

Sydnor v Westchester County
2020 NY Slip Op 34688(U)
April 28, 2020
Supreme Court, Westchester County
Docket Number: Index No. 68352/2015
Judge: Sam D. Walker
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To commence the statutory right time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

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SHANNEN SYDNOR and JACQUETTA SYDNOR,

Plaintiffs,

-against -

DECISION AND ORDER

Index # 68352/2015

Motion Seq. # 4

WESTCHESTER COUNTY, BURIM SYLAJ and
LIBERTY LINES TRANSIT, INC.,

Defendants.

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The following papers were read and considered in deciding the present motion:

Notice of Motion/Affirmation in Support/Exhibits A-K	1-181
Affirmation in Opposition/Plaintiff’s Affidavit/Exhibit A-F	182-542
Reply Affirmation	543-553

The plaintiffs Shannen Sydnor and Jacquetta Sydnor (“plaintiffs” and “Shannen” and Jacquetta”) commenced this action on October 18, 2015, to recover monetary damages for injuries Jacquetta allegedly sustained as a result of a motor vehicle accident (the “accident”) which occurred on March 3, 2015. Plaintiffs allege that Jacquetta suffered serious injuries to her cervical spine, lumbar spine and right shoulder.

The defendants Westchester County, Burim Sylaj and Liberty Lines Transit, Inc. (“defendants”) now file the instant motion for an order granting summary judgment against plaintiffs on the grounds that Jacquetta did not sustain a “serious injury” under NY Insurance Law 5104 (a) and 5102 (d) and her injuries are not causally related to the accident. Plaintiffs oppose the motion.

In support of their motion, defendants argue that, apart from making conclusory allegations contained in plaintiffs’ bill of particulars and deposition testimony, plaintiffs cannot demonstrate a triable issue of fact that Jacquetta has sustained a serious injury pursuant to New

York's No-Fault Law. Defendants rely on expert opinions, *inter alia*, to demonstrate that Jacquetta has not 1) suffered the permanent loss or of use or disfigurement of her cervical and lumbar spines, or in her right shoulder; 2) sustained a permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system; 3) suffered significant use of a body function or system; or 4) sustained a medical determined injury or impairment of a non-permanent nature which prevents her from performing substantially all of the material acts which constitute her usual and customary activities for at least 90 days of the 180 days immediately following the accident.

In opposition, plaintiffs contend that there is a triable issue of fact regarding the injuries to Jacquetta's cervical and lumbar spines and right shoulder. Plaintiffs argue that they have presented evidence by medical experts that 1) the injuries sustained have resulted in a permanent consequential limitation; 2) the injuries are causally related to the accident; 3) despite conservative treatment Jacquetta continues to show signs of residual inflammatory pathology involving the muscular and connective tissue structures of the lumbar and cervical spine; 4) her condition is chronic and the injuries sustained have resulted in significant and permanent alteration of the structure and biomechanical function in the lumbar and cervical spine; 5) Jacquetta has sustained a permanent partial disability involving the lumbar and cervical spine as a direct result of the accident; 6) the impact from the accident resulted in a violent injury to her neck and back; 7) the injuries and symptoms are not as a result of degeneration or a pre-existing condition; 8) as a result of the accident, Jacquetta is prevented from performing her customary daily activities for at least 90 days out of the 180 days immediately following the accident; and 9) any further physical therapy treatment would be palliative in nature and would not increase her healing and/or function.

Discussion

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law (*see Zuckerman v City of N.Y.*, 49 NY2d 557[1980]). Furthermore, the proponent of a summary judgment motion must establish the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when a showing of entitlement to judgment as a matter of law has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact, (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad, supra.*; *Cendant Car Rental Group v Liberty Mut. Ins. Co.*, 48 AD3d 397, 398 [2d Dept 2008]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901 [2d Dept 2008]).

Once the moving party has made a *prima facie* showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or

demonstrate an acceptable excuse for failing to do so (*see Zuckerman v City of N.Y., supra.*). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions (*see Sun Yau Ko v Lincoln Sav Bank*, 99 AD2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]).

The court's main function on a motion for summary judgment is issue finding rather than issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The role of the court is to determine if bona fide issues of fact exist and not to resolve issues of credibility (*see Knepka v Tallman*, 278 AD2d 811 [4th Dept 2000]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*see Stone v Goodson*, 8 NY2d 8 [1960]). In reviewing a motion for summary judgment, the court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (*see Baker v Briarcliff School Dist.*, 205 AD2d 652, 661-662 [2d Dept 1994]).

Defendants submit, *inter alia*, the following to demonstrate that Jacquetta did not sustain a serious injury under the definition of the statute: 1) medical report of Dr. Ronald L. Mann dated August 9, 2019 ("Mann Report" - Defs' Ex. D); 2) Emergency Room report dated March 3, 2015 ("ER Report" - Defs' Ex. E); 3) Empress Ambulance Services Report dated March 3, 2015 ("Empress Report" - Defs' Ex. F); 4) John Iozzo, D.C., L.Ac Report dated August 25, 2015 ("Iozzo Report" - Defs' Ex. G); 5) Aleksandr Khaimov, D.O. Report dated December 16, 2015 ("Khaimov Report" - Defs' Ex. H); 6) MRI Report from Hudson Valley Radiology Associates dated May 22, 2014 ("MRI Report" - Defs' Ex. I); 7) Jonathan Holder, MD Report dated July 2, 2014 ("Holder Report" - Defs Ex. J); and Kevin K. Toosi, MD Report dated August 29, 2019 ("Toosi Report" - Defs Ex. K).

The independent medical examinations of Dr. Mann and Dr. Iozzio demonstrate that Jacquetta did not sustain a total loss of use of a body organ or member. In August 2019, Dr. Mann examined Jacquetta. In his affidavit, Dr. Mann states that he reviewed Jacquetta's medical records. Dr. Mann observed ranges of motion in all of the body parts Jacquetta complains of injury. Mann's findings indicate that Jacquetta does retain use of her cervical spine, lumbar spine, and right shoulder. Dr. Mann further concluded that plaintiff had "no disability related to the subject accident" and that she is "able to do activities of daily living and self-care." The report of the examination of Dr. Mann dated August 9, 2019 states that, after a physical examination of Jacquetta following a review of her medical records, Dr. Mann determined that her cervical and lumbar strains/sprains and her strain/sprain to her right shoulder were resolved and that Jacquetta has use of all body parts she complains were injured in the accident (Defs' Ex. D). Dr. Mann's examination included range of motion testing in his examination. Dr. Mann opines that Jacquetta has "no disability related to the subject accident" and that she is "able to do activities of daily

living and self care” (*id.*).

Moreover, as early as August 2015, Dr. John Iozzio’s chiropractic examination of the plaintiff revealed “no evidence of a disability” and that she was capable of performing “her activities of daily living and may seek employment without restrictions or limitations.” Dr. Iozzo noted that “treatment [post August 2015 would no longer be] medically necessary and further treatment would be excessive.” In his chiropractic examination, Dr. Iozzio found “no evidence of disability” and plaintiff no longer needed medical treatment. These medical opinions were later confirmed in December 2015 by Dr. Aleksandr Khaimov who noted that based on his objective physical evaluation “there is no evidence [of] orthopedic disability” and opined that Jacquetta “may work and perform activities of daily living without restrictions.” Thus, any injuries plaintiffs claim that Jacquetta sustained in the accident had resolved at least as early as August 2015. Defendants have demonstrated *prima facie* that Jacquetta’s injuries are not permanent and they are not significant. Defendants further demonstrate this point by submitting Jacquetta’s records from the emergency room immediately following the accident. Jacquetta’s treating medical providers in the emergency department at St. John’s Riverside Hospital described the accident as a “minor MVA”, and further discharged plaintiff with a final diagnosis of “muscle strain”, noting the severity to be “moderate”. The reports of defendants’ experts repeatedly state that plaintiff’s injuries have consistently been characterized as “sprains” or “strains” at different times and on multiple occasions from the date of the accident to the date of Dr. Mann’s examination. Sufficient evidence has been submitted by defendants that demonstrate Jacquetta’s range of motion in her cervical spine, lumbar spine, and right shoulder as early as August 25, 2015 was within normal ranges. The range of motion tests conducted by Dr. Mann did reveal some loss of range of motion, however Dr. Mann attributed any loss to Jacquetta’s back or shoulder to Jacquetta’ age and a prior shoulder injury.

Based upon the foregoing the Court finds that defendants have demonstrated *prima facie* entitlement to summary judgment as to whether Jacquetta sustained a total loss of use of a body organ or member or sustained a permanent consequential limitation of use of a body organ or significant limitation of use of a body function or system (*see Lim v Flores*, 96 AD3d 723 [2d Dept 2012]).

The Court now turns to whether plaintiffs have presented evidence creating a triable issue of fact that Jacquetta sustained a serious injury. In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an inquiry that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of the No-Fault Law (*see Toure v Avis Rent A Car Sys., Inc., supra; Scheer v Koubek*, 70 NY2d 678, 679 [1987]).

In opposition, plaintiffs argue that the motion for summary judgment should be denied because Jacquetta clearly sustained a “serious injury” within the meaning of Insurance Law 5102

but, at the very least, genuine issues of material fact exist. Plaintiffs submit, *inter alia*, the following to demonstrate that Jacquetta sustained a serious injury under the definition of the statute: 1) affirmation of Joel M. Rubenstein, Esq. dated January 21, 2020 (“Rubenstein Aff.”); 2) affidavit of Jacquetta Sydnor sworn to January 20, 2020 (“Plf. Aff.”); 3) Empress Ambulance Services Report dated March 3, 2015 (“Empress Report” – Plfs’ Ex. A); 4) St. John’s Riverside Hospital Therapy dated November 1, 2019 (“St. John’s Report – Plfs’ Ex. B); 5) Report of Dr. Gautam Khakhar, M.D. dated January 20, 2020 (“Khakhar Report – Plfs’ Ex. C); 6) Multi-Specialty Pain Management, P.C. report dated December 19, 2019 (“Pain Management Report” – Plfs’ Ex. D); 7) Stand-Up MRI of Yonkers Report dated March 22, 2015 (“MRI Report” – Plfs Ex. E).

Plaintiffs demonstrate evidence of their opposition by claiming that as a result of the accident Jacquetta was taken to St. John’s Riverside Hospital complaining of back pain, generalized pain and weakness. She repeated those complaints at the hospital where she was treated and released from the emergency room and prescribed cyclobenzaprine and naproxen for pain. Plaintiffs state that Jacquetta began treatment and rehabilitation on March 19, 2015. Range of motion measurements and a physical examination were performed and Jacquetta was determined to be partially disabled. Jacquetta began a course of physical therapy that lasted for approximately 12 months. On March 21, 2015, Jacquetta underwent an MRI of her right shoulder which revealed post rotator cuff repair with evidence of postsurgical changes and a re-tear of both supraspinatus and infraspinatus tendons. Plaintiffs contend that Jacquetta began treating with orthopedic surgeon Emmanuel Hostin, M.D. on April 9, 2015. On April 16, 2015 Jacquetta’s ranges of motion were again tested and measured. It was recommended that an MRI be taken of her cervical and lumbar spine and that she continue physical therapy and follow up with her orthopedic doctor. On April 28, 2015, Jacquetta underwent an MRI of her cervical and lumbar spines. According to the medical reports, her cervical spine and her lumbar spine revealed disc herniations and bulges. On June 18, 2015, Jacquetta was again examined. She was complaining of neck and low back pain with radiating pain. She also complained of reported difficulties with bending and twisting activities. A physical examination of Jacquetta’s thoracic spine demonstrated tenderness to palpitation along paraspinal muscles. A range of motion test was conducted and at the end of such examination, it was recommended that an MRI be done of Jacquetta’s thoracic spine along with continued physical therapy and pain management. Jacquetta was prescribed a cane for gait abnormality.

Plaintiffs claim that Jacquetta had an initial Pain Management Evaluation on June 29, 2015 wherein she complained of neck and back pain. A range of motion test was performed and at the end of the examination, a lumbar epidural steroid injection for her lumbar spine was recommended. It was also recommended that she continue with conservative pain management. The results of an MRI taken on July 10, 2015 revealed disc herniations and bulges. On July 30, 2015, at a further physical examination Jacquetta complained of neck and back pain with difficulty bending and twisting. Physical therapy was recommended.

Plaintiffs demonstrate that on August 3, 2015, Jacquetta was experiencing a constant sharp aching pressure pain 10/10 in intensity that she described at her initial pain management exam at Multi-Specialty Pain Management (“MSPM”). The examination showed tenderness over the lesser and greater occipital nerves, limited range of motion and spasms to touch. Plaintiffs further contend that a EMG/NCV study performed on August 6, 2015 objectively revealed evidence of left-sided L5 and right-sided C6 radiculopathy. Plaintiffs argue that a physical examination on September 25, 2015 revealed no improvement and after the examination it was recommended that Jacquetta continue physical therapy, and a follow up with orthopedics, pain management and a spine specialist. On October 28, 2015, Jacquetta was experiencing the same symptoms and it was recommended that she continue physical therapy.

Plaintiffs submit evidence of her most recent physical examination on November 20, 2019 wherein range of motion measurements were performed. The examination revealed tenderness of the cervical and lumbar spine with less than normal extensions and tenderness, painful range of motion, impingement and no subluxation of the right shoulder. Plaintiffs’ examined Jacquetta and made very specific findings as to range of motion based upon objective, quantitative proof as to the extent of plaintiff’s physical limitations, designating a numeric percentage of loss of range of motion (*see Caliendo v Ellington*, 104 AD3d 625 [2d Dept 2013]; *Trezza v Metropolitan Tr. Auth.*, (113 AD3d 402 [1st Dept 2014], lv dismissed 23 NY3d 1011 [2014]).

Based upon the foregoing, the Court finds that plaintiffs have raised a triable issue of fact regarding whether judgment as to whether Jacquetta sustained a total loss of use of a body organ or member or sustained a permanent consequential limitation of use of a body organ or significant limitation of use of a body function or system.

The Court now turns to whether defendants are entitled to summary judgment on plaintiffs’ claim of serious injury under the 90/180 category. Defendants’ argument that plaintiffs do not meet the 90/180 category threshold is unavailing, and therefore, defendants have failed to meet their *prima facie* burden to demonstrate entitlement to summary judgment. No-Fault Law requires that plaintiffs demonstrate that injuries prevented Jacquetta from performing substantially the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury and that her disability was a medically determined injury of a non-permanent nature. Defendants’ contention that Jacquetta suffered only “minor curtailments” of her daily customs and activities is not established by the evidence. Defendants’ reliance on Jacquetta’s bill of particulars that she was only confined to bed for 2 days and confined to her home for 3-4 days after the accident is misplaced. Confinement to bed or home consist of only one consideration for the 90/180 category. Jacquetta testified at her deposition that she was retired at the time of the accident. Her usual and customary activities included activities

involving household duties such as cleaning, cooking, washing the dishes, walking, lifting objects, bending, sitting and laying down. Jacquetta testified that she was prevented from performing those activities. Defendants offer no evidence to refute Jacquetta's contentions regarding her activities (*see Paolini v Sienkiewicz*, 262 AD2d 1020 [2d Dept 1999] *citing Russell v Knop*, 202 AD2d 959 [4th Dept 1994]); *Mulhauser v Wood*, 107 AD2d 1019, *lv dismissed* 65 NY2d 637 [1985]). Since defendants did not adequately address that category of serious injury in their motion papers, they have failed to establish their *prima facie* entitlement to summary judgment as to that claim (*see Lopez v Geraldino*, 35 AD3d 398, 399 [2d Dept 2006]). Defendants argument that plaintiff was never specifically instructed by any of her medical providers to abstain from engaging in her usual and customary activities and was only given instructions to "rest" is similarly unavailing.

Plaintiffs are not required to produce evidence sufficient to create a triable issue of fact (*see Pezzino v Woodruff*, 103 AD3d 944 [3d Dept 2007]; *Houston v Geerlins*, 83 AD3d 1448 [4th Dept 2011]; *Ames v Paquin*, 40 AD3d 1379 [3d Dept 2007]). However, even if defendants had satisfied their *prima facie* burden, plaintiffs have submitted evidence created a triable issue of fact. In this regard, Jacquetta testified that she suffered pain to her back and shoulder after the accident and sought medical treatment. Jacquetta's medical reports substantiate her claim that she was treated with physical therapy, pain management and injections. Jacquetta was not able to participate in her usual and customary activities and has demonstrated that she has been curtailed from performing her usual activities to a greater than some slight curtailment (*see Gaddy v Eyles*, 79 NY2d 955 [1992]). Plaintiffs demonstrate that for more than 90 of the 180 days following the accident, the injuries Jacquetta sustained as a result of the accident prevented her from performing normal activities. Plaintiffs further contend that Jacquetta continues to experience pain on a daily basis that prevents her from many activities and actions, including cleaning, cooking, washing the dishes, walking, laying down, getting up, sitting, taking the steps, lifting, bending and reaching. Plaintiffs argue during the initial 180 days following the accident, there is objective evidence of a serious injury as demonstrated by her examinations. Accordingly, based on the medical evidence submitted, coupled with Jacquetta's own testimony as to her activity limitations, plaintiffs have raised triable issues of fact.

Regarding the causal relationship between Jacquetta's injuries and the accident, defendants have demonstrated *prima facie* entitlement to summary judgment. Defendants have submitted an MRI taken by Hudson Valley Radiology Associates of plaintiff's spine performed prior to the accident which revealed degenerative disc disease with spondylosis at the C3-4 level through the C6-7 level; encompassing all but one of the cervical spine levels of which plaintiff complains. Defendants further state that Dr. Mann's review of MRIs taken after the accident similarly reveal multilevel degenerative changes in plaintiff's thoracic spine, cervical spine, and lumbar spine. With respect to Jacquetta's right shoulder, defendants argue that the rotator cuff tear alleged to arise from the accident was preexisting at the time of the accident. On or around May 15, 2014, Jacquetta had a sudden onset of pain in her right shoulder. Following an MRI of

her right shoulder, and consultation with a number of providers, plaintiff was diagnosed with a “full thickness tear” of her right rotator cuff. Defendants state that this refutes plaintiffs’ allegation that, as a result of the accident, Jacquetta sustained a right shoulder rotator cuff tear, as the objective medical evidence clearly establishes that this was her then-existing physical state at the time of the accident. Further, a report submitted by defendants of Jonathan Holder, MD dated required surgery prior to the accident.

Finally, defendants submit the opinion of Dr. Mann which they claim demonstrate that a recent examination shows that Jacquetta are not related to the accident, but with respect to her spine, to her age and to the presence of degenerative disease and with respect to her right shoulder, to residuals from her rotator cuff repair completed in August 2014.

Defendants further argue that it is physically impossible for Jacquetta to have sustained the alleged injuries given the low impact of the accident. Defendants submit the report of Dr. Toosi who completed a biomechanical analysis of the forces at play in the accident, applied the scientific and engineering methodologies generally accepted as reliable in the scientific community to determine the severity of the impact involved in the accident, and evaluate whether the motions and forces experienced by plaintiff during the accident could not be related to her alleged pathologies. Dr. Toosi concluded that they could not. Dr. Toosi concluded that “the biochemical analysis, loads and mechanical force required to compromise Jacquetta Sydnor’s spine and right shoulder were not present in the incident of March 3, 2015. Disc bulges and her right shoulder pathologies cannot reasonably be attributed to the accident. In the opinion of Dr. Mann, a review of the MRIs taken after the accident reveal multilevel degenerative changes in Jacquetta’s thoracic spine, cervical spine, and lumbar spine. With respect to the right shoulder, Dr. Mann further opines that the rotator cuff tear alleged to arise from the accident was pre-existing at the time of the accident. Defendants have demonstrated that following an MRI of her right shoulder, Jacquetta was diagnosed with a “full thickness tear” of her right rotator cuff” (Defs Ex. J). Dr. Mann further opines that Jacquetta’s injuries are not related to the accident, but instead are related to her age and the presence of degenerative disease, and residuals from her rotator cuff repair in 2014.

Based upon the foregoing, the Court finds defendants have demonstrated entitlement to summary judgment that Jacquetta’s injuries were not causally related to the accident.

To demonstrate a trial issue of fact exists with regard to causation, plaintiffs submit the report of Dr. Khahkar and Dr. Kolb. Plaintiffs have raised a triable issue of fact with regard to causation through the reports of Dr. Khahkar and Dr. Kolb. Dr. Khahkar's opinion, based upon the treatment record and Dr. Kolb's review of Jacquetta's MRIs of the cervical, thoracic and lumbar spines, and the right shoulder confirms there was no degeneration. Plaintiffs also demonstrate the lack of degeneration by submitting Dr. Kolb's expert opinion that an MRI performed prior to the accident and an MRI performed subsequent to the accident by Stand-Up MRI of Yonkers (Plfs' Ex. F).

Based upon the foregoing, the Court finds plaintiffs have raised a triable issue of fact as to causation.

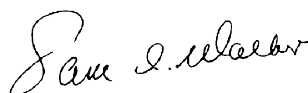
Therefore, based on all the foregoing, defendants' motion for summary judgment is denied in its entirety.

The parties are directed to appear in the Settlement Conference Part on a date to be determined.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
April 28, 2020

ENTER



Hon. Sam D. Walker, J.S.C.

Appearances:

Joel Rubenstein, Esq.
Attorney for Plaintiffs
Via NYSCEF

Jason M. Bernheimer, Esq.
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