[*1] **Sheila Travis, Plaintiff-Appellant, Barry J. Moonan, et al., Plaintiffs, v Nassirou M. Batchi, et al., Defendants-Respondents.**

2777, 14018/06

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

2010 NY Slip Op 5862*; *75 A.D.3d 411*; *905 N.Y.S.2d 66*; *2010 N.Y. App. Div. LEXIS 5714

July 1, 2010, Decided
July 1, 2010, Entered

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Leave to appeal granted by *Travis v. Batchi, 2011 N.Y. LEXIS 135 (N.Y., Feb. 10, 2011)*

COUNSEL: Grant & Longworth, LLP, Bronx (Brett R. Hupart of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondents.

JUDGES: Tom, J.P., Sweeny, Moskowitz, DeGrasse, Manzanet-Daniels, JJ.

OPINION

[**411] [***67] Order, Supreme Court, New York County (Edgar G. Walker, J.), entered April 9, 2009, which granted defendants' motion for summary judgment dismissing the complaint as to plaintiff-appellant (plaintiff) for lack of a serious injury, unanimously affirmed, without costs.

The examination records of plaintiff's own treating physician/expert show that she had full strength and range of motion in the knee both a few weeks and a few months after the accident, after he performed a right knee ACL reconstruction, partial medial and lateral meniscectomy and chrondroplasty. Absent some manner of explanation, the negative findings cannot be reconciled with the physician's affirmation submitted in opposition to the motion prepared a few years after the accident, that plaintiff sustained a permanent injury to the knee as a result of the accident. Summary judgment in favor of defendants should be granted for this reason alone, at least with respect to the alleged knee injury (*see Pou v E & S Wholesale Meats, Inc., 68 AD3d 446, 890 N.Y.S.2d 47 [2009]*). Also fatal to [**412] plaintiff, on the issue of permanence of both the alleged knee and alleged back injuries, is the physician's failure to provide any objective medical test results showing current range-of-motion impairments (*cf. Jimenez v Rojas, 26 AD3d 256, 257, 810 N.Y.S.2d 449 [2006]*). Nor does plaintiff, who concedes that she worked from home beginning two months after the accident through her return to the office five months after the accident, and fails to detail the particular job and other activities that were supposedly curtailed, satisfy the 90/180 test (*see* [*2] *Uddin v Cooper, 32 AD3d 270,*

271, 820 N.Y.S.2d 44 [2006], lv denied 8 NY3d 808, 865 N.E.2d 1256, 834 N.Y.S.2d 89 [2007]; *Linton v Nawaz, 62 AD3d 434, 443, 879 N.Y.S.2d 82 [2009], affd on other grounds NY3d , 926 N.E.2d 593, 900 N.Y.S.2d 239, 2010 NY Slip Op 2835 [2010])*.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 1, 2010