Hines v Ventura
2021 NY Slip Op 32881(U)
December 23, 2021
Supreme Court, Kings County
Docket Number: Index No. 520137/2017
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of December 2021.

O

PRESENT:

CARL J. LANDICINO, J.S.C.

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DAVONNA HINES,

Plaintiff,

-against-

CRYSTAL VENTURA,

Defendant.

---x

Index No.: 520137/2017

DECISION & ORDER

Motion Sequence #2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. Nos.
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed..	28-29, 31-37,
Opposing Affidavits (Affirmations)..	39-46,
Reply Affidavits (Affirmations)..	51-52

Upon the foregoing papers, and after oral argument, the Court finds as follows:

Upon the foregoing papers in this personal injury action, Defendant Crystal Ventura (hereinafter referred to as the "Defendant") moves (motion sequence #2), for an order, pursuant to CPLR 3212, granting her summary judgment on the ground that the Plaintiff, Davonna Hines (hereinafter referred to as the "Plaintiff"), did not sustain a "serious injury" as a result of the subject accident as defined and required by Insurance Law §§5102 (d) and 5104 (a).

Background

On October 18, 2017, Plaintiff commenced this personal injury action by filing a summons and a verified complaint alleging that she suffered severe personal injuries as a result of a May 3, 2017 motor vehicle accident in Queens, New York. Specifically, the complaint alleges that while Hines was driving in her Jeep on Astoria Boulevard, at its intersection with 77th Street, a motor vehicle owned, operated and maintained by Defendant came into contact with the rear of Plaintiff's vehicle causing her to suffer severe and permanent injuries. The complaint asserts a single cause of action against the Defendant for negligence.

On December 19, 2017, the Defendant answered the complaint and asserted affirmative defenses, including the seventh affirmative defense asserting that "[t]he plaintiff has not sustained a 'serious injury' as defined in Section 5102 (d) of the Insurance Law of the State of New York and is thereby not entitled . . . to commence and maintain this action." After issue was joined, discovery ensued.

Thereafter, on or about March 23, 2018, the Plaintiff produced a verified bill of particulars in which she averred that she suffered, among other things, serious and permanent injuries to her back and spine, left shoulder, left elbow, left knee and left ankle. Specifically, the Plaintiff alleged in her bill of particulars that:

> "[a]s a result of the negligence of the defendant [Crystal Hines] herein, plaintiff DAVONNA HINES was severely injured and damaged, rendered sick, sore, lame, and disabled, sustained severe emotional shock and mental anguish, suffered severe physical pain and impairment of her upper, lower and midback, neck and left shoulder, left elbow, left knee, left leg and ankle including, but not limited to, herniated and bulged discs in her cervical, thoracic and lumbar spine and derangement with radiculopathy, thoracic spine derangement with radiculopathy, lumbosacral spine derangement with radiculopathy; cervical stenosis, lumbar disc herniation at L5-S1 with central and left sided foraminal narrowing, which abuts the existing left L5 nerve root; cervical disc herniations with posterior disc protrusion, cord impingement, foraminal narrowing and encroachment upon the nerve root; lumbar disc herniation at L5/S1 with posterior disc protrusion, cord impingement, foraminal narrowing and encroachment upon

> the nerve root; total numbness and weakness of her back and neck; the potential need for corrective surgical procedures on her neck, back and left shoulder; suffering burning, tingling and numbness in her back, neck and left shoulder, sensitivity to touch, permanent loss of nerve function, difficulty walking, inability to walk without a limp, inability to walk up and down stairs, total loss of balance, extreme fatigue, inability to perform daily tasks, severe pain that is continuous and ongoing . . ."
> (*see* NYSCEF Doc No. 33).

On August 22, 2019, more than two years after the accident, Dr. Dorothy Scarpinato, an orthopedic surgeon, purportedly performed a medical examination of the Plaintiff. Thereafter, on February 25, 2019, the Plaintiff was deposed. On September 10, 2019, after discovery was complete, the Plaintiff filed a note of issue and a certificate of readiness.

The Defendant's Summary Judgment Motion

The Defendant moved for summary judgment dismissing the complaint on the ground that the Plaintiff's alleged injuries fail to satisfy the requisite standards for "serious injury" under Insurance Law §5102 (d). The Defendant, in support of her motion, proffers an attorney affirmation, the Plaintiff's deposition testimony and the affirmed report of Dr. Scarpinato. The Defendant contends that the Plaintiff did not suffer any permanent injuries, did not suffer any significant limitations of use of a body function or system, nor was she prevented from performing her usual and customary daily activities for a period of ninety (90) out of one hundred eighty (180) days immediately following the accident.

Dr. Scarpinato, the orthopedic surgeon who examined the Plaintiff, concluded in her report that there are no objective findings that indicate Hines suffered from an orthopedic disability or that she requires orthopedic treatment. Dr. Scarpinato also concludes, after objective testing with the use of a goniometer, that Hines' cervical spine, lumbar spine, thoracic spine, left knee, left ankle, left foot, left

elbow and left shoulder all had the normal range of motion,[1] with good muscle strength and no tenderness, swelling or atrophy.

The Plaintiff's Opposition

The Plaintiff, in opposition, asserts that her injuries, meet the threshold for the following serious injury categories: (1) permanent consequential limitation of use of a body organ or member; (2) significant limitation of use of a body function or system; and (3) a medically determined injury or impairment of a non-permanent nature which prevents her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment.

The Plaintiff submits an affirmation from Dr. Brian S. Haftel, a board-certified anesthesiologist, along with medical records and magnetic resonating imaging (MRI) reports of Dr. Thomas M. Kolbin. Dr. Haftel's expert affirmation is based on medical reports dated from May 5, 2017, (two days after the accident) through November 7, 2017, and concludes that the Plaintiff sustained, *inter alia*, herniated and bulging discs as a result of the accident. Dr. Hafter also relates the injuries to the accident and concludes that the injuries to her neck and back are permanent.

The Plaintiff argues that although Dr. Scarpinato reviewed her medical records, she did not review the MRI films. The Plaintiff claims that she suffered permanent consequential and significant limitations of the use of her cervical spine, lumbar spine, neck and back and suffers pain throughout her lower and upper extremities. The Plaintiff argues that because the examination by Dr. Scarpinato took place well

[1] "Normal" range of motion as per the guidelines of quantifications per the American Medical Associations' Guides to Evaluation of Permanent Impairment, Fifth Edition guidelines.

after the first one hundred eighty (180) days following the accident, the Defendant cannot establish that she did not meet the "90/180" category of Insurance Law § 5102.

Lastly, the Plaintiff argues that there are material issues of fact for trial. Specifically, the Plaintiff argues that Dr. Haftel's affirmation and the MRIs evidence that her alleged injuries were not pre-existing. Hines contends that the MRI reports, Dr. Haftel's findings of her limited range of motion, and her continued complaints of pain are sufficient to rebut any *prima facie* showing made by Ventura.

The Defendant's Reply

The Defendant, in reply, asserts that to there are no issues of fact that require a trial. Although, Dr. Scarpinato's report found that there is a casual relationship between the accident and the Plaintiff's claimed injuries, she concluded that the Plaintiff's injuries were resolved. Additionally, the Defendant argues that Dr. Haftel's findings regarding the Plaintiff's limited ranges of motion are not based upon objective testing and do not reference a peer reviewed source. The Defendant notes that Dr. Scarpinato's report compares the Plaintiff's ranges of motion to those ranges provided by the American Medical Association's "Guides to the Evaluation of Permanent Impairment, Fifth Edition," while Dr. Haftel's report fails to provide the source for his proffered quantities of "normal ranges of motion." The Defendant also argues that the Plaintiff failed to rebut her *prima facie* showing because the Plaintiff failed to provide the results of a recent physical examination.

Discussion

On a motion for summary judgment the court's function is issue finding, not issue determination *(see Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865 [2d Dept 2018] [internal citations omitted]). "A party moving for summary judgment must

demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). "[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" *(Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). "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" (*id.*, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1986]). In other words, "plaintiff need only raise a triable issue of fact regarding the element or elements on which the defendant has made its prima facie showing" (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 826 [2d Dept 2016] [internal quotation marks omitted]).

"In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (*Santiago v Joyce*, 127 AD3d 954, 954 [2d Dept 2015] [internal citations omitted]). "A motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], *quoting Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]). "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal citation omitted] [emphasis added]). Further, "[s]ummary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011] [internal citation omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

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" (emphasis added).

Thus, a plaintiff must have suffered a "serious injury" by, among other things, demonstrating: (1) permanent consequential limitation of use of a body organ, member, function or system, (2) significant limitation of use of a body function or system or (3) a non-permanent medical injury which prevents her from performing substantially all of her customary daily activities for at least 90 days during the 180 days immediately following the accident.

To succeed on a summary judgment motion based on the lack of a serious injury, defendant must submit evidence eliminating any material issues of fact with respect to all categories of the "serious injury" threshold (*see generally Ocasio v Henry*, 276 AD2d 611 [2d Dept 2000]). Typically, it is necessary that defendants proffer medical evidence in the form of an expert opinion demonstrating the absence of a serious injury to be entitled to an accelerated judgment dismissing the action (*see Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49-51 [2d Dept 2005]; *cf. Sequeira v W&E Auto Repair, Inc.*, 17 AD3d 442, 442-443 [2d Dept 2005]). Such evidence must affirmatively attest, within a reasonable degree of medical certainty, that the alleged injury did not result in a permanent injury limiting use of the body part's function *or* a non-permanent injury limiting plaintiff's ability to perform her daily activities for a period of 90/180 days (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002], *citing Dufel v Green*, 84 NY2d 795 [1995]; *Lopez v Senatore*, 65 NY2d 1017 [1985]). Plaintiff's own sworn statements may also be proffered to demonstrate that she did not suffer injuries or that her daily and customary activities were not

limited (*see Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664 [2d Dept 2008]; *Ocasio*, 276 AD2d at 612 [plaintiff testified that she missed only two weeks of work and school, thus failing to demonstrate she was prevented from performing substantially all material acts constituting her customary daily activities]).

Turning to the merits of the motion for summary judgment, the Court is of the opinion that based upon the foregoing submissions, including expert medical testimony, the Defendant has met her initial burden of proof as to the Plaintiff. In the instant proceeding, the Defendants' proof, in the form of the report of Dr. Scarpinato is sufficient to establish that the Plaintiff's injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). While Dr. Scarpinato did find that the Plaintiff had initially suffered from tears and herniations that were resolved, "[t]he mere existence of a bulging or herniated disc 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" (*Vidor v. Davila*, 37 AD3d 826, 827, 830 N.Y.S.2d 772, 773 [2d Dept 2007]).

What is more, the Court finds that the Defendant has provided sufficient evidence regarding the Plaintiff's 90/180 claim. Generally, where the Bill of Particulars contains conclusory allegations of a 90/180 claim, and the deposition or affidavit of the Plaintiff does not support, or reflects that there is no such claim, Defendant movant may utilize those factors in support of its motion for summary judgment on that category (*see Master v. Boiakhtchion*, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008]). The Plaintiff's Bill of Particulars states that "Plaintiff was confined to home for approximately two months" (see Defendant's Motion, Exhibit C, Paragraph 4). However, during her deposition, the Plaintiff stated that she did not take any time off from work and was able to perform her routine and daily activities after the accident. The Defendant further

notes that the Plaintiff stated at her deposition that she stepped out of her jeep immediately after the accident and drove away of her own volition. As such, this together with the medical reports, serves to establish a *prima facie* showing in support of the Defendant's motion, that there is no viable 90/180 claim.

As a result, it becomes incumbent upon the Plaintiff to establish that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, as defined by statute, in order to avoid the dismissal of her action (*see Jackson v United Parcel Serv.*, 204 AD2d 605 [2d Dept 1994]; *Bryan v Brancato*, 213 AD2d 577 [2d Dept 1995]). In this regard, the Plaintiff must submit quantitative objective findings, in addition to opinions as to the significance of the Plaintiff's injuries (*see Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 AD3d 641, 642, 775 N.Y.S.2d 546, 547 [2d Dept 2004]; *Burnett v Miller*, 255 AD2d 541 [2d Dept 1998]; *Beckett v Conte*, 176 AD2d 774 [2d Dept 1991]).

Brian S. Haftel, M.D., examined the Plaintiff on June 15, 2017, July 17, 2017, August 17, 2017, September 14, 2017, October 11, 2017 and November 7, 2017. Dr. Haftel detailed his findings based upon his review of Plaintiff's medical records, his personal observations and range of motion testing. Dr. Haftel found limited range of motion for each examination of the Plaintiff's lumbar, thoracic and cervical spines. Dr. Haftel concluded that Hines sustained significant injuries to her cervical, lumbar and thoracic spines as a result of the accident and opined that "plaintiff's pain and limited range of motion in her neck and back are *permanent* and will continue to worsen" (NYSCEF Doc No. 43 at ¶ 23 [emphasis added]).

Plaintiff's evidence, namely the affirmed reports of Dr. Haftel, fails to properly raise a triable issue of fact with regard to the Plaintiff's claim that she sustained a serious injury. Dr. Haftel does not indicate that his range of motion testing was performed with an objective test instrument such as a goniometer. Defendant raises this in reply. While Dr. Hafter does allege that the Plaintiff's injuries are permanent, the report was based upon examinations that had been conducted approximately three years before the report itself was completed and as a result the findings of permanency were conclusive in nature (see *Sapienza*

v. *Ruggiero*, 57 AD3d 643, 645, 869 N.Y.S.2d 192, 194 [2d Dept 2008]; *Elgendy v. Nieradko*, 307 A.D.2d 251, 251, 762 N.Y.S.2d 275 [2d Dept 2003]; *Diaz v. Wiggins*, 271 A.D.2d 639, 640, 707 N.Y.S.2d 870, 871 [2d Dept 2000]; *Attanasio v. Lashley*, 223 A.D.2d 614, 614–15, 636 N.Y.S.2d 834, 835 [2d Dept 1996]. What is more, the report of Dr. Haftel in conjunction with the deposition of the Plaintiff fail to raise an issue of fact in relation to the Plaintiff's 90/180 claim. See *Knopf v. Sinetar*, 69 A.D.3d 809, 810, 895 N.Y.S.2d 108, 109 [2d Dept 2010]. Finally, the Plaintiff fails to address her cessation, or gap, in treatment (*see Neugebauer v. Gill*, 19 AD3d 567, 568, 797 N.Y.S.2d 541, 542 [2 Dept 2005]; *Sibrizzi v. Davis*, 7 AD3d 691, 692, 776 N.Y.S.2d 843 [2d Dept 2004]).

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Defendant (motions sequence #2) for summary judgment is granted and the Plaintiff's complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

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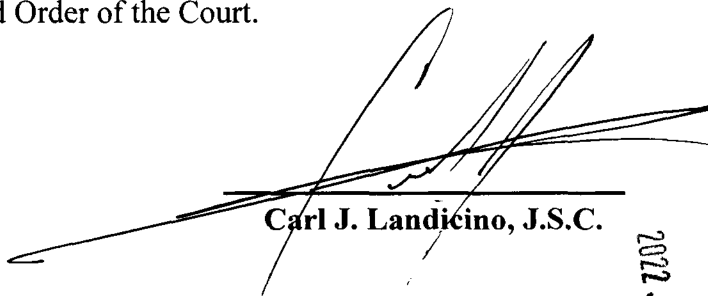

Carl J. Landicino, J.S.C.

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