 FILED Nov 16 2011 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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Cuttieri, Ernesto, et alia

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Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

Index No.: 302731/09

-against-

City of New York, et alia

DECISION/ORDER

Present:

Hon. Howard H. Sherman
Justice

----------x

The following papers numbered 1 to 4 read on this motion,
noticed on _____ and duly submitted on the motion calendar of 5/31/11

	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 by defendant Diallo and cross-motion of the City of New York for an order awarding summary judgment dismissing the complaint on the grounds that plaintiffs did not sustain serious injuries, are decided in accordance with the accompanying decision/order filed herewith

Dated: November 14, 2011
Bronx, New York

_____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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Ernesto Gutierrez, Confesora Norales-Reyes, and
Irsa A. Valencia

Plaintiffs,

Index Number **302731/09**

-against-

Decision and Order

The City of New York , The New York City Police Department , Javier Aponte and
Mamadou M. Diallo

Defendants,

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FACTS AND PROCEDURAL HISTORY

Plaintiffs seek damages for personal injuries allegedly sustained in a two-car collision that occurred on March 23, 2008 at or near the intersection of Union Avenue and East 168th Street , Bronx County, New York. Plaintiffs were passengers in a livery cab driven by defendant Diallo that was impacted by a police vehicle driven by defendant Aponte.

This action was commenced in April 2009 and issue was joined with the service of defendant Diallo's answer that month. The City defendants interposed their answer in June 2009. Each answer interposes a cross-claim against the co-defendant.

The Note of Issue was filed on October 29, 2010.

Motion/Cross-Motion

Defendant Diallo moves for an award of summary judgment dismissing the complaint and cross-claim asserted against him on the grounds that plaintiffs fail to meet the serious injury threshold defined by Insurance Law 5102(d).

In support of the motion, defendant submits copies of the pleadings (Exhibits A.B,); the verified bill of particulars (Exhibit D); contemporaneous medical records; affirmed reports of the independent medical examiners (Exhibits F-M), and copies of plaintiffs' 05/05/10 examinations before trial(Exhibits N-P).

The City of New York cross-moves for the same relief and "joins and reiterates all the arguments raised by defendant Diallo ."

Ernesto Gutierrez

Verified Bills of Particulars

Plaintiff **Ernesto Gutierrez** alleges that as a result of the motor vehicle he sustained the following permanent injuries: **tear of the posterior horn of the medical meniscus of the right knee; suprapatella effusion of the right knee; disc herniation at L5-S1 and lumbar and cervical sprain/strain** (Verified Bill of Particulars ¶ 11). It is further alleged that plaintiff was confined to bed for 21 days and "intermittent days and part days to date" [1], and was confined to home for three months and intermittent days and part to date (Id. ¶ 13) It is also alleged that the injuries constitute a serious injury as defined by every

[1] Verified Bill of Particulars is dated September 23, 2009.

category of Insurance Law Section 5102. (Id. ¶ 20). [2]

Contemporaneous Medical Reports

Defendant tenders the FDNY Pre-Hospital Care Report with respect to plaintiff's emergency treatment as well as the Lincoln Hospital emergency treatment report. [3]

The first report indicates that plaintiff was ambulatory at the scene of the accident and complaining of neck and back pain.

The hospital report indicates that plaintiff presented with thoracic and cervical back pain without extremity complaints, and that an evaluation revealed minimal paraspinal tenderness. The CT scan of the cervical spine conducted at the hospital was found to be "Normal."

Independent Medical Evaluations

On June 6, 2010, plaintiff was examined by Michael J. Carciente, M.D. for purposes of an independent **neurological** evaluation. [4] Prior to the examination, Dr. Carciente reviewed plaintiff's contemporaneous medical reports and diagnostic studies from the

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[2] It is clear that plaintiffs here neither expired in the accident, nor were they dismembered or significantly disfigured, nor were they caused to suffer the loss of a fetus nor were there any fractures sustained in the accident. It is also clear that the injuries alleged do not qualify as a permanent loss of a body organ, member, function or system (see, Oberly v. Bangs Ambulance Inc., 96 N.Y.2d 295 [2001]). As such, the issues here involves only the "significant limitation", "permanent consequential", and "90/180" categories asserted. It would be better practice for counsel to avoid the use of a boilerplate and assert only those categories applicable to the injuries alleged..

[3] Though not affirmed, the reports as tendered by defendants are admissible as plaintiff's own medical records (see, Newton v. Drayton, 305 AD2d 303 [1st Dept. 2003].

[4] Exhibit F to Moving Papers

emergency room records of 03/23/08 through the final narrative report of the treating physician dated 02/18/09.

Plaintiff presented with complaints of lower back pain, and mild pain in the right ankle.

Upon examination, Dr. Carciente found neither tenderness nor spasm upon palpation of the cervical and thoracic/lumbosacral spine. In addition, the straight leg maneuver was negative to about 90 degrees in the sitting position, bilaterally.

Visual inspection of the upper and lower extremities demonstrated neither atrophy nor fasciculations throughout. There was no spasticity , ankle clonus, or Hoffman sign, and the motor strength was 5/5 in the shoulders, abductors, and the flexors/extensors of the arm, wrist, fingers , hip, legs, and ankles.

Dr. Carciente concluded that there were no objective findings to support plaintiff's subjective complaints . Specifically, there were no findings of myotomal weakness, dermatonal sensory deficits, asymmetric reflexes or atrophy to support a finding of either a cervical or lumbosacral radiculopathy. Dr. Carciente found no correlation between the findings upon examination , and the results of the MRI study. Based upon his review of the medical records and the findings of his examination, Dr. Carciente concluded with a reasonable degree of medical certainty that there was no evidence of a neurological disability .

On June 21, 2010, plaintiff presented for purposes of an **orthopedic** evaluation with complaints of right ankle pain and difficulty in walking and in sleeping.

For purposes of the evaluation, Dr. Buckner reviewed the Lincoln Hospital emergency treatment records, and contemporaneous diagnostic studies , as well as physical therapy and "Phoenix Medical" records.

Upon examination, Dr. Buckner found plaintiff to have a normal gait and to be capable of walking on his heels and toes with symmetry and ease , and capable of touching his toes with knees straight. Spurling's test, Straight Leg Raising, and Lasegue's sign were all negative as was the McNabb's test and FABER maneuver.

Upon range of motion testing, Dr. Buckner made the following findings.

> There is full, normal range of motion about the cervical, thoracic or lumbar spine for a person of his age[5] and habitus.
>
> There is full, normal and symmetric range of motion about all major joints of the upper and lower extremities without complaint of or indication of discomfort.

Dr. Buckner concluded that the examination was normal and that there was no causally-related pathology present, and that plaintiff was capable of performing all activities of daily living without restriction, including the factory work at which he was then employed,

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[5] Mr. Gutierrez was born on 02/28/74

Deposition Testimony

In pertinent part, **Ernesto Guttierez** testified[6] that the cab in which he was a back-seat passenger was struck twice in the motor vehicle accident , and that the force of the impacts caused his head to hit the front seat [GUTTIEREZ EBT: 19-29]. He was not wearing a seat-belt at the time of the accident [EBT: 20]. He lost consciousness and was taken by ambulance to the emergency room of Lincoln Hospital where he regained consciousness and complained of pain in the head and the neck [Id. 28-20]. He was treated and released.

Plaintiff then commenced a six-month course of treatment for his neck , lower back, and right hand at Phoenix Medical [Id. 32-34]. The treatment included exercise and acupuncture . He was referred for x-rays and received a bandage for his hand , a neck, and and a knee brace [Id. 34-35]. The last time he received treatment for his injuries was about a year before the 05/15/10 deposition [Id. 39].

Plaintiff testified that he was confined to home for a six-month period post-accident [Id. 40]. At the time of the accident, plaintiff had no health insurance [Id. 40].

Concerning his present complaints, plaintiff testified that he did not still experience head or right hand or ankle pain, but he does sometimes feel pain in his neck "when it's about to rain." [Id. 41: 9]. He is also bothered by back pain "pretty often" when sitting for

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[6] Exhibit N to Moving Papers

a prolonged period [Id. 41], and right knee pain so that he "can't stand for a long time." [Id. 42:]. He also testified that he could no longer ride a bicycle as he had on most weekends prior to the accident [Id. 43].

Discussion

Upon review of the moving papers , it is the finding of this court that defendants have failed to demonstrate as a matter of law that there is no material issue of fact that *all* of the injuries alleged to have been caused by the 03/23/08 motor vehicle accident are not serious (see, Simantov v. Kipps Taxi, Inc., 68 A.D.3d 661 [1st Dept. 2009]; see also, Menezes v Khan, 67 AD3d 654, [2d Dept 2009]; Delayhaye v Caledonia Limo & Car Serv., Inc., 61 AD3d 814, 815, [2d Dept. 2009]). Specifically, despite a review of the bill of particulars and the contemporaneous diagnostic studies including the MRI report that indicated a tear of the posterior horn of the medical meniscus, defendant's orthopedist failed to evaluate either the nature , or the permanency , or indeed, resolution of the alleged injuries to plaintiff's right knee

Defendants' failure to meet their initial burden of establishing a prima facie case renders it unnecessary to consider the submissions in opposition.

Confesora Reyes

Verified Bill of Particulars

Plaintiff **Confesora Reyes** alleges that as a result of the motor vehicle accident, she

sustained the following permanent injuries: **disc bulges at L5-S1 level; straightening of the normal cervical curve, and cervical and lumbar sprain/strain** (Verified Bill of Particulars ¶ 11). It is alleged that plaintiff was confined to bed for three days and confined to the house for two weeks after the accident (Id. ¶ 13).) It is also alleged that these injuries constitute a serious injuries as defined by every category of Insurance Law Section 5102. (Id. ¶ 20).

Independent Medical Evaluations

On June 6, 2010 plaintiff was examined by Michael J. Carciente , M.D., for purposes of an independent **neurological** evaluation. [7] Prior to the examination, Dr. Carciente reviewed plaintiff's contemporaneous medical reports, physical therapy/acupuncture notes, and diagnostic studies for the period 03/22/08 through 02/18/09.

Plaintiff presented with complaints of pain in the lower back, the right side of the neck, and the right shoulder.

Upon examination, Dr.Carciente found neither tenderness nor spasm upon palpation of the cervical and thoracic/lumbosacral spine. In addition, the Straight Leg maneuver was negative to about 90 degrees in the sitting position, bilaterally.

Visual inspection of the upper and lower extremities demonstrated neither atrophy

[7] Exhibit L to Moving Papers

nor fasciculations. There was no spasticity , ankle clonus, or Hoffman sign, and the motor strength was 5/5 in the shoulders, abductors, and the flexors/extensors of the arm, wrist, fingers , hip, legs and ankles.

Dr. Carciente concluded that there was neither evidence of a neurologic injury, nor of disability or permanency . There was no correlation found between the findings of disc herniation in the MRI report and the clinical evaluation. Dr. Carciente observed that the diagnostic report did not indicate an impingement on a neural structure and those findings made in the MRI report "should not be the cause of a neurologic deficit", with the finding of spondylosis consistent with a chronic pre-existing condition.

On June 21, 2010, plaintiff presented for an **orthopedic** evaluation with complaints of dizziness, nervousness, neck and back pain, and numbness in her right leg, as well as difficulty in walking.

For purposes of the evaluation, Dr. Buckner reviewed the police report of the accident as well as contemporaneous diagnostic studies and physical therapy/acupuncture /chiropractic notes for the period through the "Final Narrative Report" of 02/18/09.

Upon examination, Dr. Buckner found plaintiff to have a normal gait and capable of walking on her heels and toes with symmetry and ease , and of touching her toes while her knees were straight.

The muscles of the cervical, thoracic and lumbar spine demonstrated normal

reciprocating function with head turning lateral bending and with gait. Dr. Buckner observed neither tenderness nor spasm about the cervical, thoracic ,and lumbar spine, and made the following findings with respect to ranges of motion.

> She turns her head left and right to 80 degrees.
> She has extension of 60 degrees and forward flexion such that her chin reaches the manubrium of sternum.

Babinski's and Hoffman's tests were negative.

Upon examination of the knees, [8] Dr. Buckner found both to demonstrate full extension and (hyperextension of 5 degrees) and flexion to 140 degrees.

Dr. Buckner concluded that the examination was normal with no causally-related pathology present . Plaintiff was found to be capable of performing all activities of daily living including any work she chooses without restriction.

Deposition Testimony

Contesora Reyes testified that she was not wearing a seat-belt at the time of the accident and that her back and her right knee came into contact with the "inside of the taxi" as a result of the impacts [REYES EBT: 21-22].

She was taken by ambulance to the emergency room of Lincoln Hospital where she was given pain medication and a prescription for more that she used for three days after the accident [EBT: 26]. Four days later she went to Phoenix Medical where she treated for

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[8] There are no injuries alleged with respect to plaintiff's knees.

a six-month period [Id. 27]. This consisted of acupuncture treatment of the neck, back and right knee [Id. 29]. She was also referred for MRI studies [Id. 31].

Plaintiff testified that she was not confined to her home for any period of time after the accident [Id. 31], and she had no future medical appointments for any injuries sustained in the accident [Id. 31]. She experiences pain in her neck two or three times a month "[w]hen the weather changes" [Id. 33:6], as well as lower back pain. Plaintiff also testified that she can't walk for a long time or wear high-heeled shoes [Id. 33].

Discussion

Upon review of the submissions consisting of the findings of plaintiff's lack of any neurological or orthopedic deficit that were made by defendants' medical experts, and supported by their objective testing upon recent examinations , as well as the testimony of plaintiff concerning the lack of post-accident confinement , it is submitted that defendants have shouldered their initial burden to prove that plaintiff did not sustain a serious injury as a result of the motor vehicle accident (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 Gaddy v. Eyler, 79 NY2d 955, 956-957 [1992]; Shinn v. Catanzaro, 1 AD3d 195, 197 [1st Dept. 2003]; Lowe v. Bennett, 122 AD2d 728 [1st Dept. 1986], affd. 69 NY2d 700 [1986]). Thus, the burden shifts to the plaintiff to demonstrate by the submission of objective proof of the nature and degree of the injuries, that she did sustain a serious injury or that there are questions of fact as to whether the alleged injury was serious (see, Toure

98 NY2d at 350). Plaintiff fails to do so.

In **opposition,** plaintiff submits her "affidavit of merit"[9] as well as the affirmed report of Phoenix Medical's Hoi Yat Kam, M.D., dated February 18, 2009 , and the affirmed Initial Neurologic Office Visit report of Aric Hausknecht, M.D., who examined plaintiff on October 7, 2010.

The report of the treating physician is entitled "Final Narrative Report" and affirmed as of 02/18/09. The report is unsupported by any other records of the treating facility, including either the initial assessment made upon plaintiff's commencement of treatment at Phoenix, or the reports of findings on any follow-up examination. As a result, the only medical evidence tendered that would serve as a quantified assessment of the accident related spinal deficits alleged, are those found upon an examination conducted nearly one year after the motor vehicle accident. These findings of "mild restricted " active/passive range of motion in all planes of the cervical and lumbosacral spine are quantified and compared to normal readings, but they are not "contemporaneous " with the accident (see, Cabrera v Gilpin, 72 AD3d 552, 899 N.Y.S.2d 211 [1st Dept. 2010]; Toulson v Young Han Pae, 13 AD3d 317, 788 N.Y.S.2d 334 [1st Dept. 2004]).

The probative value of the report is further diminished as it appears to conflate the initial assessment, which supported the noted diagnostic impression, and the recommendations for further testing , as well as the treatment plan prescribed, with these restrictions of range of motion found five months after plaintiff testified she ceased treatment for her accident-related

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[9] While plaintiff required the services of an interpreter at the deposition, there is nothing to indicate that the affidavit was translated prior to plaintiff's affixing her signature as notarized.

injuries. [10] Dr. Kam fails to present any clinical support for his finding that there was a "slow improvement" of plaintiff's injuries during the period of physiotherapy. Having failed to tender the findings upon the initial and subsequent examinations, the court cannot track such progress. With respect to any medical reason for the cessation of therapy, relevant to the issue of causation, Dr. Kam offers only the following , leaving open the issue of the need for a resumption of therapy.

> The patient presented for a full course of physiotherapy
> As prescribed. He was instructed that if the pain worsen
> he is to start on the medication , Which he was instructed
> to return to my office for reevaluation with the possibility
> of Reinstatement of therapy.

Also clinically unsupported is Dr. Kam's concluding statement : "Final whole person impairment 36 %." The method by which this conclusion was reached is not further explicated, nor is any supporting date tendered.

Dr. Aric Hausknecht , a neurologist, examined plaintiff for the first and only time on October 7, 2010, more than two and one-half years after the accident. He concluded that the injuries to plaintiff's cervical sprain had resolved, and with the use of a goniometer, he made the following findings for the ranges of motion of her thoracic/ lumbosacral spine. [11] Seated straight leg raise testing was found to be positive on the left at 78 degrees. Dr. Hausknecht concluded that plaintiff

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[10] It is noted that the report also incorporates several references to the female plaintiff as "he."

[11]

	Observed ROM	Normal ROM
Forward Flexion	0-78	0-90
Extension	0-22	0-25
L Lateral Flexion	0-25	0-25
R Lateral Flexion	0-25	0-25
L Rotation	0-30	0-30
R Rotation	0-30	0-30

suffered from a lumbar derangement with a L5-S1 disc bulge and that this injury was both causally related to the motor vehicle accident, and permanent in nature. It is submitted that the deficits in range of motion in two of the six planes of the lumbosacral spine are not significant within the meaning of Insurance Law § 5102(d) (see, Sone v. Qamar, 68 A.D.3d 566 [1st Dept. 2009]).

Accordingly, that branch of the motion seeking an award of summary judgment dismissing plaintiff's complaint should be granted.

Plaintiff Irsa Valencia

Verified Bill of Particulars

Plaintiff **Irsa A. Valencia** alleges that as a result of the motor vehicle accident, she sustained the following permanent injuries: **herniated discs at L4-5 and L5-S1 levels and lumbar sprain/strain ; tear of the posterior horn of the medial meniscus and lateral meniscal tear of the right knee , and a partial tear of the anterior cruciate ligament of that knee,**(Verified Bill of Particulars ¶11). It is alleged that plaintiff was confined to bed/home for intermittent days and part days to date (Id. ¶ 13). It is also alleged that these injuries constitute a serious injuries as defined by every category of Insurance Law Section 5102 (Id. ¶ 20).

On June 6, 2010 plaintiff was examined by Michael J. Carciente , M.D. for purposes of an independent **neurological** evaluation. [12] Prior to the examination, Dr. Carciente reviewed plaintiff's contemporaneous medical reports , commencing with ambulance and

[12] Exhibit L to Moving Papers

emergency room records, physical therapy/acupuncture notes; diagnostic studies, and an 10/23/08 operative report, through the Initial Report of Dr. Hausknecht of 05/21/09.

Plaintiff presented with complaints of pain in the lower back, the right side of the neck and the right shoulder.

Upon examination, Dr. Carciente found neither tenderness nor spasm upon palpation of the cervical and thoracic/lumbosacral spine. In addition, the straight leg maneuver was negative to about 90 degrees in the sitting position, bilaterally.

Visual inspection of the upper and lower extremities demonstrated no atrophy nor fasciculations throughout. There was no spasticity, ankle clonus, or Hoffman sign, and the motor strength was 5/5 in the shoulders, abductors, and the flexors/extensors of the arm, wrist, fingers, hip, legs and ankles.

Dr. Carciente concluded that there were no objective findings to support plaintiff's subjective complaints. Specifically, there were no findings of myotomal weakness, dermatonal sensory deficits, asymmetric reflexes or atrophy to support a finding of a peripheral nervous system injury. Dr. Carciente found no correlation between the findings upon examination and the results of the MRI study. Based upon his review of the medical records and the findings upon his examination, Dr. Carciente concluded with a reasonable degree of medical certainty that there was no evidence that plaintiff had an ongoing neurological injury.

On June 21, 2010 plaintiff presented for purposes of the **orthopedic** evaluation with complaints of nervousness; back, chest, right shoulder, arm and leg pain; bilateral knee pain, and right foot pain. Plaintiff reported numbness in her right hand , foot and toes, as well as difficulty in walking, bending, and sleeping

For purposes of the evaluation, Dr. Buckner[13] reviewed the police report of the accident as well as contemporaneous medical records/diagnostic studies and and physical therapy/acupuncture /chiropractic notes and an operative report of 10/23/08 and the initial report of Dr. Hausknecht of 05/21/09.

Upon examination, Dr. Buckner found plaintiff to be morbidly obese[14] with a normal gait capable of walking on her heels and toes and of touching her toes with ease.

Dr. Buckner observed manual motor testing to be symmetric and normal in all major muscle groups of the upper and lower extremities, and made the following findings with respect to cervical range of motion.

> She turns her head left and right to 80 degrees.
> She has full extension of 45 degrees and full flexion such that her chin reaches the manubrium .

Babinski's and Hoffman's tests were negative.

Upon examination of the knees, Dr. Buckner found both to demonstrate full

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[13] Exhibit M to Moving Papers

[14] Plaintiff was reported as weighing 236 pounds. She is 5'5".

extension with flexion to 130 degrees. McMurray's sign was found to be negative as were Apley's, Lachman's, and patellar grind tests, and drawer and patellar apprehension signs, and pivot shift. There was neither medial not lateral instability observed. Dr, Buckner found mild synovial hypertrophy, bilaterally, more pronounced in the right knee.

Dr. Buckner concluded that plaintiff had a reported thigh contusion that was clinically resolved as well as pre-existing cervical and lumbar degenerative spondylosis, and had undergone a right knee arthroscopy for pre-existing degenerative osteoarthritis unrelated to the motor vehicle accident.

Dr. A. Robert Tantleff conducted an independent **radiological** review of the 04/22/08 MRI study of plaintiff's lumbar spine.

Dr. Tantleff found the quality of the diagnostic films to be extremely variable with images grainy and blurry.

Based upon the review of the films, Dr. Tantleff found diffuse discogenic changes in the lower lumbar spine from L3/4 through L5/S1, with disc desiccation and degeneration of variable loss of height, most pronounced at L5/S1. At that level, there was found degenerative vacuum phenomena with associated anterior and posterior osteodiscal complex changes , posteriorly at L4/5 , and anteriorly at L3/4, as well as a small focal protrusion posteriorly at L4/5. Dr. Tantleff concluded that the films revealed "no evidence of acute or recent injury" and evidence of disc changes requiring years and decades to

develop.[15] He also observed that plaintiff's "increased body habitus" was a concomitant factor for degenerative disc disease.

Deposition Testimony

Irsa Valencia testified that she hit her head and chest as a result of the impacts of the collision [VALENCIA EBT: 22]. She was taken by ambulance to the emergency room of Lincoln Hospital where she complained of pain in her chest , neck, back, right arm ,and knee . A chest x-ray was performed [EBT: 24], and plaintiff was given pain medication that she took for a two-week period [Id. 24-25].

A day after the accident, she commenced a seven-month course of acupuncture/exercise treatment at Phoenix Medical for her right knee, neck, back and right arm injuries [Id. 26-27;31]. She testified that she was confined to home for about three months after the accident [Id. 35], and lost one year and two months time from her employment as a home health attendant [Id. 13]. She also had arthroscopic surgery on her right knee , and that after the surgery, she resumed therapy at Phoenix Medical for three and one-half months [Id. 30-31].

Plaintiff testified that she had no future medical appointments for treatment of injuries sustained in the accident [Id. 32]. She also testified that she has constant neck,

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[15] Plaintiff testified that she was born on 09/25/51 [VALENCIA EBT: 10:2]. However, it is noted that each of the medical reports refer to plaintiff's age at the time of examination as "50." Her treating physician note plaintiff's age on 05/21/09 as 48, and on 10/05/10 as 51.

back, and right arm pain and that she is bothered by right knee pain when she walks [Id. 34].

Discussion

Upon review of and based upon the moving papers including the affirmed reports of defendant's experts, who within a reasonable degree of medical certainty opined *inter alia,* that the contemporaneous diagnostic films of plaintiff's lumbosacral spine revealed evidence of pre-existing disc disease and no evidence of trauma, and that the objective testing of the affected area on recent clinical examinations exhibited neither neurological nor orthopedic deficits, and with respect to plaintiff's right knee, post-surgery, that it exhibited neither instability nor deficits in extension or flexion of the range of motion, it is the finding of this court that defendants have shouldered their initial burden on this motion with respect to the lack of a serious injury in the significant limitation and permanent consequential categories asserted.

However, defendants fail to come forward with sufficient evidence to demonstrate as a matter of law that plaintiff did not sustain a serious injury as defined under the 90/180 test of Insurance Law § 5102 (d). While characterizing plaintiff's testimony concerning her post-accident confinement as "self-serving", defendants fail to demonstrate as a matter of law that plaintiff was not confined to her home for a three month period after the accident, nor do they come forward with probative medical evidence consisting of contemporaneous

reports, or the assessment of their experts based upon their review of these repots, that such a confinement was not medically determined to be necessary.

In opposition, plaintiff submits the affirmed reports of : 1) Dr. Stanley Liebowitz, who conducted examinations of plaintiff on 07/03/08 and on 09/04/08 ; 2) Dr. Thomas Scilaris, who performed the arthroscopic surgery on 10/23/08, and 3) the reports of neurological examinations conducted on 05/21/09 and on 10/05/10, as well as the MRI studies of the right knee dated 03/27/08 and 06/06/08, and of the lumbar spine dated 04/22/08.

Upon review of the first of these medical reports, it is clear that the findings of Dr. Liebowitz [16] were rendered upon an examination conducted more than three months after the motor vehicle accident, however, , pursuant to the authority of Salman v. Garcia, 87 A.D.3d 482, [1st Dept. 2011], this court finds that such "objective evidence of injury" is "sufficiently contemporaneous to establish that plaintiff has suffered a serious injury." Salman , at 484 Dr. Liebowitz also conducted range of motion testing of the lumbar spine

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[16]

Lumbar Spine	Observed ROM	Normal ROM
Flexion	30	85
Extension	5	30
Lateral Bending	10	25
Lateral Rotation	20	40
Right Knee		
Flexion	115	135

and right knee four months later and the following results were noted. [17] In addition, to the ROM findings, Dr. Liebowitz found the Straight Leg Raising test to be positive at 5 degrees, and that the lumbar spine revealed tenderness and spasm at the paraspinal/gluteus. In addition, McMurray tests performed at both examinations revealed: "same was painful .... and there was clicking of the right knee."

Dr. Liebowitz concluded that the injuries observed to include cervical sprain and radiculopathy and lumbar radiculopathy with disc herniation at L4-S1, right shoulder impingement , right knee derangement and medical and lateral meniscus tear were "related to the accident of March 23, 2008 , and are permanent in nature."

The medical evidence also contains a copy of the surgical report, as well as the reports of Dr. Aric Hausknecht who performed neurological examinations on May 21, 2009 and on October 5, 2010.

In pertinent part, in the first report, Dr. Hauskneckt concluded that plaintiff's cervical sprain had resolved, and he diagnosed the injuries to the lumbosacral spine as lumbosacral derangement with L4-5 and L5-S1 disc herniations with aggravation of previously asymptomatic underlying spondylosis. While noting that there was evidence

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[17]

Lumbar Spine	Observed ROM	Normal ROM
Flexion	40	85
Extension	10	30
Right Knee		
Flexion	120	135

of pre-existing degenerative joint disease , he observed that plaintiff was asymptomatic prior to the accident, and concluded with a reasonable degree of medical certainty that the accident was the substantial cause of plaintiff's condition. He also opined that plaintiff had been symptomatic for over a year, and that she had reached a maximal degree of medical improvement [18], and that her condition was permanent in nature. He concluded that plaintiff had sustained "permanent consequential limitation of use of her lumbosacral spine."

More than one year later, Dr. Hausknecht again found deficits in three of the six planes of the lumbosacral spine as well as lumbosacral paravertebral tenderness and associated muscular spasm . Seated Straight leg raise testing was found to be positive on the right at 60 degrees, and on the left at 65 degrees. The earlier diagnosis was continued and Dr. Hausknecht found plaintiff to be "partially disabled", and "an appropriate candidate for interventional pain management and/or lower back surgery."

Upon consideration of the above submissions, and despite the failure of plaintiff to come forward with probative medical evidence to rebut defendants' expert's assessment that the right knee injury alleged has resolved without either structural or mobility residuals, it is the finding of this court that plaintiff has raised an at least arguable issue of fact that she sustained a serious permanent injury as a result of the motor vehicle accident.

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[18] Dr. Hausknecht had reviewed the reports of the 03/26/08 initial evaluation by Dr. Kim; a 04/14/08 neurological evaluation ; Dr. Liebowitz's reports, and the surgical report.

Plaintiff's medical evidence includes contemporaneous clinical findings of lumbar deficits as well as findings of deficits one and two years post-accident causally related to that accident. Any issue of causation arising from pre-existing degenerative disease raised by defendants' radiologist has been addressed in Dr. Hausknecht's evaluation , and the conflict that results from the experts' findings is an issue to be resolved by the triers of fact.

Conclusions

For the reasons above stated, the motion and the cross-motion are granted to the extent of awarding summary judgment dismissing the claims of plaintiff Confessor Norales-Reyes complaint , and are otherwise denied.

This constitutes the decision and order of this court.

Dated: November 17 2011

Howard H. Sherman