

**Ortega v Paramount Agami Tr. Corp.**

2020 NY Slip Op 30868(U)

February 10, 2020

Supreme Court, Bronx County

Docket Number: 23866/2016E

Judge: Mary Ann Brigantti

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 15



-----X  
JOSE ORTEGA

Index No. 23866/2016E

-against-

Hon. MARY ANN BRIGANTTI

PARAMOUNT AGAMI TRANSIT CORP., et al.

Justice Supreme Court

-----X  
The following papers numbered 1 to \_\_\_\_\_ were read on this motion ( Seq. No. 1 )  
for SUMMARY JUDGMENT noticed on August 30, 2019 .

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1, 2
Answering Affidavit and Exhibits (Cross-Motions)	No(s). 3, 4
Replying Affidavit and Exhibits	No(s). 5

Upon the foregoing papers, the defendants Paramount Agami Transit Corp., and Mohammad Islam (collectively, "Defendants") move for summary judgment dismissing the complaint of the plaintiff Jose Ortega ("Plaintiff") for his failure to satisfy the "serious injury" threshold as defined by New York Insurance Law § 5102 (d). Plaintiff opposes the motion.

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]). 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 Serv.*, 76 A.D.3d 818 [1st Dept 2010], citing *Pommells 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 matter, Defendants carried their initial summary judgment burden of establishing that Plaintiff did not sustain a serious injury resulting in either a "permanent consequential" or a "significant" limitation to his lumbar spine, left shoulder, or left knee as a result of this accident. Defendants accomplished this by submitting the sworn reports of radiologist Dr. A. Robert Tantleff, who reviewed the MRI films of Plaintiff's left knee and left shoulder taken approximately two (2) months after this accident. With respect to the left knee, Dr. Tantleff opined that the MRI showed non-traumatic degenerative changes unrelated to this accident (*see Lee v Lippman*, 136 A.D.3d 411, 412 [1st Dept 2016]; *Orellana v Roboris*

Motion is Respectfully Referred to Justice:

Dated:

*Cab Corp.*, 135 A.D.3d 607 [1st Dept 2016]). With respect to the left shoulder, Dr. Tantleff opined that the MRI showed no posttraumatic change causally related to the subject accident (*Taylor v Delgado*, 154 A.D.3d 620 [1st Dept 2017], citing *Nicholas v Cablevision Sys. Corp.*, 116 A.D.3d 567 [1st Dept 2014]).

Defendants additionally submitted the sworn report of Dr. John H. Buckner. While Dr. Buckner did not compare Plaintiff's range of motion values to normal values, he nevertheless examined Plaintiff's lumbar spine, left shoulder, and left knee, and opined that there was no objective evidence of injury after administering diagnostic tests resulting in negative findings (*Rodriguez v Konate*, 161 A.D.3d 565, 566 [1st Dept 2018]).

Therefore, Defendants have established that Plaintiff's lumbar spine, left shoulder, and left knee injuries have resolved and do not constitute a "permanent consequential" or "significant limitation" category of injury (*see Tejada v LKQ Hunts Point Parts*, 166 A.D.3d 436, 436-437 [1st Dept 2018]; N.Y. Ins. Law § 5102 [d]). In addition, Defendants have demonstrated that the left knee and left shoulder injuries are unrelated to this accident, thus, shifting the burden to Plaintiff with respect to those body parts to adequately address the issue of causation (*Fathi v Sodhi*, 146 A.D.3d 445, 446 [1st Dept 2017] [defendants' expert opined the claimed injury was "causally unrelated"]).

In opposition to the motion, Plaintiff has raised a triable issue of fact as to whether he sustained a "permanent consequential" or "significant" limitation to his lumbar spine and left shoulder, and whether he sustained a "significant" limitation to his left knee, as a result of the subject accident. Plaintiff submitted medical records from New York Heights Medical PC which will be considered for the limited purpose of demonstrating that Plaintiff sought medical treatment for his claimed injuries contemporaneously with the subject accident (*see Vishevnik v Bouna*, 147 A.D.3d 657, 659 [1st Dept 2017]; *Moreira v Mahabir*, 158 A.D.3d 518, 519 [1st Dept 2018]; *see also Pietropinto v Benjamin*, 104 A.D.3d 617 [1st Dept 2013] [considering unaffirmed medical records as not the sole basis for opposition]).

Plaintiff also submitted the affirmed reports of radiologist Dr. Ronald Wagner, who reviewed Plaintiff's left shoulder and left knee MRIs. Upon review, Dr. Wagner found that the left shoulder MRI revealed, among other things, hypertrophic changes of the acromioclavicular joint, and that the left knee MRI revealed, among other things, later subluxation of the patella. In addition, Plaintiff submitted the affirmed report of radiologist Dr. Samuel Mayerfield, who reviewed his lumbar spine MRI. Upon review, Dr. Mayerfield found that this MRI revealed, among other things, disc bulging at the L5/S1 level.

Plaintiff further submitted the sworn reports of Dr. Stella Mansukhani, who first examined Plaintiff the day after the subject accident, and found, among other things, pain and range of motion limitations in Plaintiff's lumbar spine and left shoulder, and other positive clinical results, and directly related those injuries to the subject accident. Dr. Mansukhani continued to find range of motion limitations throughout 2016, and again at an examination at the beginning of 2017, and most recently on June 25, 2019 (*see*

*Holloman v American United Transp. Inc.*, 162 A.D.3d 423, 424 [1st Dept 2018]).

With respect to the left knee, Dr. Mansukhani found at the initial examination, as well as at the June 6, 2016, September 1, 2016, and September 29, 2016 examinations, range of motion limitations of 110-120 out of 130 degrees, and causally related those injuries to the subject accident. On November 17, 2016, following Plaintiff's surgery which took place on November 4, 2016, Dr. Mansukhani found range of motion limitations of 20-85 out of 130 degrees. Thereafter, Dr. Mansukhani found range of motion limitations within the 110-120 out of 130 degrees range during the December 23, 2016, and January 26, 2017 examinations. The Court notes that Dr. Mansukhani found completely normal results in Plaintiff's left knee during the July 7, 2016, and August 4, 2016 examinations, prior to Plaintiff's surgery. The last time that Dr. Mansukhani documented range of motion limitation in Plaintiff's left knee was on January 26, 2017, where Plaintiff was found to have range of motion limitations of 115 out of 130 degrees. Plaintiff also submitted his surgical report from surgeon doctor Emmanuel Hostin causally relating his left knee injury to the subject accident.

Accordingly, Plaintiff has raised an issue of fact as to whether he sustained a "significant" limitation to his left knee as a result of the subject accident (*Perdomo v City of New York*, 129 A.D.3d 585, 586 [1st Dept 2015]; *Neil v Tidani*, 126 A.D.3d 581, 581-582 [1st Dept 2015]; *Collazo v Anderson*, 103 A.D.3d 527, 528 [1st Dept 2013]). As Plaintiff does not have any recent medical records documenting range of motion limitation in his left knee, he has failed to raise an issue of fact as to whether he sustained a "permanent consequential" limitation to his left knee (*see De La Rosa v Okwan*, 146 A.D.3d 644 [1st Dept 2017] [citations omitted]; *Vasquez v Almanzar*, 107 A.D.3d 538, 539-540 [1st Dept 2013], citing *Zambrana v Timothy*, 95 A.D.3d 422 [1st Dept 2012]).

Although Plaintiff's doctors did not directly address the issue of degeneration, by ascribing his injuries to a different, yet equally plausible, explanation — the accident — the doctor's opinions were sufficient to raise an issue of fact (*Moreira v Mahabir*, 158 A.D.3d 518, 519 [1st Dept 2018]).

With respect to Plaintiff's "90/180-day" injury claim, Defendants sufficiently established their entitlement to dismissal of this claim by submitting Plaintiff's own deposition testimony wherein he admitted that he only missed approximately five days from work as a result of the subject accident (Pl. EBT at 46). This demonstrates that Plaintiff has no viable "90/180 day" injury claim (*see Moreira v Mahabir*, 158 A.D.3d 518, 519 [1st Dept 2018]; *Gomez v Davis*, 146 A.D.3d 456, 457 [1st Dept 2017] [citation omitted]).

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Accordingly, it is hereby,

ORDERED, that Defendants' motion for summary judgment is granted to the extent that Plaintiff's claim that he sustained a "90/180 day" injury as a result of this accident is dismissed, and it is further,

ORDERED, that Plaintiff's claim that he sustained a "permanent consequential" limitation to his left knee is dismissed, and it is further,

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

This constitutes the Decision and Order of this Court.

Dated: 2/10/2020

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

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- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
  - 2. MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER
  - 3. CHECK IF APPROPRIATE.....  SETTLE ORDER  SUBMIT ORDER  SCHEDULE APPEARANCE
  - FIDUCIARY APPOINTMENT  REFEREE APPOINTMENT