

Allen v Boro Tr.

2018 NY Slip Op 31303(U)

January 15, 2018

Supreme Court, New York County

Docket Number: 151650/2015

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 22

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Stacia Allen, an infant by her
father and natural guardian
Carl T. Allen, Sr. and Carl T. Allen,
Sr.

Plaintiffs,

Index Number:

-against-

151650/2015

Boro Transit, Inc., the City of
New York, the Board of Education
of City School District of the
City of New York i/s/h/a New York
City Department of Education,
Board of Education of the City
of New York and "John Doe", name
fictitious, true name unknown
to plaintiffs,

Defendants.

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Paul Goetz, J.:

Defendants move, pursuant to CPLR 3212, for summary judgment
dismissing plaintiffs' complaint for failure to meet the serious
injury threshold of Insurance Law § 5102 (the No-Fault Law).

Underlying Allegations

Plaintiffs allege that, on January 6, 2014, at 8:15 a.m.,
plaintiff Stacia Allen (Stacia) was a passenger in a school bus,
driven by a driver employed by defendants, when the driver backed
up at 106th Street and Park Avenue, New York, New York, and
struck a pole (bill of particulars, item 2; Stacia EBT at 22, 24,
39, 102). Stacia states that, as a result of the accident, her

body struck the seat and she suffered injuries to her neck and back including disc bulges at C-2 to C-3 and L-4 to L-5 (bill of particulars, item 3; Stacia EBT at 46-48, 58). She further states that she was confined to her bed for 20 days and missed approximately 50 days of school (bill of particulars, items 5-6; Stacia EBT at 79). Stacia also stated that there was a subsequent accident on a school bus on May 12, 2015 that also injured her neck and back (*id.* at 91, 93, 98).

Defendants have presented the affirmed reports of Dr. Alan Zimmerman, an orthopedic surgeon, (the Zimmerman Report), who examined Stacia on February 10, 2016, and found a normal range of motion in her neck and back and asserted that there were "only subjective complaints [and] no disabilities" (Zimmerman Report at 5). They also proffered the affirmed report of Dr. Robert April, a neurologist, (the April Report), who examined Stacia on February 1, 2016, and found a normal range of motion in her neck and back and who opined that her injuries were "very minor" and that there was no permanency (April Report at 4). Defendants also presented the affirmed report of Dr. Audrey Eisenstadt, a radiologist, (the Eisenstadt Report, collectively, Defendants' Medical Reports), who reviewed Stacia's X-rays, CT scan and MRIs and found "[n]o disc herniations or annular tears" (Eisenstadt Report at 3). Consequently, defendants contend that the Defendants' Medical Reports show that Stacia has not suffered a

serious injury under the No-Fault Law and their motion for summary judgment dismissing plaintiffs' complaint should be granted.

In opposition, plaintiff has presented the affirmed report of Dr. Aric Hausknecht (the Hausknecht Report), who examined Stacia on January 9, 2014, and referred her for physical therapy for three months and examined her several times in 2014 and 2015. He found a reduction of range of motion in her cervical spine of 10 to 15 degrees and a reduction of range of motion in her lumbar spine of between 5 and 10 degrees, except for forward flexion, where he found a reduction of 60 degrees (Hausknecht Report at 4). He also opined that the May 12, 2015 accident had exacerbated Stacia's injuries (*id.* at 5). Plaintiffs also presented the affirmation of Dr. Lisa Corrente, a radiologist, (the Corrente Report), who reviewed the reports and films of Stacia's lumbar spine, and found "a disc bulge [at] L4/5" and "slight lordotic curvature indicating a limited range of motion" (Corrente Report at 2-3). They also present the affirmation of Dr. David Milbauer, a radiologist, (the Milbauer Report), who reviewed MRI films and reports of Stacia's lumbar, thoracic and cervical spine and found "[m]ild lumbar dextroscoliosis [and] [s]light retrolisthesis of L4 on L5" (Milbauer Report at 3). Plaintiffs assert that these medical reports show that Stacia suffered a serious injury and defendants' motion should,

therefore, be denied.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; see also *Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

The No-Fault Law

The No-Fault Law provides, in pertinent part:

“‘Serious injury’ means a personal injury which results in . . . a fracture; . . . permanent loss of use of a body organ, member, function or system; 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.”

“[T]he ‘legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries’ . . . [by] requir[ing] objective proof of a plaintiff’s injury in order to satisfy the statutory serious injury threshold” (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002] [internal citations omitted]). Objective proof sufficient to sustain a claim is “[a]n expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion . . . [or] [a]n expert’s *qualitative* assessment . . ., 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” (*id.* at 350 [italics in original]; *Gorden v Tibulcio*, 50 AD3d 460, 463 [1st Dept 2008]). Minor limitations of movement in a plaintiff’s neck and back are insufficient to be considered a serious injury

(*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]). Rather, plaintiff must present "objective evidence" in the form of tests indicating a significant limitation to satisfy the No-Fault Law (*Toure*, 98 NY2d at 350-351; *Reyes v Esquilin*, 54 AD3d 615, 615-616 [1st Dept 2008]; *Brown v Achy*, 9 AD3d 30, 31-32 [1st Dept 2004]).

Discussion

Defendants contend that the Defendants' Medical Reports show that Stacia's injuries were minor and they do not meet the serious injury threshold of the No-Fault Law. Plaintiffs assert that the Zimmerman Report "is biased" and should be disregarded (Slavit affirmation at 12). However, "the affirmed reports of medical experts who, upon examination, found that plaintiff had full range of motion in h[er] . . . cervical and lumbar spine" meet defendants' burden of establishing a prima facie case that plaintiff did not suffer a serious injury under the No-Fault Law (*Williams v Perez*, 92 AD3d 528, 528 [1st Dept 2012]; see also *Santana v Centeno*, 140 AD3d 437, 437 [1st Dept 2016]; *Jallow v Siri*, 133 AD3d 1391, 1391 [1st Dept 2015]).

Defendants also note that Stacia's missed school time does not amount to 90 days and, therefore, her 90/180 claim should be dismissed. Plaintiffs have not presented evidence refuting this assertion and, accordingly, Stacia's 90/180 claim must be dismissed.

In opposition to defendants' showing on Stacia's injuries,

plaintiffs have presented the Corrente Report, the Milbauer Report, and the Hausknecht Report. The Corrente Report finds a disc bulge and a "slight" curvature. The Milbauer Report also characterizes Stasia's injuries as slight and mild. Slight and mild injuries do not meet the requirement of a serious injury (*Toure*, 98 NY2d at 350-351). The Hausknecht Report finds a reduction in Stacia's range of motion in her cervical spine of between 10 and 15 degrees. "[A] 20% loss of use of her cervical spine and 10% loss of use of her lumbar spine establishes neither a significant nor consequential injury" (*Trotter v Hart*, 285 AD2d 772, 773 [3d Dept 2001]; see also *Decker v Stang*, 243 AD2d 1033, 1036 [3d Dept 1997], *lv denied* 91 NY2d 812 [1998]; *McLoud v Reyes*, 82 AD3d 848, 849 [2d Dept 2011] holding that a 12% reduction in the range of motion of plaintiff's right knee "was insignificant within the meaning of the no-fault statute"). Consequently, plaintiffs have not shown a serious injury with regard to Stacia's cervical spine. The Hausknecht Report also shows a reduction of between 5 and 10 degrees of Stacia's lumbar spine, except for forward flexion. Dr. Hausknecht has reported a range of motion of between 0 and 30 degrees for forward flexion, with normal being 0 to 90 degrees. This finding conflicts with Dr. Zimmerman, who found forward flexion in Stacia's lumbar spine of 60 degrees. The conflict between the two medical doctors as to the degree of forward flexion in Stacia's lumbar spine raises

an issue of fact as to her injuries and, accepting plaintiffs' version for the purpose of deciding this motion, requires the denial of the portion of defendants' motion that seeks dismissal of the complaint for failure to meet the statutory threshold of a serious injury (see *Perl v Meher*, 18 NY3d 208, 219 [2011]; see also *Susino v Panzer*, 127 AD3d 523, 524 [1st Dept 2015]). If plaintiffs establish that Stacia sustained a serious injury to her lumbar spine at trial then she will be entitled to recover for all her injuries, including to her cervical spine (*Karounos v Doulalas*, 153 AD3d 1166 [1st Dept 2017]).

Order

It is, therefore,

ORDERED that defendants' motion for summary judgment dismissing plaintiffs' complaint is GRANTED as to plaintiffs' claim of serious injury to Stacia's cervical spine and her 90/180-day claim; and DENIED as to plaintiffs' claim of serious injury to Satcia's lumbar spine; and it is further

ORDERED that the parties are directed to appear for a settlement conference in Part 22 at 80 Centre Street, Room 136 on February 27, 2018, at 9:30 a.m.

Dated: New York, New York
January 15, 2018

ENTER:



Hon. Paul A. Goetz, J.S.C.