

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH A. DE MARO

Justice

----- TRIAL/IAS, PART 3

NASSAU COUNTY

KATIAN BRUCE,

Plaintiff,

MOTION DATE: November 21, 2007

INDEX No. 13354 /2005

-against-

SEQUENCE NOS. 1 AND 2

ALL SEASONS, INC., FRANCOIS HILAIR and
REINALDO ALVAREZ,

Defendant.

The following papers read on this motion:

- Notice of Motion
- Affirmation in Opposition
- Notice of Cross Motion

Motion by defendants All Seasons, Inc. and Francois Hilair for summary judgment dismissing the complaint on the grounds that plaintiff has failed to sustain a "serious injury" within the meaning of Insurance Law 5201(d) is granted.

The further request by these defendants for summary judgment on their cross-

claim against defendant Reinaldo Alvarez on the issue of liability is denied as moot.

Cross-motion by defendant Reinaldo Alvarez for summary judgment dismissing the complaint due to plaintiff's failure to present a *prima facie* case of "serious injury" is granted.

On November 26, 2003, at approximately 10:00 PM, a vehicle owned and operated by defendant, Alvarez, collided with a taxicab owned by defendant, All Seasons and driven by defendant, Hilair at the intersection of Maple Avenue and Fulton Street in Westbury, New York. Plaintiff, a 21-year old student, was one of two passengers in the backseat of the taxicab at the time of the collision.

According to her bill of particulars plaintiff's injuries include the following:

Bulging disc L5-S1 approximating the ventral epidural fat;

L4-5 radiculopathy;

L5-S1 radiculopathy;

Spasm and tenderness across lumbar spine;

Decreased range of motion of lumbosacral spine

Post-concussion syndrome with headaches;

TMJ.

Plaintiff denied emergency care at the scene of the accident, but sought treatment at North Shore University Hospital Emergency Room the next day.

On December 16, 2003, plaintiff commenced treatment with Dr. Butani, and this treatment lasted through March 24, 2004, at which time plaintiff states that her insurance coverage ended. Plaintiff alleges that “due to the injuries I sustained in the accident I was forced to switch from full-time student to part-time student at Nassau Community College in January, 2004. When I became a part-time student my health insurance coverage with Empire Blue Cross Blue Shield was terminated” (Bruce affidavit, par. 6). Plaintiff became a full-time student again in early 2007, and she says that in mid-February 2007 her health benefits were restored. She was re-examined by Dr. Butani on May 31, 2007.

Plaintiff claims that she still has severe back pain which goes down into both legs, and as a result she still has difficulty bending, lifting, standing, driving and sitting for prolonged periods, as well as doing household chores such as cleaning (Bruce affidavit, par. 10).

In support of their motion for summary judgment, defendants, All Seasons and Hilair submit properly affirmed reports from a radiologist, a neurologist, and an orthopedist, in addition to an affirmed report from a dentist. The radiologist opines that the MRI of plaintiff’s lumbar spine dated 2/18/04 is normal. The

neurologist opines that there is no neurological disability at this time and no residual injuries or permanency of injuries. The orthopedist's diagnosis is: status-post cervical, thoracic and lumbar spine sprain/strain - resolved, and he avers that plaintiff has no disability or work restriction and no restriction of activities of daily living. The dentist opines that from a dental perspective, there is no disability causally related to the accident. This evidence is sufficient to establish a *prima facie* case that plaintiff's injuries are not "serious" within the meaning of Insurance Law 5102(d), and the burden shifts to plaintiff to come forward with some evidence of a "serious injury" in order to survive the motion (*Gaddy v Eyster*, 79 NY2d 955, 957 (1992)).

In opposition plaintiff submits an affirmation from her treating physician, Dr. Butani, together with Dr. Butani's reports of examinations and treatments of plaintiff from December 16, 2003, through April 9, 2004, and May 31, 2007, which he expressly affirms.

The problem with this case is that rather than a gap in treatment, in reality there was a cessation of treatment [*Pommells v Perez*, 4 NY3d 566, 574 (2005)]. While the explanation of no insurance coverage for a gap in treatment is acceptable [*Francovig v Senekis Cab Corp.*, 41 AD3d 643 (2nd Dept. 2007); *Black v Robinson*, 305 AD2d 438 (2nd Dept. 2003)], this explanation is suspect when

there is no evidence of a resumption of treatment once insurance coverage resumed. When he re-examined the plaintiff in May 2007, Dr. Butani recommended a further MRI, a physical therapy program, an EMG and nerve conduction studies, if plaintiff “continues to have radicular symptoms” (Butani affirmation, par.11). There is no evidence in the record that any of these measures were pursued in the months after plaintiff’s re-examination.

All of plaintiff’s physical therapy evaluations and notes from 2003 and 2004 are unsworn and therefore inadmissible [see, *Furrs v Griffith*, 43 AD3d 389 (2nd Dept. 2007)]. Although plaintiff states that the physical therapy took place at Dr. Butani’s office, there is no affirmation by anyone that Dr. Butani was present during the physical therapy, and consequently he cannot rely on the unsworn records of others [*Govori v Agate Corp.*, 44 AD3d 821 (2nd Dept. 2007); *Verette v Zia*, 44 AD3d 747 (2nd Dept. 2007)].

Plaintiff has presented no dental evidence of TMJ or any other dental injury.

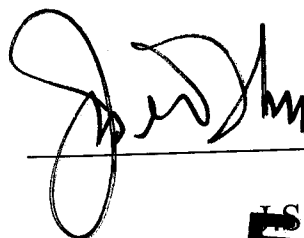
The mere existence of a bulging disc, or even radiculopathy, is not evidence of a “serious injury” within the meaning of Insurance Law 5102 (d), in the absence of evidence not presented here, of the extent of the alleged physical limitations resulting from the injury and its duration [*Cerisier v Thibiu*, 29 AD3d 507(2nd

Dept. 2006); Mejia v DeRose, 35 Ad3d 407(2nd Dept. 2006); Kearse v New York City Transit Authority, 16 AD3d 45 (2nd Dept. 2005)].

Under all of the circumstances of this case, plaintiff's affidavit does not suffice to remedy the deficiencies in her evidence [see, Govori v Agate Corp., supra]. Her claim that she was forced to become a part-time student as a result of her injuries in unsupported, and her return to full-time status is unexplained.

Based on the foregoing, the Court finds that plaintiff has failed to raise a triable issue of fact, and therefore, defendants' motion and cross-motion for summary judgment dismissing the complaint on the threshold issue of "serious injury" must be granted. In view of this determination, the further request by defendants, All Seasons and Hilair, for summary judgment on their cross-claim against defendant Alvarez, is denied as moot.

This constitutes the decision and Order of this Court.



Dated: December 21, 2007

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ENTERED

DEC 27 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**