

Hussain v Blyden

2020 NY Slip Op 30886(U)

February 27, 2020

Supreme Court, Bronx County

Docket Number: 26210/2016E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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IBRAHIM HUSSAIN,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 26210/2016E

MORRIS W. BLYDEN,

Defendant.

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John R. Higgitt, J.

Upon defendant’s September 3, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff’s February 3, 2020 affirmation in opposition and the affidavit and exhibits submitted therewith; defendant’s February 6, 2020 affirmation in reply; and due deliberation; defendant’s motion for summary judgment on the ground that plaintiff did not sustain a “serious injury” in the subject February 3, 2015 motor vehicle accident is granted in part.

Plaintiff alleges injuries to his right knee and to the cervical and lumbar aspects of his spine, and claims “serious injury” under the Insurance Law § 5102(d) categories of permanent loss of use, permanent consequential limitation, significant limitation and 90/180-day injury.

In support of the motion, defendant submits the affirmed reports of orthopedic surgeon Dr. Dassa and radiologist Dr. Greenfield, and the transcript of plaintiff’s April 19, 2017 deposition testimony.

Dr. Dassa examined plaintiff on October 2, 2017, approximately two and a half years after the accident. Dr. Dassa measured full ranges of motion in all tested planes of movement of plaintiff’s knees and cervical and lumbar spine, without tenderness or spasm. All objective provocative testing yielded negative results, and the neurological examination was normal. Dr. Dassa opined that plaintiff had sustained resolved cervical, lumbar and knee sprain/strain,

without evidence of radiculopathy, and that there were no clinical orthopedic findings correlating with positive cervical and lumbar imaging results.

Dr. Greenfield reviewed the films from the February 13, 2015 MRI of plaintiff's knee. He found no evidence of tears or derangement, and that there were no findings that could be attributable to the accident with any degree of medial certainty. Dr. Greenfield also reviewed the films from the February 13, 2015 MRI of plaintiff's cervical spine and the February 25, 2015 MRI of plaintiff's lumbar spine, finding that both sets of films depicted degeneration, despite plaintiff's age, without evidence of injury attributable to the accident.

Defendant's proof was sufficient to demonstrate, prima facie, that plaintiff did not sustain a "serious injury" and that plaintiff's injuries were, in any event, not causally related to the accident (*see Bianchi v Mason*, 2020 NY Slip Op 00504 [1st Dept 2020]).¹

In opposition, plaintiff submitted the affirmation of Dr. Banting, who examined plaintiff on March 11, 2019, in response to the motion, and various unsworn and uncertified medical records.² Dr. Banting measured reduced ranges of motion in the tested planes of plaintiff's cervical and lumbar spine and, based upon a review of the records, including imaging studies, plaintiff's lack of contributory history, and the fact that plaintiff was asymptomatic prior to the accident, opined that the accident was the cause of plaintiff's injuries and limitations. Because defendant did not submit evidence of degeneration or other pre-existing condition contained in

¹ Defendant did not raise the issue of a gap or cessation in treatment until his reply affirmation, thereby waiving such argument (*see Lewis v Revello*, 172 AD3d 505 [1st Dept 2019]; *Hayes v Gaceur*, 162 AD3d 437 [1st Dept 2018]; *Holloman v American United Transp. Inc.*, 162 AD3d 423 [1st Dept 2018]; *Paulling v City Car & Limousine Servs., Inc.*, 155 AD3d 481 [1st Dept 2017]), and obviating the need for plaintiff to address the issue (*see Massillon v Regalado*, 176 AD3d 600 [1st Dept 2019]).

² Defendant did not affirmatively object to the court's consideration of plaintiff's evidence (*see Jones v MTA Bus Co.*, 123 AD3d 614 [1st Dept 2014]). In any event, a party opposing summary judgment must submit evidence in admissible form or a reasonable excuse for the inability to do so (*see Miller-Francis v Smith-Jackson*, 113 AD3d 28 [1st Dept 2013]; *Flomenbaum v New York Univ.*, 71 AD3d 80 [1st Dept 2009], *aff'd* 14 NY3d 901 [2010]; *Rosado v Kulsakdimun*, 32 AD3d 282 [1st Dept 2006]), and plaintiff explains that the facility where he treated has closed and his efforts to obtain certified records have been unsuccessful.

plaintiff's own medical records, this proof was sufficient to raise an issue of fact as to a causal relationship between the accident and plaintiff's claimed spinal injuries (*see Ortiz v Boamah*, 169 AD3d 486 [1st Dept 2019]; *Portillo v Island Master Locksmith, Inc.*, 160 AD3d 463 [1st Dept 2018]). Furthermore, plaintiff's proof of contemporaneous and recent limitations on examination was sufficient to raise an issue of fact as to whether plaintiff sustained a permanent consequential or significant limitation of use of his cervical and lumbar spine (*see Torres v Ndonga*, 105 AD3d 480 [1st Dept 2013]).

Plaintiff failed to raise an issue of fact as to whether his claimed knee injuries are "serious" within the meaning of the statute. Although he provided evidence of contemporaneous treatment sufficient to raise an issue of fact as to a causal relationship between the accident and the claimed knee injuries (*see Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]; *Montoya v Rosenberger*, 176 AD3d 581 [1st Dept 2019]), Dr. Banting identified no findings of limitation in the records she reviewed, and she did not assess plaintiff's knee function on her recent evaluation. There is, accordingly, no objective medical evidence of limitations of sufficient magnitude persisting for an adequate period of time to be deemed significant (*see Vasquez v Almanzar*, 107 AD3d 538 [1st Dept 2013]). Furthermore, because there is no recent finding of limitation, plaintiff failed to raise an issue as to permanent consequential limitation (*see De Los Santos v Basilio*, 176 AD3d 544 [1st Dept 2019]; *De La Rosa v Okwan*, 146 AD3d 644 [1st Dept 2017], *lv den* 29 NY3d 908 [2017]; *Vega v MTA Bus Co.*, 96 AD3d 506 [1st Dept 2012]).³ Proof of a tear, without evidence of limitation resulting from the injury, is insufficient to raise an issue

³ If it is found that plaintiff sustained any injury that constitutes a "serious injury," plaintiff is entitled to recover damages for any other injury causally related to the accident (*see Singer v Gae Limo Corp.*, 91 AD3d 526 [1st Dept 2012]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]; *see also Linton v Nawaz*, 14 NY3d 821 [2010]), regardless of whether those other injuries are "serious" within the meaning of the statute (*see Arias v Martinez*, 176 AD3d 548 [1st Dept 2019]).

of fact (*see Corporan v Erichsen*, 148 AD3d 549 [1st Dept 2017]).⁴

With respect to plaintiff's 90/180-day injury claim, plaintiff asserted in his bill of particulars that he was confined to bed and home for only two days following the accident, and was "totally disabled" for only two weeks. Although plaintiff testified, obliquely, that he was confined to bed for "more than two days," he also testified that he returned to his regular duties at his full-time work after two days. This proof is sufficient to defeat the claim (*see Rose v Tall*, 149 AD3d 554 [1st Dept 2017]; *Salman v Rosario*, 87 AD3d 482 [1st Dept 2011]). Testimony and statements in bills of particulars regarding confinement, alone, is sufficient to meet defendant's prima facie burden and warrant dismissal of the claim (*see Cano v U-Haul Co. of Ariz.*, 178 AD3d 409 [1st Dept 2019]; *Williams v Laura Livery Corp.*, 176 AD3d 557 [1st Dept 2019]; *Pouchie v Pichardo*, 173 AD3d 643 [1st Dept 2019]; *Streety v Toure*, 173 AD3d 462 [1st Dept 2019]; *Curet v Kuhlör*, 172 AD3d 634 [1st Dept 2019]; *Ortiz v Boamah*, 169 AD3d 486 [1st Dept 2019]; *Tejada v LKQ Hunts Point Parts*, 166 AD3d 436 [1st Dept 2018]; *Rosario v Cablevision Sys.*, 160 AD3d 545 [1st Dept 2018]; *Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518 [1st Dept 2018]; *Sanchez v Oxcin*, 157 AD3d 561 [1st Dept 2018]; *Fernandez v Hernandez*, 151 AD3d 581 [1st Dept 2017]; *Rose, supra*). Plaintiff failed to raise an issue of fact. His assertion that he was unable to attend to his activities outside work hours is insufficient (*see Beatty v Miah*, 83 AD3d 610 [1st Dept 2011]).

It is obvious that plaintiff did not sustain a permanent loss of use (*see Riollano v Leavey*, 173 AD3d 494 [1st Dept 2019]). Such loss must be total (*see Swift v N.Y. Transit Auth.*, 115 AD3d 507 [1st Dept 2014]; *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]), and evidence of mere limitations of use is insufficient (*see Melo v Grullon*, 101 AD3d 452 [1st Dept 2012];

⁴ The court notes that Dr. Banting recites MRI findings indicating that the condition of plaintiff's right knee was identical to that of his left, uninjured knee.

Byong Yol Yi v Canela, 70 AD3d 584 [1st Dept 2010]). In any event, plaintiff abandoned this category in opposition (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *Henry v Carr*, 161 AD3d 424 [1st Dept 2018]), and the “serious injury” claims based on this category are therefore dismissed (*see Ng v NYU Langone Med. Ctr.*, 157 AD3d 549 [1st Dept 2018]).

Accordingly, it is


ORDERED, that the aspects of defendant’s motion for summary judgment dismissing plaintiff’s claims of “serious injury” under the Insurance Law § 5102(d) categories of permanent loss of use and 90/180-day injury, and with respect to plaintiff’s claimed knee injuries, are granted, and those claims are dismissed; and it is further

ORDERED, that the motion is otherwise denied.

The parties are reminded of the March 16, 2020 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: February 27, 2020



John R. Higgitt, J.S.C.