

Chiucchini v Liberty Lines Tr.
2020 NY Slip Op 35081(U)
March 28, 2020
Supreme Court, Westchester County
Docket Number: Index No. 60322/2017
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X
JOAN CHIUCCHINI,

Plaintiff,

-against-

DECISION & ORDER
Index No. 60322/2017
Seq. # 2

LIBERTY LINES TRANSIT, BEE LINE BUS SERVICE,
WESTCHESTER COUNTY DEPARTMENT OF PUBLIC
WORKS AND TRANSPORTATION, AND THE COUNTY
OF WESTCHESTER,

Defendants.

-----X

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

Notice of Motion/Affirmation/Exhibits A-L	1-14
Affirmation in Opposition/Exhibits 1-9	15-24
Memorandum of Law in Opposition	25
Reply Affirmation	26

Upon the foregoing papers it is ordered that the motion is DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Joan Chiucchini (“Chiucchini”) commenced this action on May 7, 2017, to recover monetary damages for alleged injuries sustained in a motor vehicle accident that occurred on August 3, 2016, while she was a passenger on a Liberty Lines Bus.

The defendants, Liberty Lines Transit, Bee Line Bus Service, Westchester County Department of Public Works and Transportation and the County of Westchester,

now file the instant motion for summary judgment pursuant to CPLR 3212, seeking an order dismissing the complaint on the issue of liability and on the ground that the plaintiff did not sustain a serious injury as defined under New York Insurance Law § 5102(d).

The defendants argues that, to present a valid claim that a bus stopped short, the plaintiff must present objective evidence of the force of the stop sufficient to establish an inference that the stop was extraordinary, violent and different than the jerks and jolts commonly experienced in normal city bus travel and in this case the plaintiff cannot establish such. The defendants further argue that the plaintiff does not allege in her bill of particulars under which category she is claiming to have sustained a serious injury and the plaintiff's medical records indicate that her lumbar and cervical soft tissue injuries are degenerative and pre-existing and thus, not causally related to the accident.

The defendants further assert that, in relation to the plaintiff's shoulder tears, the lack of causation is further demonstrated by the extended delay in reporting her injuries and even if the alleged injuries were causally related to the accident, they do not constitute significant limitations. The defendants also argues that the plaintiff only underwent a brief course of therapy following the arthroscopic shoulder surgeries, which indicates that she did not sustain a serious injury. They also argue that the plaintiff has not demonstrated that she was prevented from performing substantially all of her usual customary daily activities.

In opposition, the plaintiff, by her attorney, argues that the evidence shows that there are clear questions of fact that preclude summary judgment on the issue of

liability. The attorney argues that the bus driver admits to proceeding at a high rate of speed (30 mph), given the traffic conditions and then bringing the bus to a stop with only 60 to 90 feet of room in front of him, which would have required excessive force.

The attorney submits that the expert, Nicholas Bellizzi, P.E. ("Bellizzi"), who opines that the excessive rate of deceleration and lateral shifting, indicated that the bus exceeded the American Society of Civil Engineers' national standard for jerk rates for standing mass transit passengers and opines that the bus operator caused the bus to jolt and jerk sufficiently to cause the plaintiff to bang her head on the metal pole and to lose her grip on the pole.

The plaintiff's attorney also asserts that the defendants failed to make a prima facie showing that the plaintiff did not suffer a serious injury. The attorney asserts that the plaintiff specifically stated in her bill of particulars, which serious injury is claimed and the plaintiff sustained permanent injuries to her right shoulder, to her left shoulder, and to her cervical spine, resulting in permanent consequential limitations of the use of those body organs, members, and systems and significant limitations of the use of a body function or system.

The plaintiff's attorney contends that the defendants' medical expert supports the plaintiff's assertion of her serious injuries and argues that the doctor's proximate cause opinion should not be considered because the doctor was not provided with full copies of the plaintiff's medical records. The plaintiff's attorney states that the defendants' doctor found significant reductions in range of motion in the plaintiff's left shoulder, right shoulder, and cervical spine and the defendant's expert Dr. Luchs' affirmations are

tailored, conclusory and insufficient. The attorney also argues that the plaintiff has suffered a permanent consequential limitation and/or significant limitation of both her shoulders, which is supported by the affirmations and is sufficient to raise an issue of fact

In reply, the defendants contend that the plaintiff completely ignored the relevant case law with regard to a claimed sudden stop by a passenger on a bus, which states that the plaintiff must present objective evidence that the stop was extraordinary and violent and the fact that the plaintiff fell or claims that there was a sudden stop, does not demonstrate such a stop and summary judgment is appropriate when no other standing passenger fell as a result of the stop.

The defendants assert that Bellizzi's affidavit is insufficient to create an issue of fact because there is no basis to conclude that the standards to which he referred, are applicable under New York law and does not identify any standards that were violated. The defendants argue that Bellizzi's affidavit is conclusory and provides no objective basis to conclude that the stop exceeded any jerk rate standard or that any standard would be applicable. The defendants contend that Bellizzi fails to analyze factors, such as the bus' speed, distance traveled, or brake pressure and therefore, his opinion is conclusory and speculative and not based on the objective data.

The defendants further argue that the plaintiff presents no evidence that her claimed neck fracture is related to the accident, since her expert, Dr. Haig, fails to address her neck condition. They also argue that the plaintiff's alleged bilateral shoulder tears fail because there is insufficient evidence of causation due to the plaintiff's

delayed shoulder complaints without a reasonable explanation. The defendants also contend that the plaintiff fails to address the evidence of degeneration in her neck, back and shoulders and Dr. Haig provides no comment. As a result, the range of motion limitations found in the recent examinations, are irrelevant and even if considered, Dr. Haig's examination, showing greater range of motion must be the more accurate result, because a person cannot feign greater range of motion. In addition, minor restriction of motion does not establish a significant nor consequential injury.

The defendants next argue that the plaintiff does not address the 90/180 claim and therefore, it must be dismissed.

In support of the motion, the defendants rely upon a video of the incident and an affidavit by the IT Director for Liberty Lines Transit, Neftali Negrón; the plaintiff's 50-H transcript; the plaintiff's examination before trial ("EBT") transcript; the EBT of Leonard Apiscopa, the bus driver for Liberty Bus Lines; the plaintiff's medical records; an attorney's affirmation and the pleadings.

Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers, (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

"Once this showing has been made, however, the burden shifts to the party

opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324, citing to *Zuckerman v City of New York*, 49 NY2d at 562). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion (see *Mgrditchian v Donato* , 141 AD2d 513 [2d Dept 1988]).

‘To establish a prima facie that a common carrier was negligent in the stop of a bus, a plaintiff must prove that the stop was “unusual and violent,” rather than merely of the sort of “jerks and jolts commonly experienced in city bus travel” (*Lowhar-Lewis v Metropolitan Transp. Authority*, 97 AD3d 728 [2d Dept 2012]). “A plaintiff may not satisfy that burden of proof merely by characterizing the stop as unusual and violent” (*Id.*). “In seeking summary judgment dismissing the complaint, however, common carriers have the burden of establishing prima facie that the stop was *not*, unusual and violent” (*Id.*).

The plaintiff in this case testified at her 50-H hearing that five minutes after getting onto the bus, it stopped short and she went flying to the front, hitting her head and her whole left side on the floor. At her EBT, the plaintiff testified that the bus was moving along at a normal speed and that the driver stopped short and she went flying. Her whole body twisted, her head hit the coin box and her whole left side was hit. She said that the driver told her later on that he couldn’t help stopping short because a car cut him short, but she did not see it because she was looking out the window. The driver of the bus, Leonard Apiscopa, testified that about thirty yards before the light, he started applying the brakes by fanning them and the stop was a medium stop.

Bellizzi, the plaintiff's expert, states that the video shows the bus speed up after pulling away from the bus stop and abruptly change lanes from left to right and then from right to left and then slam on the brakes. As a result, the plaintiff was jerked and struck her head and shoulders. Bellizzi states that the bodies in the video are clearly seen moving involuntarily within the bus, when the bus driver changed lanes and when he braked the bus hard.

Bellizzi states that the American Society of Civil Engineers ("ASCE") in 1997, published its first national standards for "jerk rates" and on a flat surface, a longitudinal jerk rate in excess of .1G is considered unsafe for standing passengers. Bellizzi opines that the movements of the bus were sudden, violent and unusual and states that the unusually rapid deceleration rate and sudden lateral shifting or jerking of the bus, indicated that it exceeded ASCE's jerk rate national standards for standing passengers.

Bellizzi opines that, based on the surveillance videos of the incident, the plaintiff's testimony, and his analysis, that the bus was decelerated at an unnecessarily high rate of deceleration, while at the same time shifting suddenly and abruptly from right to left without warning, which indicated that the bus exceeded the ASCE's national standard for jerk rates for standing mass transit passengers. He opines that the operator of the bus caused the bus to jolt and jerk sufficiently to cause the plaintiff to bang her head on the metal pole and to lose her grip on the pole. Bellizzi opines that when the bus driver became aware that he shifted into a turn lane and veered back into the original lane of travel, he should have shouted a warning to the passengers and the bus operator did not navigate, operate and control the bus in accordance with good and commonly

accepted safe industry practices. Bellizzi opines that the sudden jolting and jerking of the bus by the bus operator, was a substantial factor in the cause of the plaintiff's accident.

Upon review of the testimony, Bellizzi's affidavit and the arguments proffered, the Court grants the motion on the issue of liability. Here, the Court finds that the defendants have established by the testimony that the stop was not unusual and violent and the plaintiff has failed to rebut that showing. No other passenger who was standing on the bus, fell as a result of the stop and the video does not show a stop that was extraordinary and violent.

Further, the plaintiff's expert failed to show that the ASCE is the standard applicable to buses in NY and even if such is the standard, Bellizzi failed use an objective or scientific basis to determine that the bus exceeded the "jerk rate". Bellizzi does not refer to the speed of the bus, the distance traveled or any other objective factors to make his determination and makes his determination in a conclusory manner. "[A] plaintiff may not satisfy th[e] burden of proof merely by characterizing the stop as unusual and violent" (*Lowhar-Lewis v Metropolitan Transp. Authority*, 97 AD3d 728 [2d Dept 2012]).

With regard to the plaintiff's serious injury;

Insurance Law §5104(a) provides in pertinent part that:

Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(McKinney's

Insurance Law §5104[a])

Insurance Law §5102(d) defines “serious injury” as

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. (McKinney's Insurance Law §5102[d])

“The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury.” (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; see also, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). “[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law” (*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition 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 (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York

State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (*see Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, the plaintiff did not suffer death, dismemberment, significant disfigurement, or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. The plaintiff alleges that she sustained a fracture, a permanent loss of use of a body organ, member, function or system; a 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 prevented her from performing substantially all of 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 or impairment. The defendants argue that the plaintiff had pre-existing and degenerative injuries not causally related to the bus incident.

The defendants submitted an independent medical report of Jonathan S. Luchs, M.D., FACR, a radiologist, who performed an independent radiology review on the plaintiff and determined that there were degenerative and pre-existing conditions in the plaintiff's cervical and lumbar spine and left and right shoulder. There was a tendon tear in the right shoulder, superimposed upon an abnormal tendon with extensive degenerative changes, but no evidence that the tear was causally related to the plaintiff's accident.

Ronald L. Mann, M.D., performed an independent orthopedic medical examination on the plaintiff on April 22, 2019. Dr. Mann found forward flexion of her left shoulder with range of motion of 115 and abduction of 105 degrees, with normal at 170; internal rotation of 75 degrees and external rotation of 20 degrees, with normal at 75 degrees. Her right shoulder revealed forward flexion of 65 degrees and abduction of 60 degrees, with normal at 170 degrees and internal rotation of 75 degrees and external rotation 0 degrees, with normal at 75 degrees. Examination of the cervical spine revealed forward flexion of 20 degrees and extension of 15 degrees, with normal at 45 degrees. Rotation was right 20 degrees, left 20 degrees, with normal at 80 degrees.

However, Dr. Mann opined that the plaintiff had significant pre-existing degenerative disease in her cervical spine, as well as osteoporosis with multiple previous compression deformities in her spine and no findings of radiculopathy. Dr. Mann opined, within a reasonable degree of medical certainty, that the plaintiff's shoulder rotator cuff surgeries were not causally related to the bus incident and her right shoulder symptoms only started in 2018. Dr. Mann diagnosed the plaintiff with cervical spine sprain/strain with pre-existing degenerative disease of the cervical spine and also determined that the plaintiff is able to do activities of daily living and self-care as before. He stated that the plaintiff has limitations at this time because she has not fully recovered from her surgery.

The plaintiff's treating physician, Scott V. Haig, M.D., stated in his affirmation that he first evaluated the plaintiff in his office on May 15, 2018, when she came in complaining of bilateral shoulder pain and reported that she was involved in an accident

on a city bus. Dr. Haig reported 90 degrees elevation for the left shoulder and 160 degrees for the right shoulder with normal of 180 degrees. He stated that her MRI at that point, demonstrated full-thickness tears of the supraspinatus and subscapularis, which he believed she sustained in the accident. He performed arthroscopic surgery on her left shoulder on June 20, 2018 and on June 25, 2019, he performed surgery on the right shoulder.

Dr. Haig stated that he most recently saw the plaintiff in March 2019, when she complained of continued pain and weakness with overhead use of both shoulders. Dr. Haig opined, within a reasonable degree of medical certainty, that as a result of her August 3, 2016, accident, the plaintiff sustained bilateral shoulders rotator cuff tears, biceps tendon tears, right shoulder anterior capsular tear, acromioclavicular arthritis, and impingement morphology, requiring surgery to repair those injuries.

He opined that her prognosis is guarded, still reporting significant diminished range of motion and continued pain with the activities of daily living. She will require continued physical therapy on both shoulders, anti-inflammatory medications, and activity modifications as posttraumatic arthropathic changes become worse.

Upon review and viewing the facts in the light most favorable to the plaintiff, this Court finds that the defendants have made a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiff suffering 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 and the plaintiff failed to rebut the showing.

The defendants presented evidence that the plaintiff had a pre-existing fracture in her neck and Dr. Luchs and Dr. Mann both opined that her neck injury was not causally related to incident. The plaintiff presented no evidence with regard to the cervical fracture to rebut the defendants' evidence, since her expert failed to address this.

The plaintiff failed to seek treatment for her left shoulder until a month after the accident and her right shoulder until two years after the accident and offered no explanation for this gap in treatment. Also, Dr. Haig only saw the plaintiff for the first time on May 15, 2018, almost two years after the incident and provides no evidence for a causal relationship between the plaintiff's 2016 fall on the bus and her shoulder injuries. Therefore, there is insufficient evidence to show causation.

In addition, the defendants' physician offered proof of pre-existing degeneration in the plaintiff's MRI reports and the plaintiff's physician failed to address this issue (*Khan v Finchler*, 33 aD3d 966 [2d Dept 2006]). Such failure rendered the plaintiff's treating physician's opinion that the injuries were caused by the accident, to be speculative (*Zarate v McDonald*, 31 AD3d 632 [2d Dept 2006]). Since the plaintiff had significant pre-existing degeneration, which was not addressed by the treating physician, the range of motion limitations need not be addressed.

Further, the evidence revealed that the plaintiff's alleged injuries did not prevent her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following her alleged injury. To sustain this category, a plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature" (see *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 357 [2002]). Curtailment of recreational and household activities is insufficient to meet the burden (*Omar v Goodman*, 295 AD2d 413 [2d Dept 2002]).

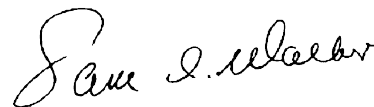
Accordingly, based upon the foregoing, it is

ORDERED that the defendants' motion for summary judgment is GRANTED; and it is further

ORDERED that the complaint against all defendants, is dismissed.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
March 28, 2020



HON SAM D. WALKER, J.S.C.