Evans v Millien
2018 NY Slip Op 31365(U)
January 12, 2018
Supreme Court, New York County
Docket Number: 160527/13
Judge: Paul A. Goetz

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

----------X

DAQUAN EVANS as Administrator of the Estate of KAREN BRYANT, Deceased,

Plaintiff,

Index No.: 160527/13
DECISION/ORDER

-against-

JEAN CLAUDE MILLIEN and "JOHN DOE" (said name being fictitious and used to designate a person whose real identity is as yet unknown),

Defendants.

----------X

HON. PAUL A. GOETZ, J.S.C.:

In this personal injury/automobile accident action, defendant Jean Claude Millien (Millien) moves for summary judgment to dismiss the complaint, pursuant to CPLR § 3212 (motion sequence number 002) on the grounds that the injuries allegedly sustained by decedent Karen Bryant fail to establish serious injury thresholds as defined by Insurance Law § 5102 (d). The bill of particulars dated January 6, 2015, alleges injuries to decedent's left and right shoulders, and to her cervical and lumbar spine, which injuries fall within one or more of the following five classifications of "serious injuries": 1) a fracture; 2) a permanent loss of use of a body member, function, organ or system; 3) a permanent consequential limitation of a body organ or member; 4) a significant limitation of a body function or system; and/or 5) a non-permanent medically determined injury which prevented her from performing substantially all of her usual and customary activities for at least 90 of the first 180 days after her accident. *See* notice of motion, exhibit B.

Decedent commenced this action on October 29, 2013 by filing a summons and

complaint that includes one cause of action for negligence, accompanied by the claim that her injuries exceed the "serious injury" threshold set forth in Insurance Law § 5102. *See* notice of motion, Exhibit A. Millien filed an answer with affirmative defenses on December 30, 2013. *Id.*, exhibit F.

BACKGROUND

This accident occurred on July 7, 2013, when the decedent plaintiff, Karen Bryant (Bryant), was struck and injured by a car, owned by Millien and operated by an unknown driver, while she was walking across the intersection of 8th Avenue and West 145th Street in the County, City and State of New York. *See* notice of motion, exhibit A, ¶¶ 14-17. Bryant later died of unrelated causes on September 1, 2015, and thereafter, on February 2, 2017, this court signed an order to substitute the administrator of Bryant's estate, Daquan Evans (Evans), as the plaintiff of record herein (for ease of reading, this decision hereinafter refers to the decedent and her administrator collectively as "plaintiff"). *See* notice of cross motion, Linden affirmation, ¶ 3.

At her January 6, 2015 deposition, Bryant stated that, at approximately 3:30-4:00 p.m. on the day of her accident, she was standing between two parked cars on the west side of 8th Avenue, between 145th and 144th Streets, facing uptown and attempting to hail a cab, when Millien's vehicle, a yellow SUV taxi cab which had been parked just below her to the south, backed up and struck her from behind. *See* notice of motion, exhibit G at 13-15, 18-29. Bryant recounted that she did not fall, that she exchanged angry words with the SUV's male driver after the impact, and that he drove away from the scene, whereupon she called the police, who had her transported to St. Luke's hospital via ambulance. *Id.* at 29-34.

In support of his motion, Millien has presented copies of the EMS report that was

prepared by the ambulance crew, and the emergency room records that were generated at the hospital. *Id.*, exhibits C, D. The former recites that Bryant had "no injuries," and sets forth a presumptive diagnosis of "hypertensive anxiety." *Id.*, exhibit C. The latter sets forth a discharge diagnosis of "contusion of thigh," and notes that Bryant opted to leave the hospital before the emergency room staff could complete their observations, although she was given an appointment at a local community medical center for a follow-up examination in several days. *Id.*, exhibit D.

Millien has also presented reports from orthopedist Lisa Nason, MD (Dr. Nason), neurologist Jean-Robert Desrouleaux, MD (Dr. Desrouleaux) and radiologist Audrey Eisenstadt, MD (Dr. Eisenstadt). *See* notice of motion, exhibits J, K, L. Dr. Nason's report, dated January 29, 2015, states that there was no tenderness or atrophy in either of Bryant's shoulders or her lumbar or cervical spine, and that physical examination disclosed a normal range of motion in all of those areas, and sets forth the impression that the alleged injuries to those areas were all "resolved." *Id.*, exhibit J. Dr. Desrouleaux's report, also dated January 29, 2015, similarly includes findings that physical examinations of Bryant's neck and back revealed a normal range of motion in her cervical and lumbar spine, and sets forth the impression that the alleged injuries to those areas were "resolved" with "no permanence or residual effect." *Id.*, exhibit K. Both Dr. Nason's and Dr. Desrouleaux's reports recite that they did not review any of Bryant's medical records, and, instead, merely reviewed her bill of particulars. *Id.* Dr. Eisenstadt's report, dated November 19, 2015, states that she did review Bryant's September 5, 2013 MRI results, and confirms the presence of tears and certain "deformities" in Bryant's shoulders, but concludes that these are the result of "developmental and degenerative changes," and that they have "no traumatic etiology." *Id.*, exhibit L.

In opposition, Plaintiff has presented copies of Bryant's follow up treatment reports at Gerard Avenue Medical, P.C., which she visited on seven occasions between July 2013 and March 2014, and where she was seen by physicians Sonia Armengol, MD (Dr. Armengol) and M. Sobin, MD (Dr. Sobin), and physiatrist Hadassah Orenstein, MD (Dr. Orenstein). *See* Linden affirmation in opposition, exhibits B, E. Dr. Armengol's final report, dated May 2014, recites all of the diagnostic tests that were performed on Bryant over her several visits, notes that she had pain in both shoulders and a decreased range of motion in her cervical and lumbosacral spine. *Id.*, exhibit B. Dr. Armengol diagnosed these as being caused, respectively, by shoulder derangement and tendon tears, and by spinal disc bulges, herniations and compression fractures. *Id.* Dr. Armengol concluded with the opinion that Bryant's injuries were causally related to the July 7, 2013 accident, and that they constitute a "permanent partial and significant loss of use and function" of Bryant's shoulders and back. *Id.* Dr. Sobin's treatment records show that he performed some of the diagnostic tests that Dr. Armengol referred to in her final report. *Id.*, exhibit E. Dr. Sobin's test results specifically show that Bryant had a below normal range of motion in both of her shoulders and in her cervical and lumbar spine. *Id.* Dr. Orenstein's treatment records disclose that she performed other of the diagnostic tests that Dr. Armengol referred to in her final report. *Id.* Dr. Orenstein's test results showed that Bryant had a positive result for pain radiating from her shoulders and back into her extremities. *Id.*

Plaintiff has also presented a copy of the report detailing the results of four MRI tests that were performed on Bryant in September 2013 by radiologist Karl L. Hussman, MD (Dr. Hussman). *See* Linden affirmation in opposition, exhibit C. Dr. Hussman's report contains the impressions of tendon tears in both of Bryant's shoulders, of a disc herniation in Bryant's lumbar

spine, and of disc herniations and bulges in Bryant's cervical spine. *Id.*

Finally, plaintiff has presented a copy of a report by Bryant's treating orthopedist, Thomas Scilaris, MD (Dr. Scilaris), and copies of records of the arthroscopic surgeries which were performed by Dr. Scilaris and his partner, orthopedic surgeon David Capiola, MD (Dr. Capiola). *See* Linden affirmation in opposition, exhibits A, D. Dr. Scilaris's report, dated February 16, 2017, includes a summary of those surgeries, which took place on October 8, 2013 and January 13, 2014, respectively. *Id.*, exhibit A. Dr. Scilaris's report states that the object of the surgeries was to repair rotator cuff tears in Bryant's shoulders, and recounts that Bryant's post-surgical physical examinations revealed decreased ranges of motions in both shoulders. *Id.* Dr. Scilaris's report sets forth the opinion that Bryant suffered "bilateral shoulder injuries" as a result of the July 7, 2013 automobile impact, that those injuries rendered her "unable to fully perform her usual and customary daily activities," and that they were "permanent," even after surgical intervention. *Id.*

DISCUSSION

The "damages" component of Bryant's negligence claims is predicated on the allegation that she suffered a "serious injuries," as defined in Insurance Law § 5102 (d). That statute provides, in pertinent part, as follows:

> "'Serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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."

"To prevail on a [threshold] motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a serious injury" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011] [internal quotation marks and citations omitted]). Once defendant meets its initial burden, plaintiff must then demonstrate a triable issue of fact as to whether s/he sustained a serious injury within the meaning of Insurance Law § 5102 [d] (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]).

Millien's motion includes several arguments as to why Bryant's injuries do not meet any of the above classifications and, thus, cannot be considered "serious." Before reviewing those arguments, however, the court must address plaintiff's opposition claim that Millien has failed to meet his burden of proof on any of them, because his underlying evidence is legally deficient. *See* Linden affirmation in opposition, ¶¶ 27-29. Plaintiff cites the holding of the Appellate Division, First Department, in *Shumway v Bungeroth* (58 AD3d 431, 431 [1st Dept 2009]), which affirmed a trial court's dismissal of a defendant's summary judgment motion on the ground that the defendant's medical expert had "reviewed only the police accident report and the bill of particulars, and did not address any of plaintiff's medical records." Plaintiff then notes that the reports of two of Millien's experts, Drs. Nason and Desrouleaux, both specifically state that they only reviewed her bill of particulars, but no medical records. *See* Linden affirmation in opposition, ¶ 29. Plaintiff argues that this failure mandates the same result as in *Shumway*; i.e., dismissal of Millien's motion. *Id.* Millien replies that the failure to review medical records is not, in and of itself, fatal to a defendant's motion. *See* Nosowitz reply affirmation, ¶ 7. After reviewing the pertinent case law, the court agrees with Millien. In *Clemmer v Drah Cab Corp.* (74 AD3d 660, 660-661 [1st Dept 2010]), the First Department specifically found that "[t]he

failure of defendants' medical experts to discuss plaintiff's medical records . . . does not require denial of defendants' motion," where "defendants' [expert] detailed the specific objective tests he used in his personal examination of plaintiff." Here, Drs. Nason's and Desrouleaux's reports set forth similar data on the physical examinations that they conducted on Bryant. *See* notice of motion, exhibits J, K. The court finds that this is sufficient to defeat plaintiff's opposition argument and to meet Millien's initial burden of proof. The court also notes that Millien's other expert, Dr. Eisenstadt, did review the MRI report that was generated at the time of Bryant's accident. *Id.*, exhibit J. This, too, has been held to be sufficient to meet a defendant's burden of proof. *See e.g. DeJesus v Paulino*, 61 AD3d 605, 607 (1st Dept 2009). Therefore, the court rejects plaintiff's initial opposition argument, and turns its attention to Millien's various dismissal arguments.

First, Millien cites the First Department's holding in *Kester v Sendoya* (123 AD3d 418, 418 [1st Dept 2014]) that "[a]bsent any evidence of contemporaneous, postaccident treatment or evaluation of plaintiff's shoulder, she failed to raise an issue of fact as to whether her shoulder condition was causally related to the accident." Millien then argues that, similarly, there is no such evidence here. *See* notice of motion, Nosowitz affirmation, ¶ 24-25. Millien is incorrect. Although the police report and the emergency room records do not contain any statements regarding traumatic injury, the treatment reports of plaintiff's experts, Drs. Armengol, Sobin and Orenstein, all *do* contain statements that Bryant suffered traumatic injuries to her shoulders and back, and that those injuries were causally related to her July 7, 2013 accident. *See* Linden affirmation in opposition, exhibits D, E. Further, Bryant began treatment with those experts within a month after her accident; i.e., contemporaneously. *Id.* This evidence is sufficient to

defeat Millien's "absence of trauma" argument.

Millien next argues that Bryant's injuries are not "serious" because they do not fall into any of the five statutory classes of "serious injuries" that she specified in her bill of particulars. *See* notice of motion, Nosowitz affirmation, ¶¶ 26-32. The court notes that plaintiff's opposition papers do not raise any argument with respect to the first and second of these categories - "fractures" and "permanent loss of use of a body organ, member, function or system." The court thus concludes that plaintiff has abandoned its reliance on those classifications, and turns its attention to the remaining three.

With respect to injuries alleged to constitute a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," the Court of Appeals held, in *Toure v Avis Rent A Car Sys.* (98 NY2d 345 [2002]), as follows:

> "For these two statutory categories, we have held that '[w]hether a limitation of use or function is "significant" or "consequential" (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part.' While [plaintiff's doctor's] affirmation does not ascribe a specific percentage to the loss of range of motion in plaintiff's spine, he sufficiently describes the 'qualitative nature' of plaintiff's limitations 'based on the normal function, purpose and use of the body part.' [Plaintiff's doctor] further attributes the limitations in plaintiff's physical activities to the nature of the injuries sustained by opining that plaintiff's 'difficulty in sitting, standing or walking for any extended period of time and his inability to lift heavy boxes at work are a natural and expected medical consequence of his injuries.'
>
> "We cannot say that the alleged limitations of plaintiff's back and neck are so 'minor, mild or slight' as to be considered insignificant within the meaning of Insurance Law § 5102 (d). As our case law further requires, [plaintiff's doctor's] opinion is supported by objective medical evidence, including MRI and CT scan tests and reports, paired with his observations of muscle spasms during his physical examination of plaintiff. Considered in the light most favorable to plaintiff, this evidence was sufficient to defeat defendants' motion for summary judgment."

98 NY2d at 353 (internal citations omitted). Here, Millien correctly argues that "by finding no current limitations, and also normal results on a variety of objective clinical tests, defendant's doctors . . . ruled out any basis" for reliance on these classifications. *See* notice of motion, Nosowitz affirmation, ¶ 30. Millien is also correct that "positive MRI results" and "the mere presence of tears, bulges and/or surgical treatment," by themselves, are legally insufficient evidence to meet the "serious injury" threshold. *Id.*, ¶¶ 27-28. Therefore, Millien has met his prima facie burden of establishing that Bryant did not suffer a serious injury as defined by Insurance Law § 5102 (d).

Plaintiff created an issue of fact through the reports of Drs. Armengol and Scilaris who both set forth the opinion that Bryant's back and shoulder injuries were "permanent." *See* Linden affirmation in opposition, ¶ 52; exhibits A, B. Further, in addition to Bryant's MRI results (which showed shoulder tendon tears) and her physical examination findings (of spinal disc bulges and herniations), the reports of Drs. Armengol and Scilaris specifically set forth, respectively, the degree to which the range of motion in Bryant's back was below normal, and the percentage of loss of use of Bryant's shoulder function. *Id.*, ¶ 56; exhibits A, E. This medical evidence is sufficient to satisfy the *Toure* requirements, discussed above, and to raise a triable issue of fact as whether Bryant suffered a "serious injury" categorized as a "permanent consequential limitation" and/or "significant limitation." Because plaintiff has met its evidentiary burden, the court reject's Millien's argument that plaintiff cannot base Bryant's negligence claim on either of these two categories. Therefore, the court finds that Millien's motion should be denied with respect to plaintiff's reliance on those portions of Insurance Law § 5102.

The final classification of "serious injuries" are those "medically determined," "non-permanent" injuries or impairments "which prevent[] 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 underlying accident. Insurance Law § 5102 (d). Millien asserts that Bryant only missed two days of work after her accident. *See* notice of motion, Nosowitz affirmation, ¶ 31. Plaintiff responds that the 180-day period after Bryant's July 7, 2013 accident expired on January 3, 2014. *See* Linden affirmation in opposition, ¶ 61. Plaintiff then states that Drs. Scilaris and Capiola provided Bryant with disability letters that certified her as incapacitated from September 23, 2013 through February 11, 2014 - a total of 141 days - and presents their medical reports, which attest to this fact. *Id.*, exhibit A. The court notes that a doctor's "general statement" regarding a plaintiff's disability has been held insufficient to raise a triable issue of fact as to the 90/180-day category of "serious injuries." *See e.g. Zambrana v Timothy*, 95 AD3d 422, 423 (1st Dept 2012); *Blake v Portexit Corp.*, 69 AD3d 426, 426-427 (1st Dept 2010). Nor is the mere fact of a plaintiff's having missed more than 90 days of work after an accident determinative of a claim. *See Bailey v Islam*, 99 AD3d 633, 634 (1st Dept 2012), citing *Uddin v Cooper*, 32 AD3d 270, 271 (1st Dept 2006). However, "objective medical evidence," including some description of limitations on a plaintiff's daily activities apart from the mere inability to return to work, is, presumably, sufficient. *See e.g. Fernandez v Niamou*, 65 AD3d 935, 936 (1st Dept 2009); citing *Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 557 (1st Dept 2009). Here, Drs. Scilaris and Capiola prepared several certificates stating that Bryant was "totally incapacitated," as a result of surgery that required her to wear a brace and/or a sling and to attend physical therapy, and that specified

that she was not to perform any lifting upon her return to work. *See* Linden affirmation in opposition, exhibit D. Although the above mentioned case law has found individual statements, such as these, to be insufficient, the court is of the opinion that, taken together and supplemented by her doctors' sworn affidavits, these medical records contain sufficient evidence that Bryant was curtailed from performing her usual and customary activities for the requisite amount of time after her accident. Therefore, the court finds that plaintiff has met its burden of proof and raised a triable issue of fact with respect to its reliance on the 90/180-day category of "serious injuries" for her negligence claim. Accordingly, the court also finds that Millien's motion should be denied, insofar as it seeks summary judgment dismissing so much of her claim as is based on that portion of Insurance Law § 5102.

DECISION

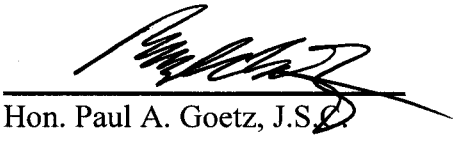
ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR § 3212, of defendant Jean Claude Millien for summary judgment to dismiss the complaint is DENIED; and it is further

ORDERED that the parties are direct to appear for a settlement conference in Part 22 at 80 Centre Street, Room 136 on February 20, 2018, at 9:30 .am.

Dated: New York, New York
January 12, 2018

ENTER:



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