

<b>Armella-Manoly v Platt</b>
2010 NY Slip Op 31364(U)
May 18, 2010
Sup Ct, Nassau County
Docket Number: 000715/09
Judge: John M. Galasso
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU  
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....  
MICHELLE ARMELLA-MANOLY,

Plaintiff,

Index No. 000715/09  
Sequence #001  
Part 37

- against -

05/12/10

EDWARD J. PLATT,

Defendant,

.....	
Notice of Motion.....	1
Affirmation In Opposition.....	2
Memorandum of Law.....	3
Reply Affirmation.....	4

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Upon the foregoing papers, defendant's motion and cross-motion for an order pursuant to CPLR Sec. 3212 granting summary judgment in his favor and dismissing the summons and complaint of plaintiff upon the grounds that, as a matter of law, plaintiff has not suffered a serious injury as defined by Insurance Law Sec. 5102 (d) is denied.

This case involves a motor vehicle accident that occurred on May 18, 2008 resulting in plaintiff's claim of serious injury as defined under Insurance Law Sec. 5102 (d).

Movant has sustained his initial burden of submitting evidentiary proof in admissible form to warrant the objective findings that plaintiff has not suffered a serious injury, including the affirmed report of Doctor Michael Katz, who concluded that there was no positive objective physical findings that plaintiff sustained any substantial or permanent injuries or disability as a result of the subject accident (see *Kearse v. NYCTA*, 16 AD3d 45; *Grossman v. Wright*, 268 AD2d 79; *Guzman v. Paul Michael Management*, 266 AD2d 508).

The Court also finds that defendant demonstrated a *prima facie* entitlement to judgment under the 90/180 days threshold category by the inclusion of plaintiff's deposition testimony (*Robinson v. Polasky*, 32 AD3d 1214; *Lopez v. Caprio-Ceballo*, 20 AD3d 336).

Plaintiff must now come forward with some admissible evidence demonstrating a serious injury within the meaning of the No-Fault Law (*Gaddy v. Eyer*, NY2d 995). This plaintiff has been able to do.

Plaintiff begins her opposition with an unsubstantiated claim that defendant's expert, Dr. Katz, did not sign his medical report. Counsel asserts that Dr. Katz' signature is different from two other reports in cases where counsel represented other plaintiffs who were examined by him.

This contention is speculative and without a shred of probative evidence submitted to the Court. Consequently, it does not impact the question of whether defendant has made out a *prima facie* case for summary judgment (*compare Radiology Today, P.C. v. GEICO*, 20 Misc.3d 70). It bears noting that judicial economy suggests raising the veracity of signatures in threshold or other motions should not be attempted without some concrete evidence necessitating a hearing.

In considering the sufficiency of defendant's evidence in support, plaintiff argues that Dr. Katz did not comment on plaintiff's MRI; consequently, defendant has failed to meet his burden of proof in the first instance. However, the undersigned determines defendant is not compelled to refute all of plaintiff's medical evidence in order to make out a *prima facie* showing of entitlement to judgment as a matter of law.

In the case at bar, where the reported existence of bulging discs in a MRI does not, standing alone, establish a serious injury, there is no requirement to specifically address the findings in the affirmation in support of defendant's motion (see *Onishi v. N & B Taxi*, 51 AD3d 594).

In any event, Dr. Katz does conclude that the MRI reports indicate multi-level pre-existing degenerative disease and a pre-existing syrinx (pathological fistula) in the thoracic spine.

Turning to the merits of plaintiff's opposition, her MRI studies taken post accident by Dr. Steven Winter revealed loss of disc hydration at C 2/3 through C 4/5, C 6/7, T 3/4 and T 5/6 accompanied by disc bulging, as well as disc bulging at T 3/4, T 5/6, T 7/8 and T 10/11 through T 12/L1, along with the associated loss of disc hydration at T 3/4 and T 5/6.

Dr. Winters also observed mid-thoracic right convex scoliosis with Kyphotic curvature and a 50-60%-cord-diameter thoracic cord syrinx, *i.e.*, fistula, from T 7/8 through T 10/11.

The only bulges apparently not associated with the pre-existing pathological or degenerative condition opined by defendant's expert appear to be at C 5/6 and T 4/5. However, causation is not addressed in Dr. Winter's affirmation.

To establish causation, plaintiff includes an affirmation from Dr. Ajendra Sohal who practices physical medicine and rehabilitation and who first examined plaintiff on June 2, 2008 shortly after the accident. She exhibited reduced cervical range of motion in addition to cervical, thoracic and lumbar spasms. Dr. Sohal concluded on the first visit plaintiff suffered a partial disability resulting from the subject accident.

At a follow-up visit on July 1, 2008, Dr. Sohal opined the loss of range of motion was significant and sufficient “to prevent, or interfere with, the activities of daily living.”

Subsequently, after reviewing plaintiff’s cervical MRI report performed on July 22, 2008, Dr. Sohal determined that the multiple disc diseases observed by Dr. Winter were in fact traumatic injuries.

On August 28, 2008 after viewing the thoracic MRI report, Dr. Sohal, while acknowledging in his examination report that the “question regarding Syringa are beyond the scope of my practice”, postulated it was “likely” caused by the automobile accident. The Court finds this statement too equivocal to be probative evidence that the thoracic cord fistula was traumatically induced (*cf. La Greca v. Ebling*, 156 AD2d 337).

The final follow-up visit occurred on October 6, 2008 when Dr. Sohal noted plaintiff was to be examined by a neurosurgeon regarding the syrinx. Her next evaluation with Dr. Sohal occurred on March 12, 2010, in response to defendant’s instant application.

At the recent examination Dr. Sohal observed almost the same limited goniometric range of motion as he did after the accident and concluded plaintiff’s condition was permanent.

This Court must accept the opinion of plaintiff’s experts in the light most favorable to her (see *Dubbs v. Stribling*, 96 NY2d 337). Therefore, it must be accepted as medically sound that the significant loss of disc hydration observed in plaintiff’s spine by her own radiologist was the result of this automobile accident.

Consequently, plaintiff has raised a credibility issue regarding causation between defendant’s and her expert, both of whom reached their opinion by interpreting radiologist Dr. Winter’s reports (see *Howe v. Wilkinson*, 275 AD2d 876).

Although Dr. Sohal does not explicitly state he used a goniometer as an objective means of establishing range of motion, he does relate in his recent examination that his numerical percentage findings regarding flexion, extension and the like are “goniometric range of motion active and active assisted.”

The Court presumes this means plaintiff’s doctor used a goniometer in his assessment of her condition. Nevertheless, even if he based the spinal numerical findings purely on his visual observations, Dr. Sohal found spasms and trigger points by an objective test: palpating the spine (see *Tour v. Avis Rent-A-Car Systems*, 98 NY2d 345; *Clements v. Lasher*, 15 AD3d 712; *Barbagallo v. Quackenbush*, 271 AD2d 724; see, also, *Hines v. CDTA*, 280 AD2d 768). The presence of spasms objectively observed, supported by objective MRI studies, in corroborating quantitative range of motion results, allow the numerical findings to be admitted as evidence

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(see *Grossman v. Wright, supra*). That there is no mention of the objective test employed in the report goes to its weight.

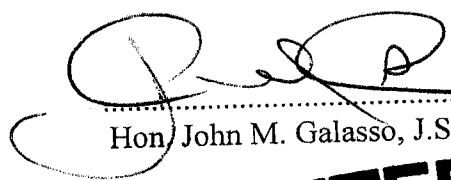
In any event, it has been held that a doctor's observation as to actual limitations of movement qualifies as objective evidence (see, *Choudhury v. Chen*, 273 AD2d 142; *Thompkins v. Burtnick*, 236 AD2d 708; see, also, *Parker v. Defontaine-Stratton*, 231 AD2d 412).

Dr. Sohal notes a 1 year 5 month gap in treatment at his office between plaintiff's last visit and her recent examination. However, this was not an actual "cessation of all treatment" as mentioned in *Pommells v. Perez*, 4 NY3d 566, since in the interim plaintiff was seeing a pain management specialist, an orthopedic surgeon, in addition to receiving physical therapy elsewhere.

Consequently, the Court concludes that plaintiff has sufficiently raised material questions of fact regarding a serious injury having presented probative evidence on causation, permanence and significance.

Plaintiff has also successfully raised questions of fact regarding the 90/180 day category. The fact that she returned to work is but one factor to consider in assessing whether substantially all of her daily activities were curtailed (see *Fortino v. Fayetteville-Manlius C.S.D.*, 16 AD3d 1124; *Judd v. Walton*, 259 AD2d 658). Dr. Sohal's affirmation provides the competent medical proof required (see *Sougstad v. Meyer*, 40 AD3d 839).

May 18, 2010

  
Hon John M. Galasso, J.S.C.

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