Ferguson v New York City Tr. Auth.
2017 NY Slip Op 30373(U)
January 26, 2017
Supreme Court, Bronx County
Docket Number: 21208/12
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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TRINA FERGUSON, **DECISION AND ORDER**

Plaintiff(s), Index No: 21208/12

- against -

NEW YORK CITY TRANSIT AUTHORITY, MABSTOA, AND DEBRA THOMAS LESLIE,

Defendant(s).

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In this action for personal injuries arising from an automobile accident, defendant DEBRA THOMAS LESLIE (Leslie) moves for an order granting her summary judgment and dismissing plaintiff's complaint on grounds that plaintiff did not sustain a serious injury as defined by the Insurance Law. Plaintiff opposes the instant motion asserting that Leslie fails to establish prima facie entitlement to summary judgment and that questions of fact on the existence of a serious injury nevertheless preclude summary judgment. Defendants NEW YORK CITY TRANSIT AUTHORITY and MABSTOA (hereinafter collectively referred to as "the Authority") cross-move seeking identical relief to that sought by Leslie and for the very same reasons. Plaintiff opposes the Authority's cross-motion for the reasons she opposes Leslie's motion.

For the reasons that follow hereinafter Leslie's motion and the Authority's cross-motion are granted.

Read together, the complaints[1], and bill of particulars allege the following: On June 23, 2011, at or near Burnside Avenue and its intersection with Sedgwick Avenue, Bronx, NY, plaintiff was involved in a motor vehicle accident. Specifically, the bus in which plaintiff rode, owned and operated by the Authority, came into contact with a vehicle owned and operated Leslie. Plaintiff alleges that defendants were negligent in the ownership and operation of their vehicles, said negligence causing her to sustain injuries. Plaintiff alleges to have sustained a host of injuries, the most serious being a herniated disc at L3-L4. Plaintiff alleges that her injuries are serious under the Insurance Law inasmuch as she sustained a (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation of use of a body organ or member; (3) significant limitation of use of a body function or system; and/or (4) a medically determined injury or impairment of a non-permanent nature which prevented her from performing all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following her accident.

Leslie's Motion

Leslie's motion for summary judgment is granted. On this

[1] This action stems from two separate actions, which on August 21, 2014, were consolidated by this Court into the instant action. Thus, the allegations are extrapolated from the complaints in each of the original actions.

record, Leslie establishes prima facie entitlement to summary judgment under the permanent category of injury by tendering objective medical evidence demonstrating the absence of any injury and by establishing a significant gap in plaintiff's medical treatment. Leslie also demonstrates prima facie entitlement to summary judgment under the 90/180 non-permanent category of injury by tendering plaintiff's own pleading which demonstrate that in the 180 days following her accident, her activities of daily living were not curtailed to the requisite degree or for the required duration. Nothing submitted by plaintiff raises an issue of fact sufficient to preclude summary judgment.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish *prima facie* entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence,

generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

The Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Insurance Law § 5104(a), also known as the "no-fault law," by design and intent, severely limits the number of personal injury law suits brought as a result of motor vehicle accidents (*Licari v Elliott*, 57 NY2d 230, 236 [1982]). Because any injury not falling within the statute's definition of "serious injury" is minor, it should not be accorded a trial by jury, and, therefore, "[i]t is incumbent upon the court to decide in the first instance whether plaintiff has a cause of action to assert within the meaning of the statute" (*id.* at 237).

A defendant seeking summary judgment on grounds that plaintiff's injuries are not serious under the Insurance Law must establish that plaintiff's injuries do not meet the threshold promulgated by the statute (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Brown v Achy*, 9 AD3d 30, 31 [1st Dept 2004]; *Rodriguez v*

Goldstein, 182 AD2d 396, 397 [1st Dept 1992]).

A defendant can meet the requisite burden by submitting objective medical evidence negating the existence of a serious injury (*Black v Robinson*, 305 AD2d 438, 439 [2d Dept 2003]; *Junco v Ranzi*, 288 AD2d 440, 440 [2d Dept. 2001]; *Papadonikolakis v First Fid. Leasing Group*, 283 AD2d 470, 470-471 [2d Dept 2001]), or by other evidence which demonstrates the absence of a serious injury (*Lowe v Bennett*, 122 AD2d 728, 729 [1st Dept 1986], *affd* 69 NY2d 700 [1986], such as plaintiff's own deposition testimony (*Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]).

With respect to objective medical evidence negating the existence of a serious injury, the tests relied upon must be specified within the doctor's medical report (*Janco* at 440), and what is required is "objective proof such as X-rays, MRIs, straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on. . .[an] examination" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Range of motion testing is an objective measure of the presence or absence of injury (*Kraemer v Henning*, 237 AD2d 492, 493 [2d Dept 1997]; *Zalduondo v Lazowska*, 234 AD2d 455, 455-456 [2d Dept 1996]), and when used, the doctor must specify plaintiff's range of motion and compare the same to normal (*Bray v Rosas*, 29 AD3d 422, 423 [1st Dept 2006] [Court held that the failure of a defendant's doctor to quantify plaintiff's range of motion while concomitantly failing to

compare the same to normal constituted a failure to establish prima facie entitlement to summary judgment "thereby leaving the court to speculate as to the meaning of those figures."]; *Kelly v Rehfeld*, 26 AD3d 469, 470 [2d Dept 2006]; *Spektor v Dichy*, 34 AD3d 557, 558 [2d Dept 2006]; *Webb v Johnson*, 13 AD3d 54, 55 [1st Dept 2004]). Notably, even if a defendant's doctor finds restricted range of motion upon examining the plaintiff, the same is not fatal when the doctor attributes the foregoing finding to a cause unrelated to the accident alleged (*Style v Joseph*, 32 AD3d 212, 214 n [1st Dept 2006]). Similarly, a minor restriction in range of motion upon a defendant's medical examination of the plaintiff is not fatal (*Camilo v Villa Livery Corp.*, 118 AD3d 586, 586 [1st Dept 2014]; *Tuberman v Hall*, 61 AD3d 441, 441 [1st Dept 2009]).

Once a defendant establishes that a plaintiff has not suffered a serious injury, summary judgment is warranted unless plaintiff can establish the existence of a serious injury. To that end, plaintiff must establish that the injuries alleged are the result of the accident claimed and that the limitations alleged are the result of those injuries (*Noble v Ackerman*, 252 AD2d 392, 394-395 [1st Dept 1998]). Plaintiff's proof establishing serious injury, medical or otherwise, must not only be admissible, but it must also be objective (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350 [2002]; *Grasso v Angerami*, 79 NY2d 813, 814-815 [1991]; *Blackmon v Dinstuhl*, 27 AD3d 241, 242 [1st Dept 2006]; *Thompson v*

Abassi, 15 AD3d 95, 97 [1st Dept 2005]; *Shinn* at 198; *Andrews v Slimbaugh*, 238 AD2d 866, 867-868 [2d Dept 1997]; *Zoldas v Louise Cab Corporation*, 108 AD2d 378, 382 [1st Dept 1985]). Plaintiff's proof must also demonstrate the existence of a serious injury contemporaneous with the accident alleged (*Blackmon* at 242; *Thompson* at 98 [Court held that the failure by plaintiff's doctor to provide objective proof of injury contemporaneous with the accident was fatal and was not cured by same doctor's finding of injury, with objective evidence, two and one half years later.); *Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]; *Pajda v Pedone*, 303 AD2d 729, 730 [2d Dept 2003]; *Jimenez v Kambli*, 272 AD2d 581, 583 [2d Dept 2000]). Such contemporaneous medical evidence, however, can be an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or "an expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure* at 350; *see also Perl v Meher*, 18 NY3d 208, 218 [2011] ["We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery."]). Additionally, in order to raise an issue of fact as to the existence of a serious injury the medical evidence presented must include a recent examination of the plaintiff at which the injuries are objectively

established (*Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Thomson v Abassi*, 15 AD3d 95, 97 [1st Dept 2005]; *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000])

An unexplained gap in medical treatment between treatment received shortly after the accident and treatment received long thereafter, warrants dismissal of plaintiff's case (*Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Brown v City of New York*, 29 AD3d 447, 448 [1st Dept 2006]; *Vasquez v Reluzco*, 28 AD3d 365, 366 [1st Dept 2006]; *Taylor v Terrigno*, 27 AD3d 316, 316-317 [1st Dept 2006]; *Rivera v Benaroti*, 29 AD3d 340, 342 [1st Dept 2006]; *Milazzo v Gesner*, 33 AD3d 317, 318 [1st Dept 2006]; *Colon v Kempner*, 20 AD3d 372, 374 [1st Dept 2005]). Thus, when defendant establishes that existence of a gap in medical treatment, to avoid summary judgment, a plaintiff must offer a reasonable explanation for the gap in treatment (*Pommells* at 574; *Brown* at 448; *Vasquez* at 366; *Taylor* at 316-317; *Rivera* at 342; *Milazzo* at 318; *Colon* at 374). Generally, if the explanation for the gap in medical treatment is medical, plaintiff must proffer medical evidence (*Mercado-Arif v Garcia*, 74 AD3d 446, 447 [1st Dept 2010]; *Crespo v Aparicio*, 59 AD3d 384, 385 [2d Dept 2009]; *Farozes v Kamran*, 22 AD3d 458, 459 [2d Dept 2005]; *Ali v Vasquez*, 19 AD3d 520, 520 [2d Dept 2005]; *Hernandez v Taub*, 19 AD3d 368, 368 [2d Dept 2005]). Alternatively, when the explanation for the gap in treatment is non-medical, such as the cessation of no-fault benefits, can be established by the

plaintiff (*Mercado-Arif* at 447; *Jules v Barbecho*, 55 AD3d 548, 549 [2d Dept 2008]; *Francovig v Senekis Cab Corp.*, 41 AD3d 643, 644 [2d Dept 2007]; *Black v Robinson*, 305 AD2d 438, 439-440 [2d Dept 2003]). A gap in treatment is not relevant to nor dispositive in an action concerning serious injury under the 90/180 category (*Gonzalez v Ceesay*, 19 Misc 3d 136(A) [App Term 2008]; *Gomez v Ford Motor Credit Co.*, 10 Misc 3d 900, 904 [Sup Ct 2005]).

In order to establish *prima facie* entitlement to summary judgment under the 90/180 non-permanent category of serious injury, the law prescribes a different burden. Generally, a defendant must provide medical evidence establishing the absence of injury during the relevant time period - first 180 days subsequent to the accident (*Sayers v Hot*, 23 AD3d 453, 454 [2d Dept 2005]; *Buford v Fabrizio*, 8 AD3d 784, 786 [3d Dept 2004]; *Lowell v Peters*, 3 AD3d 778, 780 [3d Dept 2004]). As such, medical evidence consisting of examinations conducted years after the accident are not probative as to the injuries sustained within the first 180 days after an accident and do not, in it of themselves, entitle a defendant to summary judgment with regard to the foregoing category (*Toussaint v Claudio*, 23 AD3d 268, 268 [1st Dept 2005]; *Pijuan v Brito*, 35 AD3d 829, 829 [2d Dept 2006]; *Webb v Johnson*, 13 AD3d 54, 55 [1st Dept 2004]; *Loesburg v Jovanovic*, 264 AD2d 301, 301 [1st Dept 1999]). Alternatively, a defendant can establish prima facie entitlement to summary judgment with regard to 90/180 category by

citing to evidence, such as a plaintiff's own testimony, and/or bill of particulars demonstrating that the plaintiff was not prevented from performing all of the substantial activities constituting plaintiff's customary daily activities for the prescribed period (*Hernandez v Rodriguez*, 63 AD3d 520, 521 [1st Dept 2009]["Notably, plaintiff's bill of particulars provided that she was confined to bed and home for one week following the accident. In view of this finding, plaintiff's claim of serious injury under the 90/180-day category is dismissed as against all defendants."]; *Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004] [Court found that home and bed confinement for less than the prescribed period demonstrates a lack of serious injury under the 90/180 category.]; *Robinson v Polasky*, 32 AD3d 1215, 1216 [4th Dept 2006] [Court found that plaintiff's failure to miss full days of work indicates the absence of serious injury under the 90/180 category.]; *Burns v McCabe*, 17 AD3d 1111, 1111 [4th Dept 2005] [Court found that evidence that plaintiff missed only a week of school was prima facie evidence that his activities were not curtailed to the required duration.]; *Parkhill v Cleary*, 305 AD2d 1088, 1090 [4th Dept 2003]. Once defendant meets his burden plaintiff must come forward with competent medical evidence demonstrating that as result of the accident alleged, plaintiff was unable to perform substantially all of his activities of daily living for not less than 90 of the first 180 days after the

accident (*Ponce v Magliulo*, 10 AD3d 644, 644 [2d Dept 2004]; *Sainte-Aime v Ho*, 274 AD2d 569, 570 [2d Dept 2000]).

In support of her motion, Leslie submits a sworn report from William Walsh (Walsh), an orthopedic surgeon, who details an examination he performed upon plaintiff on June 17, 2015. Plaintiff presented with complaints of pain in her neck, low back, and knees secondary to a motor vehicle accident on June 23, 2011. Plaintiff's cervical spine exhibited full range of motion in all planes (flexion was 50 degrees, 50 degrees constituting normal range of motion). Plaintiff's lumbar spine also yielded full range of motion in all planes (flexion was 60 degrees, 60 degrees constituting normal range of motion). Straight leg testing was negative. Plaintiff also had full range of motion in her right shoulder (flexion was 170 degrees, 170 degrees constituting normal). With respect to plaintiff's knees, extension was zero degrees bilaterally, zero degrees constituting normal. Flexion, however, was diminished by 20 degrees bilaterally (flexion was 130 degrees, 150 degrees constituting normal). Based on his examination, Walsh opines that plaintiff is not disabled or permanently injured and that she could engage in all her activities of daily living without restriction.

Leslie also submits plaintiff's deposition transcript wherein she testified, in pertinent part, as follows: After the motor vehicle accident on June 23, 2011, she underwent physical therapy

until November 2011. At the time of the accident plaintiff was employed by the Department of Human Resources, where she performed clerical work. She was also employed by the US Open, where she worked in the kitchen.

Lastly, Leslie submits plaintiff's bill of particulars wherein she alleges that subsequent to this accident, she was confined to her bed/and or home for two weeks.

Based on the foregoing, Leslie establishes prima facie entitlement to summary judgment. First, with respect to the permanent category of serious injury, insofar as a defendant establishes the absence of a serious injury by submitting objective medical evidence negating the existence of a serious injury (*Black* at 439; *Junco* at 440; *Papadonikolakis* at 470-471), here, Leslie satisfies her burden with the Walsh's sworn report insofar as he affirms that after examining plaintiff years after the accident and employing objective medical tests, such as range of motion testing (*Grossman* at 84; *Kraemer* at 493; *Zalduondo* at 455-456), plaintiff has no injury to her cervical and lumbar spine, right shoulder or knees. To the extent that Walsh finds diminished range of motion in both of plaintiff's knees, such finding is not fatal insofar as the restriction - 20 degrees in one plane - is minimal (*Camilo* at 586; *Tuberman* at 441).

Second, since it is well settled that an unexplained gap in medical treatment between treatment received shortly after an

accident and treatment received long thereafter, warrants dismissal of a plaintiff's case (*Pommells* at 574; *Brown* at 448; *Vasquez* at 366; *Taylor* at 316-317; *Rivera* at 342; *Milazzo* at 318; *Colon* at 374), here, with plaintiff's testimony that she only treated for five months after the instant accident (or until November 2011), Leslie also establishes prima facie entitlement to summary judgment with respect to the permanent category of serious injury for this additional reason.

Lastly, to the extent that a defendant can establish prima facie entitlement to summary judgment with regard to 90/180 category with evidence, such as a plaintiff's own bill of particulars demonstrating that the plaintiff was not prevented from performing all of the substantial activities constituting plaintiff's customary daily activities for the prescribed period (Hernandez at 521; *Copeland* at 254; *Robinson* at 1216; *Burns* at 1111; *Parkhill* at 1090), here, plaintiff's bill of particulars sufficiently satisfies Leslie's burden because plaintiff alleges home and bed confinement for a period of only two weeks, substantially short of the 90 days prescribed by law.

Nothing submitted by plaintiff competently raises an issue of fact with regard to the gap in medical treatment and the curtailment of her activities of daily living so as to preclude summary judgment.

To be sure, in opposition to the instant motion, plaintiff

submits a legion of medical evidence - her medical records - which while evincing treatment beyond November 2011, establish no treatment beyond May 2012. Thus, plaintiff's own evidence establishes an approximately four year gap in medical treatment. This four year gap is not competently explained insofar as all medical evidence submitted by plaintiff is bereft of any explanation for the gap, and while plaintiff - in an affidavit - contends that she was told that any further treatment would be palliative, thus giving rise to the gap, such explanation is insufficient as a matter of law. As noted above, generally, if the explanation for the gap in medical treatment is medical, plaintiff must proffer medical evidence (*Mercado-Arif* at 447; *Crespo* at 385; *Farozes* at 459; *Ali* at 520; *Hernandez* at 368 [2d Dept 2005]). Plaintiff, of course, is not a doctor. Thus, the unexplained gap in treatment is fatal to plaintiff's claims under the permanent category of serious injury.

With respect to the 90/180 category of serious injury, plaintiff's affidavit fails to raise an issue of fact sufficient to preclude summary judgment. Once defendant meets the burden of negating a serious injury under the 90/180 category, a plaintiff must come forward with competent medical evidence demonstrating that as result of the accident alleged, plaintiff was unable to perform substantially all activities of daily living for not less than 90 of the first 180 days after the accident (*Ponce* at 644;

Sainte-Aime at 570). Here, instead of alleging an inability to perform almost all activities of daily living for at least 90 days within the first 180 days after this accident - as required by prevailing law - plaintiff only asserts extreme pain and difficulty with "dressing, grooming, getting in and out of the car, and performing household chores."

The Authority's Cross-Motion

Based on the foregoing, the Authority's motion is granted by operation of law ((*Nelson v Distant*, 308 AD2d 338, 340 [1st Dept 2003]["Finally, since plaintiff did not sustain a serious injury, there can be no recovery against the remaining defendant Derrick Lewis. Upon searching the record, summary judgment is granted dismissing the complaint as to defendant Lewis as well."]). It is hereby

ORDERED that the complaints be dismissed with prejudice. It is further

ORDERED that Leslie serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : January 26, 2017
Bronx, New York

Ben Barbato, JSC