| **Kirfield v Dugan** |
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| 2020 NY Slip Op 31339(U) |
| April 27, 2020 |
| Supreme Court, Queens County |
| Docket Number: 700379/16 |
| Judge: Robert I. Caloras |
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Insurance Law. Joseph has submitted, *inter alia*, the following: Summons and Complaint; Joseph's Answer; McKoy's Answers; Verified Bill of Particulars; Plaintiff's deposition transcript; affirmed report from Howard Levin, M.D.; and affirmed report from Sheldon P. Feit, M.D., DABR.

At Defendant Joseph's request, Dr. Levin, Diplomate of American Board of Orthopedic Surgeons, examined Plaintiff on May 6, 2019. During his exam of the Plaintiff, Dr. Levin performed objective testing, including range of motion testing, with a goniometer in accordance with AMA guidelines. Upon physical examination of the Plaintiff, Dr. Levin found that Plaintiff exhibited full range of motion in his cervical spine, lumbar spine, right shoulder, left shoulder, right and left knees. After examining Plaintiff and reviewing pertinent medical records, Dr. Levin concluded that Plaintiff's sprains, strains, and contusions were all resolved. Furthermore, Dr. Levin found that Plaintiff had no orthopedic disability and exhibited no objective evidence of permanent residuals that would affect his ability to perform his occupational duties or daily living activities without restriction.

At Defendant Joseph's request, Dr. Feit, Board Certified Radiologist, reviewed Plaintiff's left knee MRI films, taken on March 31, 2015. Upon review of Plaintiff's left knee MRI films, Dr. Feit determined that the accident failed to demonstrate evidence of any meniscal tear, ligamentous injury or fracture. Dr. Feit further determined that there is a small nonspecific effusion and agreed with the original radiology report regarding the joint effusion. Dr. Feit also determined that there were no abnormalities causally related to the subject accident. In addition, Dr. Feit also reviewed Plaintiff's Lumbosacral MRI films taken on April 14, 2015, which revealed degenerative changes. Dr. Feit also determined that disc bulges were not traumatic but secondary to annular degeneration, and that the herniation of L1-L2 was also degenerative. Dr. Feit further determined that all findings were chronic, degenerative and unrelated to the subject accident.

At Plaintiff's deposition, he testified that he stopped going for physical therapy and chiropractic care six months after the accident, because these providers had found he no longer needed their care. For the same reason, Plaintiff stopped receiving acupuncture four months after the accident. At the time of his deposition, on March 26, 2019, Plaintiff stated he had no future appointments with any medical providers for his injuries. Plaintiff also testified he is a self-employed jeweler and is not seeking lost wages. Although Plaintiff stated he did not work and sit on his bench for the same number of hours after the accident, he explained he was never under any medical restrictions after the subject accident. After the accident, Plaintiff missed about two weeks of work, and was confined to his bed and home for about a week. Plaintiff also stated after the accident he had limitation doing his jewelry work and was significantly limited by the injuries sustained in the accident.

Based upon the medical evidence submitted and Plaintiff's own testimony, the Joseph Defendants argue that Plaintiff has not sustained an injury within the meaning of the Insurance Law. In the Cross-Motion, Defendant McKoy adopts and joins in the Joseph Defendant's motion.

In opposition, Plaintiff argues motions should be denied because they fail to establish their prima facie burden. Plaintiff claims Dr. Levin's report has no probative value, because he determined that Plaintiff's injuries had resolved, and it appeared said injuries were caused by the subject accident. Plaintiff also claims Dr. Feit's report has no probative value, because he found a meniscus degeneration, which disagreed with Plaintiff's doctor's findings of a medial meniscus tear and found joint effusion and compression of T-11. In the alternative, Plaintiff argues issues of fact exist which preclude granting Defendants' motions for summary judgment. Plaintiff has submitted his Expert Witness Disclosure of Dr. Ramy F. Hanna, which includes a verification from Dr. Hanna, an Internist at Bay Medical P.C., regarding the medical reports attached thereto; Dr. Hanna's curriculum vitae; initial physical examination report; medical records from Bay Medical P.C.; medical records from Alan B. Greenberg, M.D.; and an Outcome Assessment Testing Summary Report from Bay Medical P.C. Dr. Hanna initially treated Plaintiff on January 28, 2015, and last treated Plaintiff on September 21, 2015. At his initial exam on January 20, 2015, Dr. Hanna instructed Plaintiff to not do any heavy work and determined Plaintiff's injuries were causally related to the subject accident. Based upon his testimony and his medical records, Plaintiff argues he sustained a 90-180 injury as a result of the subject accident.

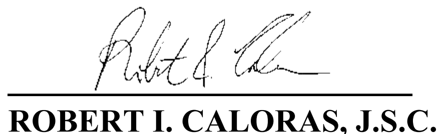
The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Beltran v Powow Limo, Inc., 98 AD3d 1070 [2d Dept. 2012]). When such a defendant's motion relies upon the findings of the defendant's own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (see Brite v Miller, 82 AD3d 811 [2d Dept. 2011]; Damas v Valdes, 84 AD3d 87 [2d Dept. 2011], citing Pagano v Kingsbury, 182 AD2d 268 [2d Dept. 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony (see Beltran v Powow Limo, Inc., supra; Bamundo v Fiero, 88 AD3d 831 [2d Dept. 2011]; McIntosh v O'Brien, 69 AD3d 585 [2d Dept. 2010]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which creates a material issue of fact (see Gaddy v Eyler, supra; Zuckerman v City of New York, supra; Beltran v Powow Limo, Inc., supra).

Here, the Court finds that both Defendants have met their prima facie burden of demonstrating that Plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]). The Court notes that, even though Dr. Feit stated Plaintiff has a small nonspecific effusion, and joint diffusion, he determined Plaintiff had "no abnormalities causally related to the accident of 1/20/2015". Consequently, the burden shifts to Plaintiff to come forward with evidence to overcome Defendants' submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v Eyler, supra; Sin v Singh, 74 AD3d 1320 [2d Dept. 2010]).

The Court finds that Plaintiff's submissions have failed to raise any triable issues of fact as to whether he sustained a serious injury, since none of those submissions were based upon a recent examination (Berkowitz v Taylor, 47 AD3d 740 [2d Dept. 2008]). Significantly, Dr. Hanna last examined Plaintiff over four years ago on September 21, 2015. The Court also notes that Plaintiff's submissions from Dr. Greenberg are not admissible, because they were neither sworn to nor affirmed (CPLR 2106), and are not evidentiary proof in admissible form (Toure, supra, Licari, supra; see also Grasso v Angerami, 79 NY2d 813 [1991]; Fung v Uddin, 60 AD3d 992 [2d Dept. 2009]; Perez v Santiago, 59 AD3d 692 [2d Dept. 200]; Pagano v Kingsbury, 182 AD2d 268 [2d Dept. 1992]). Furthermore, Plaintiff testified that after the accident he missed about two weeks of work and was confined to his bed and home for about a week. Consequently, the Court finds that Plaintiff failed to meet his burden of demonstrating that he sustained a 90 180 injury as a result of the subject accident (see Marin v Ieni, 108 AD3d 656 [2d Dept. 2013]). Accordingly, the motion and cross-motions are granted, and the Complaint and all cross claims are dismissed as against Defendants Joseph and McKoy.

**Dated:** April 27, 2020



**ROBERT I. CALORAS, J.S.C.**