Johnson v New York City Tr. Auth.
2017 NY Slip Op 30793(U)
March 24, 2017
Supreme Court, Bronx County
Docket Number: 22198/12
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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SEAN JOHNSON AND JULIE BERRIOS,

Plaintiff(s),

DECISION AND ORDER

Index No: 22198/12

- against -

NEW YORK CITY TRANSIT AUTHORITY, OPIE M. HOWDEN, DARREN MACK AND MELISSA BROWN,

Defendant(s).

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In this action for personal injuries arising from an automobile accident, defendants NEW YORK CITY TRANSIT AUTHORITY (NYCTA) and OPIE M. HOWDEN (Howden) move seeking an order granting them summary judgment and dismissing plaintiff JULIE BERRIO's (Berrios) complaint on grounds that she did not sustain a serious injury as defined by the Insurance Law. Defendants DARREN MACK (Mack) and MELISSA BROWN (Brown) cross-move for identical relief. Berrios opposes the instant motion and cross-motion asserting, *inter alia*, that defendants fail to establish prima facie entitlement to summary judgment and that, in any event, questions of fact on the issue of whether Berrios sustained a serious injury preclude summary judgment.

For the reasons that follow hereinafter the NYCTA and Howden's motion is granted and Mack and Brown's motion cross-motion is denied.

Read together, the complaint and bills of particulars allege the following: On April 14, 2012, at or near the intersection of East 224th Street and Boston Road, Bronx, NY, Berrios was involved in a motor vehicle accident. Specifically, the bus in which Berrios rode, owned by NYCTA and operated by Howden, came into contact with a vehicle owned by Brown and operated by Mack. Berrios alleges that defendants were negligent in the ownership and operation of their vehicles, said negligence causing the accident and injuries resulting therefrom. Berrios alleges to have sustained a host of injuries, the most serious being herniated discs at C4-C6. Plaintiff also alleges that the Insurance Law is inapplicable[1].

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively

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[1] Clearly the Insurance Law does apply and given the allegations in the bill of particulars, where permanency is claimed but home and bed confinement is described as intermittent, the only categories of serious injury under Insurance Law § 5102(d) that apply here, are that Berrios sustained a (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation of use of a body organ or member; and (3) significant limitation of use of a body function or system

demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with

> the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Insurance Law § 5104(a), also known as the "no-fault law," by design and intent, severely limits the number of personal injury law suits brought as a result of motor vehicle accidents (*Licari v Elliott*, 57 NY2d 230, 236 [1982]). Because any injury not falling within the statute's definition of "serious injury" is minor, it should not be accorded a trial by jury, and, therefore, "[i]t is incumbent upon the court to decide in the first instance whether plaintiff has a cause of action to assert within the meaning of the statute" (*id.* at 237).

A defendant seeking summary judgment on grounds that plaintiff's injuries are not serious under the Insurance Law must establish that plaintiff's injuries do not meet the threshold promulgated by the statute (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Brown v Achy*, 9 AD3d 30, 31 [1st Dept 2004]; *Rodriguez v Goldstein*, 182 AD2d 396, 397 [1st Dept 1992]).

A defendant can meet the requisite burden by submitting objective medical evidence negating the existence of a serious injury (*Black v Robinson*, 305 AD2d 438, 439 [2d Dept 2003]; *Junco*

v Ranzi, 288 AD2d 440, 440 [2d Dept. 2001]; *Papadonikolakis v First Fid. Leasing Group*, 283 AD2d 470, 470-471 [2d Dept 2001]), or by other evidence which demonstrates the absence of a serious injury (*Lowe v Bennett*, 122 AD2d 728, 729 [1st Dept 1986], *affd* 69 NY2d 700 [1986], such as plaintiff's own deposition testimony (*Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]).

With respect to objective medical evidence negating the existence of a serious injury, the tests relied upon must be specified within the doctor's medical report (*Janco* at 440), and what is required is "objective proof such as X-rays, MRIs, straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on. . .[an] examination" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Range of motion testing is an objective measure of the presence or absence of injury (*Kraemer v Henning*, 237 AD2d 492, 493 [2d Dept 1997]; *Zalduondo v Lazowska*, 234 AD2d 455, 455-456 [2d Dept 1996]), and when used, the doctor must specify plaintiff's range of motion and compare the same to normal (*Bray v Rosas*, 29 AD3d 422, 423 [1st Dept 2006] [Court held that the failure of a defendant's doctor to quantify plaintiff's range of motion while concomitantly failing to compare the same to normal constituted a failure to establish prima facie entitlement to summary judgment "thereby leaving the court to speculate as to the meaning of those figures."]; *Kelly v Rehfeld*, 26 AD3d 469, 470 [2d Dept 2006]; *Spektor v Dichy*, 34 AD3d 557, 558

[2d Dept 2006]; *Webb v Johnson*, 13 AD3d 54, 55 [1st Dept 2004]). Notably, even if a defendant's doctor finds restricted range of motion upon examining the plaintiff, the same is not fatal when the doctor attributes the foregoing finding to a cause unrelated to the accident alleged (*Style v Joseph*, 32 AD3d 212, 214 n [1st Dept 2006]). Similarly, a minor restriction in range of motion upon a defendant's medical examination of the plaintiff is not fatal (*Camilo v Villa Livery Corp.*, 118 AD3d 586, 586 [1st Dept 2014]; *Tuberman v Hall*, 61 AD3d 441, 441 [1st Dept 2009]).

Once a defendant establishes that a plaintiff has not suffered a serious injury, summary judgment is warranted unless plaintiff can establish the existence of a serious injury. To that end, plaintiff must establish that the injuries alleged are the result of the accident claimed and that the limitations alleged are the result of those injuries (*Noble v Ackerman*, 252 AD2d 392, 394-395 [1st Dept 1998]). Plaintiff's proof establishing serious injury, medical or otherwise, must not only be admissible, but it must also be objective (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350 [2002]; *Grasso v Angerami*, 79 NY2d 813, 814-815 [1991]; *Blackmon v Dinstuhl*, 27 AD3d 241, 242 [1st Dept 2006]; *Thompson v Abassi*, 15 AD3d 95, 97 [1st Dept 2005]; *Shinn* at 198; *Andrews v Slimbaugh*, 238 AD2d 866, 867-868 [2d Dept 1997]; *Zoldas v Louise Cab Corporation*, 108 AD2d 378, 382 [1st Dept 1985]). Plaintiff's proof must also demonstrate the existence of a serious injury

contemporaneous with the accident alleged (*Blackmon* at 242; *Thompson* at 98 [Court held that the failure by plaintiff's doctor to provide objective proof of injury contemporaneous with the accident was fatal and was not cured by same doctor's finding of injury, with objective evidence, two and one half years later.); *Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]; *Pajda v Pedone*, 303 AD2d 729, 730 [2d Dept 2003]; *Jimenez v Kambli*, 272 AD2d 581, 583 [2d Dept 2000]). Such contemporaneous medical evidence, however, can be an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or "an expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure* at 350; *see also Perl v Meher*, 18 NY3d 208, 218 [2011] ["We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery."]). Additionally, in order to raise an issue of fact as to the existence of a serious injury the medical evidence presented must include a recent examination of the plaintiff at which the injuries are objectively established (*Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Thomson v Abassi*, 15 AD3d 95, 97 [1st Dept 2005]; *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000])

An unexplained gap in medical treatment between treatment

received shortly after the accident and treatment received long thereafter, warrants dismissal of plaintiff's case (*Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Brown v City of New York*, 29 AD3d 447, 448 [1st Dept 2006]; *Vasquez v Reluzco*, 28 AD3d 365, 366 [1st Dept 2006]; *Taylor v Terrigno*, 27 AD3d 316, 316-317 [1st Dept 2006]; *Rivera v Benaroti*, 29 AD3d 340, 342 [1st Dept 2006]; *Milazzo v Gesner*, 33 AD3d 317, 318 [1st Dept 2006]; *Colon v Kempner*, 20 AD3d 372, 374 [1st Dept 2005]). Thus, when defendant establishes that existence of a gap in medical treatment, to avoid summary judgment, a plaintiff must offer a reasonable explanation for the gap in treatment (*Pommells* at 574; *Brown* at 448; *Vasquez* at 366; *Taylor* at 316-317; *Rivera* at 342; *Milazzo* at 318; *Colon* at 374). Generally, if the explanation for the gap in medical treatment is medical, plaintiff must proffer medical evidence (*Mercado-Arif v Garcia*, 74 AD3d 446, 447 [1st Dept 2010]; *Crespo v Aparicio*, 59 AD3d 384, 385 [2d Dept 2009]; *Farozes v Kamran*, 22 AD3d 458, 459 [2d Dept 2005]; *Ali v Vasquez*, 19 AD3d 520, 520 [2d Dept 2005]; *Hernandez v Taub*, 19 AD3d 368, 368 [2d Dept 2005]). Alternatively, when the explanation for the gap in treatment is non-medical, such as the cessation of no-fault benefits, can be established by the plaintiff (*Mercado-Arif* at 447; *Jules v Barbecho*, 55 AD3d 548, 549 [2d Dept 2008]; *Francovig v Senekis Cab Corp.*, 41 AD3d 643, 644 [2d Dept 2007]; *Black v Robinson*, 305 AD2d 438, 439-440 [2d Dept 2003]). A gap in treatment is not relevant to nor dispositive in

an action concerning serious injury under the 90/180 category (*Gonzalez v Ceesay*, 19 Misc 3d 136(A) [App Term 2008]; *Gomez v Ford Motor Credit Co.*, 10 Misc 3d 900, 904 [Sup Ct 2005]).

Similarly, a gap between the accident alleged and medical treatment establishing the existence of a serious injury renders any opinion as to causation speculative and warrants dismissal (*Shinn v Catanzaro*, 1 AD3d 195, 198-199 [1st Dept 2003]; *Arrowood v Lowinger*, 294 AD2d 315, 316 [1st Dept 2002]). In *Shin*, while plaintiffs had received some treatment immediately prior to the accident, it was not until four and one half years after the accident alleged that they were diagnosed with herniated discs - the injury alleged to be serious under the statute (*id.* at 198-199). Granting defendants' motion for summary judgment, the court stated that

> [i]t was not until June 2002, after plaintiffs became aware of defendant's intent to cross-move for summary judgment based on the lack of serious injury, that plaintiffs recommenced chiropractic treatment with Dr. Palmieri. Only then, after a 4½-year *199 lapse in treatment, did Dr. Palmieri discover herniated discs on both plaintiffs' cervical spines. Given this 4½-year unexplained gap in treatment, and the fact that the herniated discs were not diagnosed until five years after the accident, we find that Dr. Palmieri's opinion that these injuries are causally related to the February 1997 accident is conclusory and fails to raise a triable issue of fact as to causation

(*id.* at 198-199). The foregoing is merely another way of asserting

that the proponent of a serious injury must establish the existence of the same with contemporaneous medical evidence and that the failure to do so warrants dismissal (*Blackmon* at 242; *Thompson* at 98; *Nemchyonok* at 421; *Pajda* at 730; *Jimenez* at 583).

NYCTA and Howden's Motion

NYCTA and Howden's motion for summary judgment is granted. On this record, NYCTA and Howden establish prima facie entitlement to summary judgment under the permanent categories of injury by tendering objective medical evidence demonstrating the absence of any injury.

In support of their motion, NYCTA and Howden submit a sworn report from Thomas P. Nipper (Nipper), an orthopedic surgeon, who details an examination he performed upon Berrios on May 12, 2015. Berrios presented with complaints of pain in her neck, mid back, and extremities secondary to a motor vehicle accident on April 14, 2012. Berrios' cervical spine exhibited full range of motion in all planes (flexion was 50 degrees, 50 degrees constituting normal range of motion). Berrios' lumbar spine also yielded full range of motion in all planes (flexion was 60 degrees, 60 degrees constituting normal range of motion). Straight leg testing was negative. Berrios also had full range of motion in her shoulders (flexion was 180 degrees, 180 degrees constituting normal). With respect to Berrios' knees, extension was zero degrees bilaterally, zero degrees constituting normal. Flexion, was also normal

(flexion was 150 degrees, 150 degrees constituting normal). Based on his examination, Nipper opines that Berrios is not disabled nor permanently injured and that she could engage in all her activities of daily living without restriction.

Based on the foregoing, NYCTA and Howden establish prima facie entitlement to summary judgment. With respect to the permanent category of serious injury, a defendant establishes the absence of a serious injury by submitting objective medical evidence negating the existence of a serious injury (*Black* at 439; *Junco* at 440; *Papadonikolakis* at 470-471). Here, NYCTA and Howden satisfy their burden with the Nipper's sworn report insofar as he affirms that after examining Berrios, years after the accident, and employing objective medical tests, such as range of motion testing (*Grossman* at 84; *Kraemer* at 493; *Zalduondo* at 455-456), Berrios had no injury to her cervical and lumbar spine, shoulders, or knees.

Nothing submitted by Berrios competently raises an issue of fact with regard to the existence of a serious injury because her evidence is solely comprised of a medical affirmation from a doctor who saw her for the first time years after the accident and who relies on medical records not provided to the Court.

To be sure, in opposition to the instant motion, Berrios submits a sworn report from Aric Hausknecht (Hausknecht), a neurologist, wherein he states that he first saw Berrios on August 18, 2016, more than four years after the accident alleged. Relying

on Berrios' prior medical records and his own examination, he then concludes that Berrios is afflicted with a host of injuries, such injuries serious and permanent. Hausknecht's report, however, does not avail Berrios since the medical reports upon which he relies are not before the Court. Therefore, the only competent opinion he can offer is plaintiff's injuries, if any, which he observed upon examining Berrios years after the accident. In the absence of any admissible evidence of prior medical treatment, any attempt, to relate such injuries to the instant accident is impermissibly speculative.

Where as here, a doctor relies on inadmissible medical evidence to render an opinion and such records are not provided to the court in admissible form, such opinion shall be discounted as speculative and insufficient on the issue of the existence of a serious injury (*Vishnevsky v Glassberg*, 29 AD3d 680, 681 [2d Dept 2006]; *Puerto v Omholt*, 17 AD3d 650, 651 [2d Dept 2005]); *Friedman v U-Haul Truck Rental*, 216 AD2d 266, 266-267 [2d Dept 1995]). Thus, discounting the records reviewed and described by Hausknecht regarding plaintiff's prior medical treatment as inadmissible, on this record, there is no medical evidence of any prior treatment, thereby creating a gap in treatment between the accident and Hasknecht's examination and rendering his opinion as to causation impermissibly speculative (*Shinn* at 198-199; *Arrowood* at 316). Moreover, the pragmatic effect of the foregoing is a record bereft

of any medical treatment contemporaneous with the instant accident. Since, the proponent of a serious injury must establish the existence of the same with contemporaneous medical evidence and the failure to do so warrants dismissal (*Blackmon* at 242; *Thompson* at 98; *Nemchyonok* at 421; *Pajda* at 730; *Jimenez* at 583), this shortcoming is also fatal.

Based on the foregoing, upon a search of the record, given the absence of a serious injury, summary judgment must be granted to all remaining defendants as well (*Nelson v Distant*, 308 AD2d 338, 340 [1st Dept 2003]["Finally, since plaintiff did not sustain a serious injury, there can be no recovery against the remaining defendant Derrick Lewis. Upon searching the record, summary judgment is granted dismissing the complaint as to defendant Lewis as well."]).

Mack and Brown's Cross-Motion

To the extent that, as noted above, the complaint has been dismissed against Mack and Brown by operation of law, their cross-motion is denied as moot. It is hereby

ORDERED that Berrios' complaint be dismissed with prejudice. It is further

ORDERED that NYCTA and Howden serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : March 24, 2017
Bronx, New York

Ben Barbato, JSC