

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

SHEILA BERRY,

Plaintiff,

-against-

MEMORANDUM DECISION/
ORDER

Index No. 24249/03

STANLEY SALLEY and ENTERPRISE
RENT-A-CAR,

Defendants.

FILED
JUL 27 2003
CLERK OF COURT

HON. MARK FRIEDLANDER:

Motion by defendants Stanley Salley (Salley) and Enterprise Rent-A-Car (Enterprise) for an order granting them summary judgment, on the ground that plaintiff failed to meet the serious injury threshold required by Insurance Law § 5102(d), and cross-motion by plaintiff, Sheila Berry, granting her partial summary judgment on the issue of liability, are consolidated for the purpose of this decision and decided as follows:

This action arises out of an automobile accident that occurred on February 18, 2002. Plaintiff was 55 years old at the time.

Plaintiff claimed in her bill of particulars, dated December 17, 2003, that, as a result of the accident of February 18, 2002, she suffered the following injuries:

“ Head trauma; Significant pain in both knees, left most symptomatic; Bruises and contusions; Medial line joint tenderness; Exacerbation of underlying arthritic condition; Tricompartmental, proximal, tibial tenderness; Tear through the posterior horn of the medial & lateral menisci; Increased signal intensity in the posterior horn of the medial meniscus extending to inferior articular surface; Synovia effusion; Permanent impairment of gait, mobility, and movement; Severe pain; Swelling; Scarring; Deformity; Use of crutches and/or cane to ambulate; Necessity of physical therapy, injection of pain killing anti-inflammatory medications

and follow-up orthopedic care; and Need for future corrective surgery and total knee replacement.”

In a supplemental bill of particulars, dated June 4, 2005, plaintiff claims “permanent Keloids surgical scarring at the site of bilateral knee replacement surgery performed.... on January 5, 2005” (Exhibit C).

Because of these injuries, plaintiff claims to have suffered a serious injury, in that she suffered permanent loss of use of a body organ, member, function or system; permanent consequential limitation of a body organ or member; significant limitation of use of a body function or system; a fracture; significant disfigurement; and/or a medically determined injury or impairment of a non-permanent nature which prevented the plaintiff from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

The burden rests on defendants to establish by evidentiary proof in admissible form, that plaintiff has not suffered a serious injury (see Lowe v. Bennett, 122 AD2d 728 [1st Dept 1986], *aff'd* 69 NY2d 701 [1986]).

When defendants' evidence is sufficient to make out a *prima facie* case that a serious injury has not been sustained, the burden shifts, and it is then incumbent upon plaintiff to produce sufficient evidence in admissible form to raise a triable issue of fact as to whether plaintiff sustained a serious injury (see Licari v. Elliot, 57 N.Y2d 230 [1982]).

Plaintiff claims that this accident exacerbated a pre-existing injury to her knees, resulting in bilateral knee replacement surgery and resultant scarring.

In support of their motion, defendants rely on a number of records from plaintiff's treating physicians (Exhibits K-DD), affirmations, dated August 16, 2004 and July 11, 2005, by Edward T. Haberman, M.D., an orthopedic surgeon, who examined plaintiff at defendants' request (Exhibit G), an affirmation by Robert D. Goldstein, a plastic surgeon, who examined plaintiff at defendants' request on October 14, 2005 (Exhibit H), as well as plaintiff's depositions held on June 9, 2004 (Exhibit D) and July 6, 2005 (Exhibit E).

In her deposition, plaintiff denies that she had any problem with her right knee as a result of the instant

accident (Exhibit D- pp. 57-58).

Plaintiff began to report pain in her left knee in 1999, when she saw Dr. Stephen Waxman. He referred her to Dr. Craig H. Sherman, a radiologist, who found, as to both knees, that x-rays revealed "(m)ild narrowing of the medial femorotibial compartments bilaterally [and] (l)ateral subluxation of the patellae" (Exhibit L). She then saw Dr. Richard Koffler, a specialist in physical medicine and rehabilitation, Dr. Don Dayson and Dr. Michael Parks in 2000, complaining of pain in her right knee and right hip. Plaintiff was referred for an MRI of her right knee in October 2000, which revealed a tear of the posterior horn of the medial and lateral menisci with degenerative osteoarthritic changes and synovial effusion (Exhibit P). In October 1999, plaintiff had fallen down subway stairs, which exacerbated the pain in her right hip (Exhibit P). She was recommended for right hip replacement due to advanced degenerative joint disease, which was performed in November 2000 (Exhibit Q). After the hip operation, plaintiff began to complain of pain in her left knee in March 2001.

At the time, Dr. Parks found joint line tenderness in the left knee. In May 2001, plaintiff's main complaint was pain in her left knee which was swelling occasionally (Exhibit V). By July 2001, plaintiff had received the third in a series of Synvisc injections into her left knee (Exhibit X).

Plaintiff returned to Dr. Parks three days after the instant accident, in February 2002. He found "full range of motion of both knees. There is left greater than right medial joint line tenderness." He found no instability or deformity and was of the opinion that "she currently just has a knee contusion" (Exhibit Y). Plaintiff saw Dr. Parks again on September 12, 2002. She had had a Synvisc injection for her left knee six weeks earlier and was "delighted with the result of the treatment." She was advised to return to see Dr. Parks in four or five months (Exhibit Z). When she next returned to Dr. Parks on March 13, 2003, Dr. Parks found that the "left knee has full, painless range of motion. There is no swelling... she has a high level of functioning at this time..." (Exhibit AA).

An X-ray taken on September 17, 2004 by Dr. Miklos Weinberg, a radiologist, found "(d)egenerative

changes of the left knee with a moderate sized effusion" (Exhibit CC). Bilateral knee replacement surgery was performed on plaintiff by Dr. Parks in January 2005 (Exhibit DD).

Based on these records, and his examination of plaintiff, Dr. Haberman found that plaintiff had osteoarthritis and degenerative changes of both knees prior to the accident of February 2002, that she suffered bruises and sprains to both knees as a result of the accident, and that the bilateral knee replacement surgery was unrelated to this accident (Exhibit G).

Defendants also argue that plaintiff did not suffer a serious injury, based on her 90/180 day claim. Defendants cite the lack of evidence of a causal connection between the accident and the claimed injuries, as well as the lack of medical evidence that plaintiff was prevented from performing substantially all of the material acts which constituted her usual and customary daily activities.

Dr Goldstein, a plastic surgeon, states in his affirmation, that he examined plaintiff and her medical records, as well as two color photographs of plaintiff's knees. He describes the scar caused by the instant accident as measuring "approximately 3.5 cms. in length with a zone of hyper pigmentation that measures 1 cm." He describes this scar as not showing any gross deformity and as being "cosmetically acceptable". Dr. Goldstein does not comment on the scars from the subsequent knee replacement surgery which, in his opinion, would first need to be shown to be causally related to the instant accident.

Based on the above, defendants have made out a *prima facie* case that plaintiff did not sustain a serious injury, shifting the burden to plaintiff to raise a triable issue of fact as to whether she suffered a serious injury.

Plaintiff, in opposing the motion, submits the affirmation of Dr. Parks, the affirmation of Dr. Jonathan Zizmor, a dermatologist, plaintiff's affidavit and certified emergency room records from Princeton Medical Center.

Dr. Parks, in his affirmation of January 9, 2006 (Exhibit A), incorporates his narrative summary dated December 9, 2003. Dr. Parks recounts plaintiff's treatment history, beginning in 2000, and continuing through

June of 2005. He notes that, in 2001, when plaintiff initially complained of pain in her left knee, he had found "minimal" degenerative changes of her knees, which progressed to "moderate" by May 2003 and "significant" in November 2003, leading to bilateral knee replacement surgery in January 2005.

Dr. Zizmor, in his affirmation, dated February 9, 2006 (Exhibit E), upon his examination of plaintiff, stated that he found an area of contusion on the left tibia, "circular and triangular in nature ranging in diameter from 3/4 inch to about 2 inches which was directly caused by the accident of February 18, 2002," and which he found to be significantly disfiguring. He also found two surgical scars, each 10 inches long and 3/4 inches wide, resulting from the bilateral knee replacement surgery, which were also significantly disfiguring. He found that the photos of these scars, taken by defendants, (Exhibit H), fairly depicted the scars.

Plaintiff has failed to present sufficient evidence to raise a triable issue of fact that she suffered a serious injury.

As noted earlier, plaintiff denied that she suffered an injury to her right knee as a result of this accident. Dr. Parks noted that, before this accident, beginning in March 2001, plaintiff began to complain of pain and swelling in her left knee which was treated by a series of injections.

In May of 2001, Dr. Parks indicated in reference to her complaints of left knee pain, that he "would be loath to suggest any further surgery" at that time, because plaintiff was still recovering from hip surgery (Exhibit V). Plaintiff showed improvement after the injections but then reported pain again following the instant accident. After more injections, she again showed improvement, reporting that she felt much better in September 2002 (Exhibit Z). In March 2003, plaintiff reported no pain and was "completing all of her normal activities of daily living." Not until September 2004 were there any further problems reported as to the left knee.

Based on the above, plaintiff has failed to show that there is a causal connection between the instant accident and the bilateral knee surgery. Dr. Parks alleges that this accident exacerbated plaintiff's arthritic condition. He relies on plaintiff's reports of pain, but does not present any objective medical evidence either by

quantitative assessment, in terms of loss of range of motion, or in terms of qualitative assessment, regarding reduced functioning, to support his conclusion (see Suarez v. Abe, 4 AD3d 288 [1st Dept 2004]). Also, plaintiff fails to explain how the left knee condition was exacerbated, when both knees (the left knee, which was injured in the accident, and the right knee, which was not) needed to be replaced simultaneously.

Plaintiff's 90/180 day claim is also without merit. Plaintiff has failed to present any medical evidence to support this claim (see Thompson v. Abassi, 15 AD3d 95 [1st Dept 2005]).

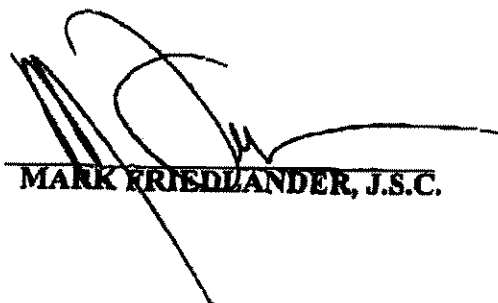
Plaintiff has also failed to present sufficient evidence to raise a triable issue of fact regarding her claim of significant disfigurement. Since no causal connection has been shown between the accident and the knee replacement surgery, the surgical scars will not be considered. The area of contusion below the left knee described by Dr. Goldstein and Dr. Zizmor and depicted in the photograph taken by defendants would not be regarded by a reasonable person viewing it, as unattractive, objectionable, or as the subject of pity or scorn (see Loiseau v. Maxwell, 256 AD2d 450 [2nd Dept. 1998]).

Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Plaintiff's cross-motion for summary judgment on the issue of liability, although unopposed, is denied as moot.

This constitutes the decision and order of the Court.

Dated: 9/25/06


MARK FRIEDLANDER, J.S.C.