Khan v Jimenez
2010 NY Slip Op 30664(U)
March 25, 2010
Supreme Court, Kings County
Docket Number: 30228/04
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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JAYANTREE KHAN,

Plaintiff,

-against-

PEDRO JIMENEZ,

Defendant.

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DECISION/ORDER

Index No. 30228/04

Submitted 1/27/10

HON. DEBRA SILBER, A.J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion for summary judgment dismissing the complaint.

Papers	Numbered
Notice of Motion and Exhibits Annexed	1-11
Affirmation In Opposition and Exhibits Annexed........................	12-22
Reply Affirmation and Exhibits Annexed.................................	23-24

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Defendant moves for summary judgment dismissing the complaint seeking compensation for injuries allegedly sustained in an automobile accident, on the grounds that plaintiff did not suffer a "serious injury" as defined by § 5102(d) of the NYS Insurance Law. For the reasons set forth herein, the defendants' motion is granted.

Plaintiff claims she sustained injuries as a result of an automobile accident on December 7, 2002, at or near the intersection of Atlantic Avenue and Essex Street in the County of Kings. Plaintiff was 37 at the time. She was a pedestrian crossing the street when she was struck by a van owned and operated by defendant. Defendant was backing up at the time. Plaintiff was taken from the scene of the accident by ambulance

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to St. Mary's Hospital. The report says she walked into the ambulance on her own. They x-rayed her hands and wrists and wrote "negative for fracture." Plaintiff was treated by Dr. Albert Winyard III of RDK Medical, P.C., Dr. Stephen Diccianni, a chiropractor, and Dr. Robert Kronenberg, a neurologist with RDK Medical P.C., and was referred for physical therapy. Plaintiff subsequently commenced this negligence action against defendant. Examinations Before Trial and Independent Medical Examinations of the plaintiff have been conducted.

Defendant contends the complaint must be dismissed because plaintiff has not sustained a "serious injury" within the meaning of Insurance Law § 5102(d) which provides:

> "Serious injury" means 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 a body organ or member; significant limitation of use of a body function or system; 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.

Defendant argues that plaintiff's admissions at her deposition, together with the affirmed medical findings of defendant's medical experts, demonstrate that she did not sustain a serious injury within the meaning of Insurance Law Section 5102(d).

In her Verified Bill of Particulars, dated April 5. 2005, plaintiff claims that she sustained "Central lumbar disc herniation at L4-L5 with compression of the thecal sac;

Posterior disc herniation of the cervical spine at C3-C4 and C4-C5; Abrasion of right and left hand; Cervical radiculopathy; Post Concussion Syndrome; Traumatic cervical paraspinal myofascitis; Displacement of lumbar intervertebral disc; Cervicalgia; Myalgia; Myosotis; Lumbago; [and] Headache[s]." There is no mention of any injury to her knees.

Defendant argues that plaintiff's claimed injuries do not fall within any one of the categories of a "serious injury" specified in Insurance Law § 5102(d).

Plaintiff does not claim that she suffered an injury resulting in death, dismemberment, a fracture, or loss of a fetus. Nor did she sustain a significant disfigurement. Plaintiff does not claim she suffered a permanent loss of use of a body organ, member, function or system.

Defendant alleges that plaintiff did not sustain a "serious injury" which constituted a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Plaintiff testified she was a homemaker, had never worked, was not confined to her bed, not confined to her house and suffered no permanent disability.

Further, defendant claims that plaintiff's admissions at her deposition, together with the affirmed medical findings of defendant's medical experts, demonstrate that she did not sustain a permanent consequential limitation of use of a body organ or member, or a significant limitation of use of a body function or system.

Defendant argues that the clinical findings and diagnosis reported by the

physician who examined plaintiff in the Emergency Room immediately after the accident establish the lack of a serious injury in that plaintiff made no complaints to the ambulance crew, other than a bruise to her hand, and at the hospital, plaintiff complained of abdominal, neck and left hand pain. The attending physician reported the neck was normal; "ROM of all joints; no muscle weakness or deformity; steady gait and equal hand grasp; no loc [loss of consciousness] or dizziness; PEARLA [pupils equal and reactive to light and accommodation]; no nausea/vomiting." X-rays of both hands revealed "no evidence of fracture, dislocation or arthritis." See defendant's Exhibit "E."

Defendant also cites the normal results of electrodiagnostic tests performed on the major muscle groups and nerves of plaintiff's upper extremities and cervical paraspinal muscles. The report of Dr. Robert Kronenberg, plaintiff's neurologist, dated January 7, 2003, states "the waves have normal N9, N19, and P22 peak latencies, interpeak intervals and amplitudes. The waveforms have good shape and reproducibility. Their side differences lie within normal range." Dr. Kronenberg concluded "this is a normal upper extremity SSEP study, indicating good integrity of the large fiber, dorsal column, medial lemniscus, and cortical radiation sensory pathways from the upper extremities." Dr. Kronenberg also said that a needle EMG on the major muscle groups of plaintiff's upper extremities and paraspinal muscles "failed to reveal any signs of radicular or peripheral nerve/plexus dysfunction on the level of cervical segments." See defendant's Exhibit "F."

Defendant also notes the results of three range of motion tests, performed at RDK Medical, P.C., six, ten and fourteen weeks after the accident, on the major

muscle groups of plaintiff's large extremities and cervical and lumbar spine, which all indicated results within normal levels. See defendant's Exhibit "G."

Additionally, defendant states that plaintiff's admissions as to the "minimal treatment" she sought and received show that she did not sustain a serious injury. Defendant points out that plaintiff made no physical complaints to the ambulance crew, and the emergency room personnel did not find it medically necessary for plaintiff to receive CAT scans, medical devices or prescriptions; they noted no injury to her head; she was released the same day. The diagnosis was "injury both hands, left knee." In plaintiff's EBT, held on 4/24/06, she states that one week after the accident, she sought medical treatment with RDK Medical, P.C., complaining of pain in the neck, back, left hand and both knees.[1] There were a "couple of months" of physical therapy, including acupuncture and back massages, and throughout the time of her treatment, plaintiff was able to continue her normal activities of cooking and cleaning. See defendant's EBT, Exhibit "H" (pages 32-35).

At her EBT, plaintiff was unable to answer most of the questions posed to her, stating "I don't remember." She did indicate, however, that she could do all of the things she did before the accident, except that when she mopped floors, she "has to take it easy" (P. 39).

In addition, defendant also had Dr. S.W. Bliefer, a board certified orthopedic surgeon, perform an Independent Medical Examination of plaintiff on June 14, 2006, to

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[1]While this report, dated December 12, 2002, was not submitted in admissible form, and thus was not considered, it must be noted that plaintiff did not make any complaints about either knee. Nor are knees mentioned in her Bill of Particulars.

evaluate plaintiff's condition. See Affirmation of Doctor Bliefer, dated June 14, 2006 attached to defendants' moving papers as Exhibit "I". This report diagnoses plaintiff with "post traumatic cervical sprain with secondary pain syndrome resolved; lumbosacral sprain resolved; and bilateral knees contusion resolved." Dr. Bliefer concluded that plaintiff "revealed no functional disability at the present time" and "may continue with activities of daily living."

Defendant also had Dr. Melissa Sapan Cohn, a board certified radiologist, conduct an evaluation of the MRI films of plaintiff's lumbosacral and cervical spines, taken in January, 2003, and her report, dated September 7, 2005, in affirmation form, found degenerative changes, but no evidence of any trauma-related abnormality (Exhibit J). She states that the film quality was poor, but she could see some disc bulges, and no disc herniations.

Based on these reports, the defendant contends plaintiff's allegations of serious injury are not supported by the medical evidence.

Plaintiff opposes the motion. Plaintiff first argues that defendant has not met his burden, in that he failed to establish a prima facie case that plaintiff did not sustain a serious injury, failed to demonstrate that the injuries are not causally related to the accident, and did not establish that plaintiff's injuries did not prevent her from performing substantially all of her activities for at least 90 of 180 days after the accident.

Plaintiff also argues she suffered a permanent consequential limitation of use of her cervical spine and her lumbar spine, and that she also suffered a significant limitation of use of a body function or system, and a medically determined injury which prevented her from performing all of the material acts which constitute her usual and

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customary daily activities for at least 90 of the 180 days following the accident. She argues that, due to the injuries in her intervertebral discs, her cervical and lumbar spine operate in a limited fashion. Further, plaintiff argues she still has difficulty and limitations with lifting, bending, prolonged sitting, standing and walking.

Plaintiff provides a report from Dr. Albert E. Winyard III at RDK Medical P.C. (Exhibit C), dated December 12, 2002, which was not sworn to or affirmed, and thus not submitted in admissible form, and thus was not considered. See, *Kearse v NYCTA*, 16 AD3d 45 [2nd Dept 2005]. Plaintiff also provides the 12/10/02 report of Dr. Stephen Diccianni, a chiropractor (Exhibit D). It too was not submitted in admissible form. *Kearse v NYCTA*, *supra*.

On January 13, 2003, Dr. Ravinda Ginde performed a cervical spine MRI on the plaintiff. On January 20, 2003, Dr. Ginde performed an MRI of plaintiff's lumbosacral spine. The reports of the radiologist were not submitted in admissible form. *Kearse v NYCTA*, *supra*.

On January 7, 2003, Dr. Robert Kronenberg performed a neurological evaluation of the plaintiff. His report is Exhibit F to the moving papers. It indicates, as noted above, normal findings. On January 7, 2003, Dr. Kronenberg conducted a thorough neurological exam, only part of which is included in defendant's papers, but the report (dated 1/7/03) is not submitted in admissible form. Neither are Dr. Winyard's reports of 12/12/02 or 1/13/03 submitted by plaintiff in admissible form. *Kearse v NYCTA*, *supra*.

Plaintiff included a few other reports which could not be considered, as they also were not submitted in admissible form. *Kearse v NYCTA*, *supra*.

On November 9, 2009, almost seven years later, plaintiff was seen by Dr. David Khanan, MD, a physiatrist. She reported injuries to her neck, lower back and both knees. At the time of this exam, he noted "she denies neck pain," and claimed she had lower back pain and pain to both knees. Dr Khanan found that plaintiff's cervical and lumbar spines' range of motion revealed limitations, and that the cervical compression test was positive. Objective range of motion tests revealed the following limitations to plaintiff's cervical spine: flexion to 50 degrees (80 normal); extension to 45 degrees (60 normal); right lateral flexion to 35 degrees (45 normal); left lateral flexion to 28 degrees (45 normal); right rotation to 38 degrees (75 normal); left rotation to 36 degrees (75 normal). Lumbar spine showed moderate tenderness and moderate range of motion limitations. Straight leg raising revealed lower back pain bilaterally at 45 degrees; Gaenslen's test was positive bilaterally and Yeoman's test was positive bilaterally. Range of motion studies to the lumbar spine revealed: flexion to 45 degrees (55 normal); extension to 30 degrees (40 normal); right lateral flexion to 28 degrees (35 normal); left lateral flexion to 30 degrees (35 normal); right rotation to 25 degrees (45 normal); left rotation to 28 degrees (45 normal). The examination also showed diffuse tenderness over the articular cartilage at the medial and lateral condyles of both knees. Abduction stress test was positive bilaterally and showed pain at the medial and lateral joint line without gapping.

Dr. Khanan's final diagnosis is that, "if the history is true that the symptoms and signs experienced by plaintiff are the direct result of the motor vehicle accident on December 7, 2002,...it is my professional opinion that as a result of the accident, plaintiff sustained cervico-brachial syndrome with disc herniation; low back syndrome

with disc herniation and L4-L5 radiculopathy; bilateral knee derangement and gait dysfunction and that these injuries are partially permanent in nature." (See plaintiff's Exhibit A).

Where a motion for summary judgment is predicated on a determination of "serious injury," the moving party has the initial burden of submitting sufficient evidentiary proof in admissible form to warrant a finding that the plaintiff has not suffered a "serious injury". *Lowe v. Bennett,* 122 AD2d 728 [1st Dept], *affirmed* 69 NY2d 701 [1986]. Defendants' evidence, comprised of expert's affirmations, supports the conclusion that plaintiff did not sustain a "serious" injury, and thus defendant has met its prima facie burden of proof.

The affirmation of Dr. Bliefer, dated June 14, 2006, diagnosed plaintiff with "post traumatic cervical sprain with secondary pain syndrome resolved; lumbosacral sprain resolved; and bilateral knees contusion resolved." Dr. Bliefer concluded that plaintiff "revealed no functional disability at the present time" and "may continue with activities of daily living." The affirmation of Dr. Melissa Sapan Cohn, dated September 7, 2005, found degenerative changes, but no evidence of any trauma-related abnormality.

Defendant has thus made a prima facie showing that plaintiff did not suffer a permanent consequential limitation of use of a body organ or member, or a significant limitation of use of a body function or system. Defendant also made a prima facie showing that plaintiff did not suffer a medically determined injury which prevented her from performing all of the material acts which constitute her usual and customary daily activities for at least 90 of the 180 days following the accident

The Plaintiff then has the burden of overcoming the motion. *Grossman v. Wright*

288 AD2d 79 [2nd Dept 2000].

Plaintiff contends that she suffered a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system and a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident.

As noted, plaintiff's own testimony at her deposition establishes that she suffered no significant curtailment of her activities. A plaintiff's testimony is probative on the issue of whether any curtailment of activities occurred during the 180 day period following the accident, and the plaintiff must provide proof that any curtailment was medically directed. See, *Rennell v Horan*, 225 AD2d 939 [3rd Dept 1996]; *Boyd v Pierce*, 225 AD2d 867 [3rd Dept 1996]; *Hewan v Callozzo*, 223 AD2d 445 [1st Dept 1996]. Plaintiff has not offered any proof that there was any curtailment in her activities which was the result of the accident. *Nelson v Distant*, 308 AD2d 338 [1st Dept 2003]. Other than plaintiff's own limited assertions in her affidavit, there is no concrete information in any of the plaintiff's exhibits concerning a medically determined curtailment of activities in the 180 day period following the accident [emphasis added]. Without proof that any curtailment of activities was directed by a doctor, her claims are not sufficient. *Atkinson v Oliver*, 36 AD3d 552 [1st Dept 2007].

The court is puzzled by the plaintiff's claims of injury, as she told different doctors that she had different symptoms. The only consistent symptom is lower back

pain, which defendant's radiologist claims is degenerative. To one doctor, she reported arm pain, to another, headaches and dizziness but no knee pain, to a third, the most recent, lower back and knee pain only, with no reference to the neck or arm or shoulder problems which she had reported earlier.

There are serious evidentiary problems with the medical information submitted by the plaintiff. Of the medical reports submitted on plaintiff's behalf, only the report of Dr. Khanan is sworn to or affirmed. It is noted that none of the reports submitted by plaintiff are admissible, because they were not submitted in admissible form, nor were they relied upon by defendant. There were a few of plaintiff's medical reports submitted by defendant in their moving papers. See, *Kearse v NYCTA*, *supra*; *Ayzen v Melendez, supra; Pech v Yael Taxi Corp*, 303 AD2d 733 [2nd Dept 2003]. However, the reports of Drs. Winyard and Kronenberg, the report of Dr. Stephen Diccianni, dated December 10, 2002, (annexed as defendant's Exhibit D), the December 13, 2002 report of physical therapist Randy Abella (annexed as plaintiff's exhibit E), the report of the acupuncturist (annexed as Plaintiff's exhibit F); the MRI report (though not the MRI films themselves) of Dr. Ravindre Ginde, dated, January 20, 2003 (Exhibit G), the test results of Doctor Kronenberg dated January 3, 2003, and January 10, 2003 (annexed as plaintiff's Exhibit I) (although part of the report of Dr. Kronenberg, annexed as Defendant's F & G, was relied upon), and the report of Dr. Susi dated 1/6/03 (annexed as Exhibit J) were not included in defendant's motion and were not submitted by plaintiff in admissible form.

It is noted that the Appellate Division, Second Department has specifically held that the mere reference to plaintiff's medical reports without reliance upon them or

commentary about them does not put those reports before the court. *Kearse v NYCTA*, *supra*.

As such, the report from Dr. Khanan following an exam of plaintiff conducted on 11/9/09, plus the reports of plaintiff's doctors which are included in defendant's papers, are insufficient to overcome the motion as they do not adduce competent medical evidence based on objective findings sufficient to raise a triable issue of fact that she sustained a serious injury. *Kivian v Acevedo*, 17 AD3d 321 [2nd Dept 2005]; *McLoyrd v Pennypacker,* 178 AD2d 227, 228 [1st Dept 1991].

Plaintiff failed to present any findings of a significant reduction in her range of motion which were both admissible and contemporaneous with the subject accident. See, *Taylor v Flaherty*, 65 AD3d 1328 [2nd Dept 2009]; *Fung v Uddin*, 60 AD3d 992 [2nd Dept 2009]; *Gould v Ombrellino,* 57 AD3d 608 [2nd Dept 2008]; *Kuchero v Tabachnikov*, 54 AD3d 729 [2nd Dept 2008]; *Ferraro v Ridge Car Service,* 49 AD3d 498 [2nd Dept 2008].

It is apparent from the affirmation of Dr. Khanan that he improperly relied upon unsworn reports from outside sources. *Kivian v Acevedo, supra, Friedman v U-Haul Truck Rental*, 216 AD2d 266 [2nd Dept 1995].

Over six and a half years passed between plaintiff's cessation of treatment and the date of the recent examination of plaintiff by Dr. Khanan on November 9, 2009. It would appear this exam was conducted specifically to respond to defendant's motion, as the motion was served on October 16, 2009. The report of Dr. Khanan also fails to mention whether plaintiff's insurance benefits had terminated, if there was a

determination she had reached maximum improvement, or to account in any other way for the gap in plaintiff's treatment.

. A plaintiff who terminates treatment following an accident, while claiming serious injury, must offer some reasonable explanation for having done so. Absent such explanation, plaintiff's gap in treatment is considered a factor that interrupts the chain of causation between the accident and the claimed injury. *Pommells v Perez*, 4 NY3d 817 [2005]. As such, the evidence submitted by plaintiff is insufficient to raise a triable issue of fact as to whether plaintiff suffered a serious injury. *Kearse v NYC Transit Authority*, 16 AD3d 45 [2nd Dept 2005]. This is a significant gap in treatment and casts doubt on the ability of the plaintiff's new doctor, who first saw plaintiff in 2009, to demonstrate causation. See, *Al v Vasquez*, 19 AD3d 520 [2nd Dept 2005]; *Adelman v. Zelman Reiss & Associates*, 239 AD2d 394 [2nd Dept 1995]; *Marshall v. Albano*, 182 AD2d 614 [2nd Dept 1992]; *Bruce v NYCTA*, 16 AD3d 377 [2nd Dept 2005]; *Howeel v Reupke*, 16 Ad3d 377 [2nd Dept 2005].

Therefore, the evidence submitted by the plaintiff has failed to raise a triable issue of fact (*see* CPLR 3212[b]). The evidence submitted by defendant establishes prima facie that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Yunatanov v Stein*, 2010 NY Slip Op 249 [2nd Dept]; *Yun v Barber*, 63 AD3d 1140 [2nd Dept 2009]; *Gavria v Alvarado*, 65 AD3d 567 [2nd Dept 2009].

Accordingly, the motion for summary judgment dismissing the plaintiff's complaint is granted.

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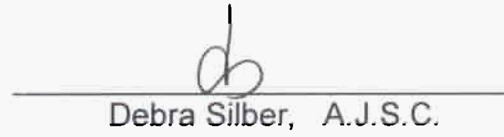
The foregoing constitutes the Decision and Order of this Court.

Dated: Brooklyn, New York
March 25, 2010



Debra Silber, A.J.S.C.

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