Ingram v SRM Mgt. Corp.
2017 NY Slip Op 30887(U)
March 8, 2017
Supreme Court, Bronx County
Docket Number: 20930/2015E
Judge: Mary Ann Brigantti
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

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ANDREW INGRAM,

Plaintiffs,

-against-

DECISION / ORDER
Index No. 20930/2015E

SRM MANAGEMENT CORP., et als.,

Defendants

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The following papers numbered 1 to 5 read on the below motion noticed on September 14, 2016 and duly submitted on the Part IA15 Motion calendar of **November 28, 2016**:

Papers Submitted	Numbered
Defendants' Notice of Motion, Exhibits	1,2
Pl.'s Aff. In Opp., Exhibits	3,4
Defendants' Reply Aff.	5

Upon the foregoing papers, the defendants/ third-party defendants SRM Management Corp. and Pedro Sosa Escoto ("Defendants") move for summary judgment, dismissing the complaint of the plaintiff Andrew Ingram ("Plaintiff") for failure to satisfy the "serious injury" threshold as defined by New York Insurance Law §5102(d).

Background

This matter arises out of an alleged motor vehicle accident that occurred on September 16, 2014 in the Bronx, New York. Plaintiff alleges that as a result of the accident, he sustained the following injuries, among others: cervical spine disc bulging at C3-4 and C4-5, discogenic end plate signal change at the interior endplate of C5 and superior endplate of C-6; disc bulging and other positive findings in the lumber spine; and suprapatellar effusion, medial suprapatellar pliace, right knee. Defendants now move for summary judgment, alleging that Plaintiff has not sustained a "serious injury" within the meaning of Insurance Law as a result of this accident.

Applicable Law and Analysis

When a defendant seeks summary judgment alleging that a plaintiff does not meet the

"serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Plameri*, 1 N.Y.3d 536 [2003]). "Such evidence includes 'affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim'" (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept. 2011][internal quotations omitted]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (*see Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

In this case, Defendants have established their prima facie entitlement to summary judgment. Defendants present a sworn IME report from orthopedist Dr. Lisa Nason who personally examined Plaintiff on December 21, 2015 and found no objective evidence of a serious injury. Notably, the Plaintiff exhibited full range of motion in his cervical spine, lumbar spine, thoracic spine, and right knee, and all other objective testing was either normal or negative. Defendants also submit affirmed reports from radiologist Dr. Mark Decker, who reviewed MRIs of Plaintiff's cervical, lumbar, thoracic spine, and right knee, and opined that any positive findings were long-standing, non-traumatic in nature, and unrelated to this accident. The foregoing evidence demonstrated that Plaintiff did not sustain a "permanent consequential" or "significant" limitation category of injury as a result of this accident (*see Jean-Louis v. Gueye*, 94 A.D.3d 504 [1st Dept. 2012]). The existence of a positive MRI examination is not, in itself, evidence of a serious injury (*see Pommels v. Perez*, 4 N.Y.3d at 574).

Contrary to Plaintiff's contentions, Defendant's experts were not required to review Plaintiff's medical records before rendering their opinions. Dr. Nason rendered her opinion after she personally examined Plaintiff and found full range of motion in the allegedly injured body parts, and Dr. Decker reviewed Plaintiff's MRIs and found no evidence of a traumatic injury (*see Clemmer v. Drah Cab Corp.*, 74 A.D.3d 660, 661 [1st Dept. 2010]). Furthermore, the mere existence of a positive MRI examination was not, in itself, evidence of a "serious injury" as

defined by New York Insurance Law (*see Pommels v. Perez*, 4 N.Y.3d at 574).

In opposition to the motion, Plaintiff submits an affirmation from his radiologist Dr. Allen Rothpearl , affirms the accuracy of MRI reports of Plaintiff's cervical, thoracic and lumbar spine, and right knee, that were taken two days after the accident and revealing positive findings. Physical therapy records from Noel Blackman Physician PC reveal that Plaintiff continuously attended treatment commencing September 17, 2014 until February 11, 2015. Records and notations of those visits indicate that Plaintiff exhibited pain in her spine and swelling/deformity in the right knee. At her initial evaluation, Plaintiff was diagnosed with, among other things, lumbar and cervical disc sprains/strains and right knee sprain/strain. In December 2014, Plaintiff underwent arthroscopic surgery on his right knee. The physical therapy records, when coupled with the affirmed findings from Plaintiff's radiologist, are sufficient to establish causation, even though there was no formal range-of-motion testing performed at that time (*see Perl v. Mehr*, 18 N.Y.3d [2011]). While the physical therapy records are unsworn, they are nevertheless admissible because they did not comprise the only evidence submitted in opposition (*see Pietropinto v. Benjamin*, 104 A.D.3d 617 [1st Dept. 2013]). Plaintiff also presents an affirmation from Dr. Varuzhan Dovlatyan, who recently examined Plaintiff and found that he had significant limitations in his cervical spine, thoracic spine, lumbar spine, and right knee upon range-of-motion evaluation. The foregoing raises an issue of fact as to whether Plaintiff sustained a "permanent consequential" or "significant" limitation to those body parts as a result of this accident. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (see *Martinez v. Pioneer Transp. Corp.*, 48 A.D.3d 306, 307 [1st Dept. 2008], citing *Noble v. Ackerman* , 252 A.D.2d 392 [1st Dept. 1998]).

Plaintiff's submissions also raise an issue of fact as to causation. Dr. Dovlatyan opined that due to the mechanics of the injury, and if Plaintiff had no prior accident, he could state with a reasonable degree of medical certainty that the patient's injuries were caused by this accident. While Dr. Dovlatyan did not directly address Dr. Decker's non-conclusory opinion that the injuries were non-traumatic in origin, "by attributing the injuries to a different, equally plausible cause, that is, the accident," the expert rejected Dr. Decker's opinion, and Dr. Dovlatyan's

opinion is entitled to equal weight (*see* see *Lee Yuen v. Akra Memory Cab Corp.*, 80 A.D.3d 481 [1st Dept. 2011]; *citing Linton v. Nawaz*, 62 A.D.3d 434 [1st Dept. 2009], *aff'd*, 14 N.Y.3d 821 [2010]; *Jallow v. Siri*, 133 A.D.3d 1391, 1392 [1st Dept. 2015]). Plaintiff further raises an issue of fact will his own affidavit, alleging that he was asymptomatic before this accident occurred (*see Feaster v. Boulabat*, 77 A.D.3d 440 [1st Dept. 2010]). Defendants' contention that Plaintiff has an unexplained gap or cessation in treatment is improperly asserted for the first time in reply papers (*see Tadesse v. Degnich*, 81 A.D.3d 570 [1st Dept. 2011]).

Defendants, however, sufficiently demonstrated her entitlement to dismissal of Plaintiff's "90/180 day" injury claim, as Plaintiff admitted at his examination before trial that he was only confined to his bed for about a week, and was not thereafter confined to his home as a result of the accident (Pl. EBT at p. 181, 182). The foregoing demonstrates that Plaintiff has no viable "90/180 day" injury claim (*see Osborne v. Diaz*, 104 A.D.3d 486, 487 [1st Dept. 2013]). Plaintiff's affidavit stating that he was confined to home "intermittently" after the accident and for a little over two months after surgery fails to raise an issue of fact.

Conclusion

Accordingly, it is hereby

ORDERED, that the branch of Defendants' motion for summary judgment, seeking dismissal of Plaintiff's claims that he suffered a"90/180 day" category of injury as a result of this accident is granted, and that claim is dismissed with prejudice, and it is further,

ORDERED, that the remaining branches of Defendants' motion for summary judgment are denied.

This constitutes the Decision and Order of this Court.

Dated: 3/8, 2017

Hon. Mary Ann Brigantti, J.S.C.