Capellan v Almonte
2020 NY Slip Op 35495(U)
May 15, 2020
Supreme Court, Bronx County
Docket Number: Index No. 20738/2019E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __15___
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RENY CAPELLAN

Index №. 20738/2019E

-against-

Hon. MARY ANN BRIGANTTI

REILLY THOMAS ALMONTE, et al.

Justice Supreme Court

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The following papers numbered 1 to ______4____ were read on this motion (Seq. No. _________) for ____**SUMMARY JUDGMENT**______ noticed on October 15, 2019.

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

Upon the foregoing papers, defendants Reilly Thomas Almonte and Charly Vasquez Almonte (collectively, "Defendants") move for summary judgment dismissing the complaint of the plaintiff Reny Capellan ("Plaintiff") for his failure to satisfy the "serious injury" threshold as defined by New York Insurance Law § 5102 (d). Plaintiff opposes the summary judgment 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 case, Defendants carried their initial summary judgment burden of establishing that Plaintiff did not sustain a serious injury resulting in either a "permanent consequential" or "significant" limitation as a result of this accident. Defendants accomplished this by submitting the sworn IME report of orthopedist Dr. Joseph Elfenbein, who found that Plaintiff had normal ranges of motion in his cervical, thoracic, and lumbar spine, right knee, and right foot, upon a physical examination, and negative clinical results (*Ahmed v Cannon*, 129 A.D.3d 645, 646 [1st Dept 2015]). The finding of minor five (5) degree limitations in two planes of Plaintiff's thoracic spine did not defeat Defendant's prima facie showing with respect to that body part (*Stephanie N. v Davis*, 126 A.D.3d 502 [1st Dept 2015]). Defendants also submitted the sworn reports of radiologist Dr. Scott Springer, who reviewed Plaintiff's cervical and lumbar spine, right knee, and right foot MRIs, taken shortly after the subject accident. Dr. Springer opined that the cervical and lumbar spine MRIs showed no evidence of traumatic injury (*see Pastora L. v Diallo*, 167 A.D.3d 424 [1st Dept 2018], citing *Hernandez v Marcano*, 161 A.D.3d 676 [1st Dept 2018]). Dr. Decker opined that the right knee and right foot MRIs showed chronic conditions with no evidence of traumatic injury (*id.*).

In addition, Plaintiff's deposition testimony sufficiently refutes that he sustained any "permanent consequential" or "significant" limitation to any body part as a result of this accident (Pl. EBT at 19-20; *see Lopez v Abdul-Wahab*, 67 A.D.3d 598, 599 [1st Dept 2009], citing Insurance Law § 5102 [d]; *Thaler v Aspen Ready Mix Corp.*, 286 A.D.2d 763, 764 [2d Dept 2001]). Accordingly, Defendants' submissions established that Plaintiff's injuries to his cervical, thoracic, and lumbar spine, right knee, and right foot, have resolved, and do not constitute either 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 demonstrated that Plaintiff's alleged cervical and lumbar spine, right knee, and right foot injuries are unrelated to this accident, shifting the burden to Plaintiff to adequately address the issue of causation with respect to those body parts (*see Bianchi v Mason*, 179 A.D.3d 567 [1st Dept 2020], citing *Blake v Cadet*, 175 A.D.3d 1199, 1199-1200 [1st Dept 2019]).

In opposition to the motion, Plaintiff raised an issue of fact as to whether he sustained a "significant" limitation to his right knee as a result of this accident. At the outset the Court notes that Plaintiff's stack of certified medical records, marked as Exhibit K, and emergency room records, marked as Exhibit L, may 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]). Although the emergency room records are neither certified nor sworn, they may be considered since they do not constitute the sole basis for Plaintiff's opposition (*see Pantojas v. Lajara Auto Corp.*, 117 A.D.3d 577 [1st Dept 2014]). Plaintiff additionally submitted the sworn affirmations of Drs. Thomak Kolb and Robert Solomon. Dr. Kolb reviewed and confirmed the accuracy of Plaintiff's right foot and right knee MRIs, taken shortly after the subject accident, which revealed, among other things, multiple tears. Dr. Solomon reviewed and confirmed the accuracy of Plaintiff's cervical and lumbar spine, taken shortly after the subject accident, which revealed, among other things, multiple bulges. Plaintiff also submitted the affirmation of Dr. Jose Acevedo, who conducted Plaintiff's EMG testing, which revealed, among other things, L4-L5 radiculopathy.

Plaintiff submitted the affirmation of Dr. Gordon Davis, who first examined Plaintiff shortly after the subject accident on August 1, 2018. During this initial examination, Dr. Davis found, among other things, pain and range of motion limitations in Plaintiff's cervical, thoracic, and lumbar spine, and right knee, and causally relates those injuries to the subject accident. Since Dr. Davis includes discussion of both the thoracic and lumbar spine on page 3 of his initial report under the heading "Examination of the Lumbosacral Spine," the Court finds that Dr. Davis's general examination of the "Back" for limitations covers both the thoracic and lumbar spine. While Dr. Davis causally related Plaintiff's alleged right foot injury to the subject accident, the doctor's examination of this body part revealed normal limitations. Therefore, Plaintiff failed to refute the findings of Defendants' experts that his claimed right foot injury had

resolved (*Lopez v Morel-Ulla*, 144 A.D.3d 504, 505 [1st Dept 2016] ["Absent limitations, there is no serious injury"] [citation omitted]). Dr. Davis examined Plaintiff on several more occasions throughout 2018. However, it was only during the October 2018 examination that Dr. Davis conducted range of motion tests again, performed only on Plaintiff's right knee, which resulted in the finding of, among other things, limitations.

Plaintiff additionally submitted the affirmation of surgeon Dr. Mark McMahon, who first examined Plaintiff shortly after the subject accident on August 2, 2018, and causally related Plaintiff's right knee injury to the subject accident. Dr. McMahon performed right knee arthroscopic surgery one month later on September 18, 2018. In his operative report, Dr. McMahon observed, among other things, multiple tears. Dr. McMahon again examined plaintiff on December 19, 2018, and most recently on November 13, 2019. During the initial examination before surgery, Dr. McMahon observed, among other things, pain and a fifteen (15) degree range of motion limitation in Plaintiff's right knee. During the December 19, 2018, examination, post-surgery, Dr. McMahon observed normal range of motion in Plaintiff's right knee. During the most recent 2019 examination, Dr. McMahon observed a five (5) degree range of motion limitation in Plaintiff's right knee. As a result of finding normal limitations in Plaintiff's right knee during December 2018, Plaintiff has only established that he sustained a "significant" limitation to his right knee (see *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]; *Salman v Rosario*, 87 A.D.3d 482, 484 [1st Dept 2011]; *see also Vasquez v Almanzar*, 107 A.D.3d 538, 539-540 [1st Dept 2013]; *Holmes v Brini Tr. Inc.*, 123 A.D.3d 628, 628-629 [1st Dept 2014] [significant limitations found where doctor gave measurements "six months following" accident]; *Bianchi*, 179 A.D.3d 567 [significant limitations found where doctor gave measurements "nine months" following accident]).

Plaintiff further submitted the affirmed report of Dr. Glen Colodny, who first examined Plaintiff shortly after the subject accident on July 25, 2018, and again on September 14, 2018. During the initial

examination, Dr. Colodny found, among other things, pain and range or motion limitations in Plaintiff's cervical, thoracic, and lumbar spine, also referred to as the "thoracolumbar spine." However, during the second examination, Dr. Colodny found normal ranges of motion in Plaintiff's cervical and lumbar spine, and did not conduct any range of motion testing for the thoracic spine. Since Drs. Colodny and Davis only found limitations in Plaintiff's thoracic spine during the July and August 2018 examinations, Plaintiff has failed to raise a triable issue of fact as to whether he sustained a "serious injury" to that body part (*see Vasquez*, 107 A.D.3d at 539-540; *compare Holmes*, 123 A.D.3d at 628-629 [significant limitations found where doctor gave measurements "six months following" accident]; *Bianchi*, 179 A.D.3d 567 [1st Dept 2020] [significant limitations found where doctor gave measurements "nine months" following accident]). In addition, since Dr. Colodny found normal range of motion in Plaintiff's cervical and lumbar spine during the September 2018 examination, Plaintiff failed to refute the findings of Defendants' experts that his claimed cervical and lumbar spine injuries had resolved (*Lopez*, 144 A.D.3d at 505 ["Absent limitations, there is no serious injury"] [citation omitted]). The Court notes that while Dr. Colodny's affirmation claims that he examined Plaintiff a third time on October 26, 2018, no such report was described in the doctor's affirmation or included as an exhibit.

Nevertheless, since Plaintiff raised an issue of fact as to whether he sustained a "significant" limitation to his right knee as a result of this accident, if the trier of fact determines that Plaintiff sustained a serious injury to his right knee at trial, Plaintiff may recover damages for his cervical, thoracic, and lumbar spine, and right foot injuries, even though they do not satisfy the serious injury threshold (*Bonilla v Vargas-Nunez*, 147 A.D.3d 461, 462 [1st Dept 2017], citing *Rubin v SMS Taxi Corp.*, 71 A.D.3d 548, 549-550 [1st Dept 2010]).

Although Plaintiff's experts do not directly address the issue of degeneration, by ascribing Plaintiff's injuries to a different, yet equally plausible, explanation — the accident — their opinions were sufficient to raise an issue of fact as to causation (*Moreira*, 158 A.D.3d at 519). Defendants' argument relating to

Plaintiff's alleged gap in treatment cannot be considered since it is was raised for the first time in reply papers (*see Paulling v City Car & Limousine Servs., Inc.*, 155 A.D.3d 481 [1st Dept 2017], citing *Sylla v Brickyard Inc.*, 104 A.D.3d 605 [1st Dept 2013]).

With respect to Plaintiff's 90/180-day" injury claim, Defendants sufficiently established their entitlement to dismissal of this claim by submitting Plaintiff's deposition transcript wherein she admitted that she was not confined to bed or home for longer than a "two days" following the subject accident (Pl. EBT at 71-73; *Moreira*, 158 A.D.3d at 519; *Gomez v Davis*, 146 A.D.3d 456, 457 [1st Dept 2017]). Finally, there is no evidence on this record that Plaintiff sustained a "total loss of use" of any body part, and therefore, any claim that he sustained a "permanent loss of use" of any body part is dismissed (*see Swift v New York Tr. Auth.*, 115 A.D.3d 507, 509 [1st Dept 2014]).

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Accordingly, it is hereby,

ORDERED, that Defendants' motion for summary judgment is granted only 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 "serious injury" to his right foot, cervical spine, thoracic spine, and lumbar spine, 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 right knee is dismissed, 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: 5/15/20 **Hon.** [signature] **J.S.C.**

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