

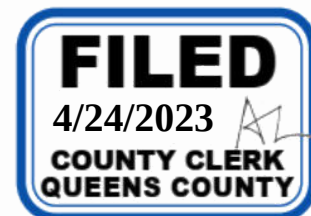
Baptiste v New York City Tr. Auth.
2023 NY Slip Op 35238(U)
April 17, 2023
Supreme Court, Queens County
Docket Number: Index No. 710448/2018
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN

IAS Part 20

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YOLETTE BAPTISTE,

Plaintiff,

Index No.: 710448/2018

-against-

Motion Seq. No.: 3

THE NEW YORK CITY TRANSIT AUTHORITY,
MABSTOA, MTA, THE MTA BUS COMPANY and
EDWARD R. BURTT,

Motion Date: 2.15.2023

Motion Cal. No.: 27

Defendants
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The e-filed papers bearing NYSCEF document numbers 34-53 were read on the motion made by the defendants, The New York City Transit Authority ("NYCTA"), Manhattan and Bronx Surface Transit Operating Authority ("MABSTOA"), MTA, The MTA Bus Company ("MTA Bus") and Edward R. Burtt ("Burtt") (collectively, the "Defendants"), for summary judgment dismissing the complaint.

The plaintiff, Yolette Baptiste (the "Plaintiff"), commenced this cause seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident (the "Accident"). Presently before the Court is the Defendants' motion for summary disposition, which is predicated on the assertion that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 [d]. For the following reasons, the motion is granted.

I. Background

The Accident occurred on September 24, 2017 on Hempstead Avenue at or near its intersection with Jamaica Avenue, Queens, New York. The Plaintiff alleges that the vehicle she was operating was struck by a vehicle operated by Burtt and owned by NYCTA.

The bill of particulars alleges injuries to the cervical spine, the lumbar spine and both shoulders. The Plaintiff, who was 60 years old at the time of the Accident, underwent, *inter alia*, a course of physical therapy. The bulk of her healthcare treatment consisted of a course of physical therapy that lasted 6 months. Treatment for her claimed injuries ended in 2018.

A. The Defendants' Submissions in Support

In support of their motion, the Defendants submit the affirmed report of Dr. Edward Toriello and the Plaintiff's deposition transcript.

Dr. Toriello, an orthopedist, conducted the independent medical examination of the Plaintiff on June 29, 2021. The physician performed range of motion testing with respect to the cervical spine, the right shoulder, the left shoulder, the right elbow, the left elbow, the left wrist and hand, the right wrist and hand, and the lumbosacral spine. Dr. Toriello found that range of motion was normal.

Dr. Toriello concluded that the "... claimant reveals evidence of resolved cervical strain, resolved low back sprain, and resolved bilateral shoulder contusion. She reveals no objective evidence of continued disability."

The Defendants also rely upon the Plaintiff's deposition testimony. In relevant part to the consideration of this motion, she testified as follows: that she did not miss any time from work because of the Accident; that although her vehicle was equipped with airbags, they did not deploy; that she did not go to the emergency room after the Accident; that the police offered to call an ambulance but she declined; that she first sought medical attention for her alleged injuries three to four days after the accident; that she attended physical therapy for a total of six months following the accident; and that she did not treat with any other doctors for her alleged injuries after six months of physical therapy.

With respect to the cessation of treatment in 2018, there was the following exchange at the Plaintiff's deposition:

Q. When therapy ended after six months, was it your decision? Did they tell you no more? How did that come about?

A. I went there and they tell me it's done.

The record further reveals that the Plaintiff had no fractures, surgeries or injections as the result of the Accident.

Lastly, the Plaintiff admits in her affidavit in opposition that she was involved in a prior accident (the "Prior Accident"). She sustained injuries to her neck and back in same, but contends that she "treated and recovered from these accidents [sic]."

B. The Plaintiff's Opposition

The Plaintiff submits an affidavit and various manner of medical documents in opposition, which are analyzed below.

The Plaintiff's affidavit indicates that she injured her left shoulder, neck and back in the Accident; that she received "approximately six (6) months of physical therapy and treatment

following the [A]ccident”; and that she injured her neck and back in a prior accident, but that she “recovered from these accidents [sic].”

The affidavit further indicates that as the result of the Accident, the Plaintiff: sustained injuries to the left shoulder, neck and back. It is also indicated therein that she underwent “approximately six (6) months of physical therapy and treatment following the [A]ccident.”

As noted, the Plaintiff testified at her deposition that treatment ended because the facility where she received physical therapy “tell me it’s done.” However, in her affidavit in opposition, the Plaintiff contends that treatment ended because no-fault benefits ceased and that she could not afford to pay for same.

The Plaintiff submits an MRI affirmation from Dr. Christopher Kyriakides, D.O., wherein he indicates that: (1) he reviewed the Plaintiff’s MRI films relative to the cervical and lumbar spines that were taken on November 4, 2017 at SouthWest Medical Imaging; and (2) Dr. Eric Feldmann’s reports relative thereto. Dr. Kyriakides indicates that he agrees with the findings expressed in Dr. Feldmann’s reports.

Dr. Kyriakides and Dr. Feldman found disc bulges and herniations in cervical and lumbar spines. However, neither physician indicates that these conditions were caused by the Accident. In fact, neither the MRI reports issued by Dr. Feldmann nor the MRI affirmation of Dr. Kyriakides address the issue of causation.

Also attached to the MRI affirmation are MRI reports with respect to both shoulders that are signed by Dr. Paresh Rijsinghani. However, said reports are not sworn to and Dr. Kyriakides does not address same in his MRI affirmation. Furthermore, Dr. Rijsinghani does not address the issue of causality in his reports.

The Plaintiff also submits an affirmed report from Dr. Kyriakides. The report is dated October 31, 2022, over five years after the Accident, and is the result of an examination, not treatment. Although not entirely clear, it appears that the report was issued as the result of an examination conducted on said date. The physician opines that the Plaintiff has losses in range of motion with respect to the neck, the lower back and both shoulders. Dr. Kyriakides provides no basis for these findings in that he does not indicate how he made these assessments. Here, among other things, he does not indicate that these findings were made using a goniometer or through another method. The physician also fails to address why treatment ceased in 2018.

The Plaintiff also submits numerous physical therapy records, medical records and medical reports (*see* NYSCEF Doc. No.: 51). The physical therapy and medical records are not certified, and the medical reports are not sworn to.

II. Discussion

A. Applicable Law

The familiar principles applicable to summary judgment motions are set forth below.

“Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law” (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

The “function of summary judgment is issue finding, not issue determination” (*see Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

To be entitled to the “drastic” remedy of summary judgment, the movant “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 from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The failure to make a *prima facie* showing of entitlement to summary judgment requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If no genuine issue of material fact exists, the grant of summary judgment is proper (*see Kornfeld v NRX Technologies, Inc.*, 62 NY2d 686, 688 [1984]).

Insurance Law § 5102 [d] states:

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.

B. The Gap in Treatment

The cessation of the Plaintiff's treatment in or about March 2018 warrants the dismissal of this cause. Where a defendant establishes that a plaintiff did not sustain serious injuries as the result of an accident, an unexplained lengthy cessation in treatment may warrant the dismissal of

the action (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Jackson v Doe*, 173 AD3d 505 [1st Dept 2019]); *Ziehl v Zhu*, 210 AD3d 612 [1st Dept 2022]). Such cessation renders the opinions of a plaintiff's medical experts speculative and severs "... the causal link between the accident and the claimed persisting injuries" (*id.*, at 613).

The Defendants establish, *prima facie*, that the Plaintiff did not sustain a serious injury to her cervical spine, lumbar spine and shoulders through Dr. Toriello's affirmed report, which indicates: that range of motion testing was normal; that the injuries consist of resolved cervical strain, resolved low back sprain, and resolved bilateral shoulder contusion; and that there is no evidence of continued disability. The Defendants also establish, *prima facie*, the absence of causation because the Accident took place on September 24, 2017; the course of treatment, which took the form of physical therapy, ended six months later; and when treatment ended, in or about March 2018, the Plaintiff was told by the physical therapy facility "it's [the therapy] done."

After it is established that treatment ceased long ago, the burden shifts to a plaintiff to offer a reasonable explanation for the cessation (*see Pommells v Perez*, 4 NY3d 566; *Delorbe v Perez*, 59 AD3d 491 [2d Dept 2009]; *DeLeon v Ross*, 44 AD3d 545 [1st Dept 2007]; *Wadford v Gruz*, 35 AD3d 258 [1st Dept 2006]; *Colon v Kempner*, 20 AD3d 372 [1st Dept 2005]).

A "reasonable explanation" exists where a Plaintiff testifies to exhausting his or her no-fault insurance and not being able to afford treatment out of pocket (*see Ramkumar v Grand Style Transp. Enterprises Inc.*, 22 NY3d 905 [2013]).

At her deposition, the Plaintiff admitted that treatment ended because the physical therapy facility "tell me it's [the physical therapy] done." At her deposition, the Plaintiff did not testify that the treatment "was done" due to the cessation of no-fault benefits; that she wanted to continue treatment; or that she could not afford to pay for continued treatment. However, the Plaintiff's affidavit in opposition indicates that treatment ceased because no-fault benefits ended and that she could not afford to pay for treatment. In light of her deposition testimony, "the [P]laintiff's affidavit present[s] feigned issues of fact designed to avoid the consequences of her earlier deposition testimony, and [is] insufficient to raise a triable issue of fact" (*Theissen v 7-Eleven, Inc.*, 189 AD3d 1502, 1504 [2d Dept 2020]) [citation omitted]).

In sum, because the Plaintiff and her healthcare providers fail to explain the cessation of treatment in or about March 2018, six months after the Accident, this cause must be dismissed (*see Pommells v Perez*, 4 NY3d 566; *Frias v Son Tien Liu*, 107 AD3d 589 [1st Dept 2013]).

"Moreover, the fact that [over] four years followed in which plaintiff did not seek treatment renders the opinion of her medical expert, submitted in opposition, speculative as to the permanency, significance, and causation of the claimed injuries" (*Pastora L. v Diallo*, 167 AD3d 424, 425 [1st Dept 2018] [internal quotation marks and citations omitted]).

C. The Plaintiff Did Not Suffer a Serious Injury to her Cervical Spine, the Lumbar Spine and the Shoulders

In any event, the Defendants establish *prima facie* entitlement to summary judgment dismissing the cervical, lumbar and bilateral shoulder claims through Dr. Toriello's affirmed report (see *Heesook Choi v Mendez*, 161 AD3d 1054 [2d Dept 2016]).

In opposition, the Plaintiff fails to raise a triable issue of fact. The MRI reports relied upon by the Plaintiff are insufficient to defeat the motion because they do not address the issue of causation (see *Sorto v Morales*, 55 AD3d 718 [2d Dept 2008]; *Collins v Stone*, 8 AD3d 321 [2d Dept 2004]). As noted, the affirmed report of Dr. Kyriakides, based on an examination conducted over four years after the cessation of treatment "is speculative as to the permanency, significance, and causation of the claimed injuries" (*Pastora L. v Diallo*, 167 AD3d 424, 425).

The physical therapy records, medical records and medical reports that the Plaintiff submits as NYSCEF Doc. No.: 51 are inadmissible and thus cannot be considered. The subject records are hearsay because they lack certification or authentication (see *Irizarry v Lindor*, 110 AD3d 846 [2d Dept. 2013]; *Rodriguez v Cesar*, 40 AD3d 731, 732 [2d Dept. 2007]). Because the medical reports are neither sworn to nor affirmed under penalty of perjury, they shall also not be considered (see *McLoud v Reyes*, 82 AD3d 848 [2d Dept. 2011]; *Rush v Kwan Chiu*, 79 AD3d 1004 [2d Dept 2010]; *Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

D. The 90/180 Day Claim

"A claim under [the 90/180] category must be supported by objective medical evidence of an injury or impairment of a nonpermanent nature which would have caused the alleged limitations on [the] plaintiff's daily activities. Further, there must be proof that the injured party was curtailed from performing [his or her] usual activities to a great extent rather than some slight curtailment" (*Sul-Low v Hunter*, 148 AD3d 1326, 1327 [3d Dept 2017]) [internal quotation marks and citations omitted]).

The 90-180 claim is dismissed on the ground that the Plaintiff admitted at her deposition that she missed no time from work as the result of her accident (see *Gordon v Reyes Hernandez*, 181 AD3d 424 [1st Dept 2020]; *Valera v Singh*, 89 AD3d 929 [2d Dept 2011]).

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Defendants' summary judgment motion is granted; and it is further,

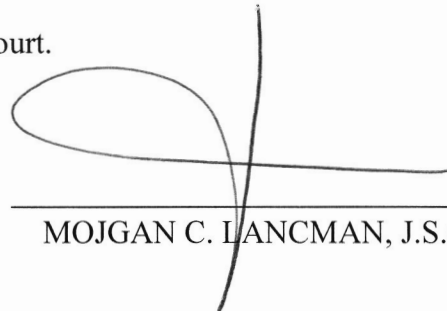
ORDERED, that the Plaintiff's complaint is dismissed as to all Defendants; and it is further,

ORDERED, that the Defendants shall serve a copy of this Order with Notice of Entry upon the Plaintiff by May 8, 2023.

The Clerk of the Court shall: (1) mark this cause dismissed; (2) close all motions; and (3) close all appearances.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
April 17, 2023



MOJGAN C. LANCMAN, J.S.C.