credit Co.*, 2005 WL 3193696).

With these guidelines in mind, this Court will now turn to the merits of defendants' motions at hand.

In support of their motions, defendants submit, *inter alia*, the affirmed report of Dr. Frank Hudak, M.D., an orthopedic surgeon, who performed an independent orthopedic examination of the plaintiff on January 7, 2008; the affirmed report of Dr. Warren Cohen, M.D., a neurologist, who performed an independent neurological examination of the plaintiff on January 2, 2008; and, the affirmed report of Dr. Robert Tantleff, M.D., who performed a radiological review of the MRI of plaintiff's lumbar spine on April 12, 2007, of her left shoulder on April 6, 2007, and of her cervical spine on March 23, 2007; the affirmed report of Dr. Carlos C. Bazan, M.D., F.A.C.S., a plastic

surgeon, who performed an independent plastic surgery evaluation of the plaintiff on January 3, 2005; the Mercy Medical Center Department of Radiology report dated February 22, 2007; and, the EMG/NCV report of the plaintiff's cervical spine dated April 9, 2007.

Dr. Tantleff's independent radiological review confirmed the following: "Normal MRI examination of the lumbar spine;" "Normal MRI examination of the left shoulder;" and "Essentially normal and unremarkable MRI examination of the Cervical Spine."

Dr. Hudak's medical report states, in pertinent part, as follows:

PHYSICAL EXAMINATION:

Examination of the cervical spine revealed no tenderness to palpation in the cervical spine area. Active and voluntary range of motion of the head and neck was such that forward flexion was 60 degrees (normal is 60 degrees), extension 45 degrees (normal is 45 degrees), right and left rotation to 60 degrees (normal is 60 degrees), and right and left tilt to 45 degrees (normal is 45 degrees) with no pain noted. No spasm is palpated in either right or left paraspinous or trapezial muscle groups of the cervical spine.

Examination of both upper extremities revealed no redness, swelling or deformity of either shoulder. There was no tenderness palpated in either shoulder. There was no atrophy in the muscles about either shoulder. No tenderness was palpated in the left clavicle area. There were negative impingement signs in both shoulders. Abduction and flexion of both shoulders was equal at 160 degrees (normal is 160 degrees), extension was 45 degrees (normal is 45 degrees). Range of motion of both elbows was 0 to 135 degrees (normal is 0 to 135 degrees). Range of motion of both wrists and hands were full and equal with dorsiflexion 60 degrees (normal is 45 degrees or greater), palmar flexion was 45 degrees (normal is 45 degrees), supination was 90 degrees (normal is 80 degrees or greater), and pronation was 90 degrees (normal is 85 degrees or greater). There was no pain noted on range of motion testing of the shoulders, elbows, wrists or hands.

There was good motor power and intact sensation to both upper extremities. The biceps, triceps and brachioradialis reflexes are bilaterally equal at 0.

Examination of the dorsal and lumbosacral spines revealed no tenderness to palpation in those areas. The claimant stood fully erect and forward flexed 95 degrees at the waist with no pain noted (normal is 90 degrees). Right and left lateral tilt was to 30 degrees with no pain noted (normal is 30 degrees or greater). No spasm is palpated in either right or left paraspinous muscle groups of the lumbosacral spine or dorsal spine.

CONCLUSION

The claimant at the time of this examination noted continued subjective complaints in the area of the cervical spine radiating into the left shoulder and noted resolution of all chest pain, lower back pain and left hip pain.

Orthopedic diagnosis by the records reviewed is that of status post cervical sprain, mid back sprain, low back sprain, left shoulder sprain and anterior chest contusion.

On this examination, there were no objective findings to confirm any disability or permanency regarding the claimant's accident of 2/21/07.

The claimant is capable of normal activities of daily living including work activity with no restrictions and she has returned to work as a cashier.

Similarly, Dr. Cohen's independent neurological review, dated January 2, 2008, also concludes, in pertinent part, as follows:

GENERAL EXAM:

Examination of the head, eyes, ears, nose, throat and thorax is unremarkable.

Extremities: There is no limitation of movement of shoulders, elbows, wrists, hips, knees and ankles.

SPINE:

Cervical Tests:

Foraminal Compression/Spurling Test:	Negative
Jackson's Compression Test:	Negative
Shoulder Depression Test:	Negative
Soto-Hall Test	Negative
Cervical Distraction Test:	Negative

Tenderness:	None
Trigger Points:	None
Spasm:	None

Cervical Spine: Range of Motion in Degrees

	<u>Claimant</u>	<u>Normal</u>
Flexion	45°	45°
Extension	45°	45°
Lateral Flexion [R]	45°	30-45°
Lateral Flexion [L]	45°	30-45°
Rotation [R]	60°	60°
Rotation [L]	60°	60°

Thoracic Spine:

Thoracic spine movement with normal excursion and without pain. No spasm or tenderness noted.

Lumbar Tests:

Forward Flexion:	Negative
Bechterew/Sitting Boot Test:	Negative
Straight Leg Raising (Supine):	Negative bilaterally
Straight Leg Raising (Sitting):	Negative bilaterally
Kernig Test:	Negative bilaterally

Lumbar tenderness:	None
Sacral tenderness:	None
Trigger Points:	None
Spasm:	None
Squat:	Able to squat

Lumbar Spine: Range of Motion in Degrees

	<u>Claimant</u>	<u>Normal</u>
Flexion	90°	90°
Extension	30°	30°
Lateral Flexion [R]	30°	30°
Lateral Flexion [L]	30°	30°
Rotation [R]	30°	30°
Rotation [L]	30°	30°

WORK STATUS:

The claimant can continue working at this time

IMPRESSION:

Cervical sprain, resolved.

Lumbar sprain, resolved.

Headaches, by self report, with features indicative of muscle tension headache
Neurologic exam reveals no neurologic deficit and there is no evidence of radiculopathy or traumatic neuropathy.

NEED FOR TREATMENT:

The claimant is not in need of any treatment from a neurological perspective inclusive of any conservative care modalities. There is no need for physical therapy. No household help, transportation, testing or medical supplies are necessary.

There is no objective evidence of a permanent injury.

Finally, Dr. Bazan's independent plastic surgery evaluation, dated January 3, 2008, concludes

in pertinent part, as follows:

PHYSICAL EXAMINATION:...Examination of the nose reveals no tenderness or deformities. There are no visible scars. There is a slight decreased of the left nasal airway. Intranasal endoscopic examination reveals a mild deviation of the nasal septum to the left. There is no hypertrophy of the turbinates.

IMPRESSION: Mild deviation of the nasal septum with mild airway obstruction.

COMMENTS: There are visible scars of the nose. There is no need for surgical treatment of the deviated septum at this time. The claimant should be able to perform her activities of daily living without any restrictions or difficulty. She is currently working

Based upon the foregoing, this Court finds that defendants have submitted ample proof in admissible form that the plaintiff, Reina Ventura, did not sustain a serious injury within the meaning of the statute as a result of the subject accident.

In opposing defendant's motion, plaintiff submits her own affidavit; the affirmation of David Khanan, M.D., who treated the plaintiff from February 26, 2007 until August 22, 2007 and re-examined her on April 24, 2008; the affirmed medical report of Dr. Paul A. Bell, M.D., an otolaryngologist who examined the plaintiff on April 12, 2007; and, the affirmation of Dr. Mark Shapiro, M.D., a radiologist, who performed and read the MRI films of plaintiff's cervical and lumbar spine.

Dr. Shapiro in his sworn MRI reports notes: "Focal bulge at C3-4;" and "Broad based disc bulges at L4-5 and L5-S1."

Dr. Khanan, in his affirmation, states, in pertinent part, as follows:

4. On her most recent visit on April 24, 2008, she had continuing complaints of headaches, neck pain, low back pain and left shoulder pain.
6. [sic] On April 24, 2008, I performed cervical range of motion testing [...] via dual inclinometer, which revealed flexion carried out to 37 degrees, 50 being the normal, extension was carried out to 31 degrees, 60 being the normal, right lateral flexion was carried out to 14 degrees, 45 being the normal, left lateral flexion was carried out to 24 degrees, 45 being the normal, right rotation was carried out 43

degrees, 80 being the normal and left rotation was carried out to 49 degrees, 80 being the normal, *for a final whole person impairment of the cervical spine of 16%.*

On April 24, 2008, I performed lumbar range of motion testing, via dual inclinometer, which revealed lumbar left lateral carried out to 13 degrees, 25 being the normal, lumbar right lateral carried out to 9 degrees, 25 being the normal, lumbar flexion carried out to 1 degree, 60 being the normal, lumbar extension carried out to 21 degrees, 25 being the normal, sacral hip flexion carried out to 2 degrees, 45 being the normal and sacral hip extension carried out to 0 degrees, 5 being the normal *for final whole person impairment of the lumbar spine of 17%.*

On April 24, 2008, I performed left shoulder motion testing, via hand held goniometer, which revealed restricted range of motion in the left shoulder.

* * *

8. The medical significance of the aforementioned is as follows:
Reina Ventura had a cervical spine MRI performed on March 23, 2007 and a lumbar spine MRI performed on April 12, 2007, which revealed C3-C4 and broad based disc bulges at L4-L5 and L5-S1...
9. We discontinued treatment of Reina Ventura after her last visit on August 22, 2007, due to the fact that we felt that she had reached maximum medical improvement. Additionally, we prescribed home exercises, which she has continued. We saw her, most recently, due to her continued complaints.
10. Based upon my conversation with Reina Ventura herein she told me she had no neck, back or shoulder pain prior to the motor vehicle accident of February 21, 2007, and that she has not re-injured her neck, back or left shoulder since the motor vehicle accident of February 21, 2007, it is my opinion, with a reasonable degree of medical certainty, that the motor vehicle accident of February 21, 2007 is a competent cause of Reina Ventura's bulging lumbar and cervical discs. It is also my opinion, with a reasonable degree of medical certainty, that the motor vehicle accident of February 21, 2007 is a competent cause of Reina Ventura's ongoing neck, back and shoulder pain and headaches.
11. These injuries will restrict her ability to lift, bend, reach with both upper extremities, to sit and stand for long periods of time and walking.
12. She has a significant limitation of use of her neck, back, left shoulder resulting from the motor vehicle accident of February 21, 2007.

Dr. Bell, upon evaluating the plaintiff from an otolaryngologic perspective on April 12, 2007,

less than 2 months from the date of the accident, notes that:

She had a notable nasal dorsal hump without nasal dorsal deviation or step-off deformities.

Reina's nasal septum was midline. She had a class-1 oral airway. Her extraocular muscles were intact. Her cranial nerves were symmetric. Her neck had full range of motion.

It is my impression that Reina has a traumatic nasal deformity. She was counseled that surgical reconstruction *may be beneficial for her*. She will consider her options.

To the extent that Dr. Shapiro notes disc bulges in plaintiff's cervical and lumbar spine, in the absence of any objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration, and in the absence of any causal relationship between the disc bulges and the subject accident, the mere existence of a bulging or herniated disc does not constitute evidence of a serious injury (*Kearse v. New York City Tr. Auth.*, supra; *Diaz v. Turner*, supra; *Monette v. Keller*, 281 AD2d 523 [2nd Dept. 2001]).

Plaintiff's proof fails to raise a triable issue of fact as to whether she sustained a serious injury within the three alleged categories of Insurance Law §5102(d) as a result of the subject accident. A review of Dr. Khanan's report reveals that he found plaintiff's cervical range of motion was only restricted by 6%, her lumbar range of motion was restricted by 5% and the range of motion of her upper extremities was only restricted by 2%. Additionally, Dr. Khanan found that her cervical range of motion revealed mild limitation. A plain reading of Dr. Khanan's report confirms that the plaintiff did not sustain a "permanent consequential limitation of use" or a "significant limitation of use" of her shoulder or her cervical and lumbar spine (*Monette v. Keller*, 281 AD2d 523 [2nd Dept. 2001]; *Sellito v. Casey*, 268 AD2d 753 [3rd Dept. 2000]; *Decker v. Stang*, 243 AD2d 1033 [3rd Dept. 1997]).

In addition, Dr. Bazan in his report, fails entirely to causally relate the subject accident to his finding of a deviation of the nasal septum with mild airway obstruction. Moreover, plaintiff's own medical records - specifically, the x-ray report at the emergency room at Mercy Medical Center on the day of the accident - revealed that the nasal x-ray was normal, revealing no fracture or deviation.

The facial x-ray was also entirely normal.

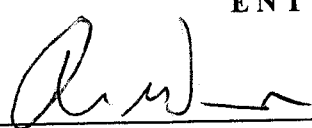
Finally, in opposing defendants' motion, plaintiff fails to refute the defendants' prima facie showing that the plaintiff did not sustain a serious injury that prevented her from performing substantially all of her daily activities for not less than 90 of the first 180 days after the accident. In her affidavit in opposition to defendants' motion, plaintiff's only statement in regards to her limitation of activities is, as follows: "I am restricted in many physical activities and have difficulty performing my duties at work. I no longer go to the gym as I had done prior to the accident and I have difficulty sitting or standing for long periods of time." However, in the absence of any documentation in evidentiary form to prove that such curtailment of activities was at the direction of a doctor and thus medically determined (*cf. Nelson v. Distant*, 308 AD2d 338 [1st Dept. 2003]), plaintiff's self-serving affidavit is insufficient to establish a serious injury within the meaning of Insurance Law §5102(d) (*GlIELmi v. Banner*, 254 AD2d 255 [2nd Dept. 1998]; *Rum v. Pam Transport, Inc.*, 250 AD2d 751 [2nd Dept. 1998]). Plaintiff's own recitation of treatment has no evidentiary value. Subjective evidence or complaints of limitations unsupported by credible medical evidence or documentation is not enough to establish the threshold issue of serious injury (*Ackerson v. Mincy*, 162 AD2d 934 [3rd Dept. 1990]). Furthermore, there is no proof of continuous confinement, total loss of mobility or substantive disability which prevented the plaintiff from engaging in all customary and usual daily activities (*Hezekian v. Williams*, 81 AD2d 261 [2nd Dept. 1981]). Thus, plaintiff's 90/180 day "serious injury" claim must also be dismissed.

In light of the fact that defendants' motions for summary judgment dismissal of plaintiff's complaint on the grounds that plaintiff has not satisfied the "serious injury" threshold requirement of Insurance Law §5102(d) is granted, defendant, Aruna's motion for summary judgment on the issue of liability is accordingly denied as moot.

This constitutes the decision and order of this Court.

DATED: July 21, 2008

ENTER



HON. ARTHUR M. DIAMOND
J. S.C.

ENTERED

JUL 25 2008

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