

<b>Dewitt v New York City Tr. Auth.</b>
2018 NY Slip Op 30550(U)
March 20, 2018
Supreme Court, New York County
Docket Number: 150416/2016
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 21

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TANYA O. DEWITT

Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY,  
METROPOLITAN TRANSPORTATION AUTHORITY,  
MTA BUS COMPANY, MANHATTAN AND BRONX  
SURFACE TRANSIT OPERATING AUTHORITY,  
LEROY FIELDS, JAMES P. JESSON and  
LANA M. JESSON

Defendants.

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Index No.: 150416/2016

Mot. Seq. 1

DECISION AND ORDER

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:*

Papers	Numbered	NYCEF #
Defendant's Summary Judgment Motion / Affirmation	<u>1</u>	14-39
Plaintiff's Opposition/ Cross-Motion	<u>2</u>	44-50

LISA A. SOKOLOFF, J.

Plaintiff Tanya Dewitt, a passenger on a bus operated by Defendant Transit bus driver Leroy Fields that was struck by a vehicle driven by Defendant Lana Jesson on March 11, 2015, brings an action for personal injuries arising from the accident.

Defendants James P. Jesson and Lana M. Jesson, the owner and driver of the vehicle, respectively, as joined by Defendants New York City Transit Authority, Metropolitan Transportation Authority, MTA Bus Company, Manhattan And Bronx Surface Transit Operating Authority, and Leroy Fields (collectively, Defendants) move for an order pursuant to CPLR § 3212 and Article 51 of the New York State Insurance Law granting summary judgment on the ground that Plaintiff has not met the "serious injury" threshold within the meaning of Insurance Law § 5102(d). Defendants claims

that Plaintiff's own medical records from years before the subject accident show that Plaintiff had the same conditions alleged to have been sustained as a result of the subject accident and that there is no objective medical evidence that establishes exacerbation of Plaintiff's pre-existing conditions to such a degree that those conditions, in and of themselves, can be considered "serious injuries." At issue in this motion is whether Plaintiff sustained serious injury to her lumbar spine.

The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [NY 1985]; *Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]). To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff did not suffer a "serious injury" as a result of the accident (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Shaw v Looking Glass Associates, LP*, 8 AD3d 100 [1st Dept 2004]).

The defendant may meet this burden by submitting expert affidavits indicating that the plaintiff's injury was caused by a pre-existing condition and not the accident (*Pommells v Perez*, 4 NY3d 566 [2005]; *Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]). In cases involving a claim of aggravation, exacerbation and/or activation of a pre-existing injury or condition, a defendant may demonstrate entitlement to summary judgment upon submission of experts' findings of no deficits in range of motion in the subject body part and opinion that MRI findings were pre-existing and not caused by the subject accident (*Kendig v Kendig*, 115 AD3d 438 [1st Dept 2014]; *Nova v Fontanez*, 112 AD3d 435 [1st Dept 2013]; *Mitrotti v Elia*, 91 AD3d 449 [1st Dept 2012]).

Once the defendant meets this threshold, the burden shifts to the plaintiff to

present objective medical evidence that the subject motor vehicle accident aggravated the pre-existing condition so severely as to produce a statutory serious injury above and beyond the pre-existing condition (*Suarez v Abe*, 4 AD3d 288 [1st Dept 2004]). Objective proof, according to the Court of Appeals in *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 353 [2002], includes MRI and CT scan tests and reports, paired with an expert's observations of muscle spasms during a physical examination of the plaintiff.

Whether a plaintiff has sustained a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" under Insurance Law § 5102(d) "involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" such as "a numeric percentage of a plaintiff's loss of range of motion" (*Id.* at 353).

In support of their motion, Defendants submitted affirmed reports of orthopedic, radiology and neurology experts. Dr. Edward Crane, an orthopedist, found numerous inconsistencies while examining Plaintiff. He found no objective evidence of any orthopedic residuals from the subject accident and determined that Plaintiff's statements that she had never had any problem with, or injury to her neck or lower back before the subject accident to be inconsistent with the report by physiatrist, Dr. Nagaveni Rao on March 31, 2015, of a past history of "neck and low back pain since 2011" and the record from Plaintiff's treating physician, Dr. Motiram, including diagnoses of "chronic lower back pain" and "upper back pain," made a month before the subject accident (Defendants' Motion, Ex. R).

Reviewing Plaintiff's June 10, 2015 lumbar MRI, Dr. Crane noted that Plaintiff's treating physicians described disc bulges at L4-L5 and L5-S1, concluding "large central disc herniation impinges on the underlying nerve roots at L5-S1," but that in the text of

the report they did not describe a "large" disc herniation, but rather a "central posterior disc herniation compressing the underlying thecal sac at L5-S1." Dr. Crane found those comments to conflict.

Dr. Crane also noted that Plaintiff was seen at Mount Sinai Hospital on July 4, 2015 and August 25, 2015, which records have also been submitted, where there was a documented history of lower back pain dating back to November 30, 2006. At those same visits, Plaintiff was examined and found to have normal range of motion in her neck and back, a normal musculoskeletal exam with normal range of motion, and a normal neurological examination. To a reasonable degree of medical certainty, Dr. Crane found no objective evidence of any orthopedic residuals from the accident, nor any objective evidence that the accident exacerbated any pre-existing conditions.

Neurologist, Dr. Roger Bonomo, found no objective evidence of injury to any part of Plaintiff's nervous system or spine: "The reported radiographic findings of pre-existing DJD (degenerative osteophytes), central HNPs (disc herniations) and disc bulges are not the cause of any symptoms or the effect of any specific trauma. Her psychopathology is also clearly pre-existing and unrelated to this accident. There is no neurologic disability or need for further diagnostic testing or treatment (Defendants' Motion, Ex. O)."

In reviewing the MRIs of Plaintiff's spine, radiologist Dr. Lewis M. Rothman, found the conditions seen in the films from June 10, 2015 to be essentially the same conditions observed in the September 23, 2011 films and clearly shown to have pre-existed the accident.

The post-accident MRI films ... reveal the same chronic degenerative disc disease manifested by disc desiccation, disc space narrowing and osteophyte formation as seen in the earlier films. The films do not display any evidence of interval post traumatic abnormality." Based on his examination of the June 10, 2015 MRI of Plaintiff's lumbar spine, Dr. Rothman found no evidence of Plaintiff having sustained traumatic injury

to the lumbar spine as a result of the subject accident. "The films show chronic degenerative disc disease is present, which is manifested by disc desiccation, osteophyte formation, and endplate degeneration with chronic disc herniations. The conditions would not be traumatically induced and would be the result of long term degeneration, and thus were not caused by the subject accident. My review of the films show diffuse desiccation more marked at the L5-S1 level. There are anterior and posterior osteophytes present in the lower thoracic region with disc space narrowing and endplate degeneration present at the L5-S1 level. There is also evidence of chronic left lateral disc herniation at L4-5 and a chronic disc herniation at L5-S1. The disc herniations at levels L4-5 and L5-S1, as stated, within a reasonable degree of medical certainty, are chronic in nature and not causally related to the subject accident, with no evidence of there having been traumatically induced (Defendants' Motion, Ex. T).

Based on the foregoing, Defendants demonstrated entitlement to summary judgment as a matter of law, by submitting evidence demonstrating that Plaintiff's lumbar spine disc bulge and/or herniation was pre-existing and/or degenerative and not causally related to the accident.

In opposition, Plaintiff submitted the psychiatric evaluation performed by Diara Gross, Doctor of Osteopathy, on March 19, 2015, shortly after the accident, which found in the lumbar spine "tenderness and spasm throughout bilateral lumbar paraspinals with worse tenderness on the right than on the left. Range of motion in flexion is 40 degrees (normal 90 degrees), extension is 20 degrees (normal 30 degrees), right side bending is 20 degrees (normal 40 degrees), and left side bending is 35 degrees (normal 40 degrees) (Plaintiff's Opposition, Ex. 2)."

A subsequent examination on March 31, 2015 by Dr. Nagaveni Roa, a physiatrist, found lumbar muscle spasm and active range of motion of the lumbosacral spine 10 degrees in forward flexion (90 degrees), 5 degrees in extension (30 degrees), 10 degrees in right and left lateral flexion (normal 20 degrees) with pain in all movements (Plaintiff's Opposition, Ex. 3).

The affirmed report of Dr. Charles Kaplan, who specializes in pain management,

physical medicine & rehabilitation, prepared January 8, 2018, which was based on his examination of Plaintiff and a review of her spinal MRIs, stated that Plaintiff sustained permanent injuries as a result of the subject accident, including a disc bulge at the C7-T1 level with indentation of the ventral margin of the thecal sac and bilateral foraminal encroachment with severe bilateral neural foraminal narrowing by the encroaching disc; cervical spine sprain; cervical spine derangement; lumbar spine sprain; lumbar spine derangement... and that ... Dewitt's injuries ... are permanent in nature (Plaintiff's Opposition, Ex. 52)."

It is well-established that disc bulges and herniations, of themselves, are insufficient to establish serious injury, in the absence of objective medical evidence showing the extent or degree of the limitations resulting from these specific injuries and their duration (*Wetzel v Santana*, 89 AD3d 554 [1st Dept 2007]).

The failure of Plaintiff's medical experts to address the findings of Defendants' experts that Plaintiff's injuries were the result of a pre-existing degenerative condition rendered speculative any conclusions they made that Plaintiff's spinal injuries were causally related to the subject accident (*Henry v Peguero*, 72 AD3d 600 [1st Dept 2010]).

Plaintiff's submissions were insufficient to raise a triable issue of material fact necessary to defeat summary judgment because her experts failed to adequately address plaintiff's preexisting back condition and did not provide any foundation or objective medical basis supporting the conclusions they reached (*Franchini v Palmieri*, 1 NY3d 536 [2003]). Inasmuch as she had full range of motion in her neck and back during Mt. Sinai Emergency Room visits in July & August 2015, four and five months, respectively, after the subject accident, Plaintiff has failed to raise an issue of fact as to her claimed injuries.

The court finds that Defendant submitted persuasive evidence that Plaintiff's injuries were the result of a preexisting degenerative disc condition, and Plaintiff failed to rebut that evidence sufficiently to raise an issue of fact.

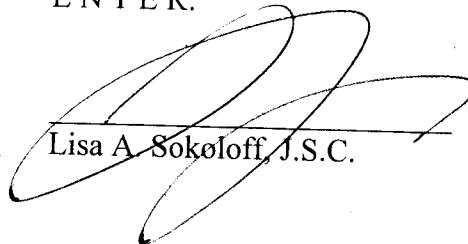
Accordingly, it is

ORDERED, that Defendants' motion for summary judgment on the ground that Plaintiff has not met the "serious injury" threshold within the meaning of Insurance Law § 5102(d) is granted and the complaint is dismissed.

This constitutes the decision and order of the Court. Any other requested relief not expressly granted is denied.

Dated: March 20, 2018  
New York, New York

ENTER:



Lisa A. Sokoloff, J.S.C.