

<b>Olivero-Buendia v Silva</b>
2012 NY Slip Op 32090(U)
July 27, 2012
Sup Ct, Nassau County
Docket Number: 18851/10
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN  
JUSTICE

-----X  
ANA F. OLIVERO-BUENDIA,

Plaintiff,

-against-

PATRICIA J. SILVA,

Defendant.  
-----X

TRIAL/IAS PART 17

INDEX # 18851/10

Motion Seq. 02

Motion Date 5-2-12

Submit Date 7-13-12

=====  
The following papers were read on this motion:

Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit .....	2
Reply Affidavit.....	3

=====  
Upon the foregoing papers, the defendant's motion seeking an order granting summary judgment pursuant to CPLR § 3212 and dismissal of the complaint of the plaintiff, on the grounds that the plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d) is determined as hereinafter provided.

The plaintiff commenced this lawsuit by filing a summons and complaint wherein the plaintiff claimed personal injuries resulting from a motor vehicle accident which occurred on August 14, 2010. Issue was then joined by service of the defendant's answer.

The incident occurred on Jericho Turnpike at the intersection of Marcellus Road in Mineola, New York. As a result of the accident plaintiff alleges to have sustained the following injuries as per her verified bill of particulars:

- Subluxation with muscular spasm and tenderness to bilateral lower cervical spine
- Muscular spasms, inflammation and derangement to left lower lumbar spine
- Malalignment with muscular spasms overlying the right lower lumbar spine
- Restricted range of motion and movement of the cervical spine
- Restricted range of motion and movement of the thoraco-lumbar spine
- Cervical radiculopathy with paresthesias
- Lumbar radiculopathy with paresthesias
- Joint dysfunction in the bilateral lower cervical spine
- Misalignment and joint dysfunction with muscular spasms, inflammation and derangement at the left upper thoracic spine
- Concomitant spasms in the deep paraspinal musculatures at the right upper thoracic spine
- Malalignment and joint dysfunction with inflammation and tenderness in the left lower thoracic spine
- Subluxation and joint dysfunction in the right lower thoracic spine
- Narrowed disc spacing at C3-C4, C4-C5, and C5-C6
- Lumbar neuritis/radiculitis
- Cervical mayalgia/myofascitis
- Cervical disc displacement
- Derangement to the left sacro-iliac articulation

At the time of the accident, plaintiff was employed full time by Winthrop University Hospital as a medical secretary. Following the accident, plaintiff did not miss any time from work. According to the verified bill of particulars, plaintiff was confined to her bed for two (2) days following the accident. She claims to be restricted in many physical activities including lifting heavy objects, housecleaning, and standing or sitting for long periods of time.

Plaintiff testified at a deposition on November 16, 2011. She stated that on the date of the accident, she refused medical treatment at the scene, but later that day she drove herself to the emergency room where x-rays were taken. She was given a neck collar, which she only wore at the emergency room. According to her testimony, plaintiff was diagnosed with a sprain.

After consulting with an attorney, and upon his recommendation, plaintiff sought treatment with a chiropractor named J.G. Rupolo. Dr. Rupolo provided acupuncture treatments and electrical stimulation treatments three times per week for two to three months. Plaintiff testified that she ended treatment because she had a very busy schedule.

Plaintiff sought no other treatment from any other medical providers such as an orthopedist or a neurologist; nor did she have an MRI performed. She claims to be limited in her "spinning" exercise but is able to do other "cardio" type exercises.

Plaintiff, who was almost 25 years old at the time of the accident, claims that her injuries fall within the following five categories of the serious injury statute: to wit, 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; and 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.

Based upon a reading of the papers submitted herein, however, it is plain that the plaintiff did not fracture any bone as a result of this accident. Her injuries, therefore, do not satisfy the statutory definition of a "fracture" (*Catalan v. Empire Storage Warehouse*, 213 AD2d 366 [2<sup>nd</sup> Dept 1995]).

Further, inasmuch as the plaintiff has failed to allege and claim that she has sustained a "total loss of use" of a body organ, member, function or system, it is clear that her injuries do not satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v. Bangs Ambulance*, 96 NY2d 295 [2001]).

Similarly, any claims that plaintiff's injuries satisfy the 90/180 category of Insurance Law § 5102(d) are also contradicted by her verified bill of particulars wherein she states that she was only confined to her bed for two (2) days as a result of this accident. Further, nowhere does the plaintiff claim that as a result of her alleged injuries, she was "medically" impaired from performing any of her daily activities (*Monk v. Dupuis*, 287 AD2d 187, 191 [3<sup>rd</sup> Dept. 2001]), or that she was curtailed "to a great extent rather than some slight curtailment" (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]; *Sands v. Stark*, 299 AD2d 642 [3<sup>rd</sup> Dept. 2002]). In light of these facts, this court determines that plaintiff has effectively abandoned her 90/180 claim for purposes of defendants' initial burden of proof on a threshold motion (*Joseph v. Forman*, 16 Misc.3d 743 [Sup. Ct. Nassau 2007]).

Thus, this court will restrict its analysis to the remaining two categories as it pertains to the plaintiff; to wit, permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system.

Under the no-fault statute, to meet the threshold for significant limitation of use of a body function or system or permanent consequential limitation, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Licari v. Elliot*, supra; *Gaddy v. Eycler*, 79 NY2d 955 [1992]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, supra; *Grossman v. Wright*, 268 AD2d 79, 83 [2<sup>nd</sup> Dept. 2000]). When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories,

then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v. Avis Rent A Car Systems*, 98 NY2d 345, 353 [2002]). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id.*).

Having said that, recently, the Court of Appeals in *Perl v. Meher*, 2011 NY Slip Op. 08452, held that a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation (*Perl v. Meher*, 2011 NY Slip Op. 08452 [2011]).

With these guidelines in mind, this court will now turn to the merits of the motion and cross motion at hand.

In support of its application, defendant relies on the independent medical examination report dated December 16, 2011 of Dr. Michael J. Katz. Prior to the examination, Dr. Katz reviewed the following records: verified bill of particulars dated 3/5/11; chiropractic report and progress notes of Dr. Rupolo dated 9/2/10 through 11/11/10; and Dr. Rupolo's radiological report of the cervical spine dated 9/25/10.

During his examination, Dr. Katz performed various range of motion tests of plaintiff's cervical and lumbar spine with a goniometer. He concluded that all these tests were within the normal range. His diagnoses was cervical and thoracolumbosacral sprain with radiculopathy-resolved. He noted that plaintiff showed no signs or symptoms of permanence relative to the musculoskeletal system and as a result of the accident. Plaintiff is not disabled and is capable of performing her full time work duties without restriction, as well as her activities of daily living. Dr. Katz states that it is significant that plaintiff's treating chiropractor, Dr. Rupolo, indicates degenerative changes on the radiology evaluation of the cervical spine.

Defendant has established that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d). Specifically, the affirmed report of Dr. Katz who examined the plaintiff and performed quantified range of motion testing on her cervical and lumbar spine with a goniometer, compared his findings to normal range of motion values and concluded that the ranges of motion measured were normal. Therefore, defendant's medical evidence sufficiently demonstrates that the plaintiff did not sustain a "serious injury" as a result of this accident.

Having made a prima facie showing that the plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v. Perez*, 4 NY3d 566 [2005]).

The only evidence submitted by plaintiff in opposition to this application is an affirmation of the treating chiropractor, Dr. Rupolo. The court notes that plaintiff fails to submit any of the doctor's progress notes dated 9/2/10 through 11/11/10 and his radiological report of the cervical spine dated 9/25/10 which were reviewed by the independent medical examiner, Dr. Katz.

Dr. Rupolo stated that he first saw plaintiff on September 2, 2010 at which time he performed various tests using a goniometer which were positive for severe to moderate neck and lumbar pain and decreased range of motion of these areas. Dr. Rupolo causally linked plaintiff's injuries to the underlying accident.

As a result of his initial examination, Dr. Rupolo prescribed a course of chiropractic treatment and physical therapy two to three times per week. He indicates that plaintiff utilized the services of his office from September 2, 2010 through December 16, 2010, after which she was not able to continue treatment because her no-fault benefits expired and because she reached maximum improvement from a chiropractic standpoint.

Dr. Rupolo states that he again examined plaintiff on June 2, 2012 and performed various range of motion tests on her cervical and lumbar spine using a goniometer. As a result of these tests, Dr. Rupolo concludes that plaintiff has suffered decreased range of motion in these areas, in the abnormal range. He causally links plaintiff's injuries to the underlying accident and concludes that these injuries are permanent in nature. His continued diagnosis is cervical disc displacement w/o myelopathy; cervical myalgia/myofascitis, and lumbar neuritis/radiculitis.

Dr. Rupolo states that he bases his current diagnosis on the history presented, clinical examination, diagnostic studies and review of medical records. However, no evidence was presented that plaintiff ever submitted to any diagnostic studies other than the physical examinations of the chiropractor, nor was any evidence presented of any medical records of the chiropractor or any other treatment provider.

Plaintiff's deposition testimony contradicts with the affirmation submitted by Dr. Rupolo in that she swore under oath that she stopped chiropractic treatment because her schedule was too busy, wherein the chiropractor affirms that plaintiff stopped treatment because her no-fault benefits ran out and because she reached maximum improvement.

Furthermore, in paragraph #21 of Dr. Rupolo's affirmation, he states the following:

It is my expert chiropractic opinion that the injuries sustained by the patient are causally related to the motor vehicle accident of *July 10, 2009* and said findings are consistent with the clinical presentation in my office. (Emphasis added)

Since the accident did not occur on July 10, 2009, but did in fact occur on August 14, 2010, the court rejects this conclusion by the expert.

Additionally, the court notes in paragraph #22 of Dr. Rupolo's affirmation, he states the following:

It is my expert chiropractic opinion that the cervical spine and lumbar spine disc pathology diagnosed via MRI are causally related to the subject motor vehicle accident as the findings are consistent with the clinical presentation in my office.  
(Emphasis added)

Since the plaintiff testified at her deposition that she never had an MRI, nor did Dr. Rupolo ever mention in his affidavit that he recommended plaintiff undergo an MRI, the court rejects Dr. Rupolo's "expert chiropractic opinion" that the injury plaintiff allegedly sustained was a result of the motor vehicle accident on August 14, 2010.

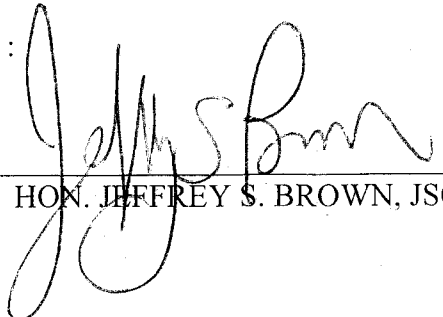
The court is troubled by plaintiff's failure to submit for its consideration the chiropractor's progress notes of the months plaintiff treated or the radiological report. In spite of this, and in spite of all the above mentioned inconsistencies, the court finds that Dr. Rupolo's affirmation is sufficient to defeat the application for summary judgment. "[O]n a motion for summary judgment, issue finding rather than issue determination is the key, and the court should not determine questions of credibility (*Capelin Assocs. v Globe Mfg. Corp.*, 34 NY2d 338)." *Francis v. Basic Metal Inc.*, 144 A.D.2d 634, 635, 534 N.Y.S.2d 697 (1988) The court finds that there is sufficient evidence in the record to establish triable issues of fact whether plaintiff suffered a "serious injury" within the meaning of the no-fault law as evidenced by the objective range of motion testing via goniometer, finding abnormalities, done on plaintiff's initial visit and last visit to the chiropractor. The court finds it sufficient that the chiropractor causally links plaintiff's injuries to the accident during the her initial examination.

Accordingly, it is

ORDERED, that the application is DENIED.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: July 27, 2012

ENTER:   
HON. JEFFREY S. BROWN, JSC

**ENTERED**  
JUL 31 2012  
MASSAU COUNTY  
COUNTY CLERK'S OFFICE

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