

**Denton v Samuels**

2019 NY Slip Op 34657(U)

September 19, 2019

Supreme Court, Bronx County

Docket Number: Index No. 20054/2017E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX - PART IA-14

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ROSALIND DENTON,

Plaintiff,

- against -

INDEX NO:  
20054/2017E

DEVARON N. SAMUELS, CHRISTOPHER M.  
COATS, and HAZRAH A. WIGGINS,

DECISION & ORDER

Defendants.

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Plaintiff commenced this action to recover damages for personal injuries she allegedly sustained as a result of a June 25, 2016 motor vehicle accident. Plaintiff claims that she suffered injuries to the cervical and lumbar aspects of her spine and her right shoulder, and that those injuries satisfied one or more of the following Insurance Law § 5102(d) threshold categories: permanent consequential limitation, significant limitation and 90/180-day injury.

Defendant Wiggins seeks summary judgment dismissing the complaint as against her and the cross claims against her on the ground that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102(d). In support of her motion, defendant Wiggins submits, among other things, plaintiff’s deposition testimony and the affirmation of an orthopedic surgeon, Dr. Nason, who examined plaintiff at the moving defendant’s behest.

With respect to her deposition testimony, plaintiff testified, in relevant part, that she missed four months of work at her office job as a result of the accident. She also testified that, as a result of the accident, she was confined to her home (other than to visit doctors’ offices for treatment) for the same four-month period.

With regard to Dr. Nason’s examination of plaintiff, that examination occurred on April 5, 2018, approximately 21 months after the accident. Dr. Nason took range-of-motion measurements of the cervical and lumbar aspects of plaintiff’s spine and plaintiff’s right shoulder using a goniometer, finding that

plaintiff had normal or near-normal ranges of motion in all tested planes of motion. Additionally, Dr. Nason performed various specified objective provocative tests on the affected body parts, which tests yielded negative results. Dr. Nason concluded that plaintiff sustained resolved sprain and contusion injuries, and commented that plaintiff had degenerative conditions in her spine.

Defendants Samuels and Coates cross-moved for summary judgment on the “serious injury” issue on the same argument and evidence submitted by defendant Wiggins.

Plaintiff opposed the motion and cross motion, arguing that defendants failed to make a prima facie showing of entitlement to judgment as a matter of law because Dr. Nason found limitations in two planes of motion. Alternatively, plaintiff contended that her evidence raises triable issues of fact.

Plaintiff submitted the detailed affirmation of one of her treating physicians, Dr. Abramov. That physician averred that he is “a medical doctor duly licensed to practice medicine in the State of New York,” and that he is “affiliated with Interventional Physical Medicine and Rehabilitation.” That medical practice began providing treatment to plaintiff for claimed injuries on July 5, 2016. A Dr. Tu treated plaintiff on that date and several subsequent dates. Dr. Tu’s affirmed medical reports and the disability certificates he issued to plaintiff are included in plaintiff’s opposition papers. Dr. Abramov did not examine plaintiff until February 1, 2017; Dr. Abramov’s review of plaintiff’s treatment at Interventional Physical Medicine is based on Dr. Tu’s affirmed reports and disability certificates.

According to Dr. Tu’s affirmed reports, he took range-of-motion measurements of plaintiff right shoulder and the cervical and lumbar aspects of her spine using a goniometer. Dr. Tu found substantial restrictions in motion in plaintiff’s right shoulder on July 5, 2016 and August 8, 2016, and substantial restrictions in motion in the cervical and lumbar aspects of the spine on August 8, 2016. In his reports of July 5, 2016 and August 8, 2016, Dr. Tu causally related plaintiff’s right shoulder and cervical and lumbar spine injuries to the June 25, 2016 motor vehicle accident. The disability certificates issued by Dr. Tu (dated July 5, 2016, August 8, 2016, September 19, 2016 and October 31, 2016) deemed plaintiff disabled and unable to work until November 21, 2016.

Dr. Abramov examined plaintiff on February 1, 2017. Dr. Abramov took range-of-motion measurements of the cervical and lumbar aspects of plaintiff’s spine using a goniometer, finding substantial restrictions in motion. Dr. Abramov

reevaluated plaintiff on April 5, 2017 and May 31, 2017; as of the May 31 examination, substantial range-of-motion restrictions persisted in the cervical and lumbar spine. Following additional office visits, Dr. Abramov examined plaintiff on November 14, 2018. At that time, Dr. Abramov found continuing substantial restrictions in motion in the cervical and lumbar aspects of plaintiff's spine. In addition to causally relating plaintiff's injuries to the accident and specifically addressing the subject of whether degeneration caused, to any degree, plaintiff's claimed injuries (Dr. Abramov concluded that preexisting degenerative conditions were not a "contributing factor" in causing plaintiff's claimed injuries), Dr. Abramov opined that plaintiff's injuries to the cervical and lumbar aspects of her spine are permanent, and attested that plaintiff had a gap in treatment because further treatment would have been merely palliative in nature.

In reply, defendant Wiggins argued, among other things, that her expert (Dr. Nason) found full ranges of motion in all measured planes save for two – cervical spine extension and lumbar spine rotation – and that the limitations she found on those two planes are minor or slight. Thus, Dr. Nason's affirmation is sufficient to discharge defendant Wiggins' prima facie burden. Dr. Wiggins contended that Dr. Abramov's affirmation lacks probative force (and therefore does not raise a triable issue of fact) because Dr. Abramov, an internist, provided opinions regarding orthopedic, physiatric and radiological matters, but he did not provide a "foundation" for his opinions. That is to say, Dr. Abramov did not demonstrate a sufficient familiarity with the areas of practice of orthopedics, physiatry and radiology. Finally, defendant Wiggins complained that plaintiff did not disclose the disability certificates issued by Dr. Tu prior to summary judgment practice and that the court should not consider them. Defendant Wiggins noted, too, that the disability certificates are not affirmed.

Defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff's claims of "serious injury" under the categories of permanent consequential limitation and significant limitation. As discussed above, Dr. Nason examined plaintiff in April 2018. Dr. Nason took range-of-motion measurements using a goniometer, finding full ranges of motion in three of the six tested planes of motion in the cervical spine, full ranges of motion in the six tested planes of motion in the lumbar spine, and full ranges of motion in the six tested planes of motion in the right shoulder. The restrictions in motion in the cervical spine – 17% in extension, 6% in right rotation and 6% in left rotation – are neither consequential nor significant within the meaning of Insurance Law §

5102(d) (*see Sone v Qamar*, 68 AD3d 566 [1st Dept 2009]). Moreover, Dr. Nason performed various specified objective provocative tests on the relevant body parts, which tests yielded negative results. Dr. Nason's affirmation was therefore sufficient to discharge defendants' prima facie burdens.

In opposition, plaintiff raised triable issues of fact as to her claims of "serious injury" insofar as they are premised on injuries to the cervical and lumbar aspects of her spine. Plaintiff submitted evidence – Dr. Tu's affirmed medical reports – that demonstrate that she received medical treatment for her claimed injuries "contemporaneously" with the subject motor vehicle accident. Dr. Abramov took range-of-motion measurements of the cervical and lumbar aspects of plaintiff's spine using a goniometer beginning on February 1, 2017, taking additional range-of-motion measurements on various dates through November 14, 2018, finding substantial, persisting restrictions in motion in both aspects of the spine. Dr. Abramov causally related plaintiff's claimed injuries to the subject motor vehicle accident, and opined that those injuries are permanent. Also, Dr. Abramov specifically addressed defendant Wiggins' argument and Dr. Nason's opinion that plaintiff's cervical and lumbar spine injuries could be attributable to degenerative changes.

Defendant Wiggins' contention that Dr. Abramov's affirmation is without probative force because he did not establish a "foundation" for his opinions is without merit. An expert witness must possess sufficient skill, training, education, knowledge or experience from which it may be inferred that the information the expert imparts and any opinion the expert gives are reliable (*Matott v Ward*, 48 NY2d 455 [1979]). A medical expert need not be a specialist in a particular field in order to testify regarding matters in that field (*Forte v Weiner*, 200 AD2d 421 [1st Dept 1994]); however, where a physician offers opinions regarding a specialized area of practice in which the physician is not a specialist, the physician must lay a "foundation" for his or her opinions, i.e., demonstrate that he or she possesses the requisite skill, training, education, knowledge or experience from which it may be assumed that the opinions are reliable.<sup>1</sup>

Dr. Abramov's affirmation discloses that he is a physician who is licensed to practice medicine in the State of New York, and that he is affiliated with

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<sup>1</sup> This principle is largely a product of medical malpractice litigation. The court assumes for the purposes of determining this motion and cross motion, that the principle applies outside of the medical malpractice context.

Interventional Physical Medicine and Rehabilitation; defendant Wiggins noted in reply that Dr. Abramov is an internist. In his affirmation, Dr. Abramov provided opinions relating to the following areas of medicine: radiology, physiatry and orthopedics. Notably, an internist – a physician who practices internal medicine -- is a generalist (*see* Pegalis, *American Law of Medical Malpractice*, § 15:2 [3d ed]), and the subjects on which Dr. Abramov offered opinions appear to relate to general medicine. Ultimately, given the procedural posture of this action, the information available to the court regarding Dr. Abramov’s qualifications and the nature and scope of the opinions Dr. Abramov has provided, it may be reasonably inferred that Dr. Abramov’s opinions are reliable (*see generally Ocasio-Gary v Lawrence Hosp.*, 69 AD3d 403 [1st Dept 2010]).

Regarding defendant Wiggins’ reply argument that plaintiff failed to disclose Dr. Tu’s disability certificates prior to summary judgment practice, and that the court therefore should not consider them, the court does not have before it sufficient information to determine whether plaintiff failed to disclose the disability certificates and, if she did fail to do so, what CPLR 3126 remedy, if any, is appropriate. Defendants are free to move for relief under CPLR 3126 with respect to the disability certificates.

Defendant Wiggins correctly observes that the disability certificates are not affirmed or otherwise sworn to. However, that they are not affirmed does not mean that they are inadmissible at this juncture. The unaffirmed disability certificates are hearsay, and hearsay may be considered for the limited purpose of determining whether a triable issue of fact exists on a summary judgment motion, provided the hearsay is not the only evidence submitted by the party opposing summary judgment. Dr. Tu’s disability certificates are not the only evidence upon which plaintiff relied – she submitted Dr. Tu’s affirmed medical reports and the affirmation of Dr. Abramov.

Dr. Abramov’s affirmation raises a triable issue of fact as to whether plaintiff has a reasonable explanation for her gap in treatment – that she reached maximum medical improvement.

Plaintiff did not raise a triable issue of fact as to her claims of “serious injury” insofar as they are premised on injuries to her right shoulder. Plaintiff offered no objective quantitative or qualitative findings regarding the right shoulder after August 8, 2016; Dr. Abramov offered no objective findings regarding plaintiff’s right shoulder. Therefore, plaintiff failed to offer sufficient

evidence suggesting that she sustained a permanent consequential limitation or significant limitation injury to her right shoulder.<sup>2</sup>

With regard to plaintiff's claim under the 90/180-day injury category, defendants failed to make a prima facie showing of entitlement to judgment as a matter of law dismissing that claim. Defendants offered no medical evidence addressing plaintiff's claimed injuries during the six months immediately following the motor vehicle accident, and neither plaintiff's bill of particulars nor her deposition testimony undermine the 90/180-day claim. Notably, both the bill of particulars allegations relating to plaintiff's post-accident confinement and lost time from work, and plaintiff's deposition testimony, support plaintiff's assertion that her claimed injuries prevented her from performing substantially all of the material acts constituting her usual and customary daily activities for at least 90 of the 180 days immediately following the accident.

Accordingly, it is hereby ORDERED that the aspects of the motion and cross motion seeking dismissal of plaintiff's claims of "serious injury" under the categories of permanent consequential limitation and significant limitation insofar as they are premised on injuries to her right shoulder are granted, and those claims are dismissed; and it is further,

ORDERED that the motion and cross motion are otherwise denied.

The parties are reminded of the September 23, 2019 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Date: September 19, 2019

Bronx, NY

  
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Hon. John R. Higgitt  
Acting Supreme Court Justice

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<sup>2</sup> The court notes that if it is found that plaintiff sustained any injury that constitutes a "serious injury," plaintiff is entitled to recover damages for any other injury causally related to the accident (*see Singer v Gae Limo Corp.*, 91 AD3d 526 [1st Dept 2012]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]; *see also Linton v Nawaz*, 14 NY3d 821 [2010]).