Spann v City of New York
2014 NY Slip Op 31919(U)
July 17, 2014
Supreme Court, Richmond County
Docket Number: 104355/11
Judge: Thomas P. Aliotta

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------x

CAROLYN SPANN,

Plaintiff,

-against-

THE CITY OF NEW YORK, MV TRANSPORTATION INC., THE NEW YORK CITY TRANSIT AUTHORITY, JOSE CASANOVA, and FARRAH FICCO,

Defendants.

----------x

BETTY JOHNSON,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY d/b/a ACCESS-A-RIDE, MY PUBLIC TRANSPORTATION INC., individually and d/b/a ACCESS-A-RIDE, JOSE CASANOVA, and FARRAH C. FICCO

Defendants.

----------x

PART C-2

Present:

Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No. 104355/11

Motion Nos. 672-003
1097-004
1610-005

Index No. 100332/12

The following papers numbered 1 to 11 were marked fully submitted on the 4th day of June, 2014:

	Pages Numbered
*Affirmation in Partial Opposition by Defendant Farrah Ficco (dated February 12, 2014)	1
Notice of Motion for Summary Judgment by Defendants the City of New York, MV Transportation, Inc.,	

Affirmation in Opposition to Plaintiff
Carolyn Spann=s Motion for Summary Judgment
by Defendants the City of New York, MV Transportation, Inc.,
the New York City Transit Authority and Jose Casanova
(dated May 30, 2014).....10

*Affirmation in Reply
by Plaintiff
(dated June 2, 2014).....11

*These papers were submitted in response to the motion (No. 002) for summary judgment on the issue of liability by plaintiff Carolyn Spann, which was granted at oral argument and entered on June 12, 2014.

Upon the foregoing papers, the motion (No. 672-003) for summary judgment by defendants the City of New York, MV Transportation, Inc., the New York City Transit Authority and Jose Casanova (collectively, hereinafter the ACity@) and the cross motion (No. 1097-004) for summary judgment by defendant Farrah Ficco are each granted; plaintiff=s cross motion (No. 1610-005) for summary judgment is denied.

This is an action to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on March 4, 2011. Plaintiff Carolyn Spann was a passenger in defendant MV Transportation Inc.=s Access-A-Ride vehicle which was owned by defendant New York City Transit Authority and operated by defendant Jose Casanova, when it was struck by a vehicle operated by defendant Farrah Ficco.1

As a result of the accident, plaintiff alleges that she sustained, inter alia, Aserious injuries@ within the definition of Insurance Law '5102(d) (*see* Plaintiff=s Bill of Particulars, para 8). More specifically, plaintiff=s alleged injuries included herniated discs at the C5-C6 and L5-S1 levels, resulting in deficits in her ranges of motion, and requiring epidural injections to

---

1

Plaintiff Betty Johnson was also a passenger in the Access-A-Ride vehicle. The two actions were consolidated for trial purposes on July 18, 2012.

the lumbar spine (id.).

Plaintiff testified at her General Municipal '50-h hearing that she was a passenger in the Access-A-Ride vehicle and wearing her seat belt on the day of the accident (*see* General Municipal 50-H Hearing transcript, pp 24-25). She does not know how the accident occurred, but became aware A[a]fter the impact, [when she] swerved over [to] the side where the window was@. Meantime, the driver Awas swinging the van back to the right, [where her] back and neck hit the back of the seat... [as she] swerved over to the right side@ (id. at 28). Upon plaintiff=s complaints of neck and back pain, she was taken to the hospital in an ambulance immediately after the accident (id. at 36-37). Plaintiff testified at her deposition that she began using Access-A-Ride in 2010 after sustaining a knee injury in an unrelated incident (*see* EBT of Carolyn Spann, pp 20-21). When asked about her ability to perform routine activities, plaintiff stated that she feels pain while she is doing house chores, that she is unable to stand up and sing with her church choir, and that she is unable to participate in Adance aerobics@ (*see* General Municipal 50-H Hearing transcript, pp 56-59; *see* EBT of Carolyn Spann, p 19, 100-101). However, plaintiff admitted that she is able to perform aqua exercise and attend yoga classes (*see* EBT of Carolyn Spann, p 19). Plaintiff has not been instructed by any doctor to limit her activities (id. at 100-101).

In support of their motion for summary judgment2, defendants submit the affirmed report of an orthopedist, Dr. Arnold T. Berman (*see* City=s Exhibit A7@), who reviewed plaintiff=s medical reports and conducted a physical examination of plaintiff on September 26, 2012. Dr. Berman=s report identified, in degrees, the range of motion of plaintiff=s cervical and thoracolumbar spine, as well as both her shoulders, hips and knees. When he compared his numerical findings to the accepted Anorms@, he found plaintiff=s ranges of motion to be within normal limits (id.).

---

[2] Defendant Farrah Ficco adopts and incorporates the evidence submitted in support of the motion for summary judgment furnished by the City.

According to the doctor, plaintiff=s Spurling, Babinski, and Lasegue testing also yielded normal results (id.).3 For his diagnosis, Dr. Berman opined within a reasonable degree of medical certainty that plaintiff=s cervical, lumbar and thoracic strain were Afully resolved with no clinical residuals, except for mild pain on range of motion@ (id.). The doctor found no aggravation of any pre-existing condition, and concluded that plaintiff Acan participate in all [the] activities of daily living with no restriction@ (id.).

Defendants have also submitted the affirmed report of a radiologist, Dr. Peter A. Ross (*see* City=s Exhibit A8@), who reviewed the MRIs of plaintiff=s cervical spine and lumbosacral spine taken on April 6, 2011 (i.e., approximately one month following the accident). In his reports, dated January 22, 2013, Dr. Ross concluded that plaintiff=s Adegenerative vertebral and discogenic changes are all chronic in nature and pre-existing to the accident which occurred on March 4, 2011.@ In the opinion of this doctor, these conditions Acould not have been produced in the 1 month [and] 2 days following the accident@ (id.).

Based on the foregoing, it is the opinion of this Court that defendants have met their prima facie burden of demonstrating a right to judgment as a matter of law through the submission of competent medical evidence establishing that the plaintiff did not sustain any serious injury to, e.g., her cervical or lumbar spine, sufficient to meet the statutory threshold of Aserious injury@ (*see* Insurance Law '5102[d]; *Felix v. Duane,* __AD3d__, 2014 NY Slip Op 3479 [2nd Dept]; *Burgett v. Schaffhauser*, 114 AD3d 822 [2nd Dept 2014]).

In this regard, it has been held that a defendant who submits competent proof that a plaintiff has full range of motion and suffers from no disability, can sustain his or her burden of proof on a summary judgment motion, notwithstanding the existence of an MRI report which shows herniated or bulging discs (*see Meely v. 4 G=s Truck Renting Co, Inc.*, 16 AD3d

---

3

Dr. Berman also conducted other tests, including Phalen, Tinel, Finkelstein, Jamar, Lachman, McMurry and Drawer, each of which likewise yielded normal results (*see* City=s Exhibit A7").

26, 30 [2nd Dept 2005]). A[T]he mere existence of a bulging or herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration@ (id.). Defendants having thus sustained their prima facie burden, it devolved upon plaintiff to come forward with evidence sufficient to overcome this proof and demonstrate the existence of a triable issue of fact that a Aserious injury@ was sustained in order to avoid dismissal (*see Grossman v. Wright*, 268 AD2d 79, 83-84 [2nd Dept 2000]). Accordingly, in order to successfully oppose defendant=s motion, it was incumbent upon plaintiff to submit, inter alia, objective, quantifiable medical findings in support of her claim of serious injury *(*id.).

Here, annexed to plaintiff=s cross motion is an affirmation by Dr. Kenneth B. Chapman, a physician specializing in pain management and anesthesiology (*see* Plaintiff=s Exhibit AB@). Dr. Chapman has been treating plaintiff since October 17, 2011 (i.e., some seven months after the accident), and has performed two procedures involving radiofrequency ablation of plaintiff=s right lumbar branch nerves, first on December 15, 2011, again on and January 5, 2012. Subsequently, he deemed it necessary to administer at least seven epidural injections to plaintiff, and on April 2, 2013, performed an invasive procedure known as a percutaneous discectomy, to address the herniated disc at the L5-S1 level of plaintiff=s spine (id.). According to Dr. Chapman, plaintiff displayed decreased range of motion in her back upon flexion, extension and rotation at his initial examination, but each of these conclusions was unsupported by quantitative measurements in terms of degrees. In fact, the only quantified testing in his reports relate to an office visit on April 14, 2014, more than three years post accident and in apparent response to defendants= motion. Accordingly, his observation of a purported Adiminishment of [plaintiff=s] lumbar range of motion@ is unverifiable. Nevertheless, he concluded that plaintiff Ademonstrates permanent loss of use, permanent consequential limitation [of use] and significant limitation [of the use] of her back relative to the March 4, 2011 motor vehicle accident@ (id.).

Based on the medical evidence submitted on her behalf, plaintiff has failed to raise a triable issue of fact as to

whether she sustained a serious injury as a result of the subject accident (*see Strenk v. Rodas*, 111 AD3d 920, 921 [2nd Dept 2013]). In this regard, the affirmed report of Dr. Chapman was, e.g., insufficiently contemporaneous with the subject accident to demonstrate that plaintiff=s initial limitations in range-of-motion were of such a nature as to constitute a serious injury, whether under the permanent consequential limitation of use or the significant limitation of use categories enumerated in section 5102(d) of the Insurance Law (*see Rush v. Kwan Chiu,* 79 AD3d 1004, 1005 [2nd Dept 2010]; *Mancini v. Lali NY, Inc.,* 77 AD3d 797, 798 [2nd Dept 2010]; *Collado v. Satellite Solutions & Electronics of WNY. LLC,* 56 AD3d 411 [2nd Dept 2008]; *cf. Evans v. Pitt*, 77 AD3d 611 [2nd Dept 2011]). In addition, Dr. Chapman=s clinical findings fail to indicate that plaintiff has sustained a total loss of use of any of the body parts which were allegedly injured in the subject accident and, thus, failed to establish that she sustained a serious injury under the permanent loss of use category of Insurance Law '5102(d) (*see Nesci v. Romanelli*, 74 AD3d 765, 766 [2nd Dept 2010]).4 Lastly, plaintiff has failed to set forth any competent medical evidence sufficient to raise a triable issue of fact as to whether she sustained a medically determined injury of a nonpermanent nature which prevented her from performing her usual and customary activities for 90 of the first 180 days following the subject accident (*see Strenk v. Rodas*, 111 AD3d at 921; *cf. Nicholson v. Bader*, 105 AD3d 719 [2nd Dept 2013]).

For all of the same reasons, plaintiff has failed to establish her prima facie entitlement to judgment as a matter of law on the issue of whether she sustained a serious injury as a result of this accident.

Accordingly, it is

ORDERED that the motion and cross motion for summary judgment by defendants the City of New York, MV Transportation, Inc., the New York City Transit Authority, Jose Casanova and Farrah Ficco are granted; and it is further

ORDERED that the complaint is dismissed; and it is further

4

In fact, plaintiff testified at her deposition that she remains capable of performing Aaqua@ exercise and yoga (*see* EBT of Carolyn Spann, p 19).

ORDERED that plaintiff=s cross motion for summary judgment is denied; and it is further

ORDERED that the Clerk enter judgment in accordance herewith.

ENTER,

Dated: July 17, 2014 __/s/_____

Hon. Thomas P. Aliotta

J.S.C.