

**Colon v Mercedes**

2014 NY Slip Op 33566(U)

October 9, 2014

Supreme Court, Bronx County

Docket Number: 304740/2012

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

NIKKI COLON,

INDEX NUMBER: 304740/2012

Plaintiff,

-against-

Present:  
HON. ALISON Y. TUITT  
*Justice*

**EMMANUEL A. MERCEDES, BOULEVARD  
TRUCKING CORP., DEMETRIUS HARRIS and  
STAR CRUISER TRANSPORTATION, INC.,**

Defendants.

The following papers numbered 1 to 4

Read on this Defendants' Motion for Summary Judgment

On Calendar of 5/19/14

Notices of Motion-Exhibits and Affirmation 1, 2

Affirmation in Opposition and Exhibits 3

Reply Affirmation 4

Upon the foregoing papers, defendants Emmanuel A. Mercedes and Boulevard Trucking Corp.'s motion for summary judgment and defendants Demetrius Harris and Star Cruiser Transportation's motion for summary judgment on the issue of threshold are consolidated for purposes of this decision. For the reasons set forth herein, the motions are granted and the complaint is dismissed.

The within action arises from a motor vehicle accident on January 18, 2012 in which plaintiff alleges she sustained serious injuries. Plaintiff testified at her deposition that she was a passenger on an Access-A-Ride bus at the time of the accident. The impact allegedly caused her head, left hip, left shoulder and left knee to impact the wall of the inside of the vehicle. Following the accident, plaintiff took another Access-A-Ride vehicle home. She did not receive first aid at the scene of the accident and did not request to go to the

hospital. Later in the day, plaintiff called her cousin and granddaughter to come over and take her to Brooklyn Hospital. At the hospital, she complained about her head, left shoulder, back, knee and hip. Plaintiff testified that at the hospital, plaintiff was diagnosed with bruises to her left shoulder and was discharged. Two to three weeks after the accident, plaintiff sought treatment from a neurologist, Dr. Gutstein with complaints of pain in her head, back and the entire left side of her body. Plaintiff stopped treating with Dr. Gutstein in June or July 2002 because her No-Fault benefits were cancelled. Plaintiff testified that she also treated with several other doctors. Dr. Gutstein referred plaintiff to Dr. Capiolla for MRIs of her lower back, left knee and left hip. Plaintiff underwent chiropractic treatment on three occasions and she also saw Dr. Davey, a pain management doctor. Additionally, plaintiff saw Dr. Mindel, an ophthalmologist with complaints of perforations and a red and swollen eye. Dr. Mindel diagnosed a conversion reaction. She thereafter went to another ophthalmologist who prescribed drops and sent her to a headache clinic for her complaints of headaches.

Before the accident, plaintiff had treated for about three years for pain in her low back but never received any medical care to her left hip or left knee. Plaintiff further testified that she was confined to her home for about one month following the accident. At the time of her deposition, October 15, 2013, plaintiff only planned on continuing treatment with her ophthalmologist. Plaintiff does not deny that she had suffered prior injuries but claims that the subject accident caused aggravation to those parts of her body that were already injured "to the point where my independence is just about gone." In her bill of particulars, plaintiff alleges to have sustained as a result of the subject accident: a linear tear of the left anterior acetabular labrum and joint effusion; left lateral meniscal tear; disc herniations at L2-3, L3-4 and L4-5; cervical derangement conversion reaction with spiraling and tunnel of the visual field; minimal nuclear and cortical lens opacities; and exacerbation of any and all preexisting injuries.

Defendants move for summary judgment on the grounds that plaintiff failed to prove a serious injury as required by §5102(d) of the Insurance Law. Defendants argue that plaintiff has a long history of complications with her physical condition. Approximately 15 to 18 years ago, plaintiff submitted an application for Social Security Disability due to a workplace incident wherein she injured her right hip and knee while employed by the New York City Transit Authority. She retired from the New York City Transit Authority in 2000. She had been a customer of Access-A-Ride since 2001 due to pain in her right hip and knee. Plaintiff also had osteoporosis and osteoarthritis prior to this accident and suffered head trauma from a fall while

working with the New York City Transit Authority. She had headaches for which she was treated and also had degenerative joint disease in her hip and permanent disability. Although defendants allege that plaintiff has been using a cane since at least 2007, at her deposition, plaintiff denied using a cane prior to treating with Dr. Gutstein and that the "Access-A-Ride application that she filled out was incorrect because she did not use a cane prior to this accident. She had undergoing physical therapy for her back and leg for months prior to the accident and up to one week before the accident.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1<sup>st</sup> Dept. 1997).

In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1<sup>st</sup> Dept. 1986), *aff'd*, 69 N.Y.2d 701 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Licari v Elliot, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "permanent

consequential limitation of use of a body organ or member", "significant limitation of use of a body function or system," or "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," in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (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. Toure, supra. <sup>1</sup>

In support of their motions, defendants submit the affirmed reports of several physicians who conducted physical examinations on plaintiff and found no evidence of disability related to the subject accident. In opposition to the motion, plaintiff submits the affirmed report of Dr. Gabriel Dassa dated December 20, 2013 regarding his physical examination of plaintiff; the affirmed report of Dr. Thomas Kolb for the MRI taken of plaintiff's lumbar spine on April 18, 2012 which showed "Marked degenerative changes... Grade I listhesis of L3 upon L4. Disc herniations at L2-3, L3-4 and L4-5"; the affirmed report of Dr. Thomas Kolb for the MRI taken of plaintiff's left hip on February 21, 2012 and March 7, 2012 which showed "Thin linear tear of the anterior acetabular labrum. Small joint effusion"; the affirmed report of Dr. Jacob Lichy for the CT Scan taken of plaintiff's left knee on April 25, 2012 which showed "Degenerative changes. While there is certainly a lateral meniscal tear as evidenced by collapse of the lateral compartment, further evaluation of the menisci and cruciate ligaments would be made with an MRI, if this patient is medically suited for that examination and it is clinically warranted."

Defendants have made a prima facie showing that plaintiff did not sustain a medically determined injury of a nonpermanent nature that prevented her from performing substantially all of her

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<sup>1</sup>The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].)

customary and daily activities for 90 of the 180 days immediately following the accident. Plaintiff failed to raise an issue of fact as plaintiff testified that she was confined to home, but not necessarily to bed, for one month (as argued by defendants) or for three weeks following the accident and then for one more month (as argued by plaintiff's counsel). Under either scenario, plaintiff fails to raise an issue of fact.

With respect to plaintiff's purported injuries to her lumbar spine and left knee, those claims must be dismissed. An MRI taken of plaintiff's lumbar spine on July 11, 2011, six months before the subject accident, revealed multilevel degenerative changes with bilateral foraminal stenosis most severe at L3-L4 and L4-L5, right foraminal disc protrusion at L4-L5 and anterolisthesis at L2-L3 and L3-L4. Dr. John Rigney, who conducted a film review on behalf of defendants opines that plaintiff had multilevel degenerative disc pathology with no evidence of a recent injury. The MRI taken of plaintiff's spine after the accident showed "[m]arked degenerative changes". Moreover, the CT Scan of plaintiff's left knee showed degenerative changes and recommended that an MRI be done which was never performed. Dr. Dassa completely fails to address plaintiff's preexisting conditions and does not provide any account as to how the pre-existing degenerative conditions differed from or exacerbated the injuries sustained in the accident. Thus, the failure of plaintiff's treating doctor's to address the degeneration is fatal to plaintiff's claims of injuries. See, Frias v. James, 895 N.Y.S.2d 335 (1<sup>st</sup> Dept. 2010)(Expert's opinion that plaintiff's restrictions were attributed to degenerative causes was conclusory as it was advanced without any elaboration and without any reference to degeneration in the MRI reports reviewed); Spencer v. Golden Eagle, Inc., 920 N.Y.S.2d 24 (1<sup>st</sup> Dept. 2011)(Plaintiff's expert must address causation where defendant's expert indicates that plaintiff's injury was caused by pre-existing condition); McCree v. Sam Trans Corp., 920 N.Y.S.2d 35 (1<sup>st</sup> Dept., 2011)(While its medical expert attributed the range of motion restrictions he found in plaintiff's right shoulder and cervical spine to degenerative changes or a pre-existing condition, his opinion lacked a factual basis and was conclusory); Valentin v. Pomilla, 873 N.Y.S.2d 537 (1<sup>st</sup> Dept. 2009)(plaintiff failed to raise an inference that his injury was caused by the accident by not refuting defendant's evidence of a preexisting degenerative condition of the spine. Missing from all of plaintiff's submissions is any mention of the congenital defect and degenerative condition. Here, not only did plaintiff's experts fail to refute defendant's evidence of a preexisting congenital and degenerative condition of the spine, her own doctors reported a degenerative condition of the right knee. Dr. Rose's failure even to mention, let alone explain, why he ruled out degenerative changes as the cause of plaintiff's knee and spinal

injuries rendered his opinion that they were caused by the accident speculative. Consequently, there is no objective basis for concluding that the present physical limitations and continuing pain are attributable to the subject accident rather than to the degenerative condition).

With respect to plaintiff's purported eye injuries, the claim must also be dismissed. Plaintiff submits the report of Dr. Mindel who examined plaintiff on February 14, 2012 diagnosed plaintiff with "Conversion reaction with spiraling and tunneling of the visual fields" and stated that no further treatment was deemed necessary. Dr. Mindel further stated in his report that "Whenever I diagnose a conversion reaction I suggest that the patient return within the next several months. The inability to rely on the subjective parts of the examination (symptoms, visual acuity and visual fields) makes the objective parts of the examination more important." Here, plaintiff fails to present any evidence that she returned for further examinations as suggested by Dr. Mindel. Moreover, defendants submit the report of Dr. Kenneth Schor, an ophthalmologist who examined plaintiff December 10, 2013 and found that plaintiff had no evidence of an afferent pupillary defect or optic neuropathy. He found her visual acuity corrected to 20/20 and 20/30, respectively, and the rest of his exam revealed no deficits. He stated that her visual field in her left eye did reveal some deficits but they were monocular, unreliable, and not consistent with her clinical examination. Dr. Schor further noted that during plaintiff's examination with Dr. Mindel, plaintiff also had difficulties performing perimetry testing. In conclusion, he did not find any evidence of damage to either of her eyes. Plaintiff, in response, fails to raise any issues of fact with respect to injury to her eyes. Plaintiff went to an ophthalmologist on one occasion and never returned. Plaintiff does not submit any medical evidence to rebut Dr. Schor's findings. Dr. Schor examined plaintiff almost two years after her examination with Dr. Mindel and his findings are current. Dr. Dassa did not examine plaintiff's eyes and did not comment on any purported injury to her eyes.

With respect to her left hip injury, that claim must also be dismissed. On December 21, 2000, plaintiff completed an Application Form for Access-A-Ride Paratransit Service and she noted that "I am in need of assistance during the use of stairs due to hip injury". She also noted that she uses a "cane" as a support device when traveling on her own or using public transportation. When asked for reasons why she was unable to take public transit, plaintiff reported that "climbing up and down stairs on and off the bus becomes quite difficult, painful and increases my chances for fall, since my hip is not stable". On March 15, 2004, plaintiff completed an ADA Transportation Assessment Application wherein she noted that she had a permanent

disability which required her to use a support cane when traveling or walking outside her home. Again, on June 15, 2007, plaintiff completed another Access-A-Ride application where she noted that she had a permanent disability which required the use of a support cane and knee brace when traveling or walking outside her home. She further reported that she needed assistance to get to and from the public transit bus stop, which is one to two blocks from her house 95% of the time. With regard to travel on the subways, plaintiff noted that "it's extremely painful and difficult to navigate steps," and that she has "an unstable hip which increases the possibility of falls."

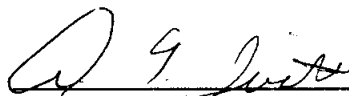
The information provided by plaintiff herself on these applications clearly contradicts her deposition testimony regarding the use of a cane. Plaintiff acknowledged that her signature and handwriting on those documents. Thus, the evidence establishes that, contrary to plaintiff's claim at her deposition that she only began using a cane after the subject accident, plaintiff had in fact been using a cane since 2000, at least 12 years prior to this accident. Plaintiff's deposition testimony clearly contradicts her own prior claims in order to qualify for Access-A-Ride and thus is insufficient to raise a triable issue of fact. See, Phillips v. Bronx Lebanon Hospital, 701 N.Y.S.2d 403 1<sup>st</sup> Dept. 2000); LoBianco v. Lake, 879 N.Y.S.2d 135 (1<sup>st</sup> Dept. 2009). Moreover, although Dr. Kolb states that plaintiff's left hip MRI revealed a thin linear tear of the anterior acetabular labrum and a small joint effusion, he does not causally relate that finding to the accident. Defendants' reviewing radiologist did not find evidence of labral injury or hip joint effusion. More importantly, however, Dr. Dassa noted in his examination of plaintiff that she had "normal and full" range of motion in her left hip and noted only mild swelling in that area.

Thus, defendants presented a prima facie case that plaintiff did not suffer a permanent loss of use, permanent consequential limitation of use or significant limitation of use within the meaning of the Insurance Law. In opposition, plaintiff failed to raise any issues of fact. Dr. Dassa's causation analysis is speculative because he never considered plaintiff's prior injuries, prior medical history or her condition immediately prior to the accident. Plaintiff has a long standing, lengthy history of prior medical conditions that resulted in pain and restriction and for which she treated up to five days before the accident.

Accordingly, defendants' motions for summary judgment are granted and the complaint is dismissed.

This constitutes the decision and order of this Court.

Dated: 10/9/14

A handwritten signature in black ink, appearing to read "Alison Y. Tuitt", is written over a horizontal line.

**Hon. Alison Y. Tuitt**