

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

ANGELA C. HARDY,

Plaintiff(s),

- against -

JASON FROST and AMERICAN STORAGE AND
TRANSPORT, INC.,

Defendant(s).

TRIAL/IAS PART 5

INDEX NO. 22457/10

MOTION SEQUENCE
NO. 2

MOTION SUBMISSION
DATE: May 25, 2012

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, the motion by the defendants for an Order pursuant to CPLR §3212, granting summary judgment in favor of the defendants, Jason Frost and American Storage and Transport, Inc., on the issue of damages and for any possible claim of economic loss, upon the ground that the plaintiff, Angela C. Hardy, has not sustained a "serious injury" as defined by Insurance Law §5102(d) and as required by Insurance Law §5104(a), is determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident that occurred on December 9, 2008 at approximately 5:45 pm on the Long Island Expressway at or near exit 33, Nassau County, New York.

The plaintiff in the plaintiff's Bill of Particulars sets forth:

- "3. (a) As a result of the accident herein, Plaintiff(s) sustained the following injuries, all of which are alleged to be of a permanent nature:
- MRI of the cervical spine reveal the following:
 - Disc bulging at L2-L3 level;
 - Right foraminal disc herniation which causes impingement upon the existing L2 nerve root;

- Disc bulging at L3-L4 level;
- Superimposed left parasagittal disc herniation which cause impingement upon the left side of the thecal sac.
- Degenerative changes of the facet joints with hypertrophy of the ligamentum flavum;
- Spinal stenosis;
- Diffuse disc bulging at the L4-L5 level;
- Osteophytic ridging with disc material extending into the neural foramen with impingement upon the existing right L4 nerve root;
- Disc bulging at the L5-S1 level;
- Disc bulging at the L5-S1 level;
- Disc space narrowing and loss of the normal T2 signal hyperintensity of the disc at the L4-L5 and L5-S1 levels;
- Dsogenic endplate at L4-L5 level;
- Straightening of the normal lumbar lordosis;
- Impingement upon the right side of the thecal sac and right S1 nerve root;
- Impingement upon the existing right L5 nerve root;
- Cervical radiculopathy;
- Sacroiliac sprain/strain acute;
- Cervicocranial syndrome;
- myalgia;

The defendants in support of the instant application, amongst other things, submit the plaintiff's July 20, 2011 deposition transcript and an affirmed letter report dated September 9, 2011 of Michael J. Katz, MD an orthopedist of a September 9, 2011 orthopedic examination of the plaintiff.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make

a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

The report of Dr. Katz sets forth:

"Physical Examination:

The claimant stands 5'6" tall and weighs 130 pounds.

The claimant is right-hand dominant.

The claimant was using no canes, walkers or crutches.

The claimant walked normally into and out of the examining room.

The claimant changed positions normally.

The claimant was identified by a valid picture I.D.

Examination of the Cervical Spine: There is no tenderness about the cervical spine and there is no paravertebral muscle spasm. Flexion is present to 50 degrees (normal 50 degrees) and extension is present to 60 degrees (normal 60 degrees). Lateral flexion is present with right-sided lateral flexion to 45 degrees (Normal 45 degrees) and left-sided lateral flexion to 45 degrees (normal 45 degrees). Right-sided rotation is present to 80 degrees (normal 80 degrees) and left-sided rotation is present to 80 degrees (normal 80 degrees). Motor strength is present in the C5-T1 innervated segments. Sensation is intact in the C5-T1 innervated dermatomes. Reflex testing reveals the biceps, triceps, and brachioradialis reflexes to be 2+ and symmetric. Adson's test is negative.

Examination of the Lumbar Spine: The gait was normal without antalgic or Trendelenburg component. No paravertebral muscle spasm was present. Active range of motion revealed forward flexion to 90 degrees (normal 90 degrees), extension to 30 degrees (normal 30 degrees), and lateral and side bending to 30 degrees (normal 30 degrees). Straight leg raising test was negative. Sensory examination revealed full sensation to light touch in the L3-S1 dermatomes. Reflexes of the quadriceps, tibialis posterior, and Achilles tendon were 2+ and symmetric bilateral. Babinski was negative and there was no demonstrable clonus. Patrick was negative.

Range of motion was determined using a goniometer.

Range of Motion Reference: Roaas A., Anderson G.B., ACTA Orthopaedic

Scandinavia 1982 April; 53(2): 205-8.

The following measurements were taken: Circumferential measurement at the ulna styloid on the right was 6 inches. Circumferential measurement at the ulna styloid on the left was 6 inches. Using the power pinch meter to measure pinch strength, there was 6 kg of force on the right and 6 kg of force on the left. Using the Jamar dynamometer to measure grip strength, there was 24 kg of force on the right and 24 kg of force on the left.

Leg lengths measured from the anterior superior iliac spine to the medial malleolus on the right 35 inches and on the left 35 inches.

Review of Records:

The following records were reviewed:

- Verified Bill of Particulars: Index #022457/10, dated 04/11/11.
- NF-3 from Deborah Kleinman, DC.
- MRI report of the lumbar spine from Next Generation Radiology, dated 09/23/09.
- Report of an initial orthopedic examination from Barry Katzman, MD., dated 10/14/09.
- Chiropractic progress notes from Deborah Kleinman-Cindrich, D.C., dated 12/22/08 through 11/09/09.
- Physical therapy progress notes dated 12/22/08 through 12/29/08.

ADDITIONAL RECORDS:

Report of an office visit consultation from Barry Katzman, M.D., dated 09/04/09. The claimant presented with complaints of small right finger pain when her finger was pulled while getting a massage sometime in August 2009. Impression: Exacerbation of right small finger arthritis.

Diagnosis:

Cervical strain - resolved
Lumbosacral strain - resolved

Comment:

The claimant is a 62-year-old female who alleges an injury of 12/09/08 as a seatbelted driver. The injuries diagnosed are: cervical strain and lumbosacral strain. Currently, she shows no signs or symptoms of permanence relative to the musculoskeletal system and relative to 12/09/08. She is currently not disabled. She is capable of her gainful employment as a consultant in home furnishing. She is capable of her activities of daily living. She is capable of all pre-loss activities."

The Court finds that the defendants have submitted evidence in admissible form to make a "prima

facie showing of entitlement to judgment as a matter of law" (**Winegrad v. New York University Medical Center, 64 NY2d 851, 853; Pagano v. Kingsbury, supra at 694**) and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact (**see Gaddy v. Eyler, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; Jean-Meku v. Berbec, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; Horan v. Mirando, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995**).

In opposition to the defendants' requested relief the plaintiff submits certain unsworn office/progress notes of Dr. Holly Bienenstock and Deborah Kleinman-Cindrich, D.C.; an affirmation of a treating physician of the plaintiff, Barry M. Katzman, M.D., an orthopedist and an affidavit from the plaintiff.

The Court initially observes that the unsworn office/progress notes of Dr. Holly Bienenstock are not properly considered in opposition to the defendants' requested relief (**see Grasso v Angerami, 77 NYS2d 813, 580 NYS2d 178**).

As to the unsworn office/progress notes of Deborah Kleinman-Cindrich, D.C., in light of the fact that the defendants' examining physician Dr. Katz review this office/progress notes in relation to said physician's report (*supra*), said notes are properly considered herein (**see, Kearse v New York City Transit Authority, 16 AD3d 45, 789 NYS2d 281 (Second Dept., 2005)**). A review of said office/progress notes together with the affidavit of the plaintiff sets forth that the plaintiff has treated with Dr. Kleinman-Cindrich beginning on December 22, 2008 to the present.

Of significance, Dr. Katzman states in said physician's affirmation:

"I treated ANGELA C. HARDY in connection with complaints of injuries sustained as the result of an accident which occurred on December 9, 2008. In addition to my own treatment and examination of the patient, **I personally reviewed the following medical records and MRI films:**

1. MRI film of the Lumbar Spine dated 09/23/09.
2. My own narrative reports dated 09/04/09, 10/14/09, 10/15/10 and 10/20/10.
3. Office notes from Dr. Holly Bienenstock dated 12/10/08 through 04/20/09.
4. Chiropractic notes of Deborah Kleinman-Cindrich from 12/22/08 through 03/15/11.

The patient presented in my office for the first time on September 4, 2009. At that time, she presented with a history of being injured in a motor vehicle collision on December 9, 2008. The patient stated that, following the collision, she began suffering from persistent intermittent headaches and posterior neck pain to palpation with stiffness which radiates to her bilateral arms. At her lower back, she noted lower back pain and stiffness. She stated that this pain radiates across her lower back. She noted this pain to be persistent.

After her initial chiropractic treatment with Deborah Kleinman-Cindrich, D.C., the medical records from which I have reviewed indicate that she began treating immediately following the collision up to and including the present, the

patient initially came under my care on September 4, 2009 for an orthopedic evaluation due to complaints to her right small finger which she thought became dislocated during therapy. She also had complaints of pain to her lower back which she indicated manifested following the motor vehicle collision of December 2008. At that time, I performed a thorough physical examination.

On the date of the initial consultation, my initial examination revealed a loss of range of motion in her lumbar spine. At that time, it was not known whether the limited range of motion would persist or resolve. I then advised her to continue with her course of physical therapy which included Heat Therapy, Electrical Muscle Stimulation, Ultrasound Therapy, Massage and a variety of muscle strengthening and range of motion exercises which were done by the patient both during the course of therapy in my office as well as at home.

When her complaints persisted and did not improve, I prescribed an MRI to determine the extent of the injuries to the spine and surrounding areas. I **personally reviewed the following MRI film, which revealed the following:**

MIR of the Lumbosacral Spine performed on September 23, 2009 revealed a right foraminal disc herniation at L2-L3, a left parasagittal disc herniation at L3-L4 and a broad based right parasagittal and foraminal disc herniation at L5-S1 as well as a bulging disc at L4-L5.

Thereafter, on October 15, 2010, I performed a further physical examination. My examination revealed a continued loss of range of motion in the lumbar spine.

Although the patient continues to receive chiropractic treatment at present, the course of physical therapy continued until December 2010. **The patient's course of treatment ended when it was determined that a maximum medical benefit had been derived from physical therapy.** At the conclusion of the course of therapy, it was determined that due to the nature of the injuries sustained by the patient as a result of the accident, no complete cure or rehabilitation was likely. At that time, it was determined that this patient would never fully recover from her injuries and that further physical therapy would be futile. The patient was then discharged from active treatment and was advised to continue home therapy and exercise and to take over the counter pain medication on a PRN basis.

I last saw the patient for a follow up examination on March 31, 2012 with no further treatment being rendered. Despite a substantial range of therapy and exercise, the injuries have not been resolved as we had hoped. The patient complained of a wide variety of limitations to her daily activities including lifting, pushing or pulling. She indicated having a difficulty standing straight and favoring her right side. She has difficulty performing certain household duties, stair climbing, standing or sitting in a single position for

more than 15 minutes at a time, walking distances or more than 3 blocks, inability to sleep comfortably and pain in the affected areas.

Upon examination on March 31, 2012, objective testing of the patient revealed the following:

Lumbosacral: Range of Motion Testing revealed the following: Flexion 45 (90 normal); Extension 20 (30 normal); and Lateral bending 20 (35 normal).

Right Hip: Range of Motion Testing revealed the following: Flexion 90 (normal 120) and Abduction 20 (normal 45).

Due to the length of time between the initial trauma which brought about these complaints and considering the intensive course of treatment which the patient underwent, the continuation of the subjective complaints confirmed by the results of objective testing leads to my conclusion that these injuries are chronic in nature and it can be further determined with a fair degree of medical certainty that these injuries are permanent in nature.

The patient currently suffers from a partial disability related to her loss of range of motion. In my opinion, the amount of time which has passed between the initial trauma and the present demonstrates that this partial disability which the plaintiff suffers from may be permanent in nature. As such, the patient has suffered and will continue to suffer a permanent significant limitation of the use of her lumbar spine.

In addition, intermittent episodes of exacerbation are expected to occur during the course of the patient's lifetime. The patient is not expected to recover fully or be able to perform her normal daily activities in a pain-free environment has she did in the past.

As a result of my personal review of the records and MRI film, my own treatment and examination of the patient, I have determined that accident which occurred on December 9, 2008 was the direct and proximate cause of the injuries discussed above and that these injuries are permanent in nature and have resulted in a permanent partial disability to the patient which will continue to worsen over time."

Based upon all of the foregoing, there is an issue of fact as to whether the plaintiff suffered a serious injury pursuant to §5102 of the Insurance Law in the accident in issue. As such, the defendants's application for an Order pursuant to CPLR §3212, granting summary judgment in favor of the defendants, Jason Frost and American Storage and Transport, Inc., on the issue of damages and for any possible claim of economic loss, upon the ground that the plaintiff, Angela C. Hardy, has not sustained a "serious injury" as defined by Insurance Law §5102(d) and as required by Insurance Law §5104(a), is **denied**.

SO ORDERED.

DATED:

7/24/2012

.....
Reg. S. Madson
ENTERED

J.S.C.

JUL 27 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE