

Altman v New YorkTr. Auth.

2011 NY Slip Op 33475(U)

December 14, 2011

Sup Ct, NY County

Docket Number: 400604/2010

Judge: Michael D. Stallman

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SCANNED ON 12/28/2011
SUPREME COURT OF THE STATE OF NEW YORK
ORCK COUNTY

Index Number : 400604/2010

ALTMAN, RUTH

vs.

NEW YORK CITY TRANSIT

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

Justice

PART 21

INDEX NO. _____
MOTION DATE 10/20/11
MOTION SEQ. NO. 001

The following papers, numbered 1 to 5, were read on this motion to/for SJ
Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits A-G | No(s) 1;2
Answering Affidavits -- Exhibits (+ memo) | No(s) 3-4
Replying Affidavits _____ | No(s) 5

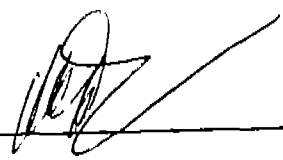
Upon the foregoing papers, it is ordered that this motion is decided as per the annexed
Memorandum Decision and Order.

FILED

DEC 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

 J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/14/11

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 21

-----X
Ruth Altman,

Plaintiff,

Index Number:

-against-

400604/2010

The New York Transit Authority,
Jeffrey E. Clarke Bus Driver
For New York City Transit
Authority, Michelle Taxi Inc.
and John Doe Taxi Driver
Employee of Michelle Taxi Inc.,

DECISION AND
ORDER

FILED

Defendants.

DEC 19 2011

-----X

HON. MICHAEL D. STALLMAN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Michelle Taxi Inc. (Taxi) moves for summary judgment
dismissing plaintiff's complaint based upon the plaintiff's
purported failure to meet the requirement of Insurance Law § 5102
(d) of a serious injury in a motor vehicle action (the No Fault
threshold).

BACKGROUND

Plaintiff alleges that she was a passenger on a New York
City Transit Authority (TA) bus, heading east on West 57th
Street, between Sixth and Fifth Avenues in midtown Manhattan on
November 29, 2008 at approximately 4:30 P.M. (bill of
particulars, item 3). Jeffrey Clarke was the bus driver of the
TA bus (*id.*), which allegedly stopped short, causing plaintiff to
fall and suffer a serious injury (*id.*, item 6). Michelle Taxi,
Inc. (Taxi) is a New York corporation that owned a taxi that

plaintiff contends abruptly changed lanes, crossing into the bus lane in front of the TA bus, leading the TA bus to stop short (complaint, ¶¶ 27-28).

Plaintiff contends that, on November 29, 2008, at approximately 4:30 P.M., she entered a crosstown 57th Street TA bus at 6th Avenue, traveling eastbound and was standing near the front of the bus, because there were no seats available (plaintiff EBT, at 9, 11, 13, 15). She states that the bus had traveled less than 10 feet, when it suddenly stopped short, causing her to fall backwards and hit the floor of the bus (*id.* at 16, 18). She also states that, as she was waiting for an ambulance, she heard other passengers mention that a taxi had crossed in front of the bus (*id.* at 20).

Plaintiff asserts that, as a result of her fall, she was taken to Lenox Hill Hospital's emergency room, where she was examined and released and that she had bruises, but no bleeding and pain in her head, neck, back and shoulders (*id.* at 23-25, 27). She states that she had X-Rays and 2 MRI tests performed, that she had physical therapy from January 13, 2009 until April 30, 2010, that she received injections and anti-inflammatory pain medications for her condition (*id.* at 27-32, 35-37) and that she suffered a torn rotator cuff injury to her right shoulder, disc herniation and bulging to her C-3 to C-4, C-4 to C-5, C-5 to C-6 and C-6 to C-7 cervical discs and continuing pain, resulting in a

20% reduction in her range of motion (bill of particulars, item 10; plaintiff EBT at 51-52, 55).

Taxi alleges that plaintiff did not suffer a serious injury under the No Fault Law and, consequently, the complaint should be dismissed. It notes that plaintiff was 69 years old at the time of the accident, that she states that she was confined to her home for two days after the accident and that she does not claim that she suffered any fractured bone as a result of her accident (bill of particulars items 3, 10 11 [c]).

Taxi states that an orthopedical examination of plaintiff was performed on its behalf on February 7, 2011 (Nason affirmed report) and a neurological examination of plaintiff was performed on its behalf on November 8, 2010 (Desrouleaux affirmed report). These reports indicated the performance of numerous tests including Soto-Hall, Tinel's, Phalen's, Finkelstein, Spurling, Hawkins, Cozen's, Kernig's and Adson's and indicated a full normal range of motion (Nason affirmed report, at 2-6; Desrouleaux affirmed report, at 3). Defendant attributes plaintiff's condition to "age related discogenic changes ... (due in part to) increased body habitus/obesity" (Tantleff affirmation dated September 17, 2010 on cervical spine) and "longstanding wear and tear degeneration ... consistent with [plaintiff's] age" (Tantleff affirmation dated September 17, 2010 on right shoulder). Both physicians measured a comprehensive number of

standard ranges of motion of the affected area with a goniometer and found that they showed no loss of range of motion when compared with professionally recognized normal percentages.

Taxi asserts that, since both physical examinations show plaintiff has a normal range of motion and no limitations, that plaintiff, therefore, did not suffer a serious injury.

In opposition, plaintiff has submitted her doctor's affirmation which stated that he had "recommended surgery" for her right shoulder and states that plaintiff asserts that she continues "to have bilateral shoulder pain with limited range of motion, mild weakness and minimal atrophy" (Gordon affirmed report, at 2). The doctor's affirmed report does not specify any tests that he performed or quantify the degree of the alleged restriction of motion. Plaintiff states that the examination by Doctor Désrouleax lasted less than 10 minutes and that the examination by Doctor Nason lasted seven minutes (plaintiff affidavit, ¶¶ 5-9). She implies that the brevity of the examinations undermines their conclusions, but does not deny that they performed the tests or the result of these tests.

Summary Judgment

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d

320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

The No Fault Law

The No Fault Law provides, in pertinent part:

“‘Serious injury’ means a personal injury which results in ... a fracture; ... 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.”

“‘[T]he legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries’ ... [by requiring] objective proof of a plaintiff’s injury in order to satisfy the statutory serious injury

threshold" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002] [internal citation omitted]). Objective proof sufficient to sustain a claim is "an expert's designation of a numeric percentage of a plaintiff's loss of range of motion ... [or] an expert's *qualitative* assessment ... provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*id.* at 350 [italics in original]; *Gorden v Tibulcio*, 50 AD3d 460 [1st Dept 2008]). Minor limitations of movement in a plaintiff's neck and back are insufficient to be considered a serious injury (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]). Rather, plaintiff must present "objective evidence" in the form of objective tests indicating a significant limitation to satisfy the No Fault Law (*Toure*, 98 NY2d at 350; *Reyes v Esquilin*, 54 AD3d 615 [1st Dept 2008]; *Brown v Achy*, 9 AD3d 30, 31 [1st Dept 2004]).

Discussion

Applying these principles to the facts of this case, Taxi's motion for summary judgment must be granted. Taxi established its prima facie entitlement to summary judgment dismissing the complaint based upon the lack of a serious injury by submitting the "affirmed reports of two medical doctors who ... concluded that ... plaintiff had normal range of motion [in the affected organ]" (*Thompson v Abbasi*, 15 AD3d 95, 96 [1st Dept 2005];

Guadalupe v Blondie Limo, Inc., 43 AD3d 669 [1st Dept 2007]), based on objectively measured tests using goniometer. See *Mensah v Salah Enterprises, Inc*, __ AD3d __, 2011 NY Slip Op 08987 (1st Dept, 12/12/11)

Plaintiff has failed to raise a material issue of fact in opposition, because her doctor's affirmed report fails to identify any tests that he performed and fails to present any evidence of any limitations on plaintiff's range of motion on either her back or right shoulder (*Wetzel v Santana*, -AD3d-, 2011 WL 5573964, 2011 NY Slip Op 03279 [1st Dept Nov. 17, 2011]; *Rubencamp v Arrow Exterminating Co., Inc.*, 79 AD3d 509 [1st Dept 2010]; *Gorden*, 50 AD3d at 462-463; cf. *Perl v Meher*, -NY3d-, 2011 WL 5838721, 2011 NY Slip Op 08452 [Nov. 22, 2011] [where plaintiff's doctor's "numerical measurements" were sufficient to create an issue of fact]).

Similarly, plaintiff's allegation in her bill of particulars (item 11 [c]) that she was confined to her bed for only two days after the accident warrants dismissal of the portion of her claim that she was "incapacitated from performing substantially all of her usual and customary activities for at least 90 of the first 180 days after the accident" (*Guadalupe*, 43 AD3d at 670; *Ronda v Friendly Baptist Church*, 52 AD3d 440, 441 [1st Dept 2008]).

Moreover, Taxi has proffered evidence that plaintiff's condition was the result of age-related degeneration and

plaintiff has failed to controvert this showing that her condition was, therefore, not related to the accident (*Torres v Triboro Servs., Inc.*, 83 AD3d 563, 566 [1st Dept 2011]; *DeJesus v Paulino*, 61 AD3d 605, 607-608 [1st Dept 2009]).

Because plaintiff cannot show a serious injury, the complaint should be dismissed against all defendants (*DeJesus*, 61 AD3d at 608; *Gwynn v Soriano*, 71 AD3d 580 [1st Dept 2010]).

Order

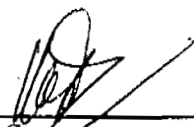
It is, therefore,

ORDERED that Michelle Taxi Inc.'s motion for summary judgment dismissing the complaint is granted and the complaint is dismissed against all defendants, with costs and disbursements to Michelle Taxi Inc., as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

MON. MICHAEL D. STALLMAN

Dated: December 14, 2011
New York, NY



J.S.C.

FILED

DEC 19 2011