

<b>Daniels v S.R.M. Mgt. Corp.</b>
2011 NY Slip Op 34068(U)
July 25, 2011
Supreme Court, Bronx County
Docket Number: 303124/09
Judge: Stanley Green
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AUG 2 2011

NEW YORK SUPREME COURT - COUNTY OF BRONX

IA-6

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: IA-6

----- X  
IVY DANIELS,

INDEX No. 303124/09

Plaintiff(s),

- against-

S.R.M. MANAGEMENT CORP., VICTOR CRUZ-  
GONZALEZ and LUIS JOSE PEREZ,

Defendant(s)

Present:  
HON. STANLEY GREEN  
J.S.C.

----- X  
The following papers numbered 1 to 4 read on this motion  
No. on the Calendar of  
Notice of Motion -Exhibits and Affidavits Annexed..... 1  
Answering Affidavit and Exhibits..... 3  
Replying Affidavit and Exhibits..... 4  
Sur-reply Affidavits and Exhibits.....  
Stipulation(s) - Referee's Report - Minutes.....  
Memoranda of Law..... 2

PAPERS NUMBERED

Upon the foregoing papers, this motion is decided in accordance with the attached memorandum decision.

Dated: July 25, 2011

  
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STANLEY GREEN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X

IVY DANIELS,

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Plaintiff(s),

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GONZALEZ and LUIS JOSE PEREZ,

Defendant(s).

DECISION

-----X

**HON. STANLEY GREEN**

The motion by defendants S.R.M. Management Corp. And Victor Cruz-Gonzalez for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint is granted.

Plaintiff commenced this action to recover damages for personal injuries she sustained in a motor vehicle accident on February 8, 2009. After the accident, plaintiff was taken to St. Barnabas Hospital, where she was treated and released. She subsequently sought medical treatment for complaints of pain in the right knee, right shoulder, neck and back. On April 1, 2009, she underwent arthroscopic surgery on her right knee. On July 10, 2009, she underwent arthroscopic surgery on her right shoulder.

Plaintiff alleges that as a result of the accident she sustained soft tissue injuries to her cervical spine and lumbar spine, including bulging discs at L4-5, L5-S1, and injuries to her right knee and right shoulder which necessitated arthroscopic surgery.

In the verified bill of particulars, plaintiff alleges that she was confined to bed for

approximately two weeks and to her home for approximately two months following the accident.

Defendants seek dismissal of the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the accident.

In support of the motion, defendants submit the affirmed reports of Dr. Fisher, who conducted a radiological review of the MRI's of plaintiff's right knee, right shoulder, lumbar spine and cervical spine, the affirmed report of Dr. Decter, who performed an orthopedic examination of plaintiff on February 23, 2010, a copy the report of a bio-mechanical engineer, Brion Toosi, and a transcript of plaintiff's deposition testimony.

Dr. Fisher's affirmed reports show that he reviewed the MRI's of plaintiff's right knee taken on 2/26/09 and 3/26/09 and it is his opinion that they revealed pre-existing degenerative conditions, no meniscal or ligament tears, no joint effusion or evidence of recent traumatic or causally related injury to the right knee. Dr. Fisher also reviewed the MRI of plaintiff's right shoulder taken on 3/24/09 and it is his opinion that it revealed degenerative changes at the acromioclavicular joint, no rotator cuff or labral tears and no joint effusion and that these findings represent a chronic pre-existing condition. He found no radiographic evidence of traumatic or causally related injury to the right shoulder. Dr. Fisher reviewed the MRI's of plaintiff's lumbar spine and cervical spine and opines that they are unremarkable, with no herniations and no significant annular bulges.

Dr. Decter's report shows that he also reviewed the MRI's of plaintiff's right knee, right shoulder, lumbar spine and cervical spine. He opines that the MRI's of plaintiff's right knee revealed pre-existing degenerative changes with no meniscal tearing, the MRI of plaintiff's right

shoulder revealed mild conditions not causally related to the accident, the MRI of plaintiff's lumbar spine revealed no herniated disc or compression on any of the nerve roots and that the MRI of plaintiff's cervical spine revealed no significant disc pathology.

Dr. Decter reviewed the intraoperative photographs of plaintiff's right knee and it is his opinion that there is no evidence of meniscal pathology, no tear of the lateral or medial meniscus and that the evidence noted on the patelloemoral joint and trochlea are chronic conditions.

Dr. Decter reviewed the intraoperative photographs of plaintiff's right shoulder and opines that it revealed chronic, longstanding conditions not caused by the accident.

Dr. Decter's examination of plaintiff revealed that she had full range of motion of her cervical spine and lumbar spine, which he quantifies and compares to normal and full range of motion of the right shoulder, except for a 5 degree restriction of motion on forward elevation. He reports that plaintiff had full, painless range of motion of the right knee of 0-110 and no ligament instability, no effusion and no popliteal space fullness.

Dr. Decter opines that plaintiff sustained no permanent orthopedic injury to the right shoulder, right knee, cervical or lumbar spine as a result of the accident, that there are no residual effects as a result of the accident and plaintiff can return to unrestricted activities.

Plaintiff's testimony shows that after the accident she was confined to her home for a few days. She could not recall how long she was confined to her bed. She also testified that she did not believe that she returned for chiropractic treatment or physical therapy after the surgery to her right shoulder, although Dr. Fairman recommended that she do so.

The report of defendant's bio-mechanical engineer is not considered because it is not in

proper form.

Plaintiff contends that defendants have failed to establish their entitlement to judgment as a matter of law because the MRI reports that are annexed to defendants' moving papers reveal conflicting findings rendering Dr. Fisher's reports insufficient to demonstrate defendants' entitlement to summary judgment as a matter of law. Notwithstanding this contention, plaintiff submits the affirmation and reports of Dr. Eial Faierman, her treating physician and surgeon, in opposition to the motion.

Dr. Faierman's report dated August 25, 2010 shows that he first examined plaintiff on March 25, 2009. At that time, she complained of lower back, right shoulder and right knee pain. He noted that after the accident, plaintiff had been treated and released from St. Barnabas Hospital and that x-rays of her cervical spine, lumbar spine and right knee were negative for fractures. He also noted that an MRI of the right knee reportedly revealed a partial medial meniscal tear with joint space narrowing. His assessment was right knee internal derangement. He recommended that plaintiff continue physical therapy and his plan was to perform right knee arthroscopy.

On April 1, 2009, Dr. Faierman performed a right knee diagnostic/operative arthroscopy. His report shows that the arthroscopy revealed a "large grade 3 and 4 osteochondral defect with direct trauma to the trochlea," but there were no medial or lateral meniscal tears and no ligamentous tears. After the surgery, plaintiff underwent physical therapy.

Due to persistent right shoulder pain, plaintiff underwent a right shoulder MRI which revealed tendinitis, a grade 2 signal change in the supraspinatus tendon and a slight bony

impingement. Dr. Faierman prescribed physical therapy, but after conservative treatment failed, Dr. Faierman recommended a right shoulder arthroscopy.

On July 10, 2009, plaintiff underwent a right shoulder arthroscopy subacromial decompression and distal clavicle resection. According to Dr. Faierman, plaintiff had an uneventful postoperative course and was treated with physical therapy.

In his narrative report, Dr. Faierman states that he last saw plaintiff on "11/16/10." However, this is clearly a typographical error, as his report is dated August 25, 2010 and the reports annexed to his narrative report show that he last treated plaintiff in November 2009.

Dr. Faierman states that at the time he last examined plaintiff, she had restricted range of motion of the right shoulder, lumbar spine and cervical spine, which he quantifies and compares to normal and "limited active motion of the right knee 0-110" and moderate to severe tenderness in the medial and patellofemoral joints. However, plaintiff had a negative Lachman exam, negative pivot shift test, a negative anterior drawer bilaterally and there was full knee stability to varus and valgus stress testing and a negative grind test.

Dr. Faierman opines that plaintiff sustained injuries to her neck, lower back, right shoulder and right knee in the accident on February 8, 2009 and that if the history is correct, there is a causal relationship between the accident and the injuries. He also opines, with respect to the cervical spine and lumbar spine, that due to the time since the injury and persistent pain in both the neck and lower back, these injuries are permanent.

With respect to the right knee, he opines that there is photographic evidence of a post-traumatic osteochondral defect of the trochlea of the right knee and that plaintiff will have

worsening degenerative changes and that due to her age she will require a total knee replacement in the future.

With respect to the right shoulder, he notes that plaintiff continues to have pain and limitation in motion and opines that the final loss of function is permanent and she will require pain medication, intermittent therapy and intermittent injections indefinitely.

On a motion for summary judgment, it is the burden of the summary judgment proponent to demonstrate, prima facie, that he is entitled to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact; failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851). The burden then shifts to the party opposing the motion to demonstrate by evidentiary proof in admissible form that a triable issue of fact exists (Zuckerman v. City of New York, 49 NY2d 557). A court's task is issue finding rather than issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395) and the court must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact (Boyce v. Vazquez, 249 AD2d 724).

decision.

"The legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (Dafel v. Green, 84 NY2d 95). An expert's qualitative or quantitative assessment of a plaintiff's condition can be used to substantiate a claim of serious injury, provided that the testing method is objective and compares the plaintiff's limitations to

normal function (Toure v. Avis Rent A Car Systems, Inc. 98 NY2d 345). However, proof of a bulging or herniated disc or arthroscopic surgery, without permanency or significant physical limitations, is not sufficient to establish a serious injury (Ortiz v. Ash Leasing, 63 AD3d 556; Lopez v. Mendoza, 40 AD3d 436).

To satisfy the requirement that plaintiff suffered a medically determined injury that prevented him from performing substantially all of his usual and customary daily activities for not less than 90 days out of the 180 days immediately following the accident, a plaintiff must show that "substantially all" of his usual activities were curtailed (Gaddy, supra).

Failure of plaintiff to rebut defendant's prima facie showing that the injuries sustained by plaintiff pre-date the accident or were caused by some other event or condition warrants dismissal of the action (Pommells, supra). In order to raise an issue of fact as to the existence of a serious injury, the medical evidence presented must include a recent examination of the plaintiff (Bent v. Jackson, 15 AD2d 46).

While a cessation of treatment is not dispositive, a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so (Pommells v. Perez, 4 NY3d 566). Where there is persuasive evidence that a plaintiff's alleged pain and injuries were related to a pre-existing condition, plaintiff had the burden of coming forward with evidence addressing defendants' claimed lack of causation (Franchini v. Palmieri, 1 NY3d at 537).

Despite plaintiff's contention to the contrary, defendants' evidence is sufficient to meet their prima facie burden. Although Dr. Fisher's opinion as to the specific MRI findings differs in

some respects from that of plaintiff's radiologists, his opinion, which is that the MRI's revealed only pre-existing, degenerative changes and no evidence of trauma or injuries causally related to the subject accident, coupled with Dr. Decter's affirmed report, which shows that plaintiff had full range of motion of his cervical spine, lumbar spine, right knee and right shoulder with one minor 5 degree limitation and plaintiff's deposition testimony, that she was confined to home for a few days, are sufficient to meet defendants' prima facie burden of establishing that plaintiff did not sustain a permanent loss of use, a permanent or significant limitation of use or an injury under the 90/180 day category as a result of the subject accident (Gaddy v. Eyler, 79 NY2d 955; Franchini v. Palmieri, 1 NY3d 536; Arjona v. Calcagno, 7 AD3d 279; Style v. Joseph, 32 AD3d 212). Thus, the burden shifted to plaintiff to present competent evidence sufficient to raise a material issue of fact to defeat defendants' motion. She has failed to meet this burden.

While plaintiff has submitted the affirmation and reports of Dr. Faierman, copies of the same medical reports submitted by defendants and a transcript her deposition testimony in opposition to defendants' motion, this evidence is insufficient to raise a material issue of fact to defeat defendants' motion for several reasons.

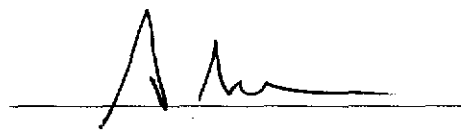
First, Dr. Faierman fails to address defendants' evidence that plaintiff had pre-existing degenerative, chronic conditions in her right knee and right shoulder, which is the crux of defendants' defense (Pommells v. Perez, 4 NY3d 566; Valentin v. Pomilla, 59 AD2d 184). Second, a plaintiff's claim that range of motion is limited must be supported by objective medical findings that are based on a recent examination of plaintiff (Grossman v. Wright, 268 AD2d 79). Since Dr. Faierman last saw plaintiff in 2009, his report and opinion are insufficient to raise a material issue of fact as to whether plaintiff sustained a permanent or significant

limitation as a result of the accident (Bent v. Jackson 15 AD3d 46). Third, while a cessation of treatment is not dispositive, a plaintiff who terminates therapeutic measures following an accident while claiming “serious injury” must offer some reasonable explanation for having done so. Here, plaintiff’s testimony shows that she stopped receiving treatment in 2009. However, she has failed to provide an explanation for the cessation of treatment (Bent v. Jackson, 15 AD2d 46), Id). Accordingly, defendants are entitled to summary judgment dismissing the complaint.

Movant shall serve a copy of this order with notice of entry on the Clerk of the Court who shall enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

Dated: July 25, 2011

A handwritten signature in black ink, appearing to read 'Stanley Green', is written over a horizontal line.

STANLEY GREEN, J.S.C.