Bassant v Metropolitan Transp. Auth.
2011 NY Slip Op 32277(U)
August 16, 2011
Supreme Court, Nassau County
Docket Number: 007241-09
Judge: Steven M. Jaeger
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 007241-09

ANETHA BASSANT, JANE NEVERSON and SANDRA BUTLER,

Plaintiffs,

-against-

MOTION SUBMISSION DATE: 5-4-11

METROPOLITAN TRANSPORTATION AUTHORITY, LONG ISLAND BUS, THE METROPOLITAN SUBURBAN BUS AUTHORITY HORACE G. McKELLOP, ARYAY N. GEFEN and ANITA I. GEFEN,

MOTION SEQUENCE NO. 2 & 3

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Cross Motion	X
Affirmation in Opposition and Exhibits (Bassant and Neverson)	X
Affirmation in Opposition, Affidavit, and Exhibits (Butler)	X
Affirmation in Opposition (Gefen)	X
Reply Affirmation	X

Motion pursuant to CPLR § 3212 and Insurance Law § 5102(d) by defendants Metropolitan Transportation Authority, Long Island Bus, The Metropolitan Suburban Bus Authority and Horace G. McKellop (collectively MTA-LI Bus and McKellop) dismissing the complaint is determined as hereinafter provided.

Cross motion by defendants Aryay N. Gefen and Anita I. Gefen pursuant to

CPLR § 3212 to dismiss the complaint is granted to the extent provided hereinafter.

This action arises from an accident on October 24, 2008 in which plaintiffs were injured when the bus in which they were passengers, operated by defendant McKellop, was involved in a collision with a motor vehicle, operated by defendant Aryay N. Gefen and owned by Anita I. Gefen, on Central Avenue at or near its intersection with Spruce Street, Cedarhurst, New York.

Defendants MTA-LI Bus and McKellop seek summary judgment dismissing the complaint predicated on the two-pronged contention that defendant driver's action in driving his vehicle into the stopped MTA-LI Bus was the sole proximate cause of the accident and plaintiffs did not sustain serious injury as defined by Insurance Law § 5102(d). The Gefen defendants cross move to join with defendant MTA-LI Bus on that branch of its motion which seeks summary judgment dismissing plaintiffs' complaint on the threshold serious injury issue.

Initially, the Court notes that summary dismissal of the complaint on the grounds that defendant MTA-LI Bus and McKellop are not liable for the accident is not warranted. In the absence of evidence to the contrary, a defendant who establishes that it was not negligent in the operation of its vehicle is entitled to summary judgment. *Cerda v Parsley*, 273 AD2d 339, 340 [2nd Dept. 2000]. However, given the lack of dispositive evidence *vis a vis* the exact cause of the accident herein, and the contradictory allegations of the parties, summary dismissal of the complaint is denied. At this juncture, it cannot be said, as a matter of law, that defendant MTA-LI Bus and

McKellop were free from negligence or that any negligence on their part was not a proximate cause of the accident. There can be more than one proximate cause of an accident. *Cox v Nunez*, 23 AD3d 427, 428 [2nd Dept. 2005].

As to the threshold issue, the plaintiffs claim the following injuries, *inter alia,* in their respective bills of particulars:

Anetha Bassant:
(bill of particulars)

> oblique linear tear of the posterior horn of the medial meniscus of the right knee; arthroscopic surgery on December 22, 2008;
>
> central disc herniation at level C3-C4;
>
> broad based central disc herniation at level C5-C6 with annular disc bulging at level C6-C7 of the cervical spine;
>
> central disc herniation at L5-S1, annular disc bulging at L3-L4 with superimposed area of central disc herniation/spondylosis at L4-L5 interspace of lumbar spine.

Jane Neverson:
(supplemental bill of particulars)

> oblique linear tear of anterior horn of the lateral meniscus/oblique linear tear of the posterior horn of the medial meniscus of the left knee; arthroscopic surgery on December 22, 2008;
>
> annular disc bulging from level L2-L3 through L4-L5 with broad based right lateral disc herniation at L3-L4, annular disc bulging at level L5-S1, broad based central disc herniation at L5-S1;

central disc herniation at C5-C6 and C6-C7.

Sandra Butler:
(bill of particulars)

cerebral concussion;

closed head injury;

persistent headaches with blurred vision;

persistent cognitive and memory impairments;

cervical derangement with radiculopathy and discogenic disease;

back spasm;

numbness in lower back and left leg; and

limited range of motion in the neck.

With respect to the threshold issue of serious physical injury, defendant MTA-LI Bus and McKellop have submitted the affirmations of the various physicians who performed independent medical examinations of each of the plaintiffs on defendant's behalf. The submissions provided with respect to each of the plaintiffs are set forth seriatim.

Jane Neverson

Neurologist R.C. Krishna, M.D. examined plaintiff Jane Neverson on September 22, 2010. He found

> "no neurological indication of a disability or contraindication from obtaining or continuing a gainful employment status.

> There are no neurological deficits identifiable on examination that would constitute a disability or permanency."

Although he found normal ranges of motion of said plaintiff's cervical and lumbar spines, measured with an inclinometer, and that the cervical and lumbosacral spine injuries had resolved, he made no finding *vis a vis* the alleged injury to plaintiff Jane Neverson's left knee and right ankle deferring instead to the opinion of the appropriate specialist. [1]

Orthopedist, S.W. Bleifer, M.D., who examined plaintiff on September 22, 2010, opined that Ms. Neverson revealed no functional disability at the time of the examination and could continue with the activities of daily living and current occupational duties as a housekeeper. He found that the cervical and lumbosacral sprains she suffered had resolved as well as the left knee contusion. Ranges of motion in plaintiff Jane Neverson's knees, shoulders, lumbosacral/cervical spines were measured, quantified, compared with the norms and found to be normal.

<u>Anetha Bassant</u>

In his affirmation, neurologist Iqbal Merchant, M.D., who examined plaintiff Anetha Bassant on August 26, 2010, found "no objective evidence of a neurological disability." Range of motion of her cervical and lumbar spines, measured by use of a goniometer, were quantified and measured against normal values. The Hoover and

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[1]There is no mention in plaintiff Jane Neverson's bill or supplemental bill of particulars of injury to the right ankle.

Straight Leg Raise tests were negative bilaterally. Deep tendon reflexes in the biceps, triceps, supinator, patellar and Achilles were normal at 2+. Dr. Merchant listed his diagnosis as cervical/thoracic/lumbar sprain/strain resolved.

Orthopedist Joseph C. Elfenbein, M.D. who examined plaintiff Anetha Bassant on August 26, 2010 reviewed her medical records including MRI and x-ray reports. He lists the tests performed[2]–all of which revealed negative results. The ranges of motion of plaintiff Anetha Bassant's cervical and lumbar spines were measured, quantified and judged to be normal as was the range of motion in said plaintiff's right and left knees. His diagnosis was of cervical/thoracic/lumbar spine sprain/strain resolved. He found no objective evidence of a disability.

<u>Sandra Butler</u>

Orthopedist Arnold M. Illman, M.D., who examined plaintiff Sandra Butler on November 8, 2010, diagnosed resolved cervical and lumbosacral sprains after measuring the ranges of motion of plaintiff's cervical and lumbosacral spines which were quantified, measured against the norm and found to be normal.

Neurologist Lawrence Robinson, M.D. examined plaintiff Sandra Butler on

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[2]The following orthopedic tests were performed:
- Lachman test
- McMurray test
- Patella tracking
- Apley's test
- Laseque
- Straight leg raising

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November 18, 2010. He states that the ranges of motion[3] of her cervical/lumbar spines were normal. He opined that there was no objective evidence of neurological dysfunction or impairment; no objective evidence to confirm cervical or lumbar discogenic disorder, radiculopathy or spinal injury and no objective evidence to establish causality between plaintiff Sandra Butler's complaints of chronic posterior headache and neck and back pain and the accident at issue herein. Records from South Queens Imaging, P.C., to which Ms. Butler was referred after the accident, reveal that x-rays of her skull and lumbar spine–and MRI of the brain–demonstrated no abnormal results. EMG/NCV studies of both lower extremities, conducted by plaintiff's own neurologist, Ira R. Casson, M.D., revealed normal results.

Based on the aforementioned submissions, defendant MTA-LI Bus and McKellop have established *prima facie* entitlement to summary judgment dismissing the complaint as to plaintiffs Anetha Bassant, Jane Neverson and Sandra Butler.

ANALYSIS

To recover damages for non-economic loss related to a personal injury allegedly sustained in an automobile accident, the plaintiff is required to present non-conclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of Insurance Law § 5102(d) but also that the injury was causally related to the accident. *Franchini v Palmieri*, 1 NY3d 536, 537 [2003]. Absent an

[3]Range of motion testing was performed using inspection and hands-on movement of necessary parts of the spine according to protocol. Results were quantified and measured against normal limits.

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explanation of the basis for concluding that plaintiff's injury was caused by the accident, as opposed to other possibilities evidenced in the record, an expert's conclusion that plaintiff's condition is causally related to the subject accident is mere speculation insufficient to support a finding that such a causal link exists. *Diaz v Anasco*, 38 AD3d 295, 296 [1st Dept. 2007].

As the movant for summary judgment on the threshold issue of whether plaintiff sustained injury, defendant has the initial burden of establishing *prima facie* entitlement to judgment as a mater of law *Rizzo v Torchiano*, 57 AD3d 872 [2nd Dept. 2008]. *Sajid v Murzin*, 52 AD3d 493 [2nd Dept. 2008]; *Hughes v Cai,* 31 AD3d 385 [2nd Dept. 2006]. A movant's expert must specify the objective tests on which his opinions are based and, with respect to an opinion regarding plaintiff's range of motion, the expert must compare his findings with those ranges of motion considered normal. *Coburn v Samuel*, 44 AD3d 698, 699 [2nd Dept. 2007]; *McNulty v Buglino*, 40 AD3d 591, 592 [2nd Dept. 2007];*Benitez v Mileski*, 31 AD3d 473, 474 [2nd Dept. 2006]. It is only when defendant successfully makes the necessary showing that the burden shifts to plaintiff to proffer competent medical evidence, based on objective medical findings and diagnostic tests, to support the serious injury claim or to show, by the submission of objective proof as to the nature and degree of the injury, the existence of questions of fact *vis a vis* whether the purported injury falls within the ambit of the statute. *Flores v Leslie*, 27 AD3d 220, 221 [1st Dept. 2006]. In response, plaintiff must come forward with objective evidence of the extent of the alleged physical limitation resulting from the

injury and its duration. The objective evidence provided must be based on a recent examination of the plaintiff. *Sham v B&P Chimney Cleaning and Repair Co., Inc.*, 71 AD3d 978, 979 [2nd Dept. 2010]. Plaintiff must also present medical proof contemporaneous with the accident, showing any initial range of motion restrictions. *Suk Ching Yeung v Rojas*, 18 AD3d 863 [2nd Dept. 2005]. Conclusions, even of an examining doctor, which are unsupported by acceptable objective proof, are insufficient to defeat a summary judgment motion on the threshold issue of whether plaintiff has suffered a serious physical injury. *Mobley v Riportella*, 241 AD2d 443, 444 [2nd Dept. 1997].

To substantiate a claim under the category of either "permanent consequential limitation of use of a body organ or member," or "significant limitation of use of a body function or system," the medical proof submitted by plaintiff must contain objective, quantitative evidence with respect to a diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body, organ, member, function or system. *Spencer v Golden Eagle, Inc.*, 82 Ad3d 589, 591 [1st Dept. 2011]; *DeLeon v Ross*, 44 AD3d 545 [1st Dept. 2007]; *Alvarez v Green*, 304 AD2d 509, 510 [2nd Dept. 2003]. An expert opinion of a certain percentage of loss of range of motion will suffice. *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]. The claimed limitation must be more than mild, minor or slight. *Licari v Ellliott*, 57 NY2d 230, 235 [1982]; *Palmer v Moulton*, 16 AD3d 933, 935 [3rd Dept 2005]. Whether a limitation of use or function is significant or consequential

relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose, use of a body part. *Dufel v Green*, 84 NY2d 795, 798 [1995]. Subjective complaints of pain and limitation of motion must be substantiated by verified objective medical findings. *Sham v B & P Chimney Cleaning and Repair Co., Inc., supra* at p. 979. Mere subjective reports of pain are not sufficient to constitute a serious injury. *Scheer v Koubek*, 70 NY2d 678, 679 [1987].

Although a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law §5102(d), a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration. *Francis v Christopher II*, 302 AD2d 425 [2nd Dept. 2003]. Where defendant presents evidence of a preexisting condition, it is incumbent upon plaintiff to present proof to address the defendant's claim of lack of causation. *Kublo v Rzadkowski*, 71 AD3d 831, 832 [2nd Dept. 2010]; *Ciordia v. Luchian*, 54 AD3d 708 [2nd Dept. 2008]. Factors such as a gap in treatment, an intervening medical problem or a pre-existing condition may interrupt the chain of causation between the accident and the claimed injury. *Pommells v Perez*, 4 NY3d 566, 574 [2005].

While defendant MTA-LI Bus and McKellop question the veracity of Dr. Anglade's affirmation, the suspicious similarities between the injuries sustained by plaintiffs Jane Neverson and Anetha Bassant, and the treatment they received, as well as the incredible coincidence that both plaintiffs experienced the same type of surgery

on the same date at the same location, the medical evidence submitted is sufficient to raise a factual issue as to whether they sustained a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system as a result of the October 24, 2008 accident.

However, given that plaintiff Anetha Bassant and plaintiff Jane Neverson have failed to demonstrate that they were prevented from performing substantially all of their respective daily activities, including work, for not less than 90 of the 180 days immediately following the accident, a claim under that category is precluded as to said plaintiffs. *Kauderer v Penta*, 261 AD2d 365, 366 [2nd Dept. 1999].

In his affirmations regarding plaintiffs Anetha Bassant and Jane Neverson respectively, Dr. Anglade provided an objective quantitative range of motion assessment of the limitations in the cervical and lumbar regions of the spine and of plaintiffs' knees both contemporaneous with the happening of the accident and on recent examination–February 3, 2011. Moreover, as is required, Dr. Anglade's opinion is supported by objective medical evidence, including sworn MRI reports, as well as his observations/tests during examination. *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 353 [2002].

While an unexplained cessation of medical treatment may be fatal to a plaintiff's claim of a significant or consequential limitation (*Baez v Rahamatelli*, 24 AD3d 256 [1st Dept. 2005], Dr. Anglade offers a bona fide and reasonable explanation for the cessation of treatment, i.e., that further treatment would be palliative in nature and, their

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no-fault benefits having run out, neither Ms. Neverson nor Ms. Bassant could afford to pay for further treatment on their own.

Plaintiff Sandra Butler's submissions, including hospital records from St. John's Hospital (day of accident); medical records/reports of Michael Tugetman, M.D. and Ira Casson, M.D., and MRI reports from Open MRI, are without probative value in opposing the motion for summary judgment by defendant MTA-LI Bus and McKellop as they are unsworn, unaffirmed and/or uncertified. *Codrington v Ahmad*, 40 AD3d 799 [2nd Dept. 2007]. Plaintiff's medical evidence when proffered to establish the existence of a serious injury must be in admissible form. *Grasso v Angerami*, 79 NY2d 813 [1991]; *D'Orsa v Bryan*, 83 AD3d 646, 647 [2nd Dept. 2011]. Moreover, it is well recognized that an attorney's affirmation that is not based on personal knowledge is of no probative value or evidentiary significance. *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2nd Dept. 2006]. Plaintiff Sandra Butler, therefore, has failed to raise a triable issue of fact sufficient to defeat defendants' motion for summary judgment dismissing the complaint as to said defendant based on her failure to sustain serious injury within the ambit of Insurance Law § 5102(d).

Accordingly, the motion by defendant MTA-LI Bus for summary judgment dismissing the complaint predicated on plaintiffs' failure to sustain serious injury, in which defendants Aryay N. Gefen and Anita I. Gefen join by notice of cross motion, is granted as against plaintiff Sandra Butler and denied as to plaintiffs Anetha Bassant and Jane Neverson.

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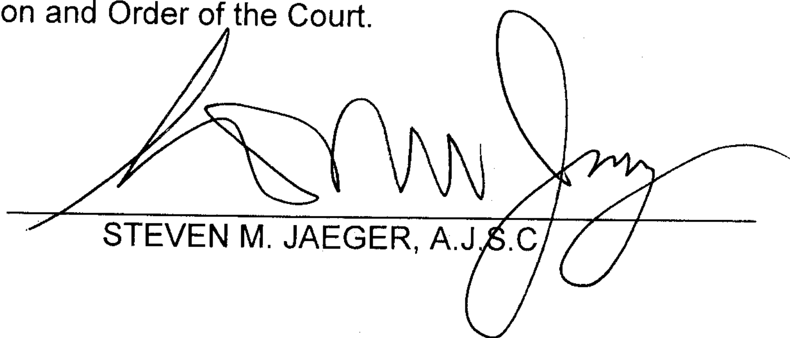
That branch of defendant MTA-LI Bus and McKellop's motion for summary judgment dismissing the complaint pursuant to CPLR §3212 on the grounds that defendant Aryay N. Gefen's actions were the sole proximate cause of the accident herein is denied.

This constitutes the Decision and Order of the Court.

Dated: August 16, 2011



STEVEN M. JAEGER, A.J.S.C

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