

<b>Hickey v IT Transit, Inc.</b>
2011 NY Slip Op 34135(U)
March 3, 2011
Sup Ct, Bronx County
Docket Number: 0300378/2009
Judge: Mark Friedlander
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This opinion is uncorrected and not selected for official publication.

[\* 1]

3/8/11 ✓

PART 25

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:Case Disposed   
Settle Order   
Schedule Appearance 

HICKEY, LORNA

Index No. 0300378/2009

-against-

Hon. MARK FRIEDLANDER

IT TRANSIT, INC.

Justice.

The following papers numbered 1 to 4 Read on this motion, SUMMARY JUDGMENT DEFENDANT  
Noticed on September 21 2010 and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of 11/4/2010

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1-2	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits	4	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this *motion is decided i/d/w the attached memorandum decision, signed this date.*

Motion is Respectfully Referred to:

Justice: \_\_\_\_\_

Dated: \_\_\_\_\_

Dated: 3 / 3 / 11Hon. 

MARK FRIEDLANDER, J.S.C.

NEW YORK SUPREME COURT - COUNTY OF BRONX  
PART IA-25

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LORNA HICKEY,

Plaintiff,

**MEMORANDUM DECISION/ORDER**

Index No.: 300378/09

-against-

IT TRANSIT and AARON R. MOORE,

Defendants.

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HON. MARK FRIEDLANDER

Motion by defendants for an order, pursuant to CPLR§3212, granting them summary judgment dismissing plaintiff's complaint on the grounds that plaintiff cannot meet the serious injury threshold requirement mandated by Insurance Law Section 5104(a), is granted.

This action arises out of a motor vehicle accident that occurred on January 10, 2007. Plaintiff was operating her motor vehicle when it came into contact with a vehicle owned by defendant It Transit and operated by defendant Aaron R. Moore.

Plaintiff claims in her bill of particulars, dated June 12, 2009 (Exhibit B), that, as a result of this accident she suffered left L4-L5 radiculopathy, central disc herniation at C4-5 with thecal sac indentation, bulging discs at C3-4, bulging discs at C5-6 and C6-7 with thecal sac indentation; bulging disc at C7-T1, bulging disc at L3-4 with mild biforaminal stenosis, right parasagittal herniation at L4-5, and bulging disc at L5-S1.

The burden rests on defendants to establish by evidentiary proof, in admissible form, that plaintiff has not suffered a serious injury (Lowe v. Bennet, 122 AD2d 728 [1<sup>st</sup> Dept. 1986], aff'd 69 NY2d 701 [701]). When defendants' evidence is sufficient to make out a *prima facie* case that a serious injury has not been sustained, the burden shifts, and it is then incumbent upon

plaintiff to produce sufficient evidence in admissible form to raise a triable issue of fact as to whether plaintiff sustained a serious injury (see Licari v. Elliot, 57 NY2d 230 [1982]).

Defendants submit an affirmation from Maria Audrie De Jesus, M.D., a neurologist, who examined plaintiff at defendants' request on June 14, 2010 (Exhibit D); an affirmation from Audrey Eisenstadt, M.D., a radiologist, who, on May 19, 2009, reviewed the MRIs of plaintiff's cervical and lumbar spines, taken on February 23, 2007 and February 21, 2007, respectively, and a copy of the transcript of plaintiff's testimony taken on May 17, 2010 (Exhibit E).

Dr. De Jesus, after examining plaintiff, found that she had normal ranges of motion of the cervical, thoracic and lumbar spines, with various enumerated tests all being negative and bilateral straight leg raise being normal at 90 degrees. The HEENT, cranial nerves, cortical functions, muscle strength, reflexes and sensation tests were all normal. Dr. De Jesus' impression was that plaintiff had cervical, thoracic and lumbar sprains, all of which had resolved, and that plaintiff had a normal neurological examination.

Dr. Eisenstadt, regarding the cervical spine, found osteophyte formation at the C5-6 and C6-7 intervertebral levels, disc degeneration C6-7 level, dessication C2-3 through C5-6 levels, bulging of disc material at C3-4, C4-5, C5-6 and C6-7 levels with a small superimposed C4-5 disc herniation. No thecal or neural impingement noted. With respect to the osteophyte formations, Dr. Eisenstadt stated that this is a bony productive change, greater than six months in origin, which could not have occurred in the short time interval between the injury and examination. With respect to the disc degeneration seen at C6-7, she stated that this is the result of a drying out and loss of disc substance, another process greater than six months in origin, which predates the incident. Dessication was seen throughout the remainder of the cervical spine. Dr. Eisenstadt stated that the drying out of the disc material is greater than three months in

origin, and predates the incident of January 10, 2007.

Dr. Eisenstadt, regarding the lumbar spine, found early osteophyte formation at the L4-5 level, desiccation, bulging, and superimposed right paracentral L4-5 disc herniation. She stated that the osteophyte formation is a bony productive change, which could not have occurred in less than six months time and is indicative of early, pre-existing degenerative disease. She further stated that the disc bulging seen at this level is degenerative in origin, related to ligamentous laxity. It suggests that the small L4-5 herniation has a degenerative etiology. No annular tears to suggest an acute disc rupture were seen. There was no thecal or neural impingement. She opined that the osseous and intervertebral disc structure changes predate the incident of January 10, 2007.

Based on the above, defendants have made out a *prima facie* case that plaintiff's injuries did not meet the threshold requirements for serious injury as regards the categories of loss of use, permanent consequential limitation or significant limitation.

As to plaintiff's 90/180 claim as well, defendants have made out a *prima facie* case. Plaintiff in her deposition testimony stated that she worked three days a week, six hours a day, as a part-time child care provider for a private family, and lost no time from work as a result of the accident (Exhibit E, pgs. 9-14).

Since defendants have made out a *prima facie* case that a serious injury has not been sustained, the burden shifts, and it is incumbent upon plaintiff to produce sufficient evidence in admissible form to raise a triable issue of fact as to whether plaintiff sustained a serious injury.

In opposing the motion, plaintiff submits an excerpt of a transcript of her deposition (Exhibit A), an uncertified copy of plaintiff's Emergency Room Record from White Plains Hospital (Exhibit B), unaffirmed MRI reports of David R. Payne, M.D., a radiologist, dated

February 21, 2007 and February 23, 2007, respectively, of plaintiff's lumbosacral and cervical spine (Exhibit D), the unaffirmed electrodiagnostic testing report of Robert A. Martini, M.D., dated March 30, 2007 (Exhibit E), report of Gregori S. Pasqua, D.C., a chiropractor, dated June 21, 2007 (Exhibit C), unaffirmed and unsigned N-F3 Forms, dated February 21, 2007, April 4, 2007 and April 12, 2007, unsigned report of Dr. Pasqua, dated October 5, 2010 (Exhibit F), and Dr. Pasqua's affidavit. Dr. Pasqua's affidavit incorporates his June 21, 2007 report.

Neither the White Plains Emergency Room Record, nor the medical reports and records of Drs. Payne and Martini, are affirmed or otherwise in admissible form and, consequently, they cannot be considered by the Court. *Grasso v. Angerami*, 79 N.Y.2d 813, 814, 580 N.Y.S.2d 178 (1991); *Hernandez v. Almanzar*, 32 A.D.3d 360 (1<sup>st</sup> Dept. 2006); *Copeland v. Kasalica*, 6 A.D.3d 254 (1<sup>st</sup> Dept. 2004); *Shinn v. Catanzaro*, 1 A.D.3d 195 (1<sup>st</sup> Dept. 2003). Dr. Pasqua's affidavit is the sole document from an expert that is in proper form.

Dr. Pasqua examination of plaintiff on January 13, 2007, found and quantified range of motion restrictions of her cervical and thoraco-lumbo-sacral spines. His working diagnosis was that plaintiff sustained a cervical/strain with a left brachial radiculopathy, a lumbo-sacral sprain/strain left radiculopathy, a left shoulder sprain/strain and cephalgias (plaintiff's bill of particulars, dated June 12, 2009, does not assert a claim for any injury to the left shoulder or cephalgias). Treatments of spinal manipulation and electrostimulation were instituted at an initial frequency of three times per week. Dr. Pasqua's October 5, 2010 report states that plaintiff was seen by him for two years, with the last visit/treatment date being 4/12/09. However, other than three inadmissible no-fault N-F 3 forms, dated 2/21/07, 4/4/07 and 4/12/07, respectively, no specific dates of treatment or treatment records thereof were produced. Dr. Pasqua's recent examination of plaintiff on October 5, 2010, found and quantified range of

motion restrictions of her cervical and thoraco-lumbo-sacral spines. He further opines that plaintiff has a significant consequential loss of use and limitation of motion of her cervical and lumbar spine and a permanent loss and impairment of a body system, the musculo-skeletal system, specifically the lumbo-sacral and cervical spine, due to the January 10, 2007 accident. However, Dr. Pasqua fails to address the affirmations of defendants' radiologist stating that disc herniations and bulging revealed on the MRIs taken on February 21, 2007 and February 23, 2007 were the result of degenerative conditions unrelated to the accident, and not to trauma. Consequently, no triable issue is raised as to whether a causal connection exists between the accident and plaintiff's alleged injuries. *Quinones v. Ksieniewicz*, 80 A.D.3d 506 (1<sup>st</sup> Dept. 2011); *Hospedales v. Doe*, 79 A.D.3d 536 (1<sup>st</sup> Dept. 2010).

Plaintiff has not presented any evidence to support her claim regarding "90/180 days."

Accordingly, defendants' motion for summary judgment dismissing plaintiff's complaint is granted.

This constitutes the Decision and Order of the Court.

Dated: 3/3/11

  
Hon. MARK FRIEDLANDER, J.S.C.