Valentin v New York City Tr. Auth.
2022 NY Slip Op 30590(U)
February 22, 2022
Supreme Court, Kings County
Docket Number: Index No. 501056/2011
Judge: Consuelo Mallafre Melendez
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At an IAS Term, Part 20 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22 day of February 2022.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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MILAGROS VALENTIN,
Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY d/b/a MTA NEW YORK CITY TRANSIT AUTHORITY, and METROPOLITAN TRANSIT AUTHORITY,

Defendants.

Index No. 501056/2011

DECISION & ORDER
Motion Sequence 004

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Hon. Consuelo Mallafre Melendez

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 22, 23, 24-36, 37-42, 43-45, 48

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendants NEW YORK CITY TRANSIT AUTHORITY (sued herein as "NEW YORK CITY TRANSIT AUTHORITY d/b/a MTA NEW YORK CITY TRANSIT AUTHORITY) and METROPOLITAN TRANSPORTATION AUTHORITY (sued herein as "METROPOLITAN TRANSIT AUTHORITY") move for summary judgment in their favor pursuant to CPLR 3211 and CPLR 3212 on the issue of liability and pursuant to Insurance Law § 5102(d) claiming that plaintiff does not meet threshold for serious injury.

On January 12, 2011, Plaintiff was a passenger on the B20 bus. As she was disembarking, plaintiff slipped while walking down the stairs of the bus. Plaintiff claims that defendants breached their duty of care in allowing the step of the bus to be in a wet, icy, dirty and slippery condition.

A Defendants' failure to make their prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 [1985]). A common carrier is required to exercise that care which a reasonably prudent carrier of passengers would exercise under the same circumstances, in keeping with dangers and risks known to the carrier or which it should reasonably have anticipated (*Fishman v. Manhattan & Bronx Surface Tr. Operating Auth.*, 79 N.Y.2d 1031 [1992]). Common carriers owe a duty of care to their passengers to require them to not only keep their transportation vehicles safe, but also to maintain a safe means of ingress and egress thereto for their passengers (*Marshall v. City of Albany*, 184 A.D.3d 1043 [3d Dept. 2020]).

Defendants fail to establish their prima facie burden to grant summary judgment in their favor. While they correctly argue that there is no duty for a common carrier to constantly clean the floor of the buses, they fail to establish facts to support their position.

In *Robins v. Metropolitan Transit Authority*, 58 A.D.3d 711 [2d Dept. 2009], the Appellate Division, Second Department, held that, where a Plaintiff slipped and fell on a wet step while exiting the bus, "the defendants did not breach a duty owed to the plaintiff since, under the weather conditions which existed at the time of the accident, it would be unreasonable to expect the defendants to constantly clean the floor of their buses." *Robins*, 58 A.D.3d at 711. The Second Department has repeatedly held that "[i]t would be unreasonable to expect the defendant[s] to constantly clean the floor[s] of [their] buses" during a time when there are adverse weather conditions. *See McKenzie v. Westchester*, 38 A.D.3d 855 [2d Dept. 2007] [quoting *Spooner v. New York City Tr. Auth.*, 298 A.D.2d 575, 575-576 [2d Dept. 2002]).

While the law does not require a common carrier to "constantly clean the floor of the bus," it nevertheless imposes a duty of care to its passengers. In this case, defendants submit no evidence to establish that the floor of the bus was cleaned or maintained at all. At a minimum, there is no indication that the condition of the aisle leading to the steps and the steps were ever inspected at any time on the day of the accident. Further, defendants have not submitted evidence of precipitation and weather conditions in effect at the time of the accident or in the hours preceding it. No meteorological report or any other evidence is offered to establish

conditions as existed at around the time of the fall. Defendants, instead, rely on the ambiguous and inconclusive testimony of the plaintiff and plaintiff's daughter recalling a previous snow fall and summarily rest on assumptions about the weather. In sum, Defendants submit no evidence of any efforts made to maintain the steps and relevant portion of the aisle. "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Birnbaum v. New York Racing Assn., Inc.*, 57 A.D.3d 598, 598–599 [2d Dept. 2008]; *See Schiano v. Mijul, Inc.*, 79 A.D.3d 726, 726–727 [2d Dept. 2010]). Indeed, common carriers owe a duty of care to their passengers to require them to not only keep their transportation vehicles safe, but also to maintain a safe means of ingress and egress thereto for their passengers (*Marshall*, 184 A.D.3d 1043 [3d Dept. 2020]).

Defendants also move pursuant to Insurance Law *§* 5102(d) claiming that plaintiff has not sustained a serious injury. "'Summary judgment is an appropriate vehicle for determining whether a plaintiff can establish, prima facie, a serious injury' within the meaning of Insurance Law § 5102(d)" (*Wright v. Melendez*, 140 A.D.2d 337 [2d Dept.1998]). The defendants bear the burden of proof to demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). The defendants may do so through the submission of affidavits and affirmations of medical experts who examined the plaintiff and found no objective medical evidence to support a serious injury claim (*Grossman v. Wright*, 268 A.D.2d 79 [2d Dept. 2000]). Once the defendants have established prima facie entitlement to summary judgment through admissible evidence, the burden shifts to the plaintiff to demonstrate that a triable issue of fact exists as to a serious injury was sustained within the meaning of the No-Fault Law (*Grossman*, 268 A.D.2d 79; *Pommells v. Perez*, 4 N.Y.3d 566 [2005]).

However, "summary judgment should be granted in cases where the plaintiff's opposition is limited to 'conclusory assertions tailored to meet statutory requirements' " (*Grossman*, 268 A.D.2d 79 at 83 quoting *Lopez v. Senatore*, 65 N.Y.2d 1017 [1985]). "In order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law *§* 5102(d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury" (*Grossman*, 268 A.D.2d 79, 84 [2d Dept. 2000]). Subjective complaints of pain alone, absent supporting objective

medical evidence is not sufficient to establish a serious injury (*Perl v. Meher*, 18 N.Y.3d 208 [2011]). Objective medical proof is critical in determining whether a plaintiff's injuries were truly "serious" (*Perl*, 18 N.Y.3d 208 [2011]). Supporting objective medical tests include "X-rays, MRI's, straight-leg or Lasque tests, and any other similarly recognized tests or quantitative results based on a neurological examination" (*Grossman*, 268 A.D.2d 79 [2d Dept. 2000]).

The timing of these medical evaluations is also significant to a court's determination. A plaintiff should submit qualitative medical evidence which establishes symptoms shortly after the accident, and quantitative measurements of range of motion performed later on in preparation of litigation (*Perl*, 18 N.Y.3d 208 [2011]). The former serves to establish that the accident was the proximate cause of a plaintiff's injuries and the latter serves to establish that the injuries are severe (*Perl*, 18 N.Y.3d 208).

Regarding the "significant limitation of use" category of serious injury, the Court of Appeals has held that the determination of "[w]hether a limitation of use or function is 'significant' or 'consequential'… relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure*, 98 N.Y.2d 345 at 353 quoting *Dufel v. Green*, 84 N.Y.2d 795 [1995]). A "minor, mild or slight limitation of use" is not significant under the statute (*Licari v. Elliott*, 57 N.Y.2d 230, 236 ([1982]). The Second Department has found that "while a significant limitation of use of a body function or member need not be permanent in order to constitute a serious injury…any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well" (*Lively v. Fernandez*, 85 A.D.3d 981, 982 [2d Dept. 2011] quoting *Partlow v. Meehan*, 155 A.D.2d 647 [2d Dept. 1989]).

To recover for an injury under the 90/180-day category of serious injury, a plaintiff "must show, by objective evidence, the existence of a medically determined injury or impairment of a non-permanent nature that affected substantially all of the material acts that constitute his or her daily activities for at least 90 days during the 180 days following the occurrence." *See*, Insurance Law § 5102(d); *Toure*, 98 N.Y.2d 345 [2002]; *Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]. The Court of Appeals has stated that "the words 'substantially all' should be construed to mean that the person has been curtailed from performing his usual activities to a great extent rather than some

slight curtailment." *See, Licari*, 57 N.Y.2d 230, 236 [1982]*; Baker v. Thorpe*, 43 A.D.3d 535 [3d Dept. 2007]; *Gaddy*, 79 N.Y.2d 955 [1992]. The Second Department has held that a plaintiff's injury must be substantiated by a physician to qualify as a 90/180-day category of serious injury. (*See, Damas v. Valdes*, 84 A.D.3d 87 [2d Dept. 2011]).

Here, as to significant limitation, the medical documentation plaintiff submits notes severe range of motion deficits contradicting defendants' submissions. Plaintiff submits that report of Dr. Leon Reyfman, M.D. a Diplomate of the American Board of Anesthesiology and Pain Management. Dr. Reyfman noted that on May 18, 2011, plaintiff complained of severe pain of the lower back which increased since the time of the accident. The pain was exacerbated by mechanical type activities including standing, sitting, bending forward, lifting and twisting. He noted that she was undergoing physical therapy sessions which she stopped due to experiencing severe pain during the treatment. The plaintiff complained of lower back pain radiating to the buttocks without numbness/tingling in the feet/toes. Objective findings in his report included a positive MRI of the cervical spine performed on February 12, 2011. Dr. Reyfman noted left paracentral herniations at C5/6 and C6/7 and smaller herniations at C3/4 and C7/T1. On physical examination he recorded limited range of motion of the lumbar spine and pelvis, especially with extension (pain). Dr. Reyfman's assessment was that physical findings were demonstrable of severely restricted lumbar and lumbosacral range of motion. Based on his evaluation, an MRI of the lumbar spine was indicated. He noted that the plaintiff had no pre-existing conditions.

Plaintiff returned to Dr. Rayfman as directed on June 1, 2011. She remained essentially unchanged from prior visits. Noting that she failed to respond to prior treatment and based on indications that she had discogenic back pain, herniated disc and radiculitis and failed non-invasive treatment, Dr. Reyfman treated her with Interlaminar Epidural Steroid Injection. On June 13, 2011 and on July 15, 2011 the plaintiff was again seen by Dr. Reyfman. On July 15, Dr. Reyfman treated the plaintiff once again with epidural steroid injection. On August 19, 2011, Dr. Reyfman referred the plaintiff to a Dr. Gerling for surgical evaluation. Plaintiff also submitted the MRI report of Dr. Inna Abramova which indicated loss of signal and a focal central herniation creating a ventral extradural defect at C3-4. The C4-5 disc demonstrated loss of height and signal. There was a left paracentral/foraminal herniation creating impingement. The C5-6 and C6-7 discs had loss of signal and central disc herniations creating central stenosis. The C7-

T1 disc demonstrated loss of signal and had a left paracentral herniation creating a ventral extradural defect.

Plaintiff also submitted the affidavit of Dr. Igor Stiler who conducted range of motion tests on her lumbar and cervical spine on 4/15/21. The results indicate the plaintiff suffers from substantial limitation of motion presently.

Plaintiff gave credible testimony regarding the length of her incapacitation for not less than 90 out of 180 days. She testified that she was bed bound for one month following the accident and then home bound for four or five months. She testified that she couldn't walk during this time and that the pain in her spine and back would prevent her from going out. These complaints and limitations are substantiated by the records of Dr. Reyfman.

In reviewing the parties' submissions, the court finds that defendants have sustained its prima facie burden for summary judgment based on serious injury threshold through its exhibits and medical affidavits. Plaintiff, however, has submitted evidence to defeat Defendant's motion for summary judgment with respect to the "significant limitation" and "90/180" categories of serious injury. The medical evidence submitted documents the extent of Plaintiff's injuries as well as the many months of treatment that she underwent which included two epidural steroid injections within the first six months of the accident, raising an issue of fact as to the significant limitation threshold. Plaintiff also raises issues of fact with regard to the 90/180 day threshold. Plaintiff testified that she suffered back pain immediately after the accident, was bound to bed for one month and home bound for four or five months thereafter. As noted above, MRI findings were positive for herniations and she required epidural steroid injections. These issues of fact preclude summary judgment.

Accordingly, defendant's motion for summary judgment in its favor is Denied in its entirety.

This constitutes the decision and order of the court

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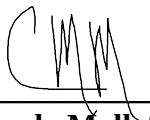

Hon. Consuelo Mallafre Melendez
J. S. C.