

Nevarez v New York City Tr. Auth.
2012 NY Slip Op 33884(U)
March 26, 2012
Supreme Court, Bronx County
Docket Number: 24525/04
Judge: Howard H. Sherman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

-----x
Karim Nevarez

Plaintiff,

-against-

New York City Transit Authority and
Lavern Otchere Sarfo

Defendants,

Index No.: 24525/04

DECISION/ORDER

Howard H. Sherman
J.S.C.

-----x
Facts and Procedural Background

Plaintiff seeks recovery for injuries allegedly sustained on February 11, 2004 when, while walking across the intersection of East Fordham Road and Valentine Avenue in Bronx County, she was struck by defendant Transit Authority's bus operated by the co-defendant driver.

The action was commenced in October 2004, and issue was joined with the service of defendants' answer in November 2006.

Plaintiff alleges that she sustained the following injuries as a result of the accident: **cervical spine**: bilateral lower cervical paraspinal tenderness, restricted range of motion, and radiculopathy; **lumbosacral spine**: herniation at L4-5 and bilateral lower paraspinal tenderness, restriction of ranges of motion, and radiculopathy ; **head trauma and residual headache ; post-traumatic cephalgia ; left knee traumatic injury** . All injuries are alleged to have the "possibility of permanency." (Verified Bill of Particulars ¶ 10 (a)-(f)). In addition, it is alleged that as a result of the accident, plaintiff was confined to bed/home for two weeks, (Id. ¶ 11). No claim for lost wages is interposed (Id. 20). Plaintiff does not set forth which

of the categories of serious injuries are alleged to be applicable to the injuries she sustained in the motor vehicle accident.¹

Motion

Defendants move for an award of summary judgment asserting that plaintiff did not sustain a serious injury in the underlying motor vehicle accident . In support defendants submits copies of the pleadings and the verified Bill of Particulars (Exhibits A,B); the affirmed reports of the independent examinations of Anna N. Krol, M.D., Joseph Pedri, D.C., Gabriel L. Dassa, M.D., and Jean-Robert Desrouleaux, M.D. (Exhibits E- H), and the transcript of plaintiff's 07/22/09 examination before trial (Exhibit I).

Independent Medical Evaluations

1) Defendants submit the report of a June 16, 2004 independent medical examination conducted by Anna N. Krol, M.D.²

Plaintiff presented with complaints of headaches and dizziness, neck , left shoulder and left knee pain.

Upon examination, Dr. Krol found full range of motion in all planes of the cervical spine as quantified and compared to normal readings. Cervical compression , Soto-Hall , and Valsalva's maneuver , were all negative.

² Dr. Krol is board certified in Physical Medicine and Rehabilitation and Acupuncture

There was full range of motion of both shoulders in flexion, abduction, external and internal rotation . There was no evidence of tenderness, heat, swelling or effusion. Tinel's sign and Phalen's test were negative.

Examination of the thoraco-lumbar spine revealed full range of motion in all planes as quantified and compared to normal readings, and Straight Leg Raising was negative, bilaterally. Kemp's , Golthwait's , Lasegue's and Valsalva tests were all negative. Neither tenderness nor spasm was noted.

The lower extremities were found to have full and free range of motion in the hips, knees, ankles and feet. There was no evidence of tenderness or erythema or effusion. Fabere-Patrick's, McMurray's , drawer sign, abduction and adduction stress tests were all within normal limits.

Dr. Krol diagnosed that the cervical and lumbar sprains, as well as the contusions of the left upper extremity, the left knee, and left hip, were all resolved. She concluded within a reasonable degree of medical certainty that plaintiff suffered from no disability, and that she was able to work and perform all normal daily activities of living without any limitations.

2) Defendants also submit the report of an independent chiropractic examination conducted on October 15, 2004. However, the report is not tendered in admissible form.

3) On November 1, 2007, plaintiff submitted to orthopedic evaluation by Gabriel L. Dassa, M.D.

For purposes of the evaluation , Dr. Dassa reviewed four evaluations of treating physicians for the period 3/15/04 -12/14/04.

Plaintiff presented with complaints of nonradiating neck and low back pain.

Upon examination, Dr. Dassa found full ranges of motion in every plane of the cervical and thoracolumbar spine as quantified and compared to normal readings. The Spurling and Valsalva maneuvers were negative in both areas, as were Milligram's, Kemp's and Straight leg raising maneuver testing of the latter.

The neurological examination revealed that sensory, gross motor power, and deep tendon reflexes were intact and normal. There were "no findings consistent with disc or nervous system injury."

Dr. Dassa's concluding impression was of: "1.[c]ervical sprain/strain, resolved; 2.[l]umbosacral sprain/strain, resolved, and 3) HNP L4-5 based on MRI of 6/29/04 without correlating clinical findings." He concluded within a reasonable degree of medical certainty that plaintiff has no objective evidence to indicate that she is suffering from any ongoing orthopedic disability, or functional deficits, or any level of permanency.

4) On November 1, 2011, plaintiff was examined for purposes of a neurological evaluation by Jean-Robert Desrouleaux, M.D., who reviewed the hospital report of 02/11/04, as well as two reports of treating physicians dated 03/15/04 and 12/04/04, as well as the report of the lumbar spine MRI study dated 06/28/04.

Plaintiff presented with complaints of neck, lower back and left knee pain. She did not report any numbness or radiating pain, and she denied any headaches, dizziness or nausea.

Examination of the head was normocephalic and atraumatic, and cranial nerves were found to reveal full visual fields. The motor examination revealed normal bulk, tone, and strength throughout. Coordination revealed neither dysmetria, ataxia, nor nystagmus.

Plaintiff's gait was normal-based and she was able to perform heel, toe and tandem walking normally.

With the use of a goniometer, Dr. Desrouleaux found full ranges of motion in every plane of the cervical and the lumbar spine. Straight leg raising was possible up to 90 degrees bilaterally in the sitting position (normal 90).

Dr. Desrouleaux concluded that there was no neurological permanency or restriction.

Deposition

In pertinent part, plaintiff testified that felt the impact of the bus on her head and back and she was knocked to the ground [NEVAREZ EBT: 15]. She was not rendered unconscious but she felt light-headed [EBT: 15]. She advised the responding EMS paramedics that she had a bump on the back of her head [Id. 18]. She was treated in the emergency room where x-rays were taken, and she was released after a period of four to eight hours [Id. 19-21]. The ext day, she felt bruising in the left part of her back [Id. 27]. She was not confined to bed for any period of time after the accident, nor did she have any "issues" with walking [Id. 32]. She did have difficulties siting for more than fifteen minutes for a period within two months after the accident [Id. 33].

Towards the end of February she consulted with a physician in the Bronx, whose name and specific office location she could not recall [Id. 29-30]. She could not recall what the doctor told her, or whether he recommended a course of treatment, but an MRI, and a CAT scan were performed. She did commence a six to nine month course of physical therapy treatment at Westchester Square, having been referred by her attorney [Id. 30-33]. She

testified that she realized no improvement of her condition [Id. 34].

She commenced working in a full-time position as a customer service representative in October 2007, and was terminated as part of a lay-off in July 2009.

DISCUSSION AND CONCLUSION

Upon review of the findings by objective testing conducted four months after the accident of the complete resolution of the soft tissue injuries asserted, as well as the as findings upon subsequent orthopedic examination three years after the accident, and those upon recent neurological examination , including full ranges of motion in all planes of the cervical and lumbosacral spine as quantified and compared to normal readings, and the lack of other evidence of orthopedic or neurological disability or permanency, as well as the testimony of plaintiff with respect to the absence of any significant curtailment of her daily activities in the immediate post-accident period, it is submitted that defendants have met their *prima facie* burden to establish that plaintiff did not sustain a serious injury as a result of the motor vehicle accident of February 11, 2004.³

Upon this showing, it is incumbent upon the plaintiff to come forward “with an objective medical basis supporting the conclusion that she sustained a serious injury (see

³ To the extent that no qualifying confinement is alleged , nor any claim for lost earnings interposed, it is presumed that no 90/180 claim is interposed, however, the category is discussed in view of the lack of any specificity in the verified b/p. In light of the nature of the soft tissue restrictions asserted , there is no issue of fact that a “permanent loss of use” claim is here viable (see, Oberly v Bangs Ambulance, 96 NY2d 295, 299, 751 NE2d 457, 727 NYS2d 378 [2001]).

Toure v Avis Rent A Car Sys., 98 NY2d 345, 350-351, 774 NE2d 1197, 746 NYS2d 865 [2002])."

Baez v. Rahamatali, 6 N.Y.3d 868, 869 ; 850 N.E.2d 19 [2006] Plaintiff has failed to do so.

In opposition, plaintiff tenders the narrative report of Barry M. Katzman, M.D. who examined plaintiff for the first time on October 4, 2011 . Plaintiff presented as noting "some back pain and tingling in her back." She reported that her "neck feels better."

Dr. Katzman's examination included range of motion testing of the cervical and lumbar spine as measured with a goniometer .

The **cervical** spine was found to have full range of motion in all planes as quantified and compared to normal readings, with a negative Spurling maneuver and 5/5 strength in the bilateral upper extremities, and the absence of tenderness along the spinous processes or the paraspinal muscles.

The **lumbar** spine range of motion testing revealed restrictions in all planes, as quantified and compared to normal, with the exception of rotation.⁴ There was 5/5 strength in the bilateral lower extremities with symmetrical reflexes. Straight leg raising test was found to "cause[] low back pain."

The left knee was not examined.

Based on his findings, Dr. Katzman rendered impressions of "lumbar herniated disc" and "cervical injury" that he found to causally relate to the above accident date of 02/11/04,

⁴ Flexion 70/90
Extension 20/30
Rotation 35/35
Lateral Bending 20/35

based upon the medical records reviewed, consisting of a "Notes" of Drs. Kwan and Etrind, respectively dated 03/15/04 and 12/14/04, and of Westchester Square Chiropractor, and the MRI of the lumbar spine of 06/29/04. He also found permanency of the injuries given the limited range of motion and the MRI findings and continued pain. As none of these factors pertain to the negative findings or the absence of any complaints with respect to the cervical spine, it would appear that this opinion as to permanency pertains to the lumbar spine, only

The remaining contemporaneous medical reports⁵ are not tendered in admissible form. As such, plaintiff fails to come forward with probative medical evidence of a contemporaneous quantitative designation of limitations of ranges of motion of the cervical and/or lumbar spine, or of an objectively based qualitative assessment comparing plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. The report of the MRI study of the lumbar spine, admissible as having been reviewed by defendants' neurologist for purposes of his evaluation, is without more, insufficient to raise an issue of fact that plaintiff sustained a serious injury, as "proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury under Insurance Law § 5102(d)." Park v. Ellison Champagne, 34 A.D.3d 274; 824 N.Y.S.2d 84 [1st Dept. 2006]

⁵Undated letter of Peter C. Kwan, M.D., addressed to the treating chiropractor concerning 03/15/04 "Date of Service"; 06/29/04 MRI report of lumbar spine; 12/14/04 letter of Irving M. Etkind, M.D. addressed to plaintiff's counsel.

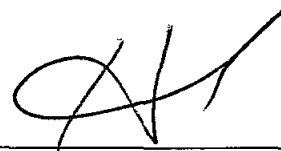
Upon review of the medical evidence tendered in opposition to the motion , it is submitted that plaintiff has failed to raise a material issue of fact to rebut defendants' prima facie showing based upon the findings of Dr. Katzman made more than seven years after the cessation of treatment , and more than seven and one-half years after the motor vehicle accident.

Neither the "cervical injury" not further described, nor supported by any positive findings of restriction or pathology upon recent examination, nor the positive findings with respect to the lumbar spine confined to limitations in the range of motion made upon a lone examination conducted more than seven and one-half years after the accident, and more than seven years after the cessation of treatment sufficient to raise a material issue of fact that plaintiff sustained a serious injury in the underlying motor vehicle accident.

Accordingly, it is ORDERED that defendants' motion for summary judgment be and hereby is granted pursuant to CPLR 3212 and it is FURTHER ORDERED that judgment be entered in favor of the defendants dismissing the complaint .

This constitutes the decision and order of this court.

Dated: March 26, , 2012



Hon. Howard H. Sherman