Miranda v Odikpo
2015 NY Slip Op 30993(U)
May 6, 2015
Supreme Court, Bronx County
Docket Number: 308166/10
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 308166/10**

Maria Miranda,
Plaintiff,

-against- **DECISION and ORDER**

Charles Odikpo, Esq. and
Andrew Hirschhorn, Esq.,

Present:

Defendants. Hon. Julia I. Rodriguez
----------X Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant Andrew Hirschhorn's motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint against him.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1**
Affirmation in Opposition & Exhibits	**2**
Reply Affirmation	**3**

This is an action for legal malpractice relating to an underlying action for serious and permanent injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on February 21, 2003. Plaintiff initially retained defendant Charles Odikpo to prosecute her personal injury claim. Plaintiff commenced the underlying action on May 21, 2004. On October 19, 2005, Odikpo retained defendant Andrew Hirschhorn to serve as trial counsel for plaintiff. On September 7, 2006, the motor vehicle accident ("MVA") defendants filed a motion for summary judgment on the issue of serious injury threshold. On February 20, 2007, Hirschhorn served a three-page Affirmation in Opposition, with no attached exhibits, in which he argued only that the movants had failed to meet their burden of proof. On June 25, 2007, the threshold motion was granted and the personal injury case was dismissed. In the decision dismissing the complaint, the Court indicated that the affirmation of Dr. Marianna Golden, defendants' medical expert, was reviewed and that "[n]o opposing medical proof was submitted by Plaintiff."

As relevant here, in the legal malpractice complaint, plaintiff alleges the following: Hirschhorn failed to annex any evidence in support of his Affirmation in Opposition. On June 25, 2007, the threshold motion was granted and the personal injury case was dismissed. On November 13, 2008 plaintiff retained new counsel to represent her in connection with the personal injury case. Hirschhorn "failed and/or refused to advise Ms. Miranda that the personal injury case was dismissed" and "failed and/or refused to disclose [to plaintiff's new attorneys] that portion of the personal injury file pertaining to the fact that the personal injury case had been dismissed." On or about March 22, 2010, plaintiff "was first able to learn" that the personal injury case had been dismissed. Hirschhorn "negligently, improperly and unskillfully" failed to prosecute the personal injury action and that "if . . . Hirschhorn had prosecuted [her] personal injury case in a proper, skillful and diligent manner, a judgment against the accident defendants and in favor of [plaintiff] could and would have been obtained." Hirschhorn "negligently, recklessly, carelessly and or deliberately concealed from [plaintiff] the true status of her case" and, as a result, she "was prevented from obtaining new counsel sooner thereby protracting the time from which she might otherwise have obtained recovery." The time to have filed suit against the responsible parties "expired on February 21, 2006 and by reason of the negligence of defendants, plaintiff is forever barred from commencing any action against the accident defendants."

Hirschhorn now moves for summary judgment dismissing the complaint against him asserting that plaintiff cannot sustain a legal malpractice claim against him because she cannot show that "but for" the alleged error by him the outcome of the underlying action would have been favorable to her. Hirschhorn contends that plaintiff cannot make such a showing because there was no medical evidence available to him which demonstrated that plaintiff sustained a serious injury. Hirschhorn further contends that the narrative reports of plaintiff's own treating physicians, which he had in his possession but did not submit in opposing the summary judgment motion, do not demonstrate that plaintiff sustained a serious injury.

In support of the motion, Hirschhorn submitted, *inter alia,* plaintiff's discovery responses and deposition testimony and the medical reports of Drs. Maria Audrie DeJesus, Marianna

Golden, Arnold T. Berman, Ravindra V. Ginde, Allen Rothpearl, Haralambos Atoynatan, Pavel Kulik, Dalbir Chhabra and Mihir Bhatt.

In her bill of particulars, plaintiff alleged injuries to her cervical and lumbar spine, including radiculopathy, herniated/bulging discs, and exaggerated/straightened lordosis. In response to defendants' demand for discovery, plaintiff indicated that she was confined to her bed for approximately three days immediately after the accident and that she was confined to her home for approximately three weeks immediately after the accident. At her deposition, plaintiff testified that she was out of work at the time of the accident because her father died and she had been in a fire. Plaintiff also testified that she received medical treatment at Pelham Medical and that she was treated there for six months immediately after the accident. Her no-fault insurance benefits were then terminated.

Drs. Atoynatan, Kulik, Chhabra and Bhatt were all employed at Pelham Medical, P.C. while plaintiff was treated there. In his "Initial Examination Report" dated February 24, 2003, Dr. Atoynatan opined that as a result of the accident plaintiff sustained cervical and lumbosacral spine sprains/strains. Dr. Atoynatan also noted that cervical radiculopathy should be "rule[d]-out." Dr. Atoynatan recommended physical therapy 3-4 times per week and acupuncture. Dr. Atoynatan opined that plaintiff's prognosis for a full and complete recovery was "difficult to determine at this time." Dr. Kulik examined plaintiff on March 31, 2003. In his report, Dr. Kulik reported neck and lower back pain with "restrictions of movement" but he provided no measurements of said restrictions. Dr. Kulik recommended physical therapy 4 times a week. Dr. Kulik's impression was that plaintiff's symptoms as well as the absence of the symptoms prior to the accident indicate a direct causal relationship between plaintiff's condition and the accident. Dr. Kulik opined that "superimposed upon the natural aging and degenerative process in the patient's spine, this injury might result in a permanent reduction in the normal range of motion of the cervical spine and peripheral neuromuscular system resulting in chronic pain and compromised performance of ordinary functions." Dr. Chhabra examined plaintiff on March 24, 2003 and reviewed an MRI of her cervical spine. Dr. Chhabra reported "decreased range of motion with sharp pain and muscle spasm upon extremes of motion" of the cervical and lumbar

spine. However, Dr. Chhabra provided no measurements of the decreased ranges of motion. Dr. Chhabra opined that the MRI of the cervical spine performed on March 6, 2003 "demonstrates lordosis of cervical spine [which] suggests muscular spasm" as well as two herniated discs and one bulging disc. Dr. Chhabra's impression was cervical and lumbosacral sprains/strains and radiculopathy, and left and right knee sprain/strain. Dr. Chhabra recommended physical therapy 3 times a week and concluded that the "overall prognosis for full and complete recovery is difficult to determine at this time." In his report dated July 18, 2003, Dr. Bhatt reported that plaintiff's lower neck and back pain "is not related to her prior workplace injury but is a result of the injuries she sustained in the accident." While Dr. Bhatt reported measured "decreased" ranges of motion of plaintiff's cervical and lumbar spine, he did not compare those measurements to normal. Dr. Bhatt referred to results of NCV and EMG testing performed on April 1, 2003 which, he reported, indicated cervical radiculopathy. Dr. Bhatt also referred to results of an MRI of the cervical spine performed on March 6, 2003 which, he reported, revealed two herniated discs and one bulging disc. And, Dr. Bhatt referred to results of an MRI of the lumbar spine performed on April 29, 2003 which, he reported, revealed a central focal disc herniation. Dr. Bhatt concluded that, as a result of the accident, plaintiff suffered cervical and lumbar spine sprains/strains, cervical radiculopathy, myofascitis, herniated/bulging discs and vertebral derangement due to acceleration/deceleration injury. Dr. Bhatt opined that "[d]efinite disability exists, the duration of which cannot be determined at this time" and that "[t]here may be permanent residual defect or disability remaining as a result of this accident."

Dr. DeJesus examined plaintiff on July 22, 2003, in connection with her no-fault insurance benefits, for a determination as to whether any further treatment was needed. In her report, Dr. DeJesus found full range of motion of the cervical spine and "limited range of motion of the lumbar spine with complaint of pain but without spasm." However, Dr. DeJesus did not provide any range of motion measurements and did not explain the extent of the limitations she noted in the lumbar spine. Dr. DeJesus concluded that plaintiff had no neurological disability or need for treatment and that plaintiff "can work and perform all of her usual daily activities without restriction or any neurological limitations."

Dr. Golden, the MVA defendants' medical expert and a board-certified neurologist, reviewed plaintiff's medical records and examined plaintiff on July 11, 2006. Dr. Golden measured full range of motion of plaintiff's cervical and lumbar spine and compared those measurements to normal. Notably, Dr. Golden reported a lumbar spine flexion range of motion of 70 degrees with 70-90 degrees being normal. As such, if 90 degrees is considered normal, then plaintiff would have had a 23% limitation in range of motion of the lumbar spine. However, Dr. Golden did not explain this ambiguity. Nor did Hirschhorn raise this issue in his affirmation in opposition to the MVA defendants' motion. In the assessment portion of her report, Dr. Golden noted that her neurological evaluation of plaintiff was normal and that the "findings above are primarily orthopedic in nature."

In connection with the legal malpractice action, Dr. Berman, an orthopedic surgeon, examined plaintiff on August 29, 2013 and reviewed her medical records. In his affirmed report, Dr. Berman measured normal ranges of motion in all affected body parts comparing his measurements to normal. Dr. Berman diagnosed plaintiff with resolved cervical and lumbar sprains/strains with no residuals and resolved right knee and right arm strains with no residuals. Dr. Berman reported that the MRI dated March 8, 2006 demonstrated degenerative changes of the cervical spine MRI that pre-existed the accident. Dr. Berman also reported that EMG studies dated April 1, 2003 indicated pre-existing degenerative changes of the cervical spine and that radiological studies on February 7, 2006 demonstrated "degenerative, herniated disc, and foraminal narrowing changes at T12-L5 on the lumbar spine MRI that pre-existed the incident." Dr. Berman found no clinical evidence of radiculopathy and concluded that plaintiff required no further treatment. Dr. Berman recommended that physical therapy be discontinued. Dr. Berman concluded that plaintiff "can participate in all activities of daily living" and that she is "fully recovered with no residuals."

In opposition to the motion, plaintiff contends that Hirschhorn's motion should be denied because: (1) he failed to establish that she did not sustain a serious injury and (2) plaintiff's deposition testimony and medical records raise triable issues of fact as to whether she sustained a serious injury and whether, but for Hirschhorn's error, she would have had a favorable result in

her personal injury action. Plaintiff also contends that Hirschhorn should be estopped from arguing that she did not sustain a serious injury because, as her attorney, he undertook the duty to prosecute her personal injury case and, in fact, plead in plaintiff's bill of particulars that she had sustained a serious injury. Plaintiff further contends that Hirschhorn's assertion that he does not believe that her deposition and medical records demonstrated a serious injury "constitutes an admission that he affirmatively, knowingly, and intentionally" violated his duty to zealously prosecute plaintiff's case as well as his duty of loyalty to her. Plaintiff notes that while Hirschhorn relies on plaintiff's IME's in support of his assertion that she did not sustain a serious injury, in opposition to the MVA defendants' motion, he argued that the very same IME's were insufficient as a matter of law. Plaintiff asserts that Hirschhorn should be held to his original position regarding the IME's.

In support of her contentions, plaintiff submitted, *inter alia,* the MRI report of plaintiff's lumbar spine and affirmation of Dr. Rothpearl. In his affirmation, Dr. Rothpearl states that, on April 29, 2003, he supervised the taking of an MRI of plaintiff's lumbar spine and his impression was "straightened lordosis; transitional S1 vertebral body; central focal disc herniation at L5-S1 encroaching on the thecal sac and effacing the ventral epidural fat." These injuries, Dr. Rothpearl states, were caused as a result of the accident. Dr. Rothpearl affirmed the contents of the MRI report which he attached to his affirmation. The report mimics the findings he noted in his affirmation.

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An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent, (2) that such negligence was a proximate cause of plaintiff's losses, and (3) proof of actual damages. *See Reibman v. Senie,* 302 A.D.2d 290, 290, 756 N.Y.S.2d 164 (1st Dept. 2003). In order to establish proximate cause, a plaintiff must demonstrate that but for the attorney's negligence, she would have prevailed in the underlying matter or would not have sustained any ascertainable damages. *See id.* at 290-291; *Brooks v. Lewin,* 21 A.D.3d 731,734, 800 N.Y.S.2d 695 (1st Dept. 2005). An attorney has the responsibility to investigate and prepare every phase of his or her client's case. *See Brady v. Meyerson,* 32 A.D.3d 410, 410, 819 N.Y.S.2d 558 (2nd

Dept. 2006). However , the failure to establish proximate cause mandates the dismissal of a legal malpractice claim, regardless of the attorney's negligence. *See Reibman* at 291; *Senise v. Mackasek,* 227 A.D.2d 184, 185, 642 N.Y.S.2d 164 (1st Dept. 1996).

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center,* 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. See *Aasaf v. Ropog Cab Corp.,* 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

Here, based upon all of the medical evidence submitted, it cannot be said as a matter of law that plaintiff cannot establish that "but for" her attorney's negligence the court would have denied the MVA defendants' summary judgment motion and she would have prevailed in her personal injury action. While plaintiff's own testimony would preclude recovery under the 90/180 category, triable issues of fact exist as to whether she would have prevailed under the "significant limitation" or "permanent consequential limitation" categories had Hirschhorn submitted the medical evidence he now proffers. Arguably, Dr. Golden's report of 2006 raised a triable issue of fact as to whether plaintiff had limitations in her lumbar spine as a result of the accident. However, Hirschhorn failed to make this argument. Significantly, Drs. DeJesus, Bhatt, Chhabra and Kulik all reported limitations/restrictions in range of motion of the lumbar spine in 2003 which they attributed to the accident. The court also notes that Dr. Berman's finding that, on August 29, 2013, plaintiff had normal ranges of motion in her cervical and lumbar spine is not probative of plaintiff's condition seven years earlier when the DMV defendants filed their summary judgment motion.

Based on the foregoing, defendant Hirschhorn's motion for summary judgment, dismissing the complaint against him, pursuant to CPLR §3212, is denied.

Dated: Bronx, New York
~~April , 2015~~
May 6, 2015

Hon. Julia I. Rodriguez, J.S.C.