

Green v Domino's Pizza LLC
2015 NY Slip Op 31651(U)
January 22, 2015
Supreme Court, Bronx County
Docket Number: 302492/2012
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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TAYQUINE GREEN,

Plaintiff,

- against -

DOMINO'S PIZZA LLC and MIGUEL SANCHEZ-
MATOS,

Defendants.

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DECISION AND ORDER

Index No. 302492/2012

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated August 22, 2014 of defendant Domino's Pizza LLC and the affirmations (2), affidavit, and exhibits submitted in support thereof; the notice of cross-motion dated September 2, 2014 and the affirmation and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated December 19, 2014 and the affirmation, affidavit and exhibits annexed thereto; the reply affirmation dated December 29, 2014 of defendant Miguel Sanchez-Matos; the reply affirmation dated January 13, 2015 of defendant Domino's Pizza LLC and the affidavit annexed thereto; and the exhibits annexed thereto; and due deliberation; the court finds:

Plaintiff pedestrian commenced this action to recover damages for injuries suffered when he was struck a motor vehicle driven by defendant Miguel Sanchez-Matos, an employee of defendant Domino's Pizza LLC ("Domino's Pizza"). Domino's Pizza now moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not sustain a "serious injury," as the phrase is defined in Insurance Law § 5102. Co-defendant cross-moves and joins the application.

Plaintiff alleges in his verified bill of particulars to have suffered tears to the medial meniscus and anterior cruciate ligament in the right knee; impingement in the left shoulder; and internal derangement of the left ankle in this January 20, 2012 accident. He was totally disabled from May 18

to June 7, 2012. According to an amended bill of particulars, he missed two days from work. He claims his injuries constitute a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a 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 ("90/180"). Plaintiff also claimed a significant disfigurement injury, but he did not identify an injury in the nature of a permanent scar in his verified bill of particulars. *See Perez v. Vasquez*, 71 A.D.3d 531, 897 N.Y.S.2d 412 (1st Dep't 2010).

Defendants rely on plaintiff's deposition transcript; an affidavit from orthopedist Herbert S. Sherry, M.D.; and an affirmation from radiologist David A. Fisher, M.D. Dr. Fisher opined there were no abnormalities or signs of traumatic injury in the MRI taken of plaintiff's right knee. The medial and lateral meniscus, anterior and posterior cruciate ligaments, medial and lateral complexes, and quadriceps and patellar tendons were all intact. Dr. Sherry examined plaintiff on July 23, 2013 and found normal ranges of motion for all areas and negative results for all clinical tests administered. Although he did not set forth the normal ranges, motion was identical in the bilateral shoulders, knees and ankles. He opined that the shoulder and ankle sprains had resolved and that plaintiff obtained an excellent clinical result after knee surgery. Plaintiff testified that he missed no time from work and returned to school one week after the accident. He ceased attending physical therapy in October 2012 after his no fault benefits were terminated. However, he stated that Medicare would have paid for additional treatment but the treatment facilities were located on the other side of Bronx County. Defendants have demonstrated that plaintiff did not suffer a serious injury within the meaning of the Insurance Law. *See Rivera v. Fernandez & Ulloa Auto Group*, 123 A.D.3d 509, — N.Y.S.2d —, 123 A.D.3d 509 (1st

Dep't 2014); *Alvarez v. NYLL Mgt. Ltd.*, 120 A.D.3d 1043, 993 N.Y.S.2d 1(1st Dep't 2014).

Plaintiff in opposition submits the FDNY Prehospital Care Report; the emergency room records from St. Barnabas Hospital; treatment records from Pambo Medical Neuro-Rehabilitation, P.C.; MRI reports from Raia Medical Health, P.C. and Excel Imaging, P.C.; treatment records from Beacon Hill Orthopedics ("Beacon"); and the operative report from Rockland-Bergen Surgery Center. None of the records are certified or affirmed nor were the majority of them reviewed and relied upon by defendants' experts in forming their opinions. However, the records do not form the sole basis of plaintiff's opposition. *See Pietropinto v. Benjamin*, 104 A.D.3d 617, 961 N.Y.S.2d 461 (1st Dep't 2013). Also submitted is an affidavit from treating orthopedist John Mitamura, M.D., who is affiliated with Beacon and performed arthroscopic surgery on the right knee.

The submissions fail to raise a triable issue of fact. *See Valdez v. Benjamin*, 101 A.D.3d 622, 957 N.Y.S.2d 325 (1st Dep't 2012). Plaintiff offered no evidence of recent motion limitations to support a permanent consequential limitation injury to the shoulder or ankle. *See Boone v. Elizabeth Taxi, Inc.*, 120 A.D.3d 1143, 993 N.Y.S.2d 302 (1st Dep't 2014). He has not shown that his limitations were significant and meaningful or significant in their duration. Although the Insurance Law does not set forth a temporal requirement, *see Vasquez v. Almanzar*, 107 A.D.3d 538, 967 N.Y.S.2d 361 (1st Dep't 2013), plaintiff submitted only two months of therapy records. Dr. Mitamura's two reports from March and April 2012 indicated positive clinical findings but lacked quantitative or qualitative assessments of limitations from the injuries. *See Toure v. Avis Rent a Car Sys.*, 98 N.Y.2d 345, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002). The MRI reports indicated positive findings in the shoulder, ankle and knee but did not set forth the cause of those abnormalities. *See Valdez v. Benjamin, supra*. Dr. Mitamura also failed to address the evidence of degeneration in the left shoulder as indicated in the MRI report. *See Rivera v. Fernandez & Ulloa Auto Group, supra*.

As to the right knee, plaintiff failed to offer proof of significant limitations both before and after

surgery. *See Dembele v. Cambisaca*, 59 A.D.3d 352, 874 N.Y.S.2d 72 (1st Dep't 2009). Dr. Mitamura reported a positive McMurray sign and crepitation at two pre-surgery examinations but did not describe any limitations in qualitative or quantitative terms. At an examination four days after surgery, Dr. Mitamura noted simply that plaintiff's right knee was "healing." The operative report indicated that the anterior cruciate ligament was intact, which contradicted the MRI report of a slight tear to that area. Dr. Mitamura last examined plaintiff on October 30, 2014. He measured the range of motion of the knee but did not compare his findings to the normal ranges for that area. *See Winters v. Cruz*, 90 A.D.3d 412, 933 N.Y.S.2d 551 (1st Dep't 2011). His affidavit also lacked an opinion as to the cause of the knee, shoulder and ankle injuries. *See Gibbs v. Hee Hong*, 63 A.D.3d 559, 881 N.Y.S.2d 415 (1st Dep't 2009). In addition, neither plaintiff nor Dr. Mitamura adequately explained the termination of all medical treatment, especially where plaintiff's insurance would have covered further treatment. *See Frias v. Son Tien Liu*, 107 A.D.3d 589, 967 N.Y.S.2d 382 (1st Dep't 2013); *Merrick v. Lopez-Garcia*, 100 A.D.3d 456, 954 N.Y.S.2d 25 (1st Dep't 2012).

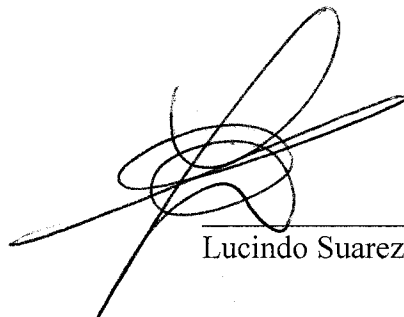
Accordingly, it is

ORDERED, that the motion of defendant Domino's Pizza LLC and the cross-motion of Miguel Sanchez-Matos for summary judgment dismissing plaintiff's complaint are granted; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of defendants Domino's Pizza LLC and Miguel Sanchez-Matos dismissing plaintiff's complaint against them.

This constitutes the decision and order of the court.

Dated: January 22, 2015



Lucindo Suarez, J.S.C.