Bushay-Clark v MTA Long Is. Bus
2010 NY Slip Op 31828(U)
July 14, 2010
Supreme Court, Nassau County
Docket Number: 015572/08
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 20

---X

MAXINE BUSHAY-CLARK,

Plaintiff,

-against-

MTA LONG ISLAND BUS,

Defendant.

---X

Index No. 015572/08
Motion Sequence...01
Motion Date... 05/06/10
XXX

Papers Submitted:
Notice of Motion.......................................x
Affirmation in Opposition...........................x
Reply Affirmation......................................x

Upon the foregoing papers, the Defendant, MTA Long Island Bus' [hereinafter MTA], motion pursuant to CPLR § 3212, seeking an order dismissing the within complaint on the basis that the Plaintiff, Maxine Bushay-Clark, has not sustained a serious injury within the ambit of Insurance Law § 5102 [d] and that the Defendant did not have actual or constructive notice of the defect alleged to have caused the Plaintiff's injuries is determined as hereinafter provided.

On November 2, 2007, the Plaintiff was a seated passenger on a bus owned and operated by MTA, when a window partially came loose from the frame and allegedly fell

onto her head (*see* Paretsky Affirmation in Support at ¶ 3; *see* Exhibit A at ¶¶ 4, 5, 11; *see also* Exhibit C at ¶ 5). The Plaintiff alleges that as a consequence thereof, she has sustained the following serious injuries: posterior disc herniation at C3-C4 impinging on the anterior aspect of the spinal cord; concussion; headaches; cervical sprain with muscle spasm; mild swelling and tenderness in the right parietal area; cervical radiculitis; post concussion syndrome; blurred vision, and; decreased range of motion of the cervical spine (*id.* at Exhibit C at ¶ 9).

As noted above, the Defendant's application contains two branches, the first of which seeks dismissal based upon the Plaintiff failing to suffer a serious injury and the second which seeks dismissal due to the Defendant's lack of actual or constructive notice with respect to the condition claimed to have caused the Plaintiff's injuries. The Court will initially address the issue of whether the Plaintiff has sustained a serious injury.

Serious Injury:

In support of the within application, the Defendant provides the affirmed, independent medical reports of Dr. Stanley Ross, M.D., and Dr. Larry Berstein, M.D. (*id.* at Exhibits F and G).

Dr. Ross, an orthopedic surgeon, conducted a physical examination of the Plaintiff on 10/15/09, at which time he also reviewed various medical records, including an MRI of the Plaintiff's cervical spine completed on 12/6/07, which revealed a posterior disc herniation at C3-C4 impinging on the anterior aspect of the spinal cord, as well as an MRI

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of the Plaintiff's brain taken on 12/6/07, which revealed normal findings (*id.* at Exhibit F).

The examination conducted by Dr. Ross included an evaluation of the Plaintiff's cervical, lumbar and thoracic spines (*id.*). With regard to the cervical spine, range of motion testing was accomplished by way of a goniometer and revealed normal findings (*id.*). Dr. Ross noted the absence of muscle spasm and tenderness and that the Distraction Test, Compression Test, Jackson's Test and Soto Hall Test were all negative (*id.*). As to the Thoracic spine, Dr. Ross stated that there was no tenderness or paraspinal spasm (*id.*). With regard to the lumbar spine, range of motion testing, again measured by a goniometer, revealed normal findings and Dr. Ross noted that the Fabere, Ely's and Kemp's tests each yielded negative findings (*id.*). Dr. Ross ultimately diagnosed the Plaintiff as having sustained cervical, thoracic and lumbar spine "sprain/strain" all of which had resolved and that there was "no evidence of an orthopedic disability" (*id.*).

Dr. Berstein, an ophthalmologist, conducted an examination of the Plaintiff on October 12, 2009 (*id.* at Exhibit G). Dr. Berstein stated that upon examination the "ocular pressures were normal" and that "slit lamp examination was normal other than a corneal scar on the right eye which * * * the claimant did indicate * * * was old and she was aware of having this scar on her right eye cornea" before the subject accident (*id.*). Dr. Ross further stated that the "dilated retinal examination revealed a normal optic nerve head" and that his examination revealed "no evidence for direct ocular trauma" related to the subject accident (*id.*).

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v. Twentieth Century Fox*, 3 N.Y.2d 395 [1957]; *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320 [1986]; *Zuckerman v. City of New York,* 49 N.Y.2d 557 [1980]; *Bhatti v. Roche*, 140 A.D.2d 660 [2d Dept. 1998]). To obtain summary judgment, the moving party must establish it's claim or defense by tendering proof, in admissible form, sufficient to warrant the Court to direct judgment in the movant's favor (*Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 [1979]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980], *supra*). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Sillman v. Twentieth Century Fox*, 3 N.Y.2d 395 [1957], *supra*).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury (*Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]). Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient

evidence, in admissible form, to raise an issue of fact as to the existence thereof (*Licari v. Elliott*, 57 N.Y.2d 230 [1982]).

Within the scope of the movants' burden, a defendants' medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (*Gastaldi v. Chen*, 56 A.D.3d 420 [2d Dept. 2008]; *Malave v. Basikov*, 45 A.D.3d 539 [2d Dept. 2007]; *Nociforo v. Penna*, 42 A.D.3d 514 [2d Dept. 2007]; *Qu v. Doshna*, 12 A.D.3d 578 [2d Dept. 2004]; *Browdame v. Candura*, 25 A.D.3d 747 [2d Dept. 2006]; *Mondi v. Keahan*, 32 A.D.3d 506 [2d Dept. 2006]).

In the matter *sub judice*, while not expressly articulated in the Plaintiff's Bill of Particulars, it appears from the injuries therein recited that the Plaintiff is claiming injuries which fall within the following statutory categories: 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 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 [hereinafter the 90/180 category] (*see* Paretsky Affirmation in Support at Exhibit C at ¶¶ 10,

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Applying the aforesaid criteria to the medical reports submitted herein, this Court finds that the Defendant has established a *prima facie* case that the Plaintiff failed to sustain a serious injury within the categories of either a permanent consequential limitation of use of a body organ or member, or a significant limitation of use of a body function or system (*Gaddy v. Eyler,* 79 N.Y.2d 955 [1992], *supra*). In his medical report, Dr. Ross clearly opined that the Plaintiff exhibited full range of motion with respect to the cervical and lumbar spines, that there was no tenderness or spasm in the thoracic spine, and that the examination yielded no evidence of any orthopedic disability (*Kearse v. New York City Transit Authority,* 16 A.D.3d 45 [2d Dept. 2005]). Further, Dr. Ross recited the specific tests upon which his medical conclusions were based and compared the Plaintiff's ranges of motion to those ranges considered normal (*Qu v. Doshna*, 12 A.D.3d 578 [2d Dept. 2004], *supra; Browdame v. Candura*, 25 A.D.3d 747 [2d Dept. 2006], *supra*; *Gastaldi v. Chen*, 56 A.D.3d 420 [2d Dept. 2008], *supra*). Additionally, Dr. Berstein also set forth the objective tests upon which he predicated his findings, which, as noted above, revealed that the Plaintiff did not suffer any "ocular trauma" causally related to the subject incident (*Qu v. Doshna*, 12 A.D.3d 578 [2d Dept. 2004], *supra*; *Nozine v. Sav-On Car Rentals*, 15 A.D.3d 555 [2d Dept.

[1] The Court notes that as the Plaintiff states in her Bill of Particulars that she was only confined to her bed for a two week period, there is no evidence in the record of a total loss, which is required to demonstrate a "permanent loss of use of a body organ, member, function or system" (*Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295 [2001]; Insurance Law § 5102 [d]).

2005]).

In addition to the foregoing medical evidence, a reading of the Plaintiff's deposition transcript, which is annexed to the moving papers, clearly reveals that Ms. Bushay-Clark testified she lost two weeks from work as a result of the subject accident and thus the Defendant has sustained its initial burden of demonstrating the Plaintiff did not sustain an injury within the 90/180 category (*Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.*, 48 A.D.3d 664 [2d Dept. 2008]; *Geliga v. Karibian*, 56 A.D.3d 518 [2d Dept. 2008]). Thus, the burden now shifts to the Plaintiff to demonstrate a triable issue of fact with respect to the existence of a "serious injury" (*Licari v. Elliott*, 57 N.Y.2d 230 [1982], *supra*).

In opposition to the instant application, the Plaintiff, in addition to providing her own supporting affidavit, provides the affirmation of Dr. Richard J. Rizzuti, M.D., as well as the affidavit of Dr. Mark Snyder, D.C. (*see* Feliciano Affirmation in Opposition at Exhibits A, B, C). Dr. Rizzuti affirms that he performed the heretofore referenced MRI of the Plaintiff's cervical spine and that said MRI reveals a "posterior disc herniation at C3-C4 impinging on the anterior aspect of the spinal cord" (*id.* at Exhibit C at ¶¶ 2, 4).

As to Dr. Snyder, a review of his affidavit reveals that the Plaintiff initially presented to his office on June 4, 2008, complaining of severe neck pain, cervical spine pain radiating into the left and right shoulders, as well as anxiety, irritability, weakness and headaches (*id.* at Exhibit B). On said date, Dr. Snyder examined the Plaintiff's cervical spine and noted restrictions as to flexion, extension and rotation (*id.* at ¶ 3). Dr. Snyder also stated

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the following: the pinwheel test showed decreased sensation in the upper extremities; the Foraminal Compression test was positive bilaterally; the distraction test was positive; the shoulder compression test was positive bilaterally; palpation and tenderness exhibited bilaterally within the upper extremities; palpation and spasm exhibited within the cervical and thoracic spine (*id.*). Dr. Snyder rendered an initial diagnosis of "cervical intervertebral disc disorder with myelopathy; cervical nerve root compression; and posterior disc herniation at C3-C4 impinging on the anterior aspect of the spinal cord" and that said injuries were causally related to the subject incident (*id.* at ¶¶ 4, 5, 6, 9).

Thereafter, on April 20, 2010, the Plaintiff again presented to Dr. Snyder at which time she complained of "neck pain * * * intermittent numbness and tingling sensations radiating to the upper extremities" (*id.* at ¶ 10). Range of motion testing revealed restrictions as to flexion, extension and rotation and Dr. Snyder noted spasm within the cervical paraspinal muscle, as well as tenderness over the cervical spine (*id.* at ¶ 11). Dr. Snyder ultimately rendered a diagnosis of "cervical intervertebral disc disorder with myelopathy; cervical nerve root compression; and posterior disc herniation at C3-C4 impinging on the anterior aspect of the spinal cord" and opined that said injuries were causally related to the subject incident (*id.* at ¶¶ 12, 13). Dr. Snyder further opined that the Plaintiff's injuries will "inhibit [her] ability to carry out his [*sic*] normal activities of daily living" (*id.* at ¶ 13).

In addition to the foregoing, the Plaintiff provides her own sworn affidavit wherein she avers that "a few days after the accident" she went to see Dr. Avella at Sports

Medicine and Rehabilitation "for examination and treatment of my injuries" (*id.* at Exhibit A at ¶ 5). At this time Dr. Avella reportedly examined the Plaintiff and performed various tests (*id.*). The Plaintiff further states that Dr. Avella recommended that she undergo "MRI's and nerve tests" and to begin a course of physical therapy (*id.*). The Plaintiff states that she received physical therapy three times a week for a period of three months, but had to stop treatment as a result of her no-fault benefits being cut off (*id.*).

While a herniated or bulging disc may constitute a serious injury, "a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration" (*Monette v. Keller*, 281 A.D.2d 523 [2d Dept. 2001]; *Duldulao v. City of New York*, 284 A.D.2d 296 [2d Dept. 2001]). Further, a plaintiff must provide medical evidence contemporaneous with the subject accident which demonstrates any initial range of motion restrictions (*Ifrach v. Neiman,* 306 A.D.2d 380 [2d Dept. 2003]; *Felix v. New York City Tr. Auth.*, 32 A.D.3d 527 [2d Dept. 2006];*Garcia v. Sobles*, 41 A.D.3d 426 [2d Dept. 2007; *Bestman v. Seymour*, 41 A.D.3d 629 [2d Dept. 2007]; *Stevens v. Sampson*, 72 A.D.3d 793 [2d Dept. 2010]; *Jack v. Acapulco Car Service, Inc.*, 72 A.D.3d 646 [2d Dept. 2010]), as well as competent medical evidence containing verified objective findings, which are predicated upon a recent examination (*Kauderer v. Penta*, 261 A.D.2d 365[2d Dept. 1999]; *Constantinou v. Surinder*, 8 A.D.3d 323 [2d Dept. 2004]; *Brown v. Tairi Hacking Corp.*, 23 A.D.3d 325 [2d Dept. 2005]; *Sham v. B&P Chimney Cleaning and Repair Co. Inc.*, 71 A.D.3d 978 [2d Dept. 2010]; *Carillo v. DePaola*, 56 A.D3d 712 [2d

Dept. 2008]; *Krauer v. Hines*, 55 A.D.3d 881 [2d Dept. 2008]).

In the instant matter, having carefully reviewed the medical evidence proffered by the Plaintiff, the Court finds that the Plaintiff has failed to raise a triable issue of fact (*Licari v. Elliott*, 57 N.Y.2d 230 [1982], *supra*). As noted above, the only medical reports provided by the Plaintiff are the affirmation of Dr. Rizzuti and the affidavit of Dr. Snyder. As to the affirmation of Dr. Rizzuti, while the expert states that there is a disc herniation at C3-C4, he does not opine as to the causality between said findings and the subject incident. With respect to the report of Dr. Snyder, while the expert identified restrictions in the Plaintiff's cervical spine, said observations were not predicated upon an examination contemporaneous with the subject accident and rather were based upon an examination conducted seven months thereafter (*Stevens v. Sampson*, 72 A.D.3d 793 [2d Dept. 2010], *supra*; *Jack v. Acapulco Car Service, Inc.*, 72 A.D.3d 646 [2d Dept. 2010], *supra; Taylor v. Flaherty,* 65 A.D.3d 1328 [2d Dept. 2009]; *Bleszcz v. Hiscock,* 69 A.D.3d 590 [2d Dept. 2010]). Moreover, the Court notes that while the Plaintiff avers that she was treated shortly after the accident by Dr. Avella and underwent physical therapy during the three months following the accident, the Plaintiff has not provided any records or medical reports relative thereto.

Notice:

As to the matter of notice, the within complaint sounds in negligence. In order to establish a *prima facie* case, the plaintiff is required to demonstrate that the defendant had

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actual or constructive notice of the defect alleged to have caused the plaintiff's injuries (*Russo v. Eveco Development Corp.*, 256 A.D.2d 566 [2d Dept. 1998). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 [1986] at 837).

In the instant matter, the record herein is devoid of any evidence that the Defendant possessed either actual or constructive knowledge of the defective window. As to actual knowledge, Mr. Serge Jerome, the bus driver on duty at the time of the subject accident, testified that prior to beginning his shift, he physically inspected the windows from inside the bus, as well as visually inspecting them from outside the bus. Mr. Jerome further testified that upon his inspections he determined that all the windows on the bus were "secure."

Moreover, there is no evidence that the window defect existed for a protracted length of time prior to Plaintiff's accident so as to have afforded the Defendant with an opportunity to have taken remedial action (*id.*). Here, the Plaintiff herself stated that in the 15 to 20 minutes immediately prior to her accident, she did not witness any shaking, rattling or anything unusual with respect to the window and that neither she nor any of the other passengers actually notified the bus driver of the broken window until the bus reached it's destination at the Hempstead terminal (*id.*).

Accordingly, it is hereby

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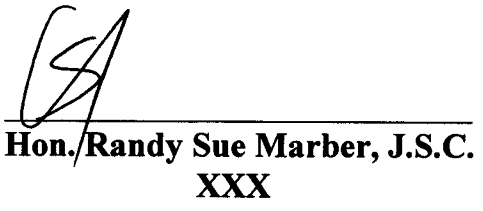
ORDERED, that the motion by the Defendant, MTA, interposed pursuant to CPLR § 3212, seeking an order dismissing the Plaintiff's complaint on the basis that she did not sustain a serious injury and on the basis of lack of notice, is hereby **GRANTED**.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
July 14, 2010



Hon. Randy Sue Marber, J.S.C.
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JUL 16 2010
NASSAU COUNTY
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