

Barinas v City of New York

2012 NY Slip Op 30522(U)

January 17, 2012

Sup Ct, Richmond County

Docket Number: 104837/08

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF RICHMOND

Part: C-2

MARIA BARINAS and HUGO BARINAS,

Plaintiff(s),

HON. THOMAS P. ALIOTTA

-against-

DECISION AND ORDER

Index No. 104837/08

THE CITY OF NEW YORK, NEW YORK CITY
 DEPARTMENT OF TRANSPORTATION, CITY
 OF NEW YORK, NEW YORK CITY TRANSIT
 AUTHORITY and NEW YORK CITY
 METROPOLITAN TRANSPORTATION
 AUTHORITY,

Motion No. 2008-002

Defendant(s).

The following papers numbered 1 to 3 were fully submitted the 2nd day of
 November, 2011.

Papers
 Numbered

Notice of Motion for Summary Judgment by Defendants NEW YORK CITY
 TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION
 AUTHORITY, s/h/a NEW YORK CITY METROPOLITAN TRANSPORTATION
 AUTHORITY, with Supporting Papers and Exhibits
 (dated August 2, 2011) _____ 1

Affirmation in Opposition by Plaintiffs, with Exhibits
 (dated October 12, 2011) _____ 2

Reply Affirmation of Defendants NEW YORK CITY TRANSIT AUTHORITY and
 METROPOLITAN TRANSPORTATION AUTHORITY s/h/a NEW YORK CITY
 TRANSPORTATION AUTHORITY,
 (dated October 31, 2011) _____ 3

Upon the foregoing papers, the motion for summary judgment is denied.

Plaintiffs commenced this action to recover damages for injuries allegedly sustained by

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MARIA BARINAS (hereinafter plaintiff) on September 12, 2007, when she allegedly tripped and fell while exiting a NEW YORK CITY TRANSIT AUTHORITY bus that had stopped at the corner of Castleton and Atlantic Avenues on Staten Island. No defect is alleged, but as a result of said fall, plaintiff claims to have sustained serious injuries to her cervical spine, including posterior disc bulges from C2-3 through C7-T1; cervigalgia; cervical muscle sprain; and hypolordosis of the cervical spine. She further alleges injury to her lumbar spine, including grade 1 anterolisthesis of L3 to L4; posterior disc bulge and face hypertrophy at L3/4; posterior disc bulge with subtle right foraminal extension at L4/5; decreased disc space at L5/S1; straightening of the normal lumbar lordosis; post traumatic headaches; sprains in both hands; lumbalgia; and lumbosacral muscle sprain. In addition, plaintiff claims that as a result of these injuries she was unable to perform many of her usual and customary daily activities for 90 of the first 180 days following the subject accident, and that because of the pain, she still remains unable to perform routine household chores, or to walk or exercise as she once did.

In the current application, defendants NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSIT AUTHORITY (hereinafter referred to collectively as the “NYCTA”), move for summary judgment dismissing the complaint on the ground that plaintiff has not sustained a “serious injury” as required under Insurance Law §5102(d). In support, the moving defendants submit the affirmation of an orthopedic surgeon, Dr. Lisa Nason, who, after an orthopedic examination of plaintiff, reported completely normal results. According to Dr. Nason, plaintiff’s cervical spine showed no structural abnormalities; that there was no tenderness to palpation along the (1) upper trapezius, (2) supraspinatus or (3) infraspinatus muscles; and that

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no muscle spasms were detected. In addition, this muscle group showed no evidence of atrophy. A foraminal compression test was performed with negative results. Upon the administration of relevant range of motion testing, which she both quantified and compared to “normal”, the doctor reported that all of plaintiff’s results fell within the normal limits. According to Dr. Nason, the testing of plaintiff’s lumbar spine revealed no tenderness to palpation along the lumbosacral and paraspinal muscles; that no muscle spasms were detected; and that plaintiff’s heel/toe walk was normal. In addition, Straight Leg Raising and Lasegue’s testing both proved negative. Neither was there any evidence that these muscles had atrophied. Here, too, relevant, quantified range of motion testing yielded “normal” results. In addition, her tests of plaintiff’s muscle reflexes revealed completely normal results, as did the tests performed on plaintiff’s hands and wrists. In her conclusion, Dr. Nason diagnosed plaintiff with status post cervical and lumbar sprain/strain, along with status post bilateral hand and wrist sprain, and opined that there was no present need for either orthopedic treatment or physical therapy. As a result, plaintiff was found to be able to work and perform her usual daily activities without boundaries or restrictions.

In further support of dismissal, defendants submitted the affirmation of a neurologist, Dr. Marie Audrie DeJesus, who performed a recent examination of plaintiff and concluded that she exhibited full range of motion on both flexion and extension; had no palpable muscle spasms in the cervical paraspinal musculature; and that her right and left lateral flexion and rotations were both normal. So, too, were the results of her Phalen’s and Tinel’s tests. With regard to plaintiff’s lumbar spine, the doctor again found no palpable muscle spasm in the lumbar paraspinal musculature; that plaintiff exhibited full range of motion on flexion and extension, and that her

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right and left lateral bending and straight leg raising was normal. Kernig's and Patrick's test were also administered to plaintiff and found to be negative. According to Dr. DeJesus, plaintiff's diagnosis was that of status post cervical, lumbar and right knee sprain with no permanency expected as a result of the subject accident.

Finally, defendants submitted the affirmation of a radiologist, Dr. Joseph Tuvia, who reviewed the MRI's taken of the plaintiff's cervical and lumbar spine, and reported that plaintiff has mild posterior disc bulges without significant stenosis or foraminal narrowing at C5-6 and C6-7. This doctor also reported multilevel disc desiccation, degeneration and multilevel posterior disc displacement, but noted that these findings were consistent with chronic degenerative spinal disease as a pre-existing condition. In furtherance of this opinion, the doctor noted that the multiplicity of levels involved, the nature of the distribution (with the lower cervical spine being the one most commonly affected) and signal changes in the discs were all typical of an individual with long-standing discogenic degenerative disease. These, plus the absence of features most associated with trauma, were all stated as favoring a degenerative etiology in plaintiff's case. According to Dr. Tuvia, these findings reflect natural wear and tear that is inconsistent with a single acute injury.

Similarly with regard to the MRI of plaintiff's lumbar spine taken on January 8, 2008, Dr. Tuvia reported normal findings except for certain abnormal osteophytic changes (most pronounced at the L2-3 and L4-5 levels, and on the T2 weighted images), and diminished signal intensity, both of which were said to be indicative of disc desiccation and degeneration. In addition, the doctor reported no spinal stenosis, disc bulge or herniation, although he did state that

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the presence of disc bulges would not be unusual even in asymptomatic individuals. In his opinion, plaintiff exhibited mild retrolisthesis at L3-4, but was otherwise essentially normal. Finally, the doctor reported no findings suggestive of acute trauma or its sequelae.

In opposition, plaintiffs contend that defendants' motion for summary judgment should be denied since they failed to establish their prima facie entitlement to judgment as a matter of law. Notably, plaintiffs allege that defendants' experts failed to address plaintiffs' claim that MARINA BARINAS had sustained a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the first 180 days immediately following the purported injury. Plaintiffs also claim that while the independent medical examination reports of Drs. Lisa Nason and Maria DeJesus state that plaintiff is not disabled, their examinations (which opinions were based on) conducted approximately three years after the accident do not address the possibility that plaintiff had sustained a medically determined injury or impairment immediately following the accident within the 90/180-day category of serious injury.

Recounting her fall, plaintiff averred that she fell on both hands and knees while exiting the bus, where upon she was taken by ambulance to the then-St. Vincent's Medical Center. There, x-rays were taken of both her neck and hip, and although she was advised that the x-rays were negative, she was given a neck brace to wear in order to keep her head from moving back and forth. Several days later, plaintiff presented to the office of Drs. Abrams and Piazza, where she underwent a conservative course of treatment, consisting of physical therapy 2-3 times per

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week for a period of several months. Then, on January 8, 2008, *i.e.*, four months post-accident, plaintiff was sent for MRIs of her neck and back which allegedly indicated the presence of, *inter alia*, posterior disc bulges at C5/6 and C6/7, C2/3 through C4/5 and C7/T1; Grade 1 anterolisthesis of L3 on to L4; posterior disc bulge and facet hypertrophy at L3/4; posterior disc bulge with subtle right foraminal extension at L4/5; and straightening of the normal lumbar lordosis.

Continuing with her own affidavit, plaintiff swears that for the first 90 days following the accident, she was unable to perform many of her usual and customary daily activities, and that by August 16, 2010, she was advised by Drs. Abrams and Piazza that she had reached her optimal level of improvement. She further avers that she presently remains unable to clean or perform household chores around her home, and is unable to walk or exercise as she once did because of the ensuing pain. In addition, plaintiff claims that a recent examination by Drs. Abrams and Piazza confirmed that she still experiences limited cervical and lumbar ranges of motion, and that such limitations are the result of the pain she continues to suffer as a direct consequence of tripping and falling from the bus.

In the alternative, plaintiff argues that should the Court deem the moving papers sufficient to establish a *prima facie* case that plaintiff did not sustain a serious injury, her detailed medical records and history, as well as the diagnostic test results regarding the injuries allegedly sustained as a result of the subject trip and fall are sufficient, standing alone, to raise triable issues of fact regarding her claim of serious injury. In support, plaintiff submits the affirmation of a chiropractor, John Piazza, who initially examined plaintiff two days after the fall, and continued

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to treat her until August 16, 2010. In his opinion, while plaintiff continues to experience neck and lower back pain and decreased range of motion, she has reached her optimal level of improvement, and any further treatment would be of no benefit to her. In addition, the chiropractor clearly sets forth the results of his objective testing of plaintiff's cervical and lumbar spine, which he quantified and compared to normal. According to this practitioner, plaintiff's injuries are a direct result of her accident on September 17, 2007, from which she continues to suffer significant and permanent consequential limitations of function and use.

The law in this area is clear. A plaintiff seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident is required to plead and prove that he or she has suffered a "serious injury" as defined in Insurance Law §§5102(d) and 5104 (*see Licari v. Elliott*, 57 NY2d 230). At the outset, it is for the Court to determine whether or not such an injury has been sustained, since "[t]he result of requiring a jury trial where the injury is clearly a minor one would perpetuate a system of unnecessary litigation" (*id.* at 237). In this case, it is the opinion of this Court that defendants have satisfied their initial burden of establishing that plaintiff did not sustain a serious injury as a result of her fall from a NYCTA bus (*see Toure v. Avis Rent A Car Sys.*, 98 NY2d 345, 352), but that the presence of triable issues of fact precludes summary judgment.

For defendants' part, the supporting affirmations of their orthopedic surgeon, neurologist and radiologist each contain objective medical evidence indicating that (1) any cervical or lumbar sprain allegedly sustained by plaintiff has resolved; (2) she has no present neurological or orthopedic disability; and (3) she is fully capable of functioning normally without assistance. In

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addition, they opine that any medical conditions which plaintiff claims limit her functionality are attributable to pre-existing degenerative disc disease rather than being causally related to plaintiff's fall from the bus.

In opposition, plaintiff has submitted sufficient medical evidence to rebut movants' prima facie case and raise triable issues of fact with regard, *e.g.*, to her ability to perform her usual and customary activities to the extent required under the 90/180 day statutory standard (*see* Licari v. Elliott, 57 NY2d 230, 236). Here, the uncontroverted MRI reports confirming, *inter alia*, the presence of lumbar and cervical disc anomalies, plus (1) the opinion of her treating chiropractor attributing her quantified, abnormal and continuing limitations to the subject accident (*cf.* Lively v. Fernandez, 85 AD3d 981; Carditto v. Xenakis, 31 AD3d 683; Kauderer v. Penta, 261 AD2d 365), and (2) plaintiff's own affidavit and EBT testimony regarding her persisting inability to perform many of her usual and customary daily activities (*e.g.*, household chores, walking and exercising) to the extent previously possible are sufficient in combination to establish that plaintiff's activities may well have been significantly curtailed during the statutory period. In addition, this same proof raises issues of fact regarding whether plaintiff sustained significant limitations of any body organ, member, function or system as a result of her accident (*see* Lopez v. Senatore, 65 NY2d 1017; *cf.*, Milk v. Shufelt, 285 AD2d 949, 950). Also, contrary to defendants' contentions regarding the failure of plaintiff's experts to address their experts' findings of pre-existing disc degeneration, the law is clear that the affidavit of plaintiff's chiropractor specifically attributing the cause of her subsisting injuries to the subject accident is

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sufficient to overcome this objection and raise a triable issue of fact (*see e.g.* Sinfelt v. Helm's Bros., Inc., 62 AD3d 983; Fraser-Baptiste v. New York City Transit Authority, 81 AD3d 878).

Nevertheless, the Court would be remiss were it not to note that plaintiff has failed to raise any triable issues of fact under the statutory category of "permanent loss", as there is no proof of any "total" loss of use of any body organ, member, function or system (*see* Oberly v. Bangs Ambulance, 96 NY2d 295, 297, 299).

Accordingly, it is

ORDERED that the motion for summary judgment of defendants NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY s/h/a NEW YORK CITY METROPOLITAN TRANSPORTATION AUTHORITY, is denied.

E N T E R,

/s/ _____
Hon. Thomas P. Aliotta
J.S.C.

Dated: January 17, 2012