

**Land v Sherman**

2014 NY Slip Op 33561(U)

October 22, 2014

Supreme Court, Bronx County

Docket Number: 302244/12

Judge: Mark Friedlander

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NEW YORK SUPREME COURT - COUNTY OF BRONX  
PART IA-25

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ROBBIE L. LAND,

Plaintiff,

**MEMORANDUM DECISION/ORDER**

Index No.: 302244/12

-against-

ROGER C. SHERMAN,

Defendant.

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HON. MARK FRIEDLANDER

Defendant moves for an order, pursuant to CPLR§3212 and Insurance Law §5102, granting summary judgment to the defendant on the ground that plaintiff has not sustained a serious injury under the Insurance Law. Defendant's motion is decided as hereinafter indicated.

This is an action by plaintiff seeking to recover monetary damages for serious injuries allegedly sustained in a motor vehicle accident on March 10, 2009, as a result of the negligence of the defendant.

Plaintiff claims in her bill of particulars, dated January 21, 2010 (Exhibit C), that, as a result of this accident, she sustained the following injuries:

- Posterior disc herniation at C3-4 with cord contact;
- Central stenosis at C4-5, C5-6 and C6-7;
- Cervical strain/sprain;
- Cervical myofascitis;
- Right foraminal stenosis at C4-5;
- Cervical sprain derangement;
- Myofascial neck pain syndrome;
- Musculoskeletal pain;
- Severe neck pain;
- Lumbar spondylosis;
- Lumbrosacral spine sprain;
- Low back pain;

Myofascial low back syndrome;  
Headaches;  
Posttraumatic headaches;  
Hypertension; and  
Inability to perform everyday functions.

Because of these injuries, plaintiff claims to have suffered a serious injury, in that she suffered a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the injured plaintiff from performing substantially all of the material acts which constituted her 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.

The burden rests on defendants to establish by evidentiary proof, in admissible form, that plaintiff has not suffered a serious injury (*Lowe v. Bennet*, 122 AD2d 728 [1<sup>st</sup> Dept. 1986], aff'd 69 NY2d 701 [701]). When defendants' evidence is sufficient to make out a *prima facie* case that a serious injury has not been sustained, the burden shifts, and it is then incumbent upon plaintiff to produce sufficient evidence in admissible form to raise a triable issue of fact as to whether plaintiff sustained a serious injury (see *Licari v. Elliot*, 57 NY2d 230 [1982]).

Defendant submits an affirmation from Robert Israel, M.D., an orthopedist, who examined plaintiff at defendants' request on December 12, 2012 (Exhibit E); affirmations from Melissa Sapan Cohn, M.D., a radiologist, who, on March 17, 2013, reviewed the MRI of plaintiff's lumbosacral spine, taken on March 29, 2007 (Exhibit F), and of plaintiff's cervical spine, taken on August 7, 2009 (Exhibit F); and a copy of the transcript of plaintiff's deposition testimony, taken on October 15, 2012 (Exhibit D).

Dr. Israel conducted range of motion testing of the cervical, thoracic and lumbar spine, the shoulders, left hand, the arms and hips. He reported normal and complete range of motion in all these areas, noting that no muscle spasm was detected in the cervical or lumbar spine and that the straight leg raising test was negative. Dr. Israel opined that plaintiff had cervical, thoracic and lumbar sprains of the spine, all of which had resolved. He further stated that plaintiff has no disability as a result of the accident and is capable of performing all activities of daily living without restriction.

Dr. Cohn, after reviewing the MRI of plaintiff's lumbosacral spine, stated that plaintiff had mild degenerative changes, consisting of disc desiccation at L3-4 through L4/S1, a drying out and loss of normal water content, which is the commencement of degenerative disc disease. There was mild bulging at L3-4 through L5/S1, which is unrelated to trauma. She opined that plaintiff had mild degenerative changes and found no evidence of disc herniation or acute traumatic injury.

Dr. Cohn, after reviewing the MRI of plaintiff's cervical spine, stated that there were diffuse multilevel degenerative changes with disc desiccation. There was disc bulging at C3-4 and C6-7, which Dr. Cohn stated were unrelated to trauma. These changes were present at C4-5 and C6-7 with anterior and posterior osteophytes and disc space narrowing. There was no evidence of disc herniation or acute traumatic related injury.

Based upon the above, defendant has made out a *prima facie* case that plaintiff's injuries did not meet the threshold requirements for serious injury.

In opposition to the motion, plaintiff submits the Emergency Room Record from Jacobi Medical Center, dated March 31, 2009 (Exhibit A); the affirmation of Dr. Jean-Etienne Thibaud,

D.O., an osteopath (Exhibit B); the MRI report of Samuel Mayerfield, M.D., a radiologist, of plaintiff's cervical spine (Exhibit C); and the MRI report of Anand P. Lalaji, M.D., a radiologist, of plaintiff's lumbar spine (Exhibit C).

Plaintiff first sought treatment for her alleged injuries on March 31, 2009, at Jacobi Medical Center, three weeks after her accident. Plaintiff fails to explain the three week gap between the accident and the commencement of treatment, which interrupts the chain of causation between the accident and claimed injuries. *Henry v. Peguero*, 72 A.D.3d 600 (1<sup>st</sup> Dept. 2010); *Garcia v. McBean*, 2010 N.Y. Slip Op. 52269(U), 2010 WL 5469122 (N.Y. Sup. App. Term, 1<sup>st</sup> Dept. 2010); *Grullon v. Rodriguez*, 29 Misc. 3d 132 (A), 2010 N.Y. Slip Op. 51919(U), 2010 WL 4595660 (N.Y. Sup. App. Term, 1<sup>st</sup> Dept. 2010).

Plaintiff has failed to raise a triable issue of fact as to the existence of a serious injury under the "permanent consequential" limitation of use of a body organ or member category, as she did not submit any evidence of permanent limitation based upon a recent examination. *Vasquez v. Almanzar*, 107 A.D.3d 538 (1<sup>st</sup> Dept. 2013).

Plaintiff has also failed to raise a triable issue of fact as to the existence of a serious injury under the "significant limitation of a body function or system" category.

Dr. Thibaud's affirmation states that she is a medical doctor at J.E.T Medical, P.C. ("J.E.T."), and that plaintiff was under the care of J.E.T. from April 9, 2009 through October 22, 2009, a period of only seven months. During this period of time, plaintiff received MRIs, diagnostic nerve testing (NCV/EMG), range of motion testing, chiropractic adjustments, acupuncture and physical therapy. Dr. Thibaud states that the complete medical records for plaintiff are attached to her affirmation. However, no records were attached. Dr. Thibaud failed

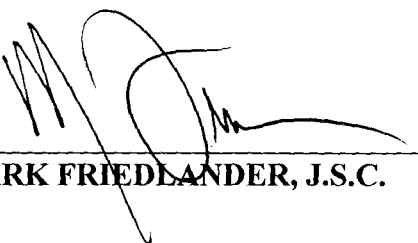
to refute the findings of defendants' radiologists that plaintiff's alleged injuries are the result of desiccation and degenerative disc disease. The MRI reports of plaintiff's radiological doctors, Mayerfield and Lalaji, contain no correlation of their findings to the plaintiff's accident. In any event, their reports recite desiccation and/or multilevel degenerative disc disease, and describe any abnormalities of the lumbar spine as mild, and of the cervical spine as moderate. A minor, mild or slight limitation of use is not significant. These findings are not discussed by Dr. Thibaud. Although Mr. Mayerfield found a disc herniation at C3/4, a herniated disc is not a serious injury without proof of restriction of motion and duration, which has not been provided. Dr. Thibaud's last range of motion testing of plaintiff occurred on July 7, 2009, approximately five months after the accident.

Lastly, plaintiff has not presented medically admissible evidence to support his claim regarding "90/180 days."

Defendant's motion is granted and plaintiff's complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: 10/22/14

  
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MARK FRIEDLANDER, J.S.C.