Civello v Chan

2012 NY Slip Op 30289(U)

February 6, 2012

Supreme Court, New York County

Docket Number: 108095/2008

Judge: Michael D. Stallman

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SCANNED ON 2/8/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

Index Number : 108095/2008
CIVELLO, FRANCINE
VS.
BRYAN CHAN
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 108095/08
MOTION DATE 11/17/11
MOTION SEQ. NO. 004

The following papers, numbered 1 to 8 were read on this motion and cross motion for summary judgment

Notice of Motion— Affirmation — Exhibits A-K	No(s).	1-2
Notice of Cross Motion— Affirmation	No(s).	3-4
Affirmation In Opposition — Exhibits A-F, G [Affidavit], H-J, K [Affidavit], L-M	No(s).	5-7
Reply Affirmation	No(s).	8

Upon the foregoing papers, it is ordered that this motion and cross motion for summary judgment are decided in accordance with the annexed memorandum decision and order.

FILED
FEB 08 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/6/12
New York, New York

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----------X

FRANCINE CIVELLO and MICHAEL WENZLER,

Plaintiffs,

Index No. 108095/2008

- against -

BRYAN CHAN, ROYALE DRAPERIES, INC., CARMELA ABRAHANTE, 349 CAR CORP., YSNOC BAVDUY, MTA/NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and WALDER R. SCHUBERT,

Decision and Order

Defendants.

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FILED
FEB 08 2012
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

This action arose of out of a November 6, 2007 accident involving four motor vehicles, including an express bus, that occurred on, in the southbound lanes of the FDR Drive, near the off ramp to Battery Park in Manhattan. Plaintiffs assert that they were passengers in the express bus, and that defendant Walder R. Schubert operated the bus. One of the other vehicles involved in this motor vehicle accident was a 2007 Lincoln Town Car, allegedly operated by defendant Ysnoc Bavduy and allegedly owned by defendant 349 Car Corp.

Defendants New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, and Schubert (collectively, the Transit defendants) move for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a serious injury, within the meaning of Insurance Law § 5102 (d). Defendants Bavduy and 349 Car Corp. also cross-move for summary judgment, adopting the Transit defendants' arguments. Plaintiffs oppose both the motion and cross motion.

BACKGROUND

Paragraph 5 of the bill of particulars alleges that Civello suffered, among other injuries, severe pain and strain of the cervical spine, with diminished motion, severe pain and strain of the lower back; severe pain of the left shoulder; tendinosis in the left shoulder; broad-based subacromial spur and subacromial/subdeltoid bursitis. (Coffey Affirm., Ex D [Verified Bill of Particulars].) According to the supplemental bill of particulars, Civello also sustained a "disc bulge at C5-6 with effacement of the ventral thecal sac and flattening of the ventral spinal cord." (*Id.* [Suppl. Bill of Particulars], at 1.) Civello was allegedly confined to bed and home "for approximately one (1) month following this accident and continuing intermittently and periodically thereafter, except for receiving medical care and treatment . . ." (Bill of Particulars ¶¶ 6-7).

Wenzler allegedly sustained, among other injuries, atrial fibrillation, cardiac dysrhythmias, severe pain and tenderness of the mid-back and lower back, and severe pain and tenderness of the left knee. (Verified Bill of Particulars ¶ 5.) According to the supplemental bill of particulars, Wenzler sustained radiculopathy at C5, C6 and C7. (Suppl. Bill of Particulars, at 2.) Like Civello, Wenzler was allegedly confined to bed and home "for approximately one (1) month following this accident and continuing intermittently and periodically thereafter, except for receiving medical care and treatment. . . " (Bill of Particulars ¶¶ 6-7.)

Dr. Ronald Mann, MD performed orthopedic medical examinations of Civello and Wenzler on November 3, 2009. Dr. Herbert Insel, M.D., F.A.C.C., a cardiologist, examined Wenzler on November 9, 2009. Dr. Charles Bagely performed neurological medical examinations of Civello and Wenzler on November 23, 2010. Dr. Joseph Tuvia reviewed x-rays of Civello's left knee and left shoulder taken on November 12, 2007, and reviewed a MRI of Civello's left shoulder taken on

November 27, 2007.

DISCUSSION

The No-Fault Law "bars recovery in automobile accident cases for 'non-economic loss' (e.g., pain and suffering) unless the plaintiff has a 'serious injury' as defined in the statute. . . ." (*Perl v Meher*, 18 NY3d 308 [2011].)

> "Of the several categories of 'serious injury' listed in the statutory definition, three are relevant here: 'permanent consequential limitation of use of a body organ or member'; 'significant limitation of use of a body function or system'; and '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 constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment' (Insurance Law § 5102[d])."

(*Id.*)

Whether Francine Civello suffered a "serious injury"

In support of their motion, the Transit defendants submit affirmed reports from Dr. Mann, Dr. Bagely, and Dr. Tuvia. Dr. Mann found almost all normal ranges of motion, objectively measured by a goniometer, in Civello's cervical spine, lumbar spine, left knee, and left shoulder. (Coffey Affirm., Ex H.) Dr. Mann noted that the external rotation of Civello's left shoulder measured at "60 degrees (80-90 degrees normal) " (*Id.*), but nevertheless concluded that Civello's cervical, lumbar, left shoulder, and left knee sprains/strains were resolved. Dr. Bagely reached similar findings, and concluded that Civello had a normal neurological examination. (Coffey Affirm., Ex I.) Based on his review of x-rays of Civello's left shoulder and left knee, Dr. Tuvia's impressions were that the left shoulder was intact, and that, except for small joint effusion, the left knee was otherwise normal. (Coffey Affirm., Ex G.) Based on his review of an MRI of Civello's

left shoulder, Dr. Tuvia concluded there were "degenerative changes about the acromioclavicular joint, impingement and distal supraspinatus tendinopathy, likely chronic in nature. Also seen are degenerative changes about the humeral head." (*Id.*)

Based on these affirmed reports, movants have established prima facie entitlement to summary judgment dismissing Civello's claims of a "permanent consequential limitation" or "significant limitations" of use her cervical spine, lumbar spine, and left knee. (*Diakite v Soderstrom*, 89 AD3d 607 [1st Dept 2011].) As plaintiffs point out, neither Dr. Mann, Dr. Bagely, nor Dr. Tuvia addressed the MRI taken of Civello's cervical spine on June 23, 2008, which was mentioned in Dr. Bagely's affirmed report. An unsworn report of the attending radiologist who read Civello's MRI indicates "diffuse disk bulge at C5-6 results in moderate effacement of the ventral thecal sac and minimal flattening of the ventral spinal cord." (Goldfarb Opp. Affirm., Ex A.) However, "the failure of a defendant's medical expert to discuss diagnostic tests indicating bulging or herniated discs will not, by itself, require denial of a defense summary judgment motion." (*Shumway v Bungeroth*, 58 AD3d 431, 431 [1st Dept 2009].)

Plaintiffs also point out that Dr. Mann measured the range of motion in the external rotation of Civello's left shoulder at "60 degrees (80-90 degrees normal)." Although "a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute" (*Licari v Elliott*, 57 NY2d 230, 236 [1982]), the Transit defendants have not demonstrated that the 25- 33% restriction in external rotation of Civello's left shoulder was minor or slight, as a matter of law. Dr. Mann does not opine that the less than normal restriction was minor or slight. The cases that the Transit defendants cite do not involve external rotation of the shoulder, and reported cases where the restriction was held to be slight or minor did not involve a similar degree of restriction as here.

(*June v Akhtar*, 62 AD3d 427 [1st Dept 2009][prima facie burden met by surgeon who averred that plaintiff sustained 5 degree limitation of external rotation of right shoulder met]; *compare with Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006][160° out of 180° range of motion in forward elevation and abduction in her left shoulder, i.e., a 11% limitation, ruled not significant].) However, Dr. Tuvia's finding of degenerative changes in Civello's left shoulder established prima facie lack of causation. (*Lavali v Lavali*, 89 AD3d 574, 575 [1st Dept 2011].)

In opposition, plaintiffs submit the reports of Dr. Kaplan, who examined Civello six days after the accident, and Dr. Gutstein, who examined Civello again on August 19, 2011. Dr. Kaplan's impression was that Civello exhibited "tenderness in the sub-acromial space on the left anteriorly and posteriorly. She has marked crepitus with sh[oulder] abduction. She has good strength and positive Speed sign. She has spasm in the cervical paraspinous musculature. . . Cervical motioin is diminished and lumbar motion is full. " (Goldfarb Affirm., Ex D.) Four years after the accident, Dr. Gutstein measured, with a goniometer, 33-40% limitations in the ranges of motion in Cevillo's cervical spine. (Goldfarb Affirm., Ex F.) Dr. Gutstein stated, that "with a reasonable degree of medical certainty, these injuries have produced meaningful and permanent impairments of Ms. Civello's cervical spine due to the 11/6/2007 bus accident." (*Id.* at 3.) Plaintiffs' submissions raise a triable issue of fact as to whether Civello suffered a "permanent consequential limitation" or "significant limitations" of use her cervical spine.

Although the Transit defendants object to the unsworn and unaffirmed reports of the doctors who treated or examined Civello after the accident, hearsay may be considered to oppose summary judgment, so long as the hearsay is not the only proof submitted. (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 564 [1st Dept 2011].) Moreover, the Court of Appeals recently

stated,

> "Potential plaintiffs should not be penalized for failing to seek out, immediately after being injured, a doctor who knows how to create the right kind of record for litigation. A case should not be lost because the doctor who cared for the patient initially was primarily, or only, concerned with treating the injuries."

(*Perl v Meher*, 18 NY3d 308, *supra.*) The Court does not consider the Transit defendants' argument, raised in the first time in reply, of a lengthy gap in treatment between the treatment that Civello received after the accident and her examination before Dr. Gutstein. (*Tadesse v Degnich*, 81 AD3d 570 [1st Dept 2011][court improperly relied on the gap-in-treatment argument, which appellants raised for the first time in their reply papers].)

As to Civello's 90/180-day claim, movants have not met their prima facie burden of summary judgment. The Transit defendants cite testimony given at Civello's statutory hearing and deposition. However, the page cited from Civello's statutory hearing (page six) was not submitted in the moving papers, and the deposition transcript is neither signed by Civello nor certified by a stenographer.

Therefore, the Transit defendants' motion for summary judgment is denied as to Civello's claims.

Whether Michael Wenzler suffered a "serious injury"

In support of their motion, the Transit defendants submit affirmed reports from Dr. Mann, Dr. Bagely, and Dr. Insel. Dr. Mann found almost all normal ranges of motion, objectively measured by a goniometer, in Wenzler's lumbar spine and left knee. (Coffey Affirm., Ex L.) Dr. Mann concluded that Wenzler's lumbar spine and left knee sprains/strains were resolved. (*Id.*) Dr.

Bagely reached similar findings, and concluded that Wenzler had a normal neurological examination. (Coffey Affirm., Ex K.) Although records indicated that Wenzler experienced syncope and was in rapid atrial fibrillation when he was admitted to the hospital after the accident, Dr. Insel, a cardiologist, found that Wenzler had no current cardiac symptoms/conditions when Dr. Insel examined him on November 9, 2009. (Coffey Affirm., Ex M.) Dr. Insel found no permanent cardiac related residual abnormalities. (*Id.*)

As plaintiffs indicate, movants did not address an MRI taken of Wenzler's cervical spine on December 8, 2009, and a needle EMG taken on December 11, 2009. (Goldfarb Opp. Affirm., Exs B, C.) The radiologist who read Wenzler's MRI found

> "At C2-C3, there is small central disc herniation without cord compression.
>
> At C3-C4 and C4-C5, there is mild disc bulging and spondylosis. A medium-sized superimposed central disc herniation asymmetric to the left is present at C4-C5. This results in mild to moderate C4-C5 and mild C3-C4 cord compression.
>
> At C5-C6, there is moderate disc bulging and spondylosis resulting in moderate compression of the spinal cord . . .
>
> Mild disc bulging and spondylosis is present at C6-C7"

(Goldfarb Opp. Affirm., Ex B.) Meanwhile, the results of the needle EMG study of Wenzler's paraspinal muscles revealed "Left C5, C6, and C7 radiculopathy", "Involuntary, bilateral cervical and lumbar paraspinal myospasm" and "Mild left ulnar neuropathy at the elbow. (Cubital Tunnel Syndrome)." (*Id.*, Ex C.) However, "[t]he mere existence of a herniated disc, a bulging disc, or radiculopathy is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration." (*Keith v Duval*, 71 AD3d 1093, 1095 [2d Dept 2010][collecting Second Department appellate cases].) Therefore,

defendants' doctors did not need to address the findings of bulging discs and radiculopathy to establish a prima facie case of summary judgment as a matter of law.

In opposition, plaintiffs submit the affirmed reports of Dr. Gutstein, who incorporated the unsworn reports of Dr. Kaplan and Dr. Crone. Dr. Kaplan purportedly examined Wenzler six days after the accident, and diagnosed "post traumatic coccygeal/sacral pain." (Goldfarb Affirm., Ex J.) Dr. Crone purportedly examined Wenzler 11 months after the accident. Four years after the accident, Dr. Gutstein measured, with a goniometer, a 50% limitation in the range of motion in Wenzler's cervical spine. (*Id.*) Dr. Gutstein stated, that "with a reasonable degree of medical certainty, these injuries have produced meaningful and permanent impairments of Mr. Wenzler's cervical spine due to the above referenced accident." (*Id.* at 6.)

As discussed above, the unsworn and unaffirmed reports of the doctors who treated or examined Wenzler may be considered to oppose summary judgment, because this hearsay is not the only proof submitted in opposition to the Transit defendants' motion. (*Sumitomo Mitsui Banking Corp,* 89 AD3d at 564.) Moreover, Wenzler could rely upon Dr. Kaplan's and Dr. Crone's unsworn reports, because the affirmed report of Dr. Bagely, the Transit defendants' own doctor, referenced these unsworn reports. (*Kearse v New York City Tr. Auth.*, 16 AD3d 45, 47 n 1 [2d Dept 2005]["this court has held that even a reference to the unsworn or unaffirmed reports in the moving papers is sufficient to permit the plaintiff to rely upon and submit these reports in opposition to the motion"]; *Fitzroy v Boothe*, 29 Misc 3d 130 (A), 2010 WL 4368377 [App Term, 1st Dept 2010].)

Nevertheless, plaintiffs fail to raise a triable issue of fact as to whether Wenzler suffered a "permanent consequential limitation" or "significant limitation of use" of his cervical spine, because evidence of causation of the limitation of the range of motion is lacking. The excerpt of Dr.

Kaplan's report quoted in Dr. Gutstein's affirmed report did not mention any limitation of range of motion in Wenzler's cervical spine. Meanwhile, the excerpt of Dr. Cone's report of a examination Wenzler on October 15, 2008 specifically states, "Cervical ROM however is full." (Goldfarb Affirm., Ex J at 2.)

Therefore, the Transit defendants' motion for summary judgment is granted only to the extent of dismissing so much of the complaint against the Transit defendants as alleges that Wenzler suffered a serious injury based on the categories of a "'permanent consequential limitation of use of a body organ or member" and a "significant limitation of use of a body function or system."

As to Wenzler's 90/180-day claim, movants have not met their prima facie burden of summary judgment. Movants' reliance on Wenzler's statutory hearing testimony, certified by a stenographer, is misplaced. Wenzler did not testify that he only missed a total of two days of work as a result of the accident. Wenzler testified as follows:

> "Q. As a result of the accident of November 6th of last year did you lose any time from work?
>
> A. Yes. I'm unable to work as long because I'm in pain . . . .
>
> Q. How about consecutive days following the accident? Did you lose any consecutive days?
>
> A. I have lost days going to the doctor. I lose time each day, consecutively, yes, but not . . .
>
> MR. HOROWITZ: What about immediately following the accident? Were there a number of days that you were out of work?
>
> A. I was out two days."

(Coffey Affirm., Ex J, at 5-6.) Given the context of the questioning and compound questions asked, Wenzler did not unequivocally testify that he missed only two days of work in total as a result of the

accident. Although the Transit defendants also cite Wenzler's deposition testimony, the deposition transcript, was neither signed by him nor certified by a stenographer. (Coffey Affirm., Ex F.)

The Court does not consider the Transit defendants' argument, raised in the first time in reply, of a lengthy gap in treatment between the treatment that Wenzler received after the accident and his examination before Dr. Gutstein. (*Tadesse v Degnich*, 81 AD3d 570, *supra*.)

Turning to the cross motion, defendants 349 Car Corp. and Ysnoc Bavduy adopted the Transit defendants' contentions and arguments as part of their own cross motion. Therefore, their cross motion is granted only to extent of dismissing so much of Wenzler's claims against them alleging a serious injury based on the categories of a "'permanent consequential limitation of use of a body organ or member" and a "significant limitation of use of a body function or system," and the cross motion is otherwise denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, and Walder R. Schubert, and the cross motion for summary judgment by defendants 349 Car Corp. and Ysnoc Bavduy, are granted in part, only to the extent of dismissing so much of the complaint by plaintiff Michael Wenzler that alleges that Wenzler suffered a serious injury based on the categories of a "'permanent consequential limitation of use of a body organ or member" and a "significant limitation of use of a body function or system," and the motion and cross motion are otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: February 6, 2012
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

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