

Martin v Nyell Mgt.

2016 NY Slip Op 30677(U)

March 25, 2016

Supreme Court, Bronx County

Docket Number: 307133/12

Judge: Wilma Guzman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Index No. **307133/12**
Motion Calendar No. 17
Motion Date: 1/20/15

JOSE MARTIN and MARIENELA MARTIN,
Plaintiff,

-against-

DECISION/ ORDER

Present:
Hon. Wilma Guzman
Justice Supreme Court

NYELL MANAGEMENT, EMILTON A. BALBI,
MIRIAM NIEVES and JULIO PAGAN
Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Defendants Notice of Motion, Affirmation in Support, and Exhibits Thereto.....	1
Affirmation in Opposition	2
Reply Affirmation	3

*Upon the foregoing papers and after due deliberation, and following oral argument, the
Decision/Order on this motion is as follows:*

Defendants Nyll Management and Balbi move this Court for an Order dismissing plaintiffs complaint on the grounds that plaintiff Jose Martin fails to meet the burden of a sustainable serious injury under Ins. Law sections 5102(d) and 5104(a). Defendants Nieves and Pagan cross-move this Court for an Order dismissing plaintiffs complaint on the grounds that plaintiff Jose Martin fails to meet the burden of a sustainable serious injury under Ins. Law sections 5102(d) and 5104(a). Defendant's Nieves and Pagan also cross-move on the issue of negligence asserting that no liability lies with these defendants. There is no opposition that portion of defendant Nieves and Pagan's cross motion for liability. As such, this motion is granted without opposition and the plaintiff's complaint dismissed as to defendants Nieves and Pagan. This Court now considers the motion of defendants Nyll Management and Balbi.

Plaintiffs commenced this cause of action seeking damages for injuries allegedly sustained on July 17, 2011 as the result of motor vehicle accident. Defendant

In support of the motion for summary judgment, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician. Pagano v. Kingsbury, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2nd Dept. 1992). Also, an affirmed physician's report, being in admissible form and showing that a plaintiff was not suffering from any disability or consequential injury from the accident would be sufficient to satisfy a defendant's burden of proof and shift to the plaintiff the burden of establishing the existence of a triable issue of fact. See Gaddy v. Eyler, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992), where defendant established a prima facie case that plaintiff's injuries were not serious through the affidavit of a physician who examined plaintiff and concluded that plaintiff had a normal examination. When the movant has made such a showing, the burden shifts and it then becomes incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the disability of serious injury. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). To raise a triable issue of fact as to whether a herniated disc constitutes a serious injury, a plaintiff is required to 'provide objective evidence of the extent or degree of the alleged physical limitations resulting from the [injury] and their duration' (Noble v. Ackerman, 252 A.d.2d 392, 394). In lieu thereof, "[a]n expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (see Dufel, 85 N.Y.2d at 798." (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 350).

Dr. Naunihal Singh conducted a neurological evaluation on plaintiff Jose Martin on April 23, 2014. Using a goniometer, Dr. Singh noted normal range of motion as compared to the norm in the cervical and lumbar spine as compared to the norms. Dr. Singh opined that the plaintiff's cervical and lumbar spine had resolved and there was no neurological disability.

Dr. Audrey Eisenstadt, reviewed the plaintiff's cervical spine MRI taken on July 25, 2011 and opined that there were no post-traumatic abnormalities. Dr. Eisenstadt's review of the plaintiff's August 17, 2011 lumbar spiner MRI and opined that the MRI revealed a congenital variation at S1, disc desiccation at L5-S1 predating the subject accident and degenerative disc disease.

In opposition, the plaintiff submits the affirmations of Dr. Losik and Dr. Bhatia as well as

the plaintiff's medical records.

Dr. Bhatia examined the plaintiff on December 9, 2014. It should be noted that Dr. Bhatia's range of motion testing in the cervical and thoracic/lumbar is not quantified with specificity rather indicating that the plaintiff's range of motion fell within in the normal ranges. However, Dr. Bhatia's review of the plaintiff's August 7, 2011 lumbar spine MRI noted L4/5 disc bulge with impingement and L4/S1 herniation with compression. The July 25, 2011 cervical spine MRI revealed C3/4 disc bulge which compresses on the thecal sac. Dr. Bhatia causally related plaintiff's injuries to the traumatic injury sustained in the subject accident. Dr. Bhatia opined that the plaintiff has reached maximum medical improvement and as such has a permanent partial disability reflecting the consequential limitation of use of his lumbar spine. Dr. Bhatia's May 5, 2015 affidavit addresses and disagrees Dr. Eisendstadt's findings of degeneration as the plaintiff had no other cervical or lumbar spine injuries before the subject accident which resulted in acute onset of pain.

Dr. Losik reviewed the plaintiff's lumbar spine MRI and noted L4-disc bulge with impingement on the neural foramina and posterior central L5/S1 disc herniation with compression of anterior thecal sac. The cervical spine MRI reviews c3-4 disc bulge which compresses anterior thecal sac and C4-5 disc bulge which compresses anterior thecal sac.

Dr. Grace Maisel, with whom plaintiff treated from July, 28 2011 to February 7, 2012, May 6, 2015 affidavit is not considered by this Court as pursuant to the December 6, 2014 Consent Order of the New York State Department of Health Board of Professional Medical Conduct, Dr. Maisel was precluded from practicing medicine and offering opinions on such. However, Plaintiff's affidavit indicates that his physical therapy treatment stopped when he was unable to pay for expenses after his no-fault benefits stopped. Plaintiff has submitted sufficient proof to rebut any gap in treatment claims. Windham v. New York City Transit Authority, 115 A.D.3d 597(1st Dept. 2012). Plaintiff has submitted competent medical proof to address defendants arguments of degeneration. Young Kyu Kim v. Gomez, 105 A.D.3d 415 (1st Dept. 2013). Plaintiff has not submitted competent medical proof that he could not perform substantially all of his daily activities for the first 90 out of 180 days following the accident. Coley v. DeLarosa, 105 A.D.3d 527 (1st Dept. 2013); Uddin v. Cooper, 32 A.D.3d 270 (1st Dept.2006).

Accordingly, it is

ORDERED that defendants Miriam Nieves and Julio Pagan's motion for summary judgment on the issue of liability is granted without opposition and the plaintiff's complaint and all cross-claims dismissed without opposition as to defendants Miriam Nieves and Julio Pagan only. It is further

ORDERED that defendants Nyell Managment and Emiltion A. Balbi's motion for summary judgment under Ins. Law 5104 is hereby granted to the extent that plaintiff Jose Martin has failed to raise a triable issue of fact as to whether he was incapable of performing all of his usual and customary activities for 90 out of 180 days following the accident. All other aspects of defendants Nyell Management and Emiltion A. Balbi's motion are hereby denied. It is further

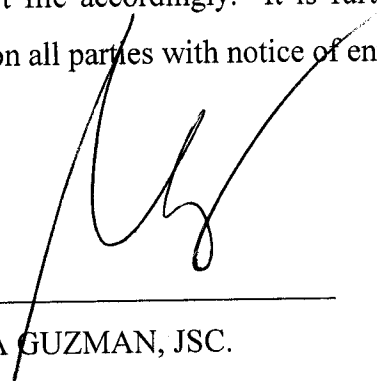
ORDERED that the Clerk of the Court mark the Court file accordingly. It is further

ORDERED that defendants serve a copy of this order upon all parties with notice of entry, within thirty(30) days of this order.

This constitutes the decision of the Court.

MAR 25 2016

DATE


HON. WILMA GUZMAN, JSC.