Pagan v Nu Way Cleaners
2014 NY Slip Op 33559(U)
October 3, 2014
Supreme Court, Bronx County
Docket Number: 301685/2011
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: Part IA 27

----------X **Index No. 301685/2011**

RAFAEL PAGAN,

Plaintiff,

-against- **DECISION and ORDER**

NU WAY CLEANERS and ANTHONY M. MARTINEZ,

Defendants.

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation as required by CPLR 2219 (a), of the papers considered in review of motion by Defendants pursuant to CPLR 3212 on the ground that Plaintiff did not sustain a "serious injury" pursuant to Insurance Law 5102 (d); and cross-motion by Plaintiff on the issue of liability and other relief:

Papers	Numbered
Defendants' Notice of Motion, Affirmation & Exhibits	**1**
Plaintiff's Cross-Motion, Affirmation in Opposition to Defendant's motion & Exhibits	**2**
Defendant's Opposition to Plaintiff's cross-motion & Reply	**3**

This action arises from a two-vehicle accident which occurred on January 15, 2009. Plaintiff was the operator of a shuttle bus which was parked in the driveway in front of a building, when Defendant's vehicle made contact with the rear of the shuttle bus. Plaintiff alleges that he sustained injuries to his neck, middle back and lower back.

After discovery Defendants move for summary judgment dismissing the complaint on the ground that Plaintiff did not sustain a "serious injury" as defined in §5102 (d) of the Insurance Law, and therefore has no cause of action pursuant to §5104(a).

In support of summary judgment Defendants submitted, *inter alia*, the sworn medical reports of (1) **Gary J. Kelman**, a Diplomate of the American Board of Othopedic Surgery, (2) **Uriel Davis,** a Board Certified Neurologist, and (3) **Jonathan Lerner, M.D.**, a physician authorized by law to practice in the State of New York.

Dr. Kelman conducted an orthopedic examination of Plaintiff on May 7, 2013. He listed numerous medical records he reviewed, *inter alia*, the MRI reports of the cervical and lumbar spines dated 10/12/2009; range of motion/computerized muscle testing from 2/10/09 to 9/8/09; chiro-practic evaluation reports dated 1/16/09 and 4/27/09; orthopedic and neurological reports dated 1/26/09 and 10/21/09, respectively; and physical therapy progress/evaluations dated through

2/18/2010.

Dr. Kelman examined the cervical spine and found no spasms, found sensory responses intact, normal muscle strength of the upper extremities (5+/5), and normal range of motion testing. The examination of the lumbar spine also revealed no spasms, sensory responses intact and muscle strength of the lower extremities (5+/5) was normal, and the straight leg testing was negative. However, Kelman did not report range of motion testing of the lumbar testing claiming that "the claimant did not cooperate for the lumbar examination and . . . would not allow range of motion testing."

Dr. Kelman diagnosed Plaintiff with cervical and lumbar sprain/strain. Kelman concluded that the examination "did not reveal any objective evidence of permanence or disability" and that Plaintiff "is capable of all of his activities of daily living."

Dr. Davis examined Plaintiff on May 28, 2013 and listed the medical records he reviewed, including but not limited to: the MRI reports of the cervical and lumbar spines dated 10/12/2009; range of motion/computerized muscle testing from 2/10/09 to 9/8/09; chiropractic evaluation reports dated 1/16/09 and 4/27/09; orthopedic and neurological reports dated 1/26/09 and 10/21/09, respectively; and physical therapy progress/evaluations dated through 2/18/2010.

Dr. Davis conducted neurological testing of the cranial nerves, and motor, reflex and sensory systems. Davis conducted range of motion testing of the cervical, lumbar and right shoulder, and found normal ranges for the three body parts. He diagnosed Plaintiff with having resolved cervical and lumbar sprain/strain. He concluded that the neurological examination was "unremarkable," that Plaintiff suffered "no accident-related disability or permanency," and that Plaintiff could continue to work and perform his regular activities of daily living without any restrictions.

Dr. Lerner attests that he reviewed MRI film of the lumbar spine performed on 10/12/2009, ten months post-accident of 1/15/2009. Lerner described a "mild diffuse disc bulge at L4-L5 . . . central disc bulge at L5-S1" both with "effacement of the thecal sac." He found no evidence "of central stenosis or neural foraminal narrowing. . . seen in the setting of desiccation of

the L4-L5 and L4-S1 intervertebral disc space levels which is consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event." Dr. Lerner concluded that the MRI revealed "no causal relationship between the claimant's alleged accident and the findings of this MRI examination."

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The issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts which may be decided on a motion for summary judgment. *See Licari v. Elliott*, 57 N.Y.2d 230, 237, 441 N.E.2d 1088, 1091, 455 N.Y.S.2d 570, 573 (1982). This court finds that Defendants met their initial burden of proof that Plaintiff did not sustain a "serious injury." Once defendant sets forth a *prima facie* case that the claimed injury is not serious, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof, that there are substantial triable issues of fact as to whether the purported injury was serious. *See Toure v. Avis Rent-A-Car Sys.*, Inc., 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 119 (2002); *Rubensccastro v. Alfaro*, 29 A.D.3d 436, 437, 815 N.Y.S.2d 514, 515 (1st Dep't 2006).

After consideration of Plaintiff''s submission, the court finds that Plaintiff failed to meet his burden of rebuttal for failure to present objective medical evidence in admissible form which was contemporaneous to the accident on January 15, 2009. Consequently, the Court finds that Plaintiff failed to raise an issue of fact that he sustained a "permanent loss of use of a body organ, member, function or system", "permanent consequential limitation of use of a body organ or member" and/or a "significant limitation of use of a body function or system" and/or satisfied the "90/180 day" threshold as contemplated in 5102(d).

In opposition to summary judgment Plaintiff submitted various medical records not in admissible form, in addition to a sworn medical affirmations by (1) **Samuel Mayerfield**, a Radiologist, dated March 14, 2014; and (2) **Albert J. Ciancimino**, M.D., dated April 16, 2014.

Dr. Mayerfield affirmed that on October 12, 2009 he interpreted and reviewed the MRI films of the cervical and lumbar spines. As an initial matter, both of these MRI studies were conducted 10-months post accident. With respect to the lumbar spine, Mayerfield found "posterior disc bulges

L4/5 and L5/S1 with thecal indentation;" in the cervical spine he found "multiple posterior central disc herniations C3/4, C4/5, C5/6, C6/7." However, Dr. Mayerfield's report is without probative value since he makes no reference of his findings as causally connected to the subject accident. Morevever, Mayerfield does not even address Dr. Lerner's opinion that the MRI findings are indicative of "degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event."

Dr. Ciancimino examined Plaintiff once on March 10, 2014, over five years after the accident in January 2009. His opinions are premised upon review of other doctors' reports, which in any event, ceased as of March 10, 2010, the last date Plaintiff underwent physical therapy. Notably, Dr. Ciancimino fails to address Plaintiff's gap in treatment from March 2010 until March 2014, and also fails to address Dr. Lerner's MRI findings indicative of "degenerative disc disease and suggestive of a chronic degenerative process," as opposed to an acute traumatic event. It appearing that Dr. Ciancimino's conclusions are not supported by competent medical evidence contemporaneously linked to the accident of January 2009, and that he relied solely upon unaffirmed findings by other doctors, his medical opinion connecting Plaintiff's alleged medical conditions to the accident is without probative value as to causation. See *Camilo v. Villa Livery Corp.*, 118 A.D.3d 586, 987 N.Y.S.2d 164 (1st Dep't 2014) (affirmation by orthopedic surgeon who examined plaintiff fifteen months after accident was insufficient to raise an issue of fact as to causation); *Henchy v. Vas Express Corp.*, 115 A.D.3d 478, 981 N.Y.S.2d 418 (1st Dep't 2014) (plaintiff's failure to provide contemporaneous objective evidence of injury to or limitations of body part is fatal to claim); *Linton v. Gonzalez*, 110 A.D.3d 534, 974 N.Y.S.2d 350 (1st Dep't 2013); *Rosa v. Mejia*, 95 A.D.3d 402, 943 N.Y.S.2d 470 (1st Dep't 2012) (an examination by a doctor years after the event cannot reliably connect the symptoms with the accident); *Coughman v. Garcia*, 35 Misc.3d 1217(A), 901 N.Y.S.2d 905 (N.Y. Co. 2009) (examining doctor's sworn report is deemed inadmissible because doctor relied upon unsworn medical records).

Significantly, this is not a case where Plaintiff submits a sworn report by his treating doctor who in turn relied upon records prepared by other doctors; instead, Dr. Ciancimino never treated Plaintiff and examined him once in response to Defendants' instant motion. Cf.: *Ortiz v. Salahudin*,

102 A.D.3d 617, 959 N.Y.S.2d 63 (1st Dep't 2013) (although plaintiff did not proffer proof of a quantitative assessment contemporaneous with the accident, she submitted certified records of medical treatment rendered shortly after the accident); *Angeles v. American United Transportation, Inc.*, 110 A.D.3d 639, 973 N.Y.S.2d 644 (1st Dep't 2013) (although plaintiff did not present range of motion findings contemporaneous with the accident, MRIs taken shortly after accident indicating deficits was sufficient to demonstrate causal link between claimed injuries and accident).

With respect to the 90/180 claim, the Bill of Particulars does not identify dates or the period of time alleged to support the 90/180 claim. At his deposition Plaintiff testified that he missed two weeks from work after the accident [Transcript page 76], and he did not did not submit an Affidavit refuting same. As Plaintiff's medical records are not in admissible form, there is no evidence of a medically determined disability caused by the accident which precluded Plaintiff from performing his activities of daily living immediately after the accident. *Galarza v. J.N. Eaglet Publishing Group., Inc.*, 117 A.D.3d 488, 985 N.Y.S.2d 494 (1st Dep't 2014).

For the foregoing reasons, in line with the pertinent case law, this court finds that Plaintiff failed to raise an issue of fact as to whether he suffered a "serious injury" within the meaning of Insurance Law §5102 (d). Therefore, Defendants' motion for summary judgment dismissing the complaint on threshold pursuant to CPLR 3212(b) is **granted as to all defendants**, and it is

ORDERED that the complaint is dismissed in its entirety.

Plaintiff's cross-motion on liability is **denied** as moot. In any event, since both vehicle operators testified at their depositions that the driveway condition was affected by ice and snow, and was slippery, whether Defendant was negligent when his vehicle skidded is a question of fact for the Jury. See Pattern Jury Instruction 2:84, *Motor Vehicle Accidents - Skidding.*

Dated: Bronx, New York
October 3, 2014

Julia I. Rodriguez, Supreme Court Justice