Rivera v Lopez-Reyes
2020 NY Slip Op 35526(U)
December 22, 2020
Supreme Court, Bronx County
Docket Number: Index No. 20620/2019E
Judge: Veronica G. Hummel
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31

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ANGEL RIVERA,

Plaintiff,

-against -

Index No. 20620/2019E
DECISION/ORDER
Motion Seq. 1

JORGE LOPEZ-REYES D/B/A MR. SOFTEE OF THE BRONX, INC., DAVID LOPEZ D/B/A MR.SOFTEE OF THE BRONX,INC., And MISTER SOFTEE,INC.,

Defendants.

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VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF regarding the motion of defendants JORGE LOPEZ-REYES D/B/A MR. SOFTEE OF THE BRONX, INC., DAVID LOPEZ D/B/A MR. SOFTEE OF THE BRONX, INC., AND MISTER SOFTEE, INC.[Mot. Seq. 1] (defendants), made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff ANGEL RIVERA has not sustained a “serious injury” as defined by Insurance Law 5102(d).

This action arises out of a single vehicle accident that occurred on April 15, 2018, at 5:00 p.m. on Coop City Boulevard, approximately 20 feet south of Asch Loop, Bronx, N.Y. (“the Accident”). While driving the relevant ice cream truck, plaintiff heard a cracking sound, and the brakes allegedly failed. The truck then mounted the sidewalk and stopped abruptly.

Defendants now moves for summary judgment dismissing plaintiff’s complaint on the legal ground that, as a matter of law, plaintiff has not demonstrated, by competent medical evidence, that he sustained a “serious injury”, as defined in Insurance Law 5102. Based on

plaintiff's verified bill of particulars, the relevant categories claimed by plaintiff to establish a "serious injury" are: permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and a 90/180 disability.

Initially, plaintiff's contention that this action does not fall within the No-Fault law, despite the fact that plaintiff accepted no-fault benefits, is rejected as contrary to the express language of Article 51 of the Insurance Law and the legal precedent defining "owner" and "loss arising out of the use and operation of a motor vehicle" (*see generally Empire Ins. Company/Allcity Insurance Co. v Hillard,* 184 Misc. 2d 821 [Sup. Ct. Westchester County 2000]; *Anglero v Hanif*, 140 AD3d 905 [2d Dept 2016]; *Casine v Wesner*, 165 AD3d 749 [2d Dept 2018]; *Marinez v Saleh*, 2020 WL 1083543 (Sup. Ct. Queens County 2020); *see also In the Matter of Paige Pierce (Utica Mutual Insurance Co.),* 110 AD2d 1023 [3d Dept 1985]; *Walton v Lumbermens Mut. Cas. Co.,* 218 AD2d 858 [3d Dept 1995]).

As for the question of a "serious injury", in support of the motion, defendants submit copies of the pleadings, the bill of particulars, plaintiff's deposition transcript, an attorney affirmation, and medical expert reports by Dr. Konrad I. Gruson, M.D. (Orthopaedic Surgeon) and Dr. Adam Mednick, M.D. (Neurologist).

Dr. Gruson examined plaintiff on December 17, 2019, measuring full ranges of motion in all tested planes of movement of plaintiff's cervical and lumbar spine, and left and right shoulders, elbows, wrists, knees, and hips. The doctor notes that he was not provided copies of the relevant MRI's and did not rely on said reports. All objective provocative testing yielded negative results. He finds, in sum and substance, no acute traumatic injury to the cervical spine, lumbar spine, or left shoulder. He finds degenerative disease in the left shoulder and

opines that the condition is longstanding, and degenerative. The expert opines that there is no evidence that plaintiff's alleged complaints are casually related to the Accident. The doctor concludes that there was no objective evidence of permanency or disability.

Dr. Mednick performed range of motion testing on the cervical spine, and lumbar spine with normal results. He diagnoses plaintiff with post-traumatic headaches-resolved, cervical sprain-resolved and lumbar sprain-resolved. Although there was tenderness reported the doctor finds that this was a subjective finding and under the voluntary control of the plaintiff. He cites variables such as body size, aging, and condition was well as plaintiff's effort as elements that may affect results. There were no objective findings to support plaintiff's subjective complaints, and the expert finds that plaintiff is neurologically intact in both the upper and lower extremities with full range of motion in the cervical and lumbar spine with no objective signs of radiculopathy. There was no clinical correlation on his examination to the MRI report findings of both the cervical and lumbar spine or the EMG/NCV report that were performed almost a year before the expert's examination. He concludes that based on the findings of the examination and available medical records, from a neurological perspective there is no disability or permanency or residuals with regards to the Accident. Plaintiff can perform all of his regular activities of daily living.

This proof was sufficient to demonstrate, *prima facie*, that plaintiff did not sustain a permanent consequential or significant limitation of use of his spine or shoulder (*see Gidarisingh v Gonzalez*, 2020 WL 4390590 [Sup. Ct. Bronx County 2020]; *Morrison v Santana,* 2020 NY Slip Op 02875 [1st Dept 2020]; *Bianchi v Mason*. 179 AD3d 567 [1st Dept 2020]). A defendants' experts are not required to review plaintiff's medical records (*see Jackson v Doe,* 173 AD3d 505 [1st Dept 2019]), or films from imaging studies (*see Oliveras v N.Y.C. Transit Auth.,* 179 AD3d 503 [1st Dept 2020]), prior to forming his opinions. Because Dr. Gurson

offered conclusions as to the lack of a causal relationship between the Accident and plaintiff's claimed injuries, defendants also shifted the burden on the issue of causation. Based on the record and the two expert reports, defendants set forth a *prima facie* showing that plaintiff did not sustain a serious injury under any of the alleged categories[1].

Defendants did not raise the issue of a gap or cessation in treatment until their reply affirmation, thereby waiving the argument (*see Massillon v Regalado*, 176 AD3d 600 [1st Dept 2019]: *Lewis v Revello*, 172 AD3d 505 [1st Dept 2019]).

In opposition, plaintiff submits the certified records of NYC Fire Department, Jacobi Hospital, Citimedical, and Promptmedical Spine Care and copies of the defendants' affirmed expert reports. Of note, plaintiff elects to not submit an affirmation from an expert in opposition to the motion. Defendants object to the court's consideration of the certified records arguing that the records are inadmissible and are not competent evidence.

In opposition to a motion for summary judgment on the ground of lack of a "serious injury," a plaintiff's medical records are not admissible merely because defendants' experts reviewed them (*see Walker v Whitney*, 132 AD3d 478 [1st Dept 2015]), unless defendants also submit the records in support of the motion (*see Jallow v* Siri, 133 AD3d 1391 [1st Dept 2015]; *Gidarisingh v Gonzalez*, *supra*). Defendants' experts must actually rely on the relevant records in formulating their opinions to render the records admissible (*Shapiro v Spain Taxi, Inc*., 146 AD3d 451 [1st Dept 2017]), and medical opinions and diagnoses contained in medical records do not become admissible because the records are certified as business records under CPLR

[1] Of note, in terms of permanent loss of use of a body organ, member, function or system, such a loss must be total. Plaintiff does not allege any such loss (*Oberly v Banges Ambulance,* 96 N.Y.2d 295 [2001])

4518 (*Richert v Diaz,* 112 AD3d 451 [1st Dept 2013]; *Gidarisingh v Gonzalez supra*). Nor do reports interpreting imaging studies become admissible merely by being certified (*see Komar v Showers*, 227 AD2d 135 [1st Dept 1996]). Such records may be considered to the extent they demonstrate when plaintiff sought treatment (*see Ortiz v Salahuddin*, 102 AD3d 617 [1st Dept 2013]), that plaintiff sought treatment contemporaneously with the accident (*see Moreira v Mahahir*, 158 AD3d 518 [1st Dept 2018]), plaintiff's complaints and the medical provider's referrals (*see Salman v Rosario,* 87 AD3d 482 [1st Dept 2011]) or consistency with other admissible evidence (*see Sanchez v Oxcin,* 157 AD3d 561 [1st Dept 2018]; *Gidarisingh v Gonzalez, supra*).

Here, while certified, none of plaintiff's records was sworn, and defendants' experts did not rely on them in actually forming their opinions. Under the circumstances, plaintiff fails to submit evidence in admissible form sufficient to raise an issue of fact as to whether he sustained a "serious injury" (*see Arias v Martinez*, 176 AD3d 548 [1st Dept 2019]; *Gblah v N.Y.C. Transit Authority,* 173 AD3d 622 [1st Dept 2019]). While inadmissible evidence may be considered to deny a motion for summary judgment, such evidence cannot form the sole basis for the court's determination on the motion (*Clemmer v Drah Cab Corp*., 74 AD3d 660 [1st Dept 2010]; *Ulm I Holding Corp. v Antell*, 155 AD3d 585 [1st Dept 2017]).

With respect to the 90/180-day injury claim, plaintiff's bill of particulars alleges, and plaintiff testified, that he missed less than 90 days of work and otherwise performed routine activities. This proof defeats the claim (*Arias v Martinez*, *supra*; *Thompson v Bronx Merch. Funding Servs., LLC,* 166 AD3d 542 [1st Dept 2018]; *Williams v Perez,* 92 AD3d 528 [1st Dept 2012]), and plaintiff failed to raise an issue of fact. In any event, without any substantiating medical documentation, testimony alone does not suffice to show a ""serious injury" under the

90/180–day category of Insurance Law 5102(d) (*Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendants JORGE LOPEZ-REYES D/B/A MR. SOFTEE OF THE BRONX, INC., DAVID LOPEZ D/B/A MR. SOFTEE OF THE BRONX, INC., AND MISTER SOFTEE, INC.[Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff ANGEL RIVERA has not sustained a "serious injury" as defined by Insurance Law 5102(d) is granted; and it is further

ORDERED that the complaint is dismissed and the clerk shall enter judgment dismissing the action.

The foregoing constitutes the decision and order of the court.

Dated: December 22, 2020

ENT E R,

/Hon. Veronica G. Hummel/ signed 12-22-2020
Hon. Veronica G. Hummel, A.J.S.C.

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