

Khouni v Sidis
2020 NY Slip Op 34190(U)
December 16, 2020
Supreme Court, Kings County
Docket Number: 504614/2018
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

Index No.: 504614/2018

Motion Date: 12/16/20

Motion Seq.: 01

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AHMED KHOUNI,

Plaintiff,

-against-

DECISION AND ORDER

JOSHUA I. SIDIS and MAURA ELAINE HART,

Defendants.
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 01) 11-18, 26-35, and 38 were read on this motion for summary judgment.

The defendants seek an order granting summary judgment based on Insurance Law § 5102(d), claiming that the plaintiff's injuries fail to meet the "serious injury" threshold as required by the statute. For the reasons set forth below, the defendants' motion is granted.

The plaintiff, Ahmed Khouni, alleges that on December 5, 2017, he was struck as a pedestrian by the defendants' vehicle as it was making a right turn, knocking him to the ground. According to the plaintiff's Verified Bill of Particulars the plaintiff's injuries include, *inter alia*, disc bulges at L1-2, L2-3, L3-4; L4-5 disc bulge and spinal stenosis and foraminal narrowing; L5-S1 disc bulge and foraminal narrowing; lumbar radiculopathy and paraspinal muscle spasm and decreased range of motion. As to the alleged right ankle injuries, the plaintiff claims he sustained a partial tear of the anterior talofibular ligament; tenosynovitis of the peroneus longus and brevis tendons; ankle and posterior subtalar joint effusion; contusion, internal derangement and swelling; antalgic gait; and decreased range of motion and muscle strength.

In his Bill of Particulars, the plaintiff claims that under Insurance Law § 5102(d) he has sustained:

significant and permanent severe injuries to his musculoskeletal and neurological systems of his body, which resulted in pain and limitation of spine. Plaintiff sustained a serious injury as detailed herein above, loss of functional range of motion, loss of sensory function, motor function, loss of strength and functional limitation and to extent loss to his shoulder arm and spine and the areas detailed above. In addition, plaintiffs [sic] could not pursue his daily activities were affected for a period of 90 days out of the first 180 days following the collision and injury. Plaintiff has sustained a consequential permanent damage to his musculoskeletal and neural systems as detailed above.

In support of the motion defendants submit the pleadings, plaintiff's deposition transcript and the affirmed report of their medical expert, Dr. Dana A. Mannor, who is board certified in orthopedic surgery. Dr. Mannor conducted an independent medical examination of the plaintiff on September 12, 2019. The plaintiff complained of pain in the low back and right ankle and foot. Dr. Mannor reviewed the Bill of Particulars, Response to Combined Demand, CT scan report of the chest, and MRI reports of the lumbar spine and right ankle. The MRI report of the lumbar spine, dated January 10, 2018, stated that there were disc bulges throughout the lumbar spine, and mild stenosis at the L4-5 level with foraminal narrowing at L4-5 and L5-S1. The MRI of the right ankle of January 11, 2018, indicated there was a low-grade partial tear of the anterior talofibular ligament and tenosynovitis of the peroneus longus and brevis tendons, with small ankle and posterior subtalar joint effusion.

Dr. Mannor's report indicates that she performed range of motion measurements and "[t]he values of all the measurements were compared to the normal active range of motion values according to the publication, 'Guidelines to the Evaluation of Permanent Impairment,' 5th edition published by the American Medical Association." An examination of the plaintiff's lumbar spine revealed no muscle spasm or tenderness to palpation. Range of motion in flexion was 60 degrees (60 degrees normal), extension to 25 degrees (25 degrees normal), right lateral bending to 25 degrees (25 degrees normal) and left lateral bending to 25 degrees (25 degrees normal). Dr. Mannor found that the plaintiff had full passive range of motion, normal motor strength of 5/5 in all muscle groups tested, grossly neurovascularly intact, and normal deep tendon reflexes of 2+ which were symmetric in the bilateral lower extremities. His gait was normal, and bilaterally the straight leg raise was negative. There was no atrophy, deformity or soft tissue swelling noted.

Dr. Mannor's examination of the plaintiff's right ankle and foot revealed that active range of motion was 20 degrees in dorsiflexion (20 degrees normal), 40 degrees in plantar-flexion (40 degrees normal), inversion to 30 degrees (30 degrees normal) and eversion to 20 degrees (20 degrees normal). Dr. Mannor noted that there was full passive range of motion, no instability, muscle strength was 5/5 and grossly neurovascularly intact. Other tests performed by Dr. Mannor of the plaintiff's right ankle and foot, such as Drawer's and Tinel's, were negative.

An examination of the plaintiff's left ankle and foot indicated that active range of motion in dorsiflexion to 20 degrees (20 degrees normal), plantar flexion to 40 degrees (40 degrees normal), inversion to 30 degrees (30 degrees normal) and eversion to 20 degrees (20 degrees normal) with normal passive range of motion. All other tests performed were also normal.

Based on her examination, Dr. Mannor opined that the plaintiff had sustained a lumbar spine sprain/strain and right ankle/foot sprain/strain that were resolved, with no evidence of orthopedic disability, permanency or residuals. She concluded that the plaintiff's prognosis was good.

According to the plaintiff's deposition testimony, taken on July 16, 2019, he was 63 years old at the time of the accident. He was not working regularly, but he would sometimes work as a driver for food and push carts in Brooklyn. At the time of the deposition he was working occasionally, approximately two to three days a week, and sometimes he would not work for a week, depending on how he was feeling. He testified that after the accident he did not work for one and a half years based on his own personal decision, and that he was not advised by his doctors that he could not work. The plaintiff's Bill of Particulars does not contain a claim for lost earnings.

The plaintiff further testified that he began physical therapy approximately three days after the accident, which he attended twice weekly until two months prior to the deposition in July of 2019, when he reduced it to once per week. When asked if he consistently attends physical therapy he responded, "sometimes I just skip it." The plaintiff testified that he did not attend physical therapy for approximately one month in 2018 when he traveled to Algeria. The plaintiff further testified that after the accident he was never confined to his bed, and that he was confined to his house for approximately one month.

The plaintiff's affidavit avers that he continues to do physical therapy at home, and continues to have pain and discomfort, has difficulty sleeping, and is unable to fully move his lower back and right foot and ankle.

The defendants argue that the plaintiff has failed to adequately address his 90/180 claim, and that the plaintiff has not presented evidence indicating that any absence from work was medically necessary. Defendants contend that aside from the plaintiff's deposition testimony and affidavit, the submissions of the plaintiff's medical providers do not state that the plaintiff has difficulty working and/or is unable to perform certain activities as a result of the accident.

The defendants also argue that the affirmation and narrative reports of plaintiff's treating physician, Dr. Nassef Hassan, lacks objectivity and therefore fails to raise a triable issue of fact. Specifically, the defendants assert that although Dr. Hassan's affirmation states that he used a goniometer to measure the plaintiff's range of motion, he did not identify the authoritative guideline for the standard of normal ranges compared to, such as AMA Guidelines or another accredited source, rendering the measurements speculative. The defendants further contend that the plaintiff's unsworn and unaffirmed medical reports are not competent evidence and lack probative value. In particular, the defendants seek to exclude the records of Brooklyn Hospital Center, Bay Ridge Medical Imaging, P.C. and treatment notes and bills because even though they are certified under the business record exception, they are not sworn to or affirmed by the treating healthcare providers. The defendants maintain that the plaintiff's deposition testimony and affidavit alone concerning complaints of pain and his inability to perform activities, are self-serving and insufficient to defeat a summary judgment motion.

The plaintiff opposes the motion, and submits the following: the affirmation of the plaintiff's treating physician, Dr. Nassef Hassan, who is board certified in physical medicine and

rehabilitation and pain medicine; the affirmation of Dr. Michael Green, a board certified radiologist, who reviewed the radiographic studies relating to the plaintiff's injuries; the affirmations of radiologists Dr. Joseph Hanono and Dr. David Kasow authenticating their findings of the MRI studies; the certified unsworn records and/or treatment notes of Dr. Hassan, Brooklyn Hospital Center, and Bay Ridge Medical Imaging P.C.; the deposition testimony of the plaintiff; and the plaintiff's sworn affidavit. The plaintiff argues that the defendants' contentions are based on speculation and surmise, and ignore the findings of objective tests, such as the MRIs, and findings by Dr. Hassan that the plaintiff has been under continuing treatment since the accident, and evidences significant restrictions in movement. The plaintiff contends that the defendants' submissions are insufficient to support summary judgment as they do not include a physician's affirmation authenticating the MRI studies, and that Dr. Mannor relied on the hearsay MRI reports in reaching her conclusion that there was no evidence of permanency of the plaintiff's injuries. Moreover, the plaintiff argues that Dr. Mannor's report is insufficient, as she did not review Dr. Hassan's records when making her determination about the plaintiff's injuries. The plaintiff does not cite to legal precedent to support his arguments.

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendants have the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed in his Bill of Particulars. See *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of defendants' examining physician, or plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians. See *Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992). The defendants' medical expert must specify the objective tests upon which the medical opinions are based, and when rendering an opinion as to the range of motion measurement, must compare the range of motion findings to those that are considered to be normal for the particular body part. See *Browdame v Candura*, 25 AD3d 747 (2d Dept 2006). Once the defendants have made a *prima facie* showing that the plaintiff did not sustain a serious injury, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating that a triable issue of fact exists that the plaintiff sustained a serious injury. See *Gaddy v Eyler*, 79 NY2d 955 (1992).

The defendants' submissions demonstrate their *prima facie* entitlement to summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). See *Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955; *Fest v Agnew*, 68 AD3d 1051 (2d Dept 2009). The defendants have submitted competent medical evidence, including the affirmed report of their examining medical expert, Dr. Mannor, establishing that the alleged injuries to the plaintiff's lumbar spine and right ankle do not constitute a serious injury under the permanent loss of use, permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d). See *Hayes v Vasilios*, 96 AD3d 1010 (2d Dept 2012); *Staff v Yshua*, 59 AD3d

614 (2d Dept 2009). “A defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury...despite the existence of an MRI which shows herniated or bulging discs.” *Kearse v New York City Transit Authority*, 16 AD3d 45, 49-50 (2d Dept 2005). The defendants have also met their *prima facie* burden under the 90/180 day category of Insurance Law § 5102(d). While the plaintiff alleged in his Bill of Particulars that he was confined to his bed and home for three months, his deposition testimony refuted these claims, and the plaintiff clarified that he was never confined to his bed, and that he was only confined to his home for approximately one month. Furthermore, while the plaintiff testified that he has certain limitations in his activities, there is no objective evidence to support plaintiff’s claim that his injuries prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities pursuant to Insurance Law § 5102(d). *See Watt v Easter Investigative Bur.*, 273 AD2d 226 (2d Dept 2000). Moreover, plaintiff’s deposition testimony established that the plaintiff’s absence from work was based on the plaintiff’s personal choice and not based on a doctor’s recommendation.

In opposition, the plaintiff has failed to raise a triable issue of fact as to his claim under the permanent loss of use, permanent consequential limitation of use, significant limitation of use and 90/180 categories of Insurance Law § 5201(d). The plaintiff submits certified unsworn and unaffirmed medical records in opposing the defendants’ motion, including the numerous narrative reports of Dr. Hassan, Brooklyn Hospital medical records, and Bay Ridge Medical Imaging, P.C. radiographic reports, which are not in admissible form, and therefore do not constitute competent medical evidence sufficient to raise a triable issue of fact of whether the plaintiff sustained a serious injury. *See Irizarry v Lindor*, 110 AD3d 846, 847 (2d Dept 2013) (“certification of the medical records and reports by the records custodian of the subject medical facility was not sufficient to properly place the medical conclusions and opinions contained in those records and reports before the court since those opinions must be sworn to or affirmed under the penalties of perjury”). *See also Radoncic v Faulk*, 170 AD3d 1058 (2d Dept 2019).

Further, Dr. Hassan’s affirmation does not provide objective findings with respect to plaintiff’s range of motion. Although he affirms that he used a goniometer to measure the plaintiff’s range of motion, and that his measurements were compared to “normal” range of motion, he failed to identify what guidelines he used to determine what the normal measurement is. Therefore, the medical evidence presented by the plaintiff concerning the measurements lacked objectivity and were speculative. Without identifying the objective standard the findings are insufficient, and fail to raise a triable issue of fact. *See Tinyanoff v Kuna*, 98 AD3d 501 (2d Dept 2012); *Forlong v Faulton*, 29 AD3d 856 (2d Dept 2006); *see also Jang v Derosa*, Sup Ct, Nassau County, Oct. 12, 2017, Murphy, J., Index No. 4198/15; *Guarascio v Hutter*, Sup Ct, Nassau County, Oct. 5, 2016, Marber, J., Index No. 007277/14. In addition, according to Dr. Hassan’s affirmation, his range of motion testing of the plaintiff’s right ankle and lumbar spine

do not appear to reveal any abnormality when compared to the “normal” range of motion cited by Dr. Hassan. For example, upon examination of the plaintiff’s right ankle Dr. Hassan found that dorsiflexion was 0, and that the “normal range of motion” is 0-20. Therefore, according to Dr. Hassan’s determination that 0-20 is normal, a finding of 0 range of motion would not be abnormal. This is true for all of the range of motion measurements taken by Dr. Hassan relating to the plaintiff’s right ankle and lumbar spine.

With respect to the 90/180 category of Insurance Law § 5102(d), the plaintiff’s reliance on his deposition testimony and affidavit alone are insufficient to raise a triable issue of fact. See *Glielmi v Banner*, 254 AD2d 255 (2d Dept 1998). Furthermore, although the plaintiff claimed that he did not work for one and a half years he was never ordered by a doctor to stay home, and as such, the plaintiff failed to establish that he had a medically determined injury. See *Pierre v Nanton*, 279 AD2d 621 (2d Dept 2001). The affirmation of Dr. Hassan, the plaintiff’s treating doctor, does not state that the plaintiff was under any restrictions relating to his ability to work during at least 90 of the first 180 days after the accident. This is consistent with plaintiff’s deposition testimony that a doctor never told him that he should not work because of his injuries. In addition, the plaintiff testified that he was not confined to his bed as a result of the accident, and that he was only confined to his home for one month. The plaintiff’s affidavit is self-serving and conclusory without medical determination of the limitations the plaintiff claims.

Lastly, the plaintiff’s argument that the defendants have not met their *prima facie* burden because their examining physician, Dr. Mannor, did not review Dr. Hassan’s records or the MRI films is unavailing. The examination performed by Dr. Mannor, which included objective testing found to be normal, was sufficient to satisfy the defendants’ *prima facie* burden. See *Hayes v Vasiliou*, 96 AD3d 1010; *Kearse v New York City Transit Authority*, 16 AD3d 45.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the defendants’ motion for summary judgment is granted in its entirety.

This constitutes the decision and order of the Court.

Dated: December 16, 2020



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.