Branch v Metropolitan Suburban Bus Auth.
2010 NY Slip Op 33281(U)
November 15, 2010
Supreme Court, Nassau County
Docket Number: 21157/08
Judge: Denise L. Sher
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SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TERESA BRANCH,

Plaintiff,

- against -

METROPOLITAN SUBURBAN BUS AUTHORITY,
MTA LONG ISLAND BUS and JOHN DOE

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 21157/08
Motion Seq. No.: 01
Motion Date: 08/11/10
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion for Summary Judgment, Affirmation and Exhibits	**1**
Affirmation in Opposition and Exhibit and Memorandum of Law	**2**
Reply Affirmation	**3**

Defendants move, pursuant to CPLR §§ 3211and 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting summary judgment to defendants on the ground that plaintiff did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiff opposes defendants' motion.

The action arises from an accident on March 5, 2008, at approximately 5:00 a.m., in which plaintiff, commuting to her job at SUNY-Old Westbury College, was riding a bus owned and operated by defendants when, as the bus entered plaintiff's stop, the bus driver allegedly stopped short and plaintiff slipped on the wet floor of the bus and fell. Plaintiff claims that, as a result of said fall, she injured her lower back, right knee and right ankle. On or about November 24, 2008, plaintiff commenced this action by service of a Summons and Verified Complaint.

Issue was joined on or about January 16, 2009.

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. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

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. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (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. *See Sillman v. Twentieth Century- Fox Film Corp.* , 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S. 2d 793 (1988). Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

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" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendants may rely either on the sworn statements of the defendants' examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (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 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Plaintiff claims that as a consequence of the above-described accident, she has sustained serious injuries as defined in New York State Insurance Law § 5102(d) and which fall within the following statutory categories of injuries:

1) significant disfigurement; (Category 3)

2) permanent loss of a body organ, member, function or system; (Category 6)

3) a permanent consequential limitation of use of a body organ or member; (Category 7)

4) a significant limitation of use of a body function or system; (Category 8)

5) 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.(Category 9).

To meet the threshold regarding significant disfigurement, the law is well settled that the test for determining when an injury is a significant disfigurement is whether a reasonable person viewing the plaintiff's body in its altered state would regard the condition as unattractive, objectionable or as the object of pity or scorn. *See Spevak v. Spevak*, 213 A.D.2d 622, 624 N.Y.S.2d 232 (2d Dept. 1995); *Maldonado v. Piccirilli*, 70 A.D.3d 785, 894 N.Y.S.2d 119 (2d Dept. 2010); *Lynch v. Iqbal*, 56 A.D.3d 621, 868 N.Y.S.2d 676 (2d Dept. 2008); *Sirmans v. Mannah*, 300 A.D.2d 465, 752 N.Y.S.2d 359 (2d Dept. 2002). Small, well-healed scars do not constitute significant disfigurement within the meaning of the no-fault statute. *See Santos v. Taveras*, 55 A.D.3d 405, 866 N.Y.S.2d 43 (1st Dept. 2008).

For a permanent loss of a body organ, member, function or system to qualify as a "serious injury" within the meaning of No-Fault Law, the loss must be total. *See Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001); *Amata v. Fast Repair Incorporated*, 42 A.D.3d 477, 840 N.Y.S.2d 394 (2d Dept. 2007).

To meet the threshold regarding 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. *See Gaddy v. Eyler,* 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992); *Licari v. Elliot*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. *See Licari v. Elliot, supra.* A claim 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 can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. *See Toure v. Avis, supra.* In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system. S*ee id.*

Finally, 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." *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment." *See Licari v. Elliott, supra* at 236. Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co.,* 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bronx County, 2005).

With these guidelines in mind, this Court will now turn to the merits of the defendants' motion. In support of their motion, defendants submit the pleadings, plaintiff's Verified Bill of Particulars, the transcript of plaintiff's testimony from the public authorities hearing and her examination before trial, the affirmed report of Paul J. Miller, M.D, who performed an independent orthopedic medical examination of plaintiff on April 19, 2010, plaintiff's North Shore Hospital Department of Radiology MRI report dated October 8, 2009, plaintiff's medical records from James Liguori, M..D., a letter from plaintiff's doctor James P. Bottari, D.C., P.C.,

plaintiff's North Shore Hospital Emergency Department records dated July 9, 2001, plaintiff's North Shore Hospital Emergency Department records dated March 5, 2003 and plaintiff's North Shore Hospital Department of Radiology reports dated May 24, 2009.

Based upon this evidence, the Court finds that the defendants have established a *prima facie* case, that the plaintiff did not sustain serious injury within the meaning of New York State Insurance Law § 5102(d). Dr. Miller examined the plaintiff, performed quantified and comparative range of motion tests on plaintiff's cervical spine, thoracic spine, lumbar spine, right shoulder, right elbow, right wrist/hand and right ankle/foot. Dr. Miller performed the range of motion tests on plaintiff using an orthopedic goniometer. The results of the tests indicated no deviations from normal. Dr. Miller concluded, "Cervical spine sprain/strain - resolved. Thoracic spine sprain/strain - resolved. Lumbar spine sprain/strain - resolved. Right shoulder sprain/strain - resolved. Right elbow sprain/strain - resolved. Right wrist/hand sprain/strain - resolved. Right ankle/foot sprain/strain - resolved. There is no evidence of an orthopedic disability."

Defendants also argue that, in addition to the negative findings of Dr. Miller, plaintiff's own medical records disprove any claim of lumbar radiculopathy citing the October 8, 2009 North Shore Hospital Department of Radiology MRI report which defendants claim show that plaintiff exhibited pre-existing disc desiccation and only mild disc bulges and herniations. Additionally, defendants submit that plaintiff's own physician, Dr. James Liguori, conducted nerve conduction studies of plaintiff's upper and lower extremities and found only normal results. Also, all examined muscles showed no evidence of electrical instability (as indicated objectively in the EMG scoring table). Defendants contend that this disproves plaintiff's allegations of neurological disabilities, including radioculopathy. Thus, all claims of neurological disabilities within plaintiff's Bill of Particulars are without merit.

Defendants further argue that plaintiff's claims that she has bulging disc injuries and soft tissue injuries to her back, neck and shoulder are not enough to meet the threshold set by the State Insurance Law. Defendants state that plaintiff's MRI reports, offered merely to assert the presence of bulges and herniations without offering any medical opinion as to their cause of duration, are not capable of establishing serious injury even if submitted in admissible form. Proof merely of the existence of herniated discs has repeatedly been held insufficient to

establish a "serious injury."

Defendants also argue that plaintiff cannot establish at trial that she sustained any causally related serious injury because none of her physicians have considered her pre-accident and post-accident injuries. Defendants submit that "[d]iscovery has revealed that plaintiff has both prior and subsequent accidents which she never voluntarily disclosed to her treating physicians in this action. Medical records from North Shore University Hospital reveal that plaintiff, treated under her maiden name of 'Teresa Stone,' received medical care for back pain in July 2001. Within those records, plaintiff acknowledged that she suffers from an "old back injury" causing her pain in her lower back with sudden onset. Further, medical records from North Shore University Hospital in March, 2003 reveal plaintiff was taking Vioxx regularly for pain at that time. Lastly, subsequent to the subject accident of March 5, 2008, plaintiff presented to North Shore University Hospital's emergency room due to a trip and fall in which she injured her right knee and foot." Defendant asserts that "[o]nce a pre-existing condition has been established by a defendant, it becomes the plaintiff's burden to prove by objective medical evidence that her alleged injuries must be causally related to the subject accident rather than the pre-existing condition or a prior injury. See Pommels v. Perez, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005)(holding that summary judgment was properly granted to the defendant where the plaintiff claimed an injury to his kidney in a motor vehicle accident but the defendant demonstrated that the plaintiff has a prior history of a kidney condition which was not addressed by any of the plaintiff's physicians when causally relating the kidney injury to the accident).

Defendants submit that none of plaintiff's alleged injuries constitute "total" loss of use, necessary in order to establish that any of her injuries fall within the category regarding permanent loss of a body organ, member, function or system. Defendants also submit that plaintiff cannot establish a serious injury under the significant disfigurement category as plaintiff has not identified any disfigurement to her body in her Bill of Particulars and she has not suffered from any alleged visible injury.

With respect to plaintiff's 90/180 claim, defendants rely on the testimony of the plaintiff which indicates there was virtually no diminution in the plaintiff's ability to work. Plaintiff returned to work nineteen days after the accident with no change in her job duties.

The burden now shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating the existence of a triable issue of fact that serious injury was sustained. *See Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005); *Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000). In opposition to defendants' motion, plaintiff contends that defendants have not meet their burden of proof in establishing that plaintiff's injuries do not meet the definition of any of the nine categories defined as serious in the insurance law. Plaintiff argues that defendants' independent medical expert, Dr. Paul Miller, failed to perform a complete set of range of motion testing in all plains of motion on plaintiff's injured area, specifically that Dr. Miller did not conduct any range of motion testing in the areas of either left or right lumbar rotation and therefore his opinion that plaintiff has a normal range of motion is suspect.

The only medical record that plaintiff provides in support of her opposition is that of Iqbal Merchant, M.D. who conducted an independent neurological examination of plaintiff on April 19, 2010. Plaintiff claims that defendants did not annex this report to their moving papers "because Dr. Merchant diagnoses the plaintiff with extremely significant losses of range of motion in her lumbar spine which he does not attribute to anything other than the accident."

The Court notes that plaintiff denied any history of a prior accident or injury during her examination with Dr. Merchant as she had also done during her examination with Dr. Miller. The Court also notes that Dr. Merchant's diagnosis was "Cervical Spine sprain/strain- resolved. Thoracic spine sprain/strain - resolved. Lumbar spine sprain/strain- resolved. There is no evidence of a neurological disability as it relates to the accident of record."

Finally, plaintiff argued that "due to the defendants' failure to meet their required burden of proof, the plaintiff need not submit any evidence in opposition."

When moving for dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury. *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Within the scope of the movants' burden, 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.

See Gastaldi v. Chen, 56 A.D.3d 420, 866 N.Y.S.2d 750 (2d Dept. 2008); *Malave v. Basikov*, 45 A.D.3d 539, 845 N.Y.S.2d 415 (2d Dept. 2007); *Nociforo v. Penna*, 42 A.D.3d 514, 840 N.Y.S.2d 396 (2d Dept. 2007); *Meiheng Qu v. Doshna*, 12 A.D.3d 578, 785 N.Y.S.2d 112 (2d Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747, 807 N.Y.S.2d 658 (2d Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506, 820 N.Y.S.2d 625 (2d Dept. 2006). The Court finds that the report of Dr. Paul Miller satisfied said criteria.

The Court finds that plaintiff has failed to come forward with evidence to overcome the defendants' submissions by demonstrating the existence of a triable issue of fact that serious injury was sustained. Even if plaintiff had provided ample proof of her injury, plaintiff's intervening medical problem and her pre-existing conditions interrupt the chain of causation between the accident and the claimed injury would override plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. *See Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Additionally, plaintiff's deposition testimony does not establish that she was unable to perform 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 occurrence of the injury.

Therefore, based upon the foregoing, defendants' motion dismissing the complaint against them and granting summary judgment is hereby granted.

This constitutes the decision and order of this Court.

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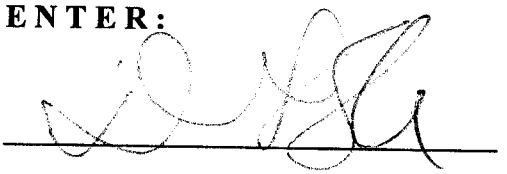

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
November 15, 2010

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