

Novembre v Punnoose
2020 NY Slip Op 31169(U)
April 16, 2020
Supreme Court, Kings County
Docket Number: 516018/2018
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

_____X

JASMINE NOVEMBRE AND WOODNICA EDMOND,

Plaintiffs,

-against-

**GEORGE J. PUNNOOSE, ANCY G. PUNNOOSE,
FRANKY PHILIDOR and KEVIN CADET,**

Defendants.

_____X

DECISION / ORDER

**Index No. 516018/2018
Motion Seq. No. 1
Date Submitted: 2/27/20
Cal No. 34**

***Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants
George J. Punnoose and Ancy G Punnoose’s motion for summary judgment.***

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>13-24</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>37-40</u>
Reply Affirmation.....	<u>42-43</u>

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

This is a personal injury action arising out of a motor vehicle accident that took place on November 29, 2017 on Jericho Turnpike at the intersection with North 2nd Street in Nassau County, NY. Plaintiffs were passengers in a vehicle owned by defendant Kevin Cadet and operated by defendant Franky Philidor. The other vehicle was owned by defendant Ancy G. Punnoose and operated by defendant George J. Punnoose. Defendants Ancy G. Punnoose and George J. Punnoose move for summary judgment dismissing the complaint and any cross claims against them, contending that plaintiffs did not sustain “serious injuries” from the accident, as defined by Insurance Law § 5102(d). The co-defendants did not oppose the motion.

Defendants support their motion with an attorney's affirmation, the pleadings, plaintiffs' deposition transcripts and affirmed reports from an orthopedist, Jeffrey Passick, M.D., who examined both plaintiffs, and a radiologist, Sheldon P. Feit, M.D., who examined the plaintiffs' MRIs.

Plaintiffs oppose the motion and counter that defendants have not met their burden of proof for summary judgment and that even if they did, plaintiffs aver they have overcome the motion and raised triable issues of fact with competent medical evidence.

Jasmine Novembre

In her Bill of Particulars, plaintiff Jasmine Novembre, who was 17 years old at the time of the accident, alleges that as a result of the accident, she sustained injuries to her lumbar and cervical spine, including a herniated disc at L5-S1 and bulging discs at C2-C3 and C3-C4, with radiculopathy. She testified at her EBT that she was confined to her home for a month and that she treated for approximately three months.

Dr. Jeffrey Passick, an orthopedist, examined plaintiff Jasmine Novembre on April 24, 2019 for defendants. He tested plaintiff's range of motion in her cervical and lumbar spine and reports that her range of motion was normal in all planes, with otherwise negative test results. Dr. Passick concludes that she sustained "resolved sprains to her cervical and lumbar spine." He states that "the exam findings are not consistent with or proportional to plaintiff's subjective complaints." He finds "no orthopedic disability and no permanent residuals."

Dr. Sheldon P. Feit, a radiologist, examined the MRIs of plaintiff Novembre's cervical spine taken on December 19, 2017, and of her lumbar spine taken on December 29, 2017. He reports that the MRIs do not indicate any evidence of "any disc bulges or focal herniations and no central canal or exit stenosis." His states that they

are normal studies, with no discernable abnormalities and therefore they show no abnormalities which are causally related to the November 29, 2017 accident.

Defendants contend that Dr. Passick's affirmed report that plaintiff had a normal orthopedic exam, with no restriction in the range of motion in her cervical or lumbar spine, combined with Dr. Feit's affirmed reports, which state that there are no abnormalities on the plaintiff's MRIs, when considered along with plaintiff Novembre's EBT testimony, demonstrate that plaintiff did not sustain an injury in any of the applicable categories of serious injury. With regard to the 90/180 category of injury, plaintiff testified at her EBT in 2019 that at the time of the accident, she had recently graduated from Erasmus High School in Brooklyn and was not working. She went to her own doctor the day after the accident, who referred her for physical therapy. She testified that she had physical therapy for three months, ending around the end of February 2018. She could not say how many times per week she went. She testified that she was confined to her home, except for medical appointments, for a month [EBT Page 49]. Plaintiff was not asked any questions at her EBT about her activities in the first six months after the accident. When plaintiff was asked "[a]re there any activities that you regularly did before this accident, in the six months before the accident, that you completely stopped doing, or that you still do today, but you do with more pain or more difficulty because of the accident?" she answered both questions "No" [Page 51].

The court finds that defendants make a *prima facie* case for summary judgment dismissing the complaint as against them. The burden of proof then shifts to the plaintiff.

Plaintiff contends defendants fail to make a *prima facie* showing of their entitlement to summary judgment and that issues of fact exist as to causation. Plaintiff

also contends that she has shown, by submission of admissible medical evidence, specifically the affirmation of Irving Friedman, M.D., that she has sustained a serious injury as a result of the subject accident. The court notes that plaintiff's papers in opposition consist solely of an attorney's affirmation, plaintiff's affidavit, and Dr. Friedman's affirmation.

Dr. Irving Friedman, a neurologist, reviewed Jasmine Novembre's medical records and examined her for the first time on December 31, 2019. As such, he is more akin to an "expert" witness, although he avers that he is her treating doctor. Dr. Friedman performed range of motion testing on plaintiff's cervical and lumbar spine, but only reports the results for some of the usual and customary tests. He found significant restrictions in the range of motion in her cervical and lumbar spine and opines that, as a result of the November 29, 2017 accident, plaintiff sustained a disc herniation at L5-S1, with radiculopathy, and post-traumatic disc bulges at C2-C3 and C3-C4. He finds she has "a significant and painful disability with localized spasm, restricted range of motion and radicular symptoms at the cervical and lumbar spine that are directly and causally related to the injuries sustained on November 29, 2017 and are permanent."

The plaintiff's submissions in opposition are insufficient to raise a triable issue of fact. Plaintiff has failed to submit any affirmations or affidavits of her treating physicians, or any medical records in admissible form indicating what treatment, if any, she received for her alleged injuries in the two-year period between the time of the accident and the examination conducted by her expert. Dr. Friedman states he reviewed her physical therapy notes but does not name the doctor or facility. Plaintiff was unable to provide the name of her treating doctor or of the physical therapy facility at her EBT. Plaintiff's expert also fails to explain the two-year gap in treatment between the accident

and his examination of plaintiff, and he fails to describe the treatment, if any, that plaintiff received for her alleged injuries during that time (see *Bruce v New York City Tr. Auth.*, 16 AD3d 608, 609 [2d Dept 2005]; *Smith v Askew*, 264 AD2d 834 [2d Dept 1999]). In addition, the neurologist partially based his conclusions on inadmissible, unsworn medical records (see *Friedman v U-Haul Truck Rental*, 216 AD2d 266 [2d Dept 1995]; (*Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992])).

Finally, his opinion that the injuries sustained by plaintiff are a direct result of the accident is completely conclusory, since he had not seen her prior to his exam two years post-accident, and thus is insufficient to raise a triable issue of fact (see *Walker v Greatheart*, 50 AD3d 893, 894 [2d Dept 2008])

With regard to the 90/180 category of injury, the plaintiff's allegations in her self-serving affidavit are insufficient to demonstrate that she sustained a medically-determined injury or impairment which prevented her from performing substantially all of the material acts constituting her normal daily activities for not less than 90 of the first 180 days following the accident (see, Insurance Law § 5102 [d]; *Rum v Pam Transp.*, 250 AD2d 751 [2d Dept 1998]). She does not provide any medical evidence from the first six months after the accident to satisfy her burden of proof.

Woodnica Edmond

In her Bill of Particulars, plaintiff Woodnica Edmond, who is co-plaintiff's cousin, and was 19 years old on the date of the accident, alleges that as a result of the accident, she sustained injuries to her left knee which required arthroscopic surgery. In addition, she claims she injured her lumbar spine, with traumatically induced herniated discs at L2-L3 and L3-L4 and bulging discs at L4-L5 and L5-S1.

Plaintiff Edmond testified at her EBT in March 2019 that she went home by taxi after the accident and went to her primary care doctor the next day. She said she hit her head on the window and her left knee hit the dashboard of the car. He referred her for physical therapy. She went for physical therapy and acupuncture for her back and physical therapy for her left knee for approximately three months after the accident, or until February 2018, and she went for a month of physical therapy for her knee after the arthroscopic surgery in April 2018. At the time of the accident, plaintiff was working at a Burger King and going to Kingsborough Community College. She testified that she stopped working and going to school after the accident because of the pain [EBT Pages 13-14]. By the time of the EBT, she had started a different job and was back in school [Page 84].

Plaintiff Edmond testified at her EBT that she was confined to her home for about six months after the accident, other than going to medical appointments. but that no doctor advised her to miss time from school or work following the accident [EBT Pages 78-79, 84].

Dr. Jeffrey Passick, an orthopedist, examined plaintiff Edmond on April 24, 2019. He tested plaintiff's range of motion and reports that she had completely normal range of motion in her lumbar spine and knee, with otherwise negative test results. Dr. Passick concludes that Edmond had sprains to her lumbar spine which had resolved and a "left knee contusion, S/P diagnostic arthroscopy, recovered." He states that plaintiff's "exam findings are not consistent with or proportional to plaintiff's subjective complaints." He finds "no evidence of sequela of injury, no orthopedic disability and no permanent residuals."

Dr. Sheldon P. Feit, a radiologist, examined the MRIs of Woodnica Edmond's left knee taken on December 19, 2017. He finds no evidence of any meniscal tears, ligamentous injury or fracture. His impression is that it was "an essentially normal study with no discernable abnormalities and therefore no abnormalities causally related to the November 29, 2017 accident." He did not review the MRI of plaintiff's lumbar spine.

Defendants contend that Dr. Passick's affirmed report of a normal orthopedic exam with full range of motion, and Dr. Feit's affirmed report, finding no abnormalities on the MRI of plaintiff's left knee, when combined with the plaintiff's MRI transcript, undercut all of the applicable categories of serious injury and make a *prima facie* case for summary judgment dismissing the complaint as against them.

Plaintiff contends the defendants fail to make a *prima facie* showing of entitlement to summary judgment and that issues of fact exist as to causation. Plaintiff contends that she has shown, through the MRIs and the range of motion limitations found by Sanford R. Wert, M.D. in his affirmation, that she sustained a serious injury as a result of the subject accident. The court notes that plaintiff's papers in opposition consist solely of an attorney's affirmation, plaintiff's affidavit, and Dr. Wert's affirmation.

The court finds that defendants make a *prima facie* case for summary judgment dismissing the complaint as against them. The burden of proof then shifts to the plaintiff.

Dr. Sanford R. Wert reviewed Woodnica Edmond's medical records and examined her for the first time on October 10, 2019. As such, he is more akin to an "expert" witness. He reports that he found quantified and significant restrictions in the range of motion in her lumbar spine and left knee and opines that Edmond sustained lumbosacral spine strain/sprain, herniated discs at L2-L3 and L3-L4, bulging discs at L4-

L5 and L5-S1, and, with regard to her left knee, hypertrophic synovitis, a torn lateral meniscus, and a condylar injury to the medial femoral condyle. He concludes that the injuries to her left knee and lower back are causally related to the November 29, 2017 accident. He finds that the decreased range of motion in the left knee and the injuries to her lower back are permanent.

The plaintiff's submissions in opposition are insufficient to raise a triable issue of fact. Plaintiff has failed to submit any affirmations or affidavits from her treating physicians, or any medical records in admissible form indicating what treatment, if any, she received for her alleged injuries in the two-year period between the time of the accident and the examination conducted by her expert. Plaintiff's expert also fails to explain the two-year gap in treatment between the accident and his examination of plaintiff, and he fails to set forth the treatment, if any, that plaintiff received for her alleged injuries during that time (*see Bruce v New York City Tr. Auth.*, 16 AD3d 608, 609 [2d Dept 2005]; *Smith v Askew*, 264 AD2d 834 [2d Dept 1999]). In addition, Dr. Wert partially based his conclusions on inadmissible, unsworn medical records (*see Friedman v U-Haul Truck Rental*, 216 AD2d 266 [2d Dept 1995]; (*Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Finally, his opinion that the injuries sustained by plaintiff are a direct result of the accident is completely conclusory, since he had not seen her prior to his exam two years post-accident, and thus is insufficient to raise a triable issue of fact (*see Walker v Greatheart*, 50 AD3d 893, 894 [2d Dept 2008])

With regard to the 90/180 category of injury, the plaintiff's allegations in her self-serving affidavit are insufficient to demonstrate that she sustained a medically-determined injury or impairment which prevented her from performing substantially all of the material acts constituting her normal daily activities for not less than 90 of the first

180 days following the accident (see, Insurance Law § 5102 [d]; *Rum v Pam Transp.*, 250 AD2d 751 [2d Dept 1998]). She does not provide any medical evidence from the first six months after the accident to satisfy her burden of proof. Further, she was directly asked at her EBT if she stopped working or stopped going to school because a doctor told her to, and she said “no.” She was also asked if she was given a doctor’s note to give to her job to show she could not come to work, and she said “no.”

In conclusion, it is

ORDERED that the motion is granted, and the complaint of both plaintiffs is dismissed as against movants Punnoose and Punnoose, as are the co-defendants’ crossclaims. The trial shall proceed with regard to damages only, against defendants Philidor and Cadet.

This constitutes the decision and order of the court.

Dated: April 16, 2020

ENTER:



Hon. Debra Silber, J.S.C.