Torres v Knight
2008 NY Slip Op 33654(U)
March 20, 2008
Supreme Court, Bronx County
Docket Number: 6455/2005
Judge: Betty Owen Stinson
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NEW YORK SUPREME COURT - COUNTY OF BRONX
IAS PART 08

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CARMEN TORRES,

Plaintiff,

INDEX No. 6455/2005

-against-

CINDERETHA KNIGHT, et al.,

Defendants.

Present:
HON. BETTY OWEN STINSON
J.S.C.

---X

The following papers numbered 1 to 4 read on this motion and cross-motion for summary judgment, Noticed on 08-29-07 and submitted as No. 43 on the Calendar of 11-02-07

	PAPERS NUMBERED
Notice of Motion -Exhibits and Affidavits Annexed..	1, 2
Order to Show Cause - Exhibits and Affidavits Annexed..............................	
Answering Affidavits and Exhibits..	3
Replying Affidavits and Exhibits..	4
Sur-reply Affidavits and Exhibits...	
Stipulations – Referee's Report – Minutes...	
Memorandum of Law...	

Upon the foregoing papers this motion and cross-motion are decided per annexed memorandum decision.

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Dated: March 20, 2008
Bronx, New York

BETTY OWEN STINSON, J.S.C.

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[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

---X

CARMEN TORRES,

Plaintiff,

INDEX № 6455/2005

-against-

DECISION/ORDER

CINDERETHA KNIGHT; JAMES McGIRTH; PARKCHESTER YELLOW CAB; KAMNAKI SERVICE, INC.; SIDI SALL; DUARTE CORPORATION and ANTONIO ROMERO,

Defendants.

---X

HON. BETTY OWEN STINSON:

This motion by defendants Kamnaki Service, Inc., ("Kamnaki") and Sidi Sall ("Sall") for for summary judgment dismissing the plaintiffs' complaint and all cross-claims against it is granted. Cross-motion by defendants Duarte Corporation and Antonio Romero for summary judgment dismissing the plaintiff's action for failure to demonstrate a serious injury is denied as moot in light of previous dismissal of the complaint against them by order of this court dated October 3, 2007.

Plaintiff was injured on June 20, 2004 while a passenger in a taxi owned by defendant Duarte Corporation and operated by defendant Sall, when the taxi was struck from behind by a vehicle owned and operated by defendants Cinderetha Knight and James McGirth, respectively, forcing the taxi into the vehicle in front of it, the latter vehicle owned and operated by Kamnaki and Sall. Plaintiff commenced suit against the defendants alleging injuries including a laceration to her right eye brow resulting in significantly disfiguring scarring, disc herniations at C3-5 and

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L3-4, disc bulging at C5-7 and L5-S1, right shoulder supraspinatus tendinosis, and macular edema and vitreous detachment in the right eye. The complaint as against defendants Cinderetha Knight, Antonio Romero and Duarte Corporation was dismissed by orders of this court dated January 7, 2008 and October 3, 2007 . After completion of discovery, Kamnaki and Sall moved for summary judgment based on lack of liability as well as plaintiff's inability to show she had suffered a serious injury as a result of the subject motor vehicle accident. Plaintiff did not oppose that portion of the motion inasmuch as it addressed Kamnaki's and Sall's lack of liability in the happening of the accident.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). A party opposing the motion must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

In order to recover for non-economic loss resulting from an automobile accident under New York's "No-Fault" statute, Insurance Law § 5104, the plaintiff must establish, as a threshold matter, that the injury suffered was a "serious injury" within the meaning of the statute. "Serious injury" is defined by Insurance Law § 5102(d) to include, among other things not relevant here, a "permanent consequential limitation of use of a body organ or member", a "significant limitation of use of a body function or system", 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 constitutes such person's usual and customary activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment" or a

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"significant disfigurement".

The initial burden on a threshold motion is upon the defendants to present evidence establishing that plaintiff has no cause of action, i.e.: that no serious injury has been sustained. It is only when that burden is met that the plaintiff would be required to establish *prima facie* that a serious injury has been sustained within the meaning of Insurance Law § 5102(d) (*Franchini v. Palmieri*, 1 NY3d 536 [2003]; *Licari v. Elliot*, 57 NY2d 230 [1982]).

To make out a *prima facie* case of serious injury, a plaintiff must produce competent medical evidence that the injuries are either "permanent" or involve a "significant" limitation of use (*Kordana v. Pomelito*, 121 AD2d 783 [3rd Dept 1986]). A finding of "significant limitation" requires more than a mild, minor or slight limitation of use (*Broderick v. Spaeth*, 241 AD2d 898, *lv denied,* 91 NY2d 805 [1998]; *Gaddy v. Eyler*, 167 AD2d 67, *aff'd,* 79 NY2d 955 [1992]). A permanent loss of use must be "total" in order to satisfy the serious injury threshold (*Oberly v. Bangs Ambulance*, 96 NY2d 295 [2001]; *Hock v. Aviles*, 21 AD3d 786 [1st Dept 2005]). Strictly subjective complaints of a plaintiff unsupported by credible medical evidence do not suffice to establish a serious injury (*Scheer v. Koubek*, 70 NY2d 678 [1987]). To satisfy the requirement that plaintiff suffered a medically determined injury preventing her from performing substantially all of her material activities during 90 out of the first 180 days, a plaintiff must show that "substantially all" of her usual activities were curtailed (*Gaddy*, 167 AD2d 67). The "substantially all" standard "requires a showing that plaintiff's activities have been restricted to a great extent rather than some slight curtailment" (*Berk v. Lopez*, 278 AD2d 156 [1st Dept 2000], *lv denied*, 96 NY2d 708). Allegations of sprains and contusions do not fall into any of the categories of serious injury set forth in the statute (*Maenza v. Letkajornsook*, 172 AD2d 500 [2nd Dept

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1991]).

"Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommels v. Perez*, 4 NY3d 566 [2005]). A plaintiff's subjective complaints of pain are insufficient, without more, to establish that herniated discs constitute a serious injury (*Pierre v. Nanton*, 279 AD2d 621 [2nd Dept 2001]).

An injury is disfiguring if it alters for the worse the plaintiff's natural appearance (PJI 3d 2:88B [2005]). A disfigurement is significant if a reasonable person viewing the plaintiff's body in its altered state would regard the condition as unattractive, objectionable, or as the object of pity or scorn (*id.*).

The defendant may rely on medical records and reports prepared by plaintiff's treating physicians to establish that plaintiff did not suffer a serious injury causally related to the accident (*Franchini*, 1 NY3d 536). Once the burden has shifted however, an affidavit or affirmation by the person conducting a physical examination of the plaintiff is necessary to establish a serious injury, unless plaintiff is offering unsworn reports already relied upon by the defendant (*Grossman v. Wright*, 268 AD2d 79 [3rd Dept 2000]; *see also Zoldas v. Louise Cab Co.*,108 AD2d 378 [1st Dept 1985]). The affirmation must set forth the objective medical tests and quantitative results used to support the opinion of the expert (*Grossman*, 268 AD2d 79). "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 (cite omitted)" (*Toure v. Avis Rent A Car Systems*, 98 NY2d 345 [2002]). A conclusory affidavit of the doctor does not constitute medical evidence (*Zoldas*,

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108 AD2d 3778; *see also Lopez v Senatore*, 65 NY2d 1017 [1985] [conclusory assertions tailored to meet statutory requirements insufficient to demonstrate serious injury]).

In support of the motion, movants offered the plaintiff's bill of particulars, her deposition testimony, the police accident report, deposition testimony of Sidi Sall, and the affirmed reports of Dr. Iqbal Merchant, Dr. Michael R. Rafiy, and Dr. Steven J. Katz. Plaintiff alleged in her bill of particulars that she was "substantially" confined to her home for 6 weeks after the accident and out of work for 6 weeks.

Plaintiff testified that she was a passenger in a taxi that stopped for a red light behind another vehicle when she felt an impact, first from behind, and then another impact at the front of the taxi (Deposition of Carmen Torres, June 8, 2007 at 13-16). She was removed to Harlem Hospital emergency room after the accident and received 7 sutures above her right eye (*Id.* at 22). Three to five days later, she visited Roosevelt Hospital emergency room complaining of pain to her neck and back (*Id.* at 23). Two to three weeks later, she visited Park Avenue Clinic with complaints about pain in her neck and back (*Id* at 28). Plaintiff underwent physical therapy consisting of electrical stimulation and hot and cold pads to her neck and back for "maybe" 6 months (*Id.* at 27-29). She stopped therapy when the insurance stopped paying (*Id.* at 27).

Plaintiff was operating a hair and nail salon at the time of the accident and worked 70 hours a week (*Id.* at 45). She was out of work for 3 months after the accident but has continued running the business (*Id.* at 45-46). Now she only works 5 days a week and 6 hours a day (*Id.* at 46). Since the accident she has had occasional headaches, some lower back pain and daily neck pain (*Id* at 43). She has right eye pain and has had to begin using over-the-counter reading glasses (*Id.* at 39). She can no longer jog daily, exercise, dance or walk "as much" because her

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lower back and right leg will begin to hurt after 3 or 4 blocks (*Id.* at 47-50). She cannot go out to dinner as often as before (*Id.* at 47). Plaintiff could not show her scar to the attorneys at the deposition because it would have required shaving her eyebrow (*Id.* at 61).

Sidi Sall testified that he was stopped behind another vehicle for approximately 5 seconds when his taxi was struck from behind, forcing it into the vehicle in front of his (Deposition of Sidi Sall, November 28, 2006 at 71-82).

Dr. Merchant, neurologist, examined plaintiff on April 23, 2007 finding a 51-year-old woman, 5' 2" tall, weighing 128 pounds. Dr. Merchant found no spasm in either plaintiff's cervical or lumbar spine. Her range of motion was limited in both areas due to "poor effort" on her part. Plaintiff expressed pain at 30 degrees in the straight leg raising test. Dr. Merchant was given no medical records to review and his diagnosis was resolved cervical and lumbar sprain/strain. He found no neurological disability.

Dr. Rafiy, orthopedist, examined plaintiff on April 23, 2007. She complained of headaches, neck pain, and mid-back and lower back pain. Dr. Rafiy found no swelling or tenderness in plaintiff's right shoulder and normal range of motion. There was no spasm in plaintiff's cervical or lumbar spine, but range of motion in her cervical spine was "voluntarily restricted". Range of motion in her lumbar spine was normal. Straight leg raising was full and equal and Lasegue test was negative. Plaintiff walked well on her heels and toes. Dr. Rafiy found no muscle atrophy. His diagnosis was cervical and lumbar sprain/strain and right shoulder sprain, resolved. He found no orthopedic disability.

Dr. Katz, ophthalmologist, examined plaintiff on April 20, 2007. She complained of loss of vision and "pressure" around her right eye. Dr. Katz found her best corrected vision to be

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20/20 with no ophthalmologic pathology. Dr. Katz found no objective evidence for plaintiff's visual complaints.

In opposition to the motion, plaintiff offered her emergency room records from Harlem Hospital, her own affidavit and the affirmed reports of Dr. Samuel Mayerfield and Dr. Gideon Hedrych. The emergency room records reported plaintiff's complaints of pain in her neck and back. The records contained no mention of right shoulder trauma.

Plaintiff stated in her affidavit dated October 29, 2007 that she was unable to work "at all" in her hair salon for 3 months after the accident. When she went back, it was only to supervise and speak with the customers. She has since returned to working 4 to 5 days a week up to 6 hours a day. She cannot shampoo hair. She can only cut or blow-dry a customer's hair occasionally. Before the accident, she was on her feet all day, shampooing, cutting, styling and blow-drying customers' hair. In the first 3 months after the accident, plaintiff "rarely" left her apartment except for medical appointments. She takes painkillers on a regular basis. She used to eat dinner out several times a week, but now has only started going out at least once a week. She does not go dancing because of her injuries. Since the accident she cannot lean over at the waist, stand or sit for more than 15 minutes, walk more than a few blocks or keep her arms raised at or above shoulder height for even short periods. She has gained 30 pounds because she cannot exercise.

Dr. Mayerfield performed MRI exams of the plaintiff's cervical and lumbar spine and right and left shoulder. The MRI of plaintiff's cervical spine performed on August 30, 2004 revealed herniated discs at C3-4 and C4-5 and bulging discs at C5-6 and C6-7. The MRI of plaintiff's lumbar spine performed on the same date showed a disc herniation at L3-4, contacting the L4 nerve root and a disc bulge at L5-S1. An MRI of her right shoulder found supraspinatus

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tendinosis and glenohumeral joint fluid. The MRI of her left shoulder was negative for any abnormal findings.

Dr. Hedrych examined plaintiff for the first time on August 13, 2004. Her complaints included headache, nausea, "bouts" of blurred vision in her right eye, toothache, TMJ while yawning and chewing, cervical pain, upper back pain, lower back pain, pain with urination and right shoulder pain with exertion. Plaintiff had difficulty walking. She could not walk on heels and toes because of pain. Dr. Hedrych found a 1/4-inch scar over her right eyebrow. On physical examination, Dr. Hedrych found spasm in plaintiff's cervical and lumbar spine. Her range of motion in both areas as well as her right shoulder was limited due to complaints of pain. Dr. Hedrych offered numerical measurements of her limitations but did not say whether the tests were objective or subjective measures of limitation. Dr. Hedrych reported the findings of the MRI studies. He also mentioned x-ray studies and EMG/NCV studies. Those reports were not offered. According to Dr. Hedrych, the x-ray studies noted spondylosis at C5-6 and C6-7. The EMG/NCV studies of plaintiff's lower extremities were within normal limits, while the same studies of her upper extremities showed signals consistent with right C5-C6 root dysfunction. Dr. Hedrych's diagnosis after his second examination of plaintiff on June 25, 2007, with essentially the same physical findings, was post-concussion syndrome, loss of mandibular molar, the cervical and lumbar herniations and bulges, cervical and lumbar radiculopathy, right shoulder tendinosis, bilateral heel contusions, depression and anxiety. No mention was made of plaintiff's right eye. All diagnostic conditions were said to be causally related to the subject motor vehicle accident and had "altered her ability to function as she did prior to the accident and will result in chronic and exacerbative symptoms, with limitations upon her activities of daily living". Dr. Hedrych did not

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attach his examination notes. He based his conclusions on the "medical records, history, examinations, consultations, electrodiagnostic tests, and imaging studies performed to date" although only the MRI studies were offered with his affirmation.

Defendants have established their entitlement to summary judgment which plaintiff has not refuted with admissible medical evidence. Plaintiff's own testimony is sufficient to show that a scar which is invisible without shaving her eyebrow is, as a matter of law, not significantly disfiguring. Plaintiff filed a note of issue certifying that discovery is complete, yet there is no evidence at all of a medically-determined injury which prevented her from performing *substantially* all her customary daily activities for 90 out of the first 180 days after the accident. Her bill of particulars only alleged 6 weeks of confinement to home. No amended or supplemental bill of particulars was offered. Her testimony and affidavit that she was out of work for 3 months are not sufficient to show she was unable to dress, bathe or feed herself during that time. Furthermore, she qualified her claims of being confined to home during that period, stating that she "rarely" left her apartment, a statement insufficient to meet the statutory requirement.

With regard to plaintiff's claims of eye, neck, back and shoulder injuries, defendants met their burden of showing by admissible medical evidence that the plaintiff suffered sprain injuries which have completely resolved, or suffered no permanent or significant injury at all. Dr. Katz found no pathology associated with plaintiff's right eye. Dr. Merchant's and Dr. Rafiy found no neurologic or orthopedic disabilities. Plaintiff's limitations of motion in those examinations were self-imposed.

Plaintiff did not raise an issue of fact for trial with her submissions. Dr. Mayerfield's affirmations did not establish a causal connection between the subject accident and plaintiff's disc

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bulges and herniations or her right shoulder tendinosis. Dr. Hedrych's affirmation did not raise an issue of fact for trial because it is not supported by objective testing or examination. He did not state how he measured range of motion, whether the tests were objective or subjective or account for the fact that plaintiff limited those movements herself with subjective complaints of pain. Dr. Hedrych mentioned a finding of spondylosis in plaintiff's cervical spine, yet never addressed that finding when concluding that the herniations and bulges in her cervical spine were caused by the subject accident. He concluded she had radiculopathy of her lumbar spine, yet the EMG/NCV studies of her lower extremities were within normal limits. He reportedly examined the relevant medical records but did not account for the fact that plaintiff never complained about her right shoulder in any emergency room after the subject accident. Finally, neither he nor plaintiff adequately explained the gap of almost 2-1/2 years between the end of her reported 6 months of therapy and the final examination performed by Dr. Hedrych.

All testimony shows that movants have no liability in the happening of the accident since their stopped vehicle, located in the middle of the three-car accident, was first struck from behind before being propelled into the vehicle in front of it (see *Figueroa v. Luna*, 281 AD2d 204 [1st Dept 2001][rear-end collision with stopped vehicle establishes *prima facie* negligence against the moving vehicle unless driver of latter provides non-negligent explanation for collision]). Plaintiff offered no opposition to these facts or movants' lack of liability as a result. Furthermore, plaintiff's inability to show with admissible medical evidence that she suffered a serious injury as a result of the subject motor vehicle accident requires dismissal of her complaint as against all defendants.

The complaint is, therefore, dismissed in its entirety. Movants are directed to serve a copy

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of this order with notice of entry on the Clerk of Court who shall enter judgment dismissing the plaintiffs' complaint.

This constitutes the decision and order of the court.

Dated: March 20 , 2008
Bronx, New York

BETTY OWEN STINSON, J.S.C..

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