

Sue v Espinal
2012 NY Slip Op 32071(U)
July 31, 2012
Sup Ct, NY County
Docket Number: 103285/2009
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 103285/2009
SUE, JONATHAN
vs.
ESPINAL, BENNY A.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 103285/09
MOTION DATE 5/2/12
MOTION SEQ. NO. 002

The following papers, numbered 1 to 14 were read on this motion for summary judgment

Notice of Motion— Affirmation — Exhibits A-J _____	No(s). <u>1-2</u>
Affirmation In Opposition — Exhibits A [Affirmation], B [Affirmations], C [Affidavit], D [Affirmation], E [Affirmations], F [Affidavit] _____	No(s). <u>3-13</u>
Replying Affirmation — Exhibits _____	No(s). <u>14</u>

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant New York City Transit Authority is decided in accordance with the annexed memorandum decision and order.

FILED

AUG 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 7/31/12
New York, New York

, J.S.C.

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

1. Check one:
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

- | | |
|---|---|
| ☐ CASE DISPOSED | ☒ NON-FINAL DISPOSITION |
| ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER | |
| ☐ SETTLE ORDER ☐ SUBMIT ORDER | |
| ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE | |

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

FILED

AUG 07 2012

-----X
JONATHAN SUE and YOONSUN SUE,

Plaintiffs,

- against -

BENNY A. ESPINAL and NYC TRANSIT AUTHORITY,

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE
Index No. 1038285/2009

Decision and Order

-----X

HON. MICHAEL D. STALLMAN, J.:

In this action alleging personal injuries arising out of a motor vehicle accident, defendant New York City Transit Authority (NYCTA) moves for summary judgment dismissing the complaint, arguing that both plaintiffs did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiffs oppose the motion.

BACKGROUND

Plaintiffs allege that, on August 31, 2008, their vehicle was rear-ended by defendants' bus on Fifth Avenue at either 43rd Street or 44th Street in Manhattan. Plaintiff Jonathan Sue, the driver, and his wife, Yoonsun Sue, a passenger, commenced this action against NYCTA and defendant Benny A. Espinal, the alleged bus driver employed by NYCTA.

Plaintiffs' bill of particulars alleges that plaintiff Jonathan Sue suffered, among other things, spinal stenosis, cervical disc herniation, and disc bulging, lumbar disc

bulging and disc herniation, and a partial tear of the supraspinatus tendon of his left shoulder. (Coffey Affirm., Ex D [Verified Bill of Particulars ¶ 10].) Plaintiff Yoonsun Sue allegedly suffered, among other things, a disc herniation at C6-C7, “slight retrolisthesis of L-3 on L-4, and L-4 on L-5,” a posterior bulge at L5-S1, and a tear of the supraspinatus tendon of her right shoulder. (*Id.*) The bill of particulars also states that plaintiffs were confined to bed for approximately two weeks, and confined to home for approximately one month. (*Id.* ¶ 11. A.)

By decision and order dated February 22, 2012, plaintiff were granted summary judgment in their favor as to liability on the first and second causes of action against defendants.

DISCUSSION

In support of its motion, NYCTA submits the affirmed reports from Dr. Ronald Mann, an orthopedic surgeon, who examined Jonathan Sue on November 30, 2010, and Yoonsun Sue on October 6, 2010. (Coffey Affirm., Exs G, J.)

Serious Injury as to Jonathan Sue

Dr. Mann recorded normal ranges of motion (expressed in degrees and corresponding normal values) in Jonathan Sue’s cervical spine and apparently better than normal ranges of motion in Jonathan Sue’s lumbar spine in flexion, extension, and right and left lateral bending. (Coffey Affirm., Ex G.) There is no range of

motion measurement for lumbar rotation. As to Jonathan Sue's left shoulder, Dr. Mann recorded ranges of motion in forward flexion, abduction, and external rotation that were 10 degrees less than their corresponding normal values; only internal rotation was measured at a normal range of motion.¹ Dr. Mann affirmed that all ranges of motion were based on AMA guidelines and that a goniometer was used to measure all ranges of motion. (*Id.*)

NYCTA did not meet its prima facie burden of demonstrating that Jonathan Sue did not suffer a "permanent consequential limitation of use of a body organ or member" or a significant limitation of use of a body function or system" of his lumbar spine and left shoulder. As plaintiffs point out, Dr. Mann omitted measurement of Jonathan Sue's range of motion in the rotation of his lumbar spine, which is a necessary measurement to meet a defendant's prima facie burden of serious injury with respect to alleged injuries to Jonathan Sue's lumbar spine. (*McFadden v Barry*, 63 AD3d 1120, 1121 [2d Dept 2009].) As to Jonathan Sue's left shoulder, Dr. Mann measured less than normal ranges of motion. NYCTA correctly points out that "a minor, mild or slight limitation of use should be classified as insignificant

¹ Dr. Mann measured the external rotation of Jonathan's Sue's left shoulder at "80 degrees (90 degrees normal, the claimant exceeds the normal value)." (Coffey Affirm., Ex G.) It is curious that Dr. Mann states that the movement of the shoulder exceeded the normal value when Dr. Mann allegedly recorded the range of motion as less than the corresponding normal value.

within the meaning of the statute.” (*Licari v Elliott*, 57 NY2d 230, 236 [1982].) However, Dr. Mann did not opine as to whether the limitations in the movement of Jonathan’s left shoulder were minor, mild, or slight. The cases that defendant cites in the moving papers to support the argument that the restrictions were minor as a matter of law did not involve limitations of the shoulder. (See Coffey Affirm. ¶¶ 23-24.)

NYCTA has met its prima facie burden of demonstrating that plaintiff Jonathan Sue did not suffer a “permanent consequential limitation of use of a body organ or member” or a significant limitation of use of a body function or system” of his cervical spine. NYCTA submitted an expert medical report “finding normal ranges of motion in the claimed affected body parts and no objective evidence that any limitations resulted from the accident.” (*Vega v MTA Bus Co.*, 96 AD3d 506, 506 [1st Dept 2012].)

Contrary to plaintiffs’ argument, Dr. Mann did comment on Jonathan Sue’s cervical rotation in his report. Dr. Man measured right cervical rotation a “80 degrees (80 degrees normal) and left rotation at 80 degrees (80 degrees normal).” (Coffey Affirm., Ex G.) In addition, Dr. Mann was not required to review Jonathan Sue’s MRI films to meet the prima facie burden. Dr. Mann’s report mentions a review of three MRI reports of the cervical spine, left shoulder, and lumbosacral spine. Dr.

Mann did not offer an opinion different from the impressions mentioned in the MRI reports. Dr. Mann's conclusions that Jonathan Sue had normal ranges of motion in his cervical spine, and that any symptoms had fully resolved, were sufficient to meet the prima facie burden. (*Mitchell v Calle*, 90 AD3d 584, 584 [1st Dept 2011].)

In opposition, plaintiffs submit the affirmed report of Dr. Harshad C. Bhatt, M.D., who initially examined Jonathan Sue on November 21, 2008 and again on March 12, 2012. (Edley Opp. Affirm., Ex A [Bhatt Affirm.].) Dr. Bhatt recorded, using a goniometer, limited ranges of motion in Jonathan Sue's lumbar spine, cervical spine, and left shoulder. (Bhatt Affirm. ¶¶ 9-10, 14-15, 19-20.) Dr. Bhatt's final diagnosis is lumbar muscle spasms, cervical radiculopathy, cervical muscle spasm, and internal derangement of the left shoulder. (*Id.* ¶ 23.) According to Dr. Bhatt, "[t]he injuries sustained by the patient were caused solely by the motor vehicle accident of August 31, 2008 and not from degenerative diseases." (*Id.* ¶ 29.) Dr. Bhatt states that Jonathan Sue's "condition is permanent and any medical treatments he receives will be palliative in nature only." (*Id.* ¶ 4.) Plaintiffs also submit affirmations from Dr. Khodadadi and Dr. Qureshi, who claim to have reviewed MRI films taken of Jonathan Sue and the MRI reports of other radiologists. (Edley Opp. Affirm., Ex B.)

In reply, NYCTA points out that plaintiffs' opposition papers show "a gap in

treatment” with Dr. Bhatt between 2008 and 2012. “While a cessation of treatment is not dispositive—the law surely does not require a record of needless treatment in order to survive summary judgment—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, 574 [2005].) Here, Jonathan Sue states that his no-fault carrier terminated benefits a few months after the accident, and that before his no-fault benefits were terminated, his doctor informed him that his injuries “were permanent and that continuing treatment would be palliative in nature only.” This explanation of Jonathan Sue’s “gap in treatment” is satisfactory. (*Ayala v Cruz*, ___ AD3d ___, 945 NYS2d 240 [1st Dept 2012]; *Jean-Baptiste v Tobias*, 88 AD3d 962 [2d Dept 2011]; *but see Antonio v Gear Trans Corp.*, 65AD3d 869 [1st Dept 2000][physician’s conclusory opinion that plaintiffs “reached a plateau” and physical therapy was discontinued because physician “felt [plaintiffs] had reached maximum medical improvement with therapy” is insufficient” to explain a seven year gap in treatment].)

NYCTA’s argument that Jonathan Sue’s affidavit was tailored to avoid the consequences of summary judgment is unpersuasive. Jonathan Sue was apparently not asked at his deposition why his treatment had ended “sometime in 2009.” (Coffey Affirm., Ex F, at 26.)

In sum, plaintiffs' submissions are sufficient to raise triable issues of fact as to whether injuries to plaintiff Jonathan Sue's cervical spine constitute a "serious injury" under the categories of "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system."

Notwithstanding the above, NYCTA is entitled to summary judgment dismissing so much of the complaint as alleges that Jonathan Sue suffered a "serious injury" under the 90/180 day category. "[A]n injury must be 'medically determined' to qualify under the 90/180-days category, meaning that the condition must be substantiated by a physician. Additionally, the condition must be causally related to the accident." (*Damas v Valdes*, 84 AD3d 87, 93 [2d Dept 2011][internal citations omitted].) Here, Jonathan Sue testified at his statutory hearing and at his deposition that he did not miss any days of work. (Coffey Affirm., Ex E, at 25; Coffey Affirm., Ex F, at 21.)

"[W]here evidence shows, for example, that the plaintiff actually returned to work within the first 90 days after the accident, it is proper to dismiss 90/180 claims, since the ability to return to work may be said to support a legitimate inference that the plaintiff must have been able to perform at least most of his usual and customary daily activities."

(*Correa v Saifuddin*, ___ AD3d ___, 943 NYS.2d 86, 87 [1st Dept 2012]; *Williams v Perez*, 92 AD3d 528 [1st Dept 2012] [evidence that plaintiff missed less than 90 days of work in the 180 days immediately following the accident and indeed

otherwise worked “light duty” is fatal to the 90/180–day claim].)

Serious Injury as to Yoonsun Sue

Dr. Mann recorded normal and better than normal ranges of motion (expressed in degrees and corresponding normal values) in Yoonsun Sue’s cervical spine and lumbar spine, and normal ranges of motion in her right shoulder. (Coffey Affirm., Ex J.) Dr. Mann affirmed that all ranges of motion were based on AMA guidelines and that a goniometer was used to measure all ranges of motion. (*Id.*) NYCTA has met its prima facie burden of demonstrating that plaintiff Yoonsun Sue did not suffer a “permanent consequential limitation of use of a body organ or member” or a significant limitation of use of a body function or system” of her cervical and lumbar spine and her right shoulder. (*Vega*, 96 AD3d at 506.)

In opposition, plaintiffs submits the affirmed report of Dr. Bhatt who initially examined Yoonsun Sue on November 21, 2008 and again on March 12, 2012. (Edley Opp. Affirm., Ex D.) Dr. Bhatt recorded, using a goniometer, limited ranges of motion in Yoonsun Sue’s lumbar spine and cervical spine. (*Id.* ¶¶ 8-9, 13-14.) Dr. Bhatt’s final diagnosis is “internal derangement of the right shoulder and right wrist derangement.” (*Id.* ¶ 19.) According to Dr. Bhatt, “[t]he injuries are permanent in nature and are all casually [*sic*] related to the motor vehicle accident of August 31, 2008.” (*Id.* ¶ 20.) Dr. Bhatt states that Yoonsun Sue’s “condition is permanent and

any medical treatments he [*sic*] receives will be palliative in nature only.” (*Id.* ¶ 4.) Plaintiffs also submit affirmations from Dr. Khodadadi and Dr. Azar. Dr. Khodadadi claimed to have reviewed an MRI taken of Yoonsun Sue and the MRI report of another radiologist. (Edley Opp. Affirm., Ex E.) Dr. Azar affirmed MRI reports concerning Yoonsun Sue’s lumbar and cervical spine that Dr. Azar prepared. (*Id.*)

Plaintiffs’ submissions fail to raise a triable issue of fact as to whether Yoonsun Sue’s right shoulder injuries meet the serious injury threshold, because Dr. Bhatt’s affirmation does not contain any measurements of the range of motion of Yoonsun Sue’s right shoulder. However, plaintiffs’ submissions are sufficient to raise triable issues of fact as to whether plaintiff Yoonsun Sue’s cervical and lumbar spine injuries constitute a “serious injury” under the categories of “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system.”

In reply, NYCTA points out that plaintiffs’ opposition papers show that Yoonsun Sue had “a gap in treatment” with Dr. Bhatt between 2008 and 2012. Like her husband, Yoonsun Sue states that her no-fault carrier terminated benefits a few months after the accident, and that before her no-fault benefits were terminated, her doctor informed her that her injuries “were permanent and that continuing treatment would be palliative in nature only.” (Yoonsun Sue Aff. ¶ 6.). This satisfactorily

explains Yoonsun Sue's "gap in treatment." (*Ayala*, ___ AD3d ___, 945 NYS2d at 242; *Jean-Baptiste*, 88 AD3d at 963. NYCTA's argument that Yoonsun Sue's affidavit, like her husband's affidavit, was tailored to avoid the consequences of summary judgment is unpersuasive. Yoonsun Sue testified at her statutory hearing that she was still getting treatment. (Coffey Affirm., Ex H, at 21.) At her deposition, she was apparently not asked why treatment had ended in 2009. (*See Coffey Affirm.*, Ex I, at 28.)

Notwithstanding the above, NYCTA is entitled to summary judgment dismissing so much of the complaint as alleges that Yoonsun Sue suffered a "serious injury" under the 90/180 day category. Here, Yoonsun Sue testified at her statutory hearing that she missed "two, three days of work" (Coffey Affirm., Ex H, at 23.) Such testimony is fatal to her 90/180 day claim. (*Correa v Saifuddin*, ___ AD3d ___, 943 NYS2d at 87; *Williams*, 92 AD3d at 528.)

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant New York City Transit Authority is granted in part, only to the extent of dismissing so much the complaint that alleges that plaintiff Yoonsun Sue suffered a serious injury within the meaning of Insurance Law § 5102 (d) with respect to her alleged injuries to her right

shoulder, and dismissing so much of the complaint that alleges that plaintiffs Jonathan Sue and Yoonsun Sue suffered a serious injury under the 90/180 category are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

July 31
Dated: ~~August~~, 2012
New York, New York

ENTER:



J.S.E.

HON. MICHAEL D. STALLMAN

FILED

AUG 07 2012

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