

Mendez-Tatis v New York City Tr. Auth.
2022 NY Slip Op 35169(U)
December 5, 2022
Supreme Court, Bronx County
Docket Number: Index No. 23894/2016E
Judge: Mitchell J. Danziger
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 3**

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DEYANIRA MENDEZ-TATIS and MARIA PENA, Index No.: 23894/2016E

-against-

Hon. Mitchell J. Danziger

**NEW YORK CITY TRANSIT AUTHORITY, et.
al.,**

Justice Supreme Court

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**MARTHA D. VERA and AMADO
VALDEZ-GRULLON,**

Index No.: 24170/2016E

-against-

NEW YORK CITY TRANSIT AUTHORITY, et. al.,

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The following papers were read on this motion (Seq. No. 2) for **summary judgment** noticed for May 27, 2022 and submitted on July 28, 2022

Notice of Motion - Affirmation and Exhibits, Statement of Material Facts, Memorandum of Law in Support,	NYSCEF Doc. # 61-83
Notice of Cross-Motion, Affirmation in Support	NYSCEF Doc. # 85-86
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 88-99
Affirmation in Reply	NYSCEF Doc. # 101

Motion by defendants, Martha D. Vera ("Vera") and Amado Valdez-Grullon ("Valdez-Grullon"), for an order pursuant to CPLR §§3211 and 3212, granting summary judgment in their favor, dismissing plaintiffs' complaint as against them, and improperly filed cross-motion by defendants, New York City Transit Authority, MTA Bus Company, and Josue Gregoria (hereinafter "Transit") for an order pursuant to CPLR §§3211 and 3212, also seeking summary judgment and dismissal of plaintiffs' claims, are decided as follows:

This is a personal injury action arising out of a July 27, 2015, motor-vehicle accident. Defendant, Vera was the operator of a motor vehicle at the intersection of Bruckner Boulevard and Wilkinson Avenue when his vehicle came into contact with a MTA bus operated by defendant, Gregoria. The plaintiffs were passengers on the bus.

As an initial matter, the Transit defendants improperly cross-move on the Vera and Valdez-Grullon motion. A cross-motion properly seeks relief against the moving parties. (CPLR

§2215). Here, the Transit defendants seeks affirmative relief against a non-moving party. The Court will entertain the improper cross-motion because it is within the Court's discretion to do so; the cross-motion simply adopts the arguments made by defendants, Vera and Valdez-Grullon; the note of issue has not been filed in this matter; and in the interest of judicial economy. (*Smulczeski v. Smulczeski*, 128 A.D.3d 671 [2nd Dept. 2015]).

The defendants move for summary judgment on the grounds that neither plaintiff, Mendez-Tatis, nor plaintiff, Pena have sustained a serious injury pursuant to Insurance Law §5102(d). While plaintiffs allege qualifying injuries, the movants submit that there is no objective proof or support for these allegations in the form of competent medical evidence. Further, the plaintiffs underwent minimal treatment and only plaintiff, Mendez-Tatis missed five (5) days of work. Plaintiff Pena missed no time from work. Plaintiffs oppose defendants' motions submitting that plaintiffs sustained serious injuries as defined by Insurance Law §5102(d) and that defendants failed to sustain their burden of establishing entitlement to summary judgment.

Plaintiff, Mendez-Tatis, in her Bill of Particulars alleges that she suffered the following injuries: lumbar spine herniation at L4-5 with compression on the thecal sac, spinal stenosis, L5-S1 disc bulging, sprain, strain, and reduced range of motion; cervical spine C5-6 radiculopathy, sprain, strain, and reduced range of motion; thoracic spine sprain, strain, and reduced range of motion; right hip pain and contusion; concussion, headaches, loss of sleep and disturbance due to pain and discomfort.

Plaintiff, Pena, in her Bill of Particular alleges that she suffered the following injuries: lumbar spine L3-4 facet hypertrophy, loss of disc signal at L4-5 with broad herniation and annular tear contacting but not displacing the L5 nerve roots, loss of disc signal and height at L5-S1, central and asymmetric to right disc herniation and annular tear contacting the S1 nerve roots with slight posterior displacement of the right S1 nerve root, disc bulging, sprain, strain and reduced range of motion; cervical spine C5-6 and C6-7 disc herniations, disc bulging at C3-4 and C4-5, sprain, strain and reduced range of motion; headaches, sleep loss and disturbance due to pain and discomfort.

In support of their motion, moving defendants, Vera and Valdez-Grullon submit the radiological review of Melissa Sapan-Cohn, M.D., who opines that plaintiff, Mendez-Tatis did not suffer an acute brain injury and her cervical and lumbar herniations are as a result of

degeneration which is chronic in nature and not as a result of any acute traumatic related injury. (Ex. E1 and E2). Dr. Sapan-Cohn also reviewed the radiology report for plaintiff, Pena's lumbar spine. Dr. Sapan-Cohn found that Ms. Pena has degenerative disc disease at L4-5 and L5-S1 with superimposed disc herniations at both levels. She notes there is disc desiccation at L4-5 and L5-S1 which indicates that the disc has dried out and lost its normal water content which is the commencement of degenerative disc disease. Dr. Cohn opines that the disc herniations at L4-5 and L5-S1 are chronic in nature and there are no findings to confirm acute traumatic related injury.

Defendants contend that plaintiff, Mendez-Tatis testified she missed only five days to one week from her job at Allen Health Services. Her medical treatment consisted of physical therapy, and acupuncture and she did not undergo surgery as a result of this incident. Plaintiff, Mendez-Tatis underwent a second CT scan of her brain on October 12, 2015, and the finding was no acute intracranial abnormality.

Lastly, plaintiff, Mendez-Tatis was examined at an independent medical exam on May 2, 2019, wherein Lisa Nason, M.D., found that her cervical spine sprain, thoracic spine sprain, lumbar spine sprain, and right shoulder contusion had resolved. Dr. Nason found that Ms. Mendez-Tatis had a clinically normal exam of the right hip. Dr. Nason noted that while there were findings of decreased range of motion in her physical examination, there were no positive objective findings from an orthopedic standpoint. Dr. Nason found Ms. Mendez-Tatis to have suffered no orthopedic disability.

With regard to plaintiff, Pena, she testified she did not miss any time from work at Crab Shanty. Her medical treatment consisted of testing, physical therapy, chiropractic care, and acupuncture. She did not undergo surgery. Moreover, plaintiff, Pena's own treating doctor, Andre Duhamel, M.D. of Morris Park Medical noted that on July 19, 2016, Ms. Pena had no complaints or conditions of her lower back or neck and her lumbar sprain/strain had achieved "100% improvement."

Lastly, plaintiff, Pena was examined at an independent medical exam on May 2, 2019, wherein Lisa Nason, M.D., found that her cervical spine and lumbar spine sprains were resolved. Dr. Nason found decreased range of motion in plaintiff, Pena's lumbar and cervical spine during physical examination, however notes there were no positive objective findings from an orthopedic standpoint. Dr. Nason found that plaintiff, Pena suffered no orthopedic disability

based on her exam. As a result of the foregoing, the moving defendants aver that there is no issue of fact as to whether either plaintiff suffered a serious injury as defined by Insurance Law §5102(d).

Plaintiff opposes the motion arguing that the defendants have failed to tender sufficient evidence to eliminate any material issues of fact from the case with respect to the permanent injury and significant limitation categories of Insurance Law §5102(d). Plaintiff contends that the reports by defendants' own experts raise material questions of fact regarding plaintiffs' injuries. Dr. Nason found decreased range of motion in each plaintiff, however states that there were no positive objective findings from an orthopedic standpoint. Plaintiff submits that such conclusory opinions should not be considered. (*Amatulli by Amatulli v. Delhi Cons. Corp.*, 77 N.Y.2d 525 [1991]). Further, defendants' radiologist found that all while both plaintiffs' radiology reports were positive for disc herniations, the herniations were as a result of degenerative chronic changes and disc disease as opposed to trauma. Plaintiff submits that defendants' experts contradict each other which raises a questions of fact for a jury to resolve. (*Greenberg v. Sheikm*, 2017 NY Slip Op 32330, citing, *Martinez v. Pioneer Transportation Corp.*, 48 A.D. 306 [1st Dept. 2008]). Plaintiffs further contend that the defendants have not met their burden as to the 90/180 day category by failing to submit medical reports that contradict plaintiffs claims.

Plaintiffs submit that they have sustained a serious injury based on the medical records of the plaintiffs' treating physicians and the medical report of Dr. Alimentero who performed physical exams of the plaintiffs in June of 2022. Plaintiff, Mendez-Tatis asserts that she was seen at Lincoln Hospital one day after the incident and was diagnosed with a concussion. Thereafter, she was treated by Dr. Andre Duhamel at Morris Park Medical Care, P.C. from August 24, 2015, to August 16, 2016. Per plaintiff, Dr. Duhamel noted decreased range of motion in her cervical and lumbar spine on November 10, 2015, more than 90 days after the incident occurred. Plaintiff, Mendez-Tatis offers the report of Dr. Felix Alimentero, who first examined her on June 29, 2022. Dr. Alimentero found that plaintiff, Mendez-Tatis has decreased range of motion in her lumbar and cervical spine, which is causally related to the accident on July 27, 2015. Plaintiff, Pena was also seen by Dr. Duhamel starting August 24, 2015. At the time, Dr. Duhamel found that plaintiff, Pena had decreased range of motion in her lumbar spine. Ms. Pena followed up with Dr. Duhamel until July 19, 2016. During her October

27, 2015, evaluation, which was 90 days post incident, Dr. Duhamel indicated that plaintiff was still experiencing a loss of range of motion in her lumbar spine. Plaintiff, Pena was seen by Dr. Felix Alimentero on June 1, 2022, for the first time. Dr. Alimentero found that Ms. Pena still suffers from a loss of range of motion in her lumbar spine. Plaintiffs contend that the differing opinions from plaintiffs' and defendants' medical evaluations can only be solved by the trier of fact.

The movant on a summary judgment motion must put forth sufficient evidence to show the absence of any material issue of fact (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1980)). The non-moving party is entitled to every favorable inference and need only show that a triable issue of fact exists. (*International Rescue Committee v. Reliance Ins. Co.*, 230 A.D.3d 641 (1st Dept. 1996)). A motion for summary judgment should not be granted where there are facts in dispute, where there are conflicting inferences that may be drawn from the evidence, or where there are issues of credibility to determine. (*Scott v. Long Island Power Authority*, 294 A.D.2d 348 [2nd Dept. 2002]).

Plaintiffs alleges they sustained a "serious injury" from the accident pursuant to the New York Insurance Law. In order to recover, §5102(d) of the Insurance Law defines "serious injury" as follows:

"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."

"In order for a non-permanent injury to be considered 'serious', for a purpose of establishing a civil right of recovery, there must be a medical determination as to the extent of the injury and its adverse impact on the injured party's ability to perform his usual and customary daily activities." (*McLoyrd v. Pennypacker*, 178 A.D.2d 227, 227 [1st Dept. 1991]).

The Court notes that categories, one (death), two (dismemberment), three (significant disfigurement), four (a fracture), five (loss of fetus), and six (permanent loss of a body organ, member, function, or system) of Insurance Law §5102(d) are not applicable to the injuries alleged by plaintiffs, nor are they claimed in plaintiff's pleadings. As such, at issue here is categories seven, eight, and nine i.e. permanent limitation, significant limitation, and 90/180 day curtailment of usual activities.

With regard to plaintiffs' claims that they were unable to perform substantially all of their usual activities for the first 90 out of 180 days after the accident, said claim is dismissed. According to plaintiff's testimony and their Bills of Particulars, plaintiffs missed minimal time from work, if any, and did not claim they were confined to home or bed post-accident. Such is sufficient to warrant dismissal of this claim. (*Holmes v. Brini Tr. Inc.*, 123 A.D.3d 628 [1st Dept. 2014], *Colon v. Torres*, 106 A.D.3d 458 [1st Dept. 2013]). Accordingly, defendants have met their prima facie burden as to category nine (9) of the Insurance Law and in opposition, plaintiff fails to raise an issue of fact.

On August 16, 2016, Dr. Duhamel examined plaintiff, Mendez-Tatis. Dr. Duhamel found that the range of motion in both her lumbar and cervical spine was normal. He noted that plaintiff, Mendez-Tatis had improved 95% with her lumbar and cervical sprain/strain. He discharged her from physical therapy and indicated that she no longer needed to follow up for these injuries. On July 19, 2016, Dr. Duhamel examined plaintiff, Pena. Dr. Duhamel found that Ms. Pena had achieved 100% improvement of her lumbar sprain/strain. He advised her to continue therapy 1 time per week and to follow up in 4 weeks. He noted that discharge was anticipated at the next follow-up.

Based on the findings of plaintiffs' treating physician, Dr. Duhamel, the IME reports of Dr. Nason, and plaintiff's own testimony, the defendants have established that plaintiffs did not suffer a permanent consequential limitation of a body organ or system (category seven (7) of the Insurance Law). According to plaintiffs treating physician, plaintiff, Mendez-Tatis' lumbar and cervical sprain/strain had resolved 95% and her range of motion was normal for both areas of her back on August 16., 2016. Plaintiff, Pena's injuries had improved 100%. Plaintiff, Mendez-Tatis was discharged from her doctor's care as a result and plaintiff, Pena was likely to be discharged at the next follow-up appointment. There are no further medical records submitted to the Court that indicate either plaintiff had any further treatment until they were seen by Dr. Alimentero in

June of 2022, almost seven (7) years after the accident and almost six (6) years after the plaintiffs underwent medical treatment for their alleged injuries. As such, the defendants have met their prima facie burden as to category seven (7) of the Insurance Law and in opposition, plaintiffs fail to raise a question of fact.

Lastly, the Court turns to whether the plaintiffs suffered a significant limitation of use of a body function or system (category 8 of the Insurance Law) as a result of this incident. The radiology reviews conducted by Dr. Sapan-Cohn indicate that the injuries alleged by both plaintiffs were degenerative in nature. Dr. Nason, defendants' independent medical exam doctor who conducted physical exams of the plaintiffs in May of 2022, found that both plaintiffs' injuries were resolved and from an orthopedic standpoint. Dr. Nason did note that both plaintiffs had a limited range of motion, plaintiff, Mendez-Tatis in her cervical spine and right hip and plaintiff, Pena in her cervical and lumbar spine, however, Dr. Nason notes that this was not based on objective findings. Moreover, plaintiffs' own doctor, Dr. Duhamel indicated that the plaintiffs' injuries had resolved in July and August of 2016 and specifically, plaintiff, Mendez-Tatis had a normal range of motion at that time. Lastly, plaintiff, Mendez-Tatis missed 5 days to 1 week of work and plaintiff, Pena did not miss work at all. As defendants' radiologist found that plaintiffs' disc herniations were degenerative, chronic, and not traumatically caused and defendants' orthopedist found plaintiffs' injuries to be resolved, defendants have made a prima facie showing that the plaintiffs did not suffer a significant limitation as a result of the subject motor vehicle accident. (*Rivera v. Fernandez & Ulloa Auto Group*, 123 A.D.3d 509 [1st Dept. 2014]).

Plaintiff fails to raise a triable issue in opposition. To establish a significant limitation of use of a body function or system, plaintiff must come forth with objective proof of the extent and duration of his limitations. (*Arjona v. Calcano*, 7 A.D.3d 279 [1st Dept. 2004]). Physical examinations and orthopedic tests are objective tests which will satisfy the standard of evidence required to defeat a threshold motion. (*Grossman v. Wright*, 268 A.D.2d 79 [2nd Dept. 2000]). Initially, plaintiff points to the contradictions in defendants' reports to create a question of fact. Dr. Sapan-Cohn found, after reviewing the plaintiffs' radiology reports, that plaintiffs did have injuries, but Dr. Nason found that their injuries were resolved. As such, plaintiff submits this is a question for the jury since conflicting medical evidence is offered. (*Martinez v. Pioneer Transp. Corp.*, 48 A.D.3d 306 [1st Dept. 2008]). However, Dr. Sapan-Cohn's report indicates that the

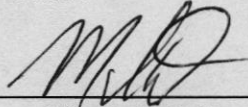
plaintiffs' injuries were not as a result of the incident, but as a result of degeneration. Thereafter, in July and August of 2016, plaintiffs' treating physician indicated that the plaintiffs' injuries were resolved. Dr. Nason confirms that with her IME report in 2019. While she does note that both plaintiffs have decreased range of motion, she does not attribute those finding to objective findings. The Court notes that Dr. Nason's examination of the plaintiffs was conducted four years post-accident and two years after plaintiffs' treating physician found that plaintiffs' injuries were resolved. As such, Dr. Nason's findings of decreased range of motion cannot be said to be causally related to the subject incident.

Lastly, Dr. Alimentero performed a physical examination of the plaintiffs for the first time, seven years post-incident. Dr. Alimentero does not address causation in his report for plaintiff, Mendez-Tatis. Dr. Alimentero states that "if the above statements are true and correct, causality is established between the above-stated accident and today's pathological findings" for plaintiff, Pena. However, his report does not address Dr. Sapan-Cohn's findings of degeneration for either plaintiff, nor does it address the resolution of plaintiffs' injuries by Dr. Duhamel. Simply stating the abovementioned injuries are causally related without addressing the findings of defendants' radiologist is insufficient. (*Rosa v. Delacruz*, 158 A.D.3d 571 [1st Dept. 2018]). Further, Dr. Alimentero's examination was too remote in time to raise an inference that the limitations he found were causally related to this incident. (*Pou . E&S Wholesale Meats, Inc.*, 68 A.D.3d 446 [1st Dept. 2009], *Khan v. Goldmag Hacking Corp.*, 149 A.D.3d 403 [1st Dept. 2017]). As such, the defendants have met their prima facie burden as to category eight (8) of the Insurance Law and in opposition, plaintiffs fail to raise a question of fact.

Based on the foregoing, plaintiffs have failed to demonstrate that they sustained a serious injury within the meaning of Insurance Law §5102(d). Accordingly, defendants' motions are granted, and plaintiffs' complaint is dismissed in its entirety.

This constitutes the decision and judgment of the Court.

Dated: 12/5/22

Hon. 

Mitchell J. Danziger, J.S.C.

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| 1. CHECK ONE..... | X CASE DISPOSED IN ITS ENTIRETY | ☐ CASE STILL ACTIVE |
| 2. MOTION IS..... | X GRANTED | ☐ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 3. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER | ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE |
| | ☐ FIDUCIARY APPOINTMENT | ☐ REFEREE APPOINTMENT |