

Burgos v New York City Tr. Auth.

2021 NY Slip Op 32766(U)

December 20, 2021

Supreme Court, New York County

Docket Number: Index No. 452125/2016

Judge: J. Machelle Sweeting

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 62

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 CARMEN BURGOS,

Plaintiff,

Index No.: 452125/2016

-against-

DECISION AND ORDER

THE NEW YORK CITY TRANSIT AUTHORITY,
 MABSTOA, MTA, The MTA BUS COMPANY, THE
 CITY OF NEW YORK, MALI LMOXINE
 INCORPORATED, DIAMOND BRICKS INC.
 CODOU THIAM, JOHN DOES I and JOHN DOE II,

Motion Sequence No. 001

Defendants.

-----X
Hon. J. Machele Sweeting, J.S.C.

In this motor vehicle action, defendants Diamond Bricks Inc. (“Diamond Bricks”) and Codou Thiam (“Thiam”) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them on the ground that plaintiff Carmen Burgos (“Plaintiff” / “Burgos”) has not sustained a serious injury as required by the New York State Insurance Law.

BACKGROUND

On July 30, 2014, at approximately 4:30 p.m., Burgos was a passenger in an Access-A-Ride van (“the Van”) which was involved in a motor vehicle accident (“Accident”). At the time of the Accident, Thiam was the driver of the Van and Diamond Bricks was the Van’s owner. Burgos was seated directly behind the driver and was wearing a seatbelt. According to her court submission, Burgos “did not observe the contact between the two cars and first became aware of

an accident when she felt a hard ‘double hit.’ She observed that the front of the Access-A-Ride van struck the back of the car directly in front of them, which she believed was a BMW. As a result of the impact, Ms. Burgos’s head hit the headrest. She immediately felt pain to her cervical spine and in her collar bone” (affirmation in opp at 3 [internal citations omitted]).

The next day, July 31, 2014, Burgos sought medical attention at the emergency room at NY-Presbyterian, Allen Emergency Department. Her chief complaint was left-sided “neck pain s/p MVA yesterday” (Newman affirmation, exhibit I at 4 and 6). She was given Toradol for pain. There was no evidence of fracture. No x-rays, CT scans or MRI’s were done at that time. She was discharged with naproxen and Vicodin for pain. Plaintiff testified that as a result of the Accident she was confined to her bed for just a couple of weeks, and also, as a result of the Accident, she was “more” confined to home as well (Mcevoy affirmation, exhibit D at 102-103). She uses the term “more confined” since she was already at home on disability for years before the accident. Because she continued to have pain, she sought additional medical treatment at Physical Medicine Rehabilitation of New York, where she was treated by Dr. Ornella Rehova. Range of motion tests performed by Dr. Rehova reflected a loss in range of motion both for cervical and lumbar flexion, extension, bending and rotation. She was advised to undergo physical therapy, x-ray, and to continue pain medication. The October 7, 2014 x-rays of her lumbar spine indicated loss of disc space height and “anterior endplate osteophytes. The x-ray of the cervical spine revealed spondylosis.

On November 7, 2014, Burgos underwent MRI’s of her lumbar and cervical spine. According to Dr. Rehova, the MRI of the lumbar spine revealed “a disc bulge at L1-2, disc herniations at L2-3, L3-4, L4-5, and L5-S1 disc bulge. Therefore, comparing both MRIs, the new finding a straightened lordosis.” The MRI of her cervical spine revealed: “disc herniation at C2-3

with cord impingement, disc herniations at C3-4, C4-5, and C5-6 with cord impingement at C5-6, and C6-7 disc herniation” (Newman affirmation, exhibit K at 7). In the updated bill of particulars, plaintiff alleges injuries to the lumbosacral spine, the cervical spine, and the right knee. Burgos continued to treat with Dr. Rehova until June of 2015.

On September 27, 2016, Burgos called Dr. Sama's office due to a steady increase in her lower back pain radiating to the left hip and buttock. Consequently, she was recommended for an MRI of the lumbar spine before determining which level to recommend an epidural steroid injection. On October 11, 2016, Burgos underwent an MRI of the lumbar spine at Hospital for Special Surgery. On October 18, 2016, Burgos called Dr. Sama's office for an MRI review, which was performed at HSS on October 11, 2016. Burgos related ongoing symptoms of lower back pain with radiation into the bilateral lower extremities. She described her pain as through the buttocks and down the posterior aspect of her thighs, as well as into the left foot. After reviewing the MRI, it was noted that Burgos would benefit from a bilateral epidural steroidal injection at the L5-S1 level. She was advised to continue with physical therapy and follow up after the injections. On July 18, 2017, Burgos had a phone conversation with Heather Sorrentino, PAC from Dr. Sama's office. She complained about her continuing pain and it was recommended that she follow up with an appointment for an updated imaging.

Burgos underwent a lumbar spine epidural injection with trigger point injections on December 18, 2017 at Manhattan Surgery Center, and lumbar spine epidural injections on April 22, 2019 and July 9, 2018¹ at Manhattan Surgery Center.

¹ These are the dates of treatment as set forth in the treatment notes of Dr. Mikelis (Newman affirmation, exhibit J at 17).

Burgos complied with defendants' demands and submitted to physical examinations conducted by two different orthopedists. Defendant The New York City Transit Authority designated Dr. Gregory Kinnett, and defendants Diamond and Thiam designated Dr. Joseph Elfenbein.

In 2003, prior to the Accident, Burgos suffered a work-related injury, when she injured her knees, left shoulder and lower back. She subsequently had another fall in 2009 when she reinjured her lower back and bilateral knees. The plaintiff has been on Social Security Disability due to that work-related injury since August 2008. As a result, Burgos was retired at the time of the 2014 accident. Prior to the 2014 accident, she had bilateral knee arthroscopy surgeries, left shoulder rotator cuff repair, hysterectomy, and right total knee replacement.

DISCUSSION

Insurance Law section 5102 (d) defines serious injury as:

“‘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.”

Diamond Bricks and Thiam argue that plaintiff has no permanent consequential injury and was not significantly limited, or curtailed for a minimum of 90 out of one hundred and eighty days following the accident.

In support of their motion, defendants rely on the reports of Dr. Marc A. Probst, an emergency medical physician (“Dr. Probst”), Dr. Joseph Elfenbein, an orthopedist (“Dr. Elfenbein”), and Dr. Audrey Eisenstadt, a radiologist (“Dr. Eisenstadt”).

In his report, Dr. Probst states that there is no evidence to support any significant, acute spine injury, since “[h]ad there been an acute, significant spine injury, one would expect to find midline tenderness, step-off deformities, ecchymoses, limitation in range of motion, numbness, tingling radiating down the extremities or difficulty with handling objects or ambulating. There were no such abnormal findings” (Mcevoy affirmation, exhibit E at 3).

According to Dr. Probst, if there had been a suspicion of such injury, an x-ray, CT scan, or MRI would have been done, or a specialty neurosurgery consultation would have been obtained or Burgos would have been admitted to the hospital. Likewise, with respect to a significant, acute right knee injury, there were no radiological tests ordered and there was no “acute pain, swelling, ecchymoses, deformities, joint laxity, numbness, tingling or difficulty with range of motion” (*id.*). Burgos had a history of right knee replacement surgery before the accident.

Dr. Probst concludes: “The records reviewed are inconsistent with the injuries alleged in the Bill of Particulars and show that the claimed injuries do not have an acute traumatic origin and so could not be causally related to the accident of 7/30/2014” (Mcevoy affirmation, exhibit E at 4).

In his January 9, 2019 report, Dr. Elfenbein states that the results of his January 9, 2019 orthopedic exam are as follows: With respect to the cervical spine, there is no range of motion limitation, as all tested at normal levels. With respect to the lumbar spine, again, there is no limitation of range of motion as all tested at normal levels. With respect to the right knee, range of

motion all appears normal. It is Dr. Elfenbein's conclusion that the cervical spine sprain, lumbar spine sprain and right knee sprain are all resolved. Further, Dr. Elfenbein concludes that the Burgos' orthopedic examination is normal: "the examinee is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties" (Mcevoy affirmation, exhibit F at 4).

In her May 16, 2018 report concerning the cervical spine, Dr. Eisenstadt examined a November 7, 2014 MRI of Burgos' cervical spine. Dr. Eisenstadt notes a "straightening of the cervical lordosis," which she terms as "a nonspecific finding." There are no indicia of a traumatic cause for this condition of the cervical spine. She found "bony productive changes" that all appear older than six months in origin, and therefore do not relate to the accident. She notes a drying out of the discs that is likewise older than the accident, as well as disc bulging, which "has no traumatic basis," but "is degenerative in origin," which "strongly indicated that the central C2-3, superimposed small central C3-4 and superimposed right paracentral C5-6 and central C6-7 disc herniations are also degenerative in origin" Finally, she finds "[n]o annular tears . . . to indicate any traumatic disc rupture associated with the incident" (Mcevoy affirmation, exhibit G at 2).

In her May 2018 report concerning the lumbar spine, Dr. Eisenstadt examined a November 7, 2014 MRI of Burgos' lumbar spine. Dr. Eisenstadt concludes that there is a straightening of the lumbar lordosis. Again, Dr. Eisenstadt concludes that this condition is not due to trauma, but to degeneration, and, again, concludes that "[n]o annular tears are seen at any level to indicate any traumatic disc rupture related to the incident of July 30, 2014" (Mcevoy affirmation, exhibit G at 4).

Transit defendants offer the report of Dr. Gregory Kinnett, an orthopedic surgeon, who found decreased range of motion for the cervical spine with respect to: flexion (Burgos had 45 degree range; 50 degrees is normal); extension (Burgos had a forty-five degree range; sixty degrees is normal); right rotation (Burgos had a fifty degree range; eighty is normal); left rotation (Burgos had a fifty degree range; eighty degrees is normal); right lateral flexion (Burgos had a thirty-five degree range; forty-five is normal); and left lateral flexion (Burgos had a thirty-five degree range; forty-five degrees is normal).

Dr. Kinnett also found a decreased range of motion for the lumbar spine in terms of extension (Burgos had a twenty degree range; twenty-five degrees is normal). Likewise, he found a limited range of motion with respect to flexion of the right knee (Burgos had a range of one hundred degrees; normal is one hundred and fifty) and flexion of the left knee (Burgos had a one hundred and forty degree range; normal is one hundred and fifty).

Dr. Kinnett concludes that Burgos has degenerative disc disease in the cervical spine and left knee degenerative joint disease. In his opinion, Burgos “is capable of performing activities of daily living with the following restrictions: No lifting greater than 30 lbs., or repetitive cervical/lumbar spine bending” (Newman affirmation, exhibit G at 6). He concluded that it was premature to comment on the permanency of Burgos’ injuries at the time of the report. Dr. Kinnett did not relate any of Burgos’ injuries to the 2014 accident.

Burgos sought treatment from Dr. Demetrios Mikelis, MD beginning in April 2015 and continuing into 2016, and then again on July 3, 2019. In his July 3, 2019 report, Dr. Mikelis concluded, based upon:

“the patient’s history, the objective test, such as the aforementioned range of motion testing, and a review of the MRI of her Cervical Spine and Lumbar Spine it can be stated with a reasonable degree of medical certainty that Carmen Burgos symptomatology and limited range of motion of her neck and back are causally related to the accident of July 30, 2014”

(Newman affirmation, exhibit J at 17).

In his report, Dr. Mikelis further states: “[a]s Carmen Burgos has experienced these symptoms for a period of well over (4 ½) four and one half years, her condition is permanent and has required diagnostic imaging, physical therapy, medication, epidural injections, warm pack, exercise, and massage and may require additional procedures in the future” (*id.* at 17 and 18). Based on his report, Dr. Mikelis first examined Burgos on April 29, 2015, and saw her most recently on July 03, 2019, and notes throughout, a recurring diagnosis of “herniated cervical intervertebral disc; cervical nerve root impingement; herniated lumbar intervertebral Disc; lumbar radiculopathy” (*id.* at 3, 5, 7, 9, 11, 13, 15).

Dr. Mikelis found limitations of range of motion at each visit. At the most recent visit, on July 3, 2019, the first since March 2, 2016, he measured Burgos’ cervical spine and found “restricted ranges of motion, flexion 45, extension 30, left and right turning to 60 degrees. Normal cervical flexion is 70 degrees, normal extension 45 degrees, and normal right/left turning 80 degrees” (Newman affirmation, exhibit J at 14-15). The lumbar spine measurements for that visit reveal “restricted ranges of motion, flexion 65, extension 15, left and right turning to 25 degrees. Normal lumbar flexion is 90 degrees, normal extension 40 degrees, and normal right/left turning 60 degrees” (*id.* at 15). Dr. Mikelis concludes that these limitations are “causally related to the accident of July 30, 2014” (*id.* at 17).

Of Burgos' back injuries and knee injury, prior to the accident, Mikelis writes:

“Patient states history of a prior injury, work related slip and fall on 3/31/2003 sustaining injury in her back, knees and shoulders, and was symptomatic prior treated with knee surgery and epidural injections, was on disability as a result and states no prior injury to her cervical spine and no subsequent injury to the cervical or lumbar spine”(id. at 16).

Mikelis states that the accident exacerbated Burgos' previous injuries: “as well as an exacerbation and or aggravation of any pre-existing trauma, degeneration and/or congenital conditions of the cervical and/or lumbar spine which made Carmen Burgos more susceptible to trauma” (id. at 18). And, other than stating that he has no MRI date prior to the November 7, 2014 MRI, Dr. Mikelis does not address the previous injuries in any detail and does not comment on the degenerative nature of those injuries to any extent. He additionally states, based on her July 3, 2019 visit, that she discontinued physical therapy, but does not comment any further on her cessation of treatment from March 2, 2016 to July 3, 2019.

Burgos sought treatment at Physical Medicine and Rehabilitation of New York, beginning on October 2, 2014 for neck pain and low back pain. Although she had been suffering from low back pain prior to the accident, she said the pain had increased from 5 out of 10 to 10 out of 10.

“In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold” (*Linton v Nawaz*, 62 AD3d 434, 438 [1st Dept 2009]). New York courts require “objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold” (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). Subjective complaints alone are not sufficient (id.). In order to prove the extent or degree

of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. An expert's qualitative assessment of a plaintiff's condition also may suffice, 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. When an expert's opinion is unsupported by objective data, it may be "wholly speculative," which would "frustrat[e] the legislative intent" (*id.* at 51).

"The mere existence of a herniated or bulging disc, and even radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (*Patterson v NY Alarm Response Corp.*, 45 AD3d 656, 656 [2d Dept 2007]). The plaintiff must also establish causation between the claimed injury and the accident:

"We conclude that, even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury—such as a gap in treatment, an intervening medical problem or a preexisting condition—summary dismissal of the complaint may be appropriate"

(*Pommells v Perez*, 4 NY3d 566, 572 [2005]).

Defendants make a i showing that Burgos did not sustain a permanent or significant serious injury caused by the Accident. Defendants' evidence, including the affirmed findings of an orthopedist and a radiologist, establishes pre-existing degenerative changes and absence of evidence of recent traumatic injury causally related to plaintiff's cervical and lumbar spine, as well as plaintiff's right knee. Both doctors Probst and Eisenstadt state that plaintiff's MRI's indicate the existence of degenerative injuries that are not causally related to trauma.

Dr. Eisenstadt states with specificity how the results of the November 7, 2014 MRI establish that Burgos' injuries pre-date the Accident:

“Review of the MRI examination of the cervical spine performed three months, eight days following the incident reveals straightening of the cervical lordosis. This is a nonspecific finding, most frequently related to patient positioning and comfort for the examination. No osseus contusion or prevertebral swelling is seen to indicate a traumatic etiology for the straightening noted. Anterior osteophyte formation is seen at the C4-5 and C5-6 intervertebral disc levels. These bony productive changes are all greater than six months in origin and could not have developed in the three month, eight day interval between this examination and the incident. Degeneration is also seen at the C4-5 through C6-7 levels. This involves a drying out and loss of disc substance, also greater than six months in origin”

(Mcevoy affirmation, exhibit G at 2).

Dr. Eisenstadt additionally concludes that there is “desiccation of the remaining cervical intervertebral disc levels,” (*id.*) and this drying out of the discs is not traumatic in origin and is months to years in development. Further, Dr. Eisenstadt opines that disc bulging has no traumatic basis, and, therefore, is a result of degeneration. Dr. Eisenstadt continues in detail, explaining how the injuries to the cervical and the lumbar spine revealed on the MRI taken three months after the Accident, are not traumatic but are degenerative in nature.

In opposition, Plaintiff has submitted emergency room records, medical and chiropractic records that demonstrate that within the months and years after the accident she continued to seek treatment for her cervical and lumbar spine and for her knee. She continued to experience pain and limitations in her range of motion as indicated in the report of Dr. Mikelis and the records of Dr. Rehova. On October 2, 2014, just about two months after the accident, Dr. Rehova examined Burgos and found quantified limitations of range of motion with respect to Burgos' cervical and lumbar spine. Furthermore, noting Burgos' previous accidents, Dr. Rehova states: “If the above statements are true and accurate, causality is established between the above stated accident and today's pathological findings” (Newman

affirmation, exhibit K at 3). In her report of January 29, 2015, Dr. Rehova explains the difference in the MRI results prior to the 2014 accident and the MRI results after the 2014 accident:

“Of note, from her prior accident, the lumbar spine MRI showed a disc bulge at L1-2, disc herniations at L2-3, L3-4, L4-5, and L5-S1 disc bulge. Therefore, comparing both MRIs, the new finding is a disc herniation rather than a disc bulge at L5-S1 with mild bilateral foraminal stenosis”

(Newman affirmation, exhibit K at 7).

Dr. Rehova notes that plaintiff reports that the pain in her lower back is worse since the 2014 accident. Additionally, in his report, Dr. Mikelis confirms Burgos’ statements that her injuries are causally related to the 2014 accident, where he states:

“the patient’s history, the objective test, such as the aforementioned range of motion testing, and a review of the MRI of her Cervical Spine and Lumbar Spine it can be stated with a reasonable degree of medical certainty that Carmen Burgos symptomatology and limited range of motion of her neck and back are causally related to the accident of July 30, 2014”

(Newman affirmation, exhibit J at 17).

Both Dr. Rehova and Dr. Mikelis designate a numeric percentage of Burgos’ loss of motion with concrete references to normal function to show, in objective terms, the discrepancies. In opposition, Burgos is unable to create a question of fact as to the defendants’ motion, as neither Dr. Mikelis nor Dr. Rehova address defendants’ radiologist’s findings attributing plaintiff’s spinal condition to a preexisting degenerative condition (see *Riviello v Kambasi*, 82 AD3d 543, 543 [1st Dept 2011]). The Court in *Riviello* concluded that where plaintiff fails to address defendants’ experts’ findings that the injuries are degenerative, and not a result of trauma, the plaintiff is unable to meet its burden:

“In opposition, plaintiff failed to raise a triable issue of fact by not refuting defendants’ evidence of the preexisting degenerative condition of the lumbar and cervical spine. In fact, some of plaintiff’s experts also identify the degenerative condition. Although one of plaintiff’s experts, Dr. Shein, identifies the cervical spine degeneration as having been aggravated by the accident, his failure to

explain why he ruled out degenerative changes as the cause of plaintiff's spinal injuries renders his opinion that they were caused by the accident speculative”

(*id.* at 543 [internal citations omitted]; (see also *Simms v APA Trucking Corp.*, 14 AD3d 322, 322-323 [1st Dept 2005]; *Lorthe v Adeyeye*, 306 AD2d 252, 253 [2d Dept 2003] [“plaintiffs' orthopedist failed to address the proof that the disc bulges in the lumbosacral spines of both plaintiffs were due to preexisting degenerative changes. Therefore, his findings that the plaintiffs' current restrictions of motion were causally related to the subject accident was mere speculation”]).

Furthermore, on this point, the First Department in *Linton* (62 AD3d 434) quotes the Court of Appeals decision in *Pommells* (4 NY3d 566), which stands for the proposition that:

“Where the defendant submits ‘persuasive’ evidence of a pre-existing injury and the plaintiff’s doctor has no reliable basis for linking the symptoms to the accident, an issue of fact cannot be created by the plaintiff’s doctor’s simply repeating the mantra that the injuries were caused by the accident”

(*Linton*, 62 AD3d at 443).

Moreover, the Court in *Linton* makes a point of stating that plaintiff’s treating physician’s conclusions are persuasive because the physician treated plaintiff within eight days of the accident, rather than months later. The Court cites one of its 2009 decisions on this point:

“This Court held that the plaintiff failed to raise an issue of fact because the chiropractor’s opinion was not based on an examination of the plaintiff made contemporaneously with the accident, but rather on an examination which occurred two months thereafter, when the link between the trauma and the reported symptoms would not have been as readily discernable”

(*Linton*, 62 AD3d at 442, citing *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Here, plaintiff sought treatment from Dr. Rehova approximately two months after the Accident. The Accident occurred on July 30, 2014 and Burgos' first visit to Dr. Rehova was on October 2, 2014. Additionally, neither Dr. Rehova, nor Dr. Mikelis offers any medical documentation either addressing or refuting the finding that Burgos' injuries are degenerative or pre-date the accident. Although Dr. Mikelis offers the conclusory observation that the pre-existing injuries were exacerbated by the accident, he offers no explanation, medical data or any facts whatsoever to support this conclusion. This court finds, therefore, that defendants are entitled to summary judgment on this issue.

On the second statutory category, defendants also made a *prima facie* showing of entitlement to judgment as a matter of law with respect to plaintiff's 90/180-day category under the statute. Defendants established their entitlement to summary judgment dismissing plaintiff's 90/180-day claim based upon the evidence from plaintiff's bill of particulars and deposition testimony which provided that, immediately after the accident, plaintiff was confined to bed for only two weeks and continued to be confined to home as a result of her previous injuries. In her amended verified bill of particulars, on this issue, Burgos stated in relevant part: "Confined to home: It is impossible to state with reasonable certainty the exact division of time Plaintiff was actually confined to home, except to state that there were periods of home confinement" (Mcevoy affirmation, exhibit B, ¶ 13). Further, on this issue, at her 50-H hearing on November 14, 2014, Burgos was asked the following questions and gave the following answers:

“Q: As a result of this accident, were you confined to your home for any amount of time? By confined to your home, I mean that you could get up and move around the house, but you had to stay at home.

A: I stayed at home because I wasn't feeling well. I was in pain. Yes.

Q: For how long did you stay at home?

A: I would say I stood at least three or four days. It wasn't even—because I have a lot of appointments, I'm forced to go out”

(Newman affirmation, exhibit B at 30-31).

Additionally, during her deposition, Burgos was asked the following questions and gave the following answers:

“Q: As a result of the injuries you sustained in this accident on July 30th, 2014, were you confined to your bed, yes or no?

A: I was in the bed.

Q: Yes or no, ma'm.

A: Yes.

Q: For how long were you confined to your bed?

A: A couple weeks.

Q: As a result of this accident, were you confined to your home?

A: I've been confined to my home for years.

Q: As a result—so you weren't confined as a result of this accident then because you were already confined?

A: I was in pain with headaches.

Q: Ma'm, you were already confined to your home when this accident occurred; yes or no?

A: I was confined to home, and it made me more confined to my home with that neck injury.

Q: How long did it make you more confined?

A: I was confined to my bed.

Q: I'm asking about home now.

A: I stayed home. This is my life now.

Q: How long were you more confined after this accident?

A: Still confined because of this accident.

Q: So, you're still more confined from 2014 until now?

A: Yes"

(Mcevoy affirmation, exhibit D at 102-104).

Furthermore, when asked at her 50-h hearing how the injuries impacted her ability to perform daily activities, Burgos testified:

"Q: So, is there anything that you absolutely cannot do anymore?

A: No.

Q: Are there some things that are now harder for you to do?

A: Yes.

Q: Please tell me what those things are.

A: When I'm sleeping at night, I start on the pillow, but it becomes uncomfortable. I have to push off the pillow and try to find -- it messes with my sleep. There's times, like, if I'm reading, I have my head down. Like I come up too fast, I get a pain that goes up my head (indicating).

Q: Anything else?

A: That's about it. I mean, I can turn, but my thing is I can't bend my head"

(Newman affirmation, exhibit B at 31-32).

In opposition, plaintiff argues that there is a question of fact as to whether plaintiff's injuries affected her usual daily activities for 90 days out of the first 180 days following the Accident. In support of this point, plaintiff cites to her testimony at the 50-h hearing, annexed as exhibit B to her opposition, for the proposition that she testified that she was unable to perform "basic functions [such] as sleeping, carrying, lifting, bending, sitting standing or walking for extended periods of time . . ." (Burgos' opposition at 43).

However, this court finds that plaintiff has not met her burden in creating a question of fact on this statutory category of injury. First, plaintiff's testimony at her deposition conflicts with her testimony at the 50-h hearing. Importantly, during her deposition, Burgos testified that she was "more" confined to home for years as a result of the Accident. Yet, at her 50-h hearing she states that she was confined to home for three to four days and then went out for appointments. Additionally, a review of plaintiff's 50-h hearing testimony reveals that the only impairment she may have suffered from is lack of sleep. There are no references to the other daily functions in her testimony. Accordingly, this court grants defendants' motion for summary judgment on this ground as well.

In accordance with the foregoing, it is hereby

ORDERED that defendants Diamond Bricks Inc.'s and Codou Thiam's motion, (Motion Sequence 001), seeking an order, pursuant to CPLR 3212, to dismiss the complaint is **GRANTED**; and it is further

ORDERED that the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Date: New York, New York
December 20, 2021

ENTER:



Hon. J. MACHELLE SWEETING, J.S.C.