

**Adom v Choudhury**

2020 NY Slip Op 35631(U)

January 31, 2020

Supreme Court, Bronx County

Docket Number: Index No. 20678/2018E

Judge: Mitchell J. Danziger

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 3

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ROMEO ADOM,

Plaintiff,

-against-

Index No.: 20678/2018

**DECISION/ORDER**

**Present:**

**HON. MITCHELL J. DANZIGER**

RAMINUL H. CHOUDHURY, NEW YORK CITY  
TRANSIT AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY,

Defendants.

-----x  
Recitation as Required by CPLR §2219(a): The following papers  
were read on this Motion for Summary Judgment:

Papers Numbered

Defendants' Notice of Motion,	
Affirmation in Support and Exhibits .....	<u>1</u>
Plaintiff's Affirmation in Opposition and Exhibits.....	<u>2</u>
Defendants' Reply Affirmation .....	<u>3</u>

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendants, RAMINUL H. CHOUDHURY, NEW YORK CITY TRANSIT AUTHORITY, AND METROPOLITAN TRANSPORTATION AUTHORITY (“defendants”), move for an order granting summary judgment and dismissing the complaint on the grounds that plaintiff has failed to state a cause of action against the defendants and that the injuries allegedly sustained by plaintiff do not satisfy the “serious injury” threshold requirements set forth pursuant to New York Insurance Law (“Ins. Law”) §5102(d). For the foregoing reasons, defendant’s motion is granted.

Plaintiff commenced this action seeking damages for injuries allegedly sustained as the result of a motor vehicle accident on May 20, 2017. According to plaintiff’s bill of particulars dated April 18, 2018 (Ex. D to defendant’s motion), plaintiff sustained a sprain of the biceps tendon at the insertion, left elbow; joint effusion, left elbow; disc herniations at C2-C3 and C6-C7, disc bulges from C3-C4 through C5-C6; restricted range of motion, left elbow; restricted range of motion, cervical spine; future pain and suffering; future lost wages and medical

expenses; and future surgery. According to plaintiff's supplemental response to demand for verified bill of particulars dated June 26, 2018 (Ex. E to defendant's motion), plaintiff suffered in addition to the above, a L4-L5 posterior central focal herniation causing impingement upon the anterior thecal sac; and L5-S1 left lateral focal herniation causing impingement. Plaintiff alleged all of his injuries are permanent in nature and were proximately caused by the motor vehicle accident or in the alternative, the injuries are of a pre-existing nature and were exacerbated or aggravated by this occurrence.

According to plaintiff's testimony at his deposition taken August 15, 2018 (Ex. H of defendant's motion), plaintiff refused an ambulance at the scene of the accident. (Ex. H, pg. 41). Plaintiff sought medical treatment "a couple of days after the accident." (Ex. H, pg 49). Plaintiff's first treatment was with Advanced Chiropractic Care. (Ex. H, pg. 50). Plaintiff underwent physical therapy, treated with a chiropractor, and had acupuncture. (Ex. H, pg. 52). At the time of plaintiff's deposition, he was done with physical therapy after approximately seven or eight months of treatment. (Ex. H, pg. 53). At the time of plaintiff's deposition, he was seeing a different doctor, Dr. Gerling, whose office was located "in a physical therapy place," that gave him a heat lamp and an "electronic stimulator" to use on his back nightly. (Ex. H, pg. 53, 55). At the time of his deposition, plaintiff was still getting massages for his back, but was scared to have surgery despite it being recommended. (Ex. H, pg. 56). Plaintiff had two epidural injections to his back. (Ex. H, pg. 56). Plaintiff did not have a third epidural planned and was taking Tylenol and Advil for pain. (Ex. H, pg. 56, 57). Surgery was only recommended for plaintiff's back and not his elbow, as his back was the issue that was "lingering most." (Ex. H, pg. 56). At the time of his deposition plaintiff testified that the daily pain he experienced was from his back and then elbow which "started not too long ago." (Ex. H, pg. 56). Plaintiff rated his elbow pain as a 3 and his back as a 4 or 5, but potentially a 7 if he sits for too long. (Ex. H, pg. 57). With regard to his elbow, plaintiff testified sometimes he feels nothing and sometimes he has numbness out of no where. (Ex. H, pg. 58).

Ins. Law §5104(a) provides that there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss. Ins. Law § 5102(d) defines "serious injury" as follows:

“a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

If it can be said, as a matter of law, that plaintiff suffered no serious injury within the meaning of the Ins. Law, then plaintiff has no claim to assert and there is nothing for the jury to decide (*Licari v Elliott*, 57 NY2d 230, 238 [1982]). Here, it is undisputed that plaintiff has not sustained a serious injury that satisfied any of the first five (5) categories enumerated in §5102(d). In other words, plaintiff is not deceased, did not suffer any dismemberment, fracture, significant disfigurement, or loss of a fetus. However, in his opposition to defendant's motion, plaintiff asserts that he was seriously injured in that he sustained permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system, or a medically determined impairment that prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following his accident.

On June 6, 2017, approximately 17 days after the accident, plaintiff underwent initial evaluations at Advanced Chiropractic Care/Dynamic PT, treating with a chiropractor, an acupuncturist, and undergoing physical therapy. In opposition to the motion, plaintiff submits medical records affirmed by Thomasina Striano, D.C.. “CPLR §2106 does not provide that a chiropractor may affirm the truth of his (her) statement with the same force as an affidavit” which renders Dr. Striano's affirmation as inadmissible. (*Shin v. Catanzo*, 1 A.D.3d 195 [1<sup>st</sup> Dept. 2003]). Further, the Court notes that Dr. Striano appears to have only have her name on some of the medical records annexed as Ex. 1 to plaintiff's opposition with treatment spanning from June 6, 2017 through December 21, 2017. The remainder of the records annexed to Ex. 1 to plaintiff's opposition were authored by other treating providers to which Dr. Striano cannot affirm the truth of. “Statements and

reports by plaintiff's examining and treating physicians, which are unsworn or which are not affirmed to be true under penalties of perjury" are "not competent, admissible evidence." (*McLoryd v. Pennypacker*, 78 A.D.2d 227 [1<sup>st</sup> Dept. 1991]). Despite Dr. Striano's affirmation dated August 4, 2019, which says that "that it is my opinion, stated with a reasonable degree of medical certainty, that the injuries sustained by Romeo Adom were as a result of the automobile accident of 5/20/17 and have caused a permanent partial disability", the Court notes that the portion of the medical records that may have been authored by Dr. Striano (which consist of 46 pages) are devoid of any mention of plaintiff's accident on May 20, 2017, of the cause of plaintiff's injuries, or of plaintiff's prior medical history which is positive for a prior cervical injury.

Plaintiff annexes as Ex. 2 to their opposition the affirmation of Priyesh Patel, M.D. which affirms that he oversaw the MRIs taken of plaintiff's cervical spine and of plaintiff's left elbow, however, he does not affirm the truth of his report that is annexed to his affirmation rendering it inadmissible. (*See McLoryd*). The Court notes that the same is true of the affirmation and MRI report of plaintiff's lumbar spine in Ex. 4 of plaintiff's opposition. Ex. 3 to plaintiff's opposition is the affirmation and medical records of Michael Gerling, M.D. with whom plaintiff treated from April 10, 2018 through July 10, 2018. There is an additional medical record annexed to Dr. Gerling's report but it was authored by Joseph Pyun, M.D. and therefore, it's truth is not affirmed and it is not admissible evidence. (*See McLoryd*). The Court notes that Dr. Gerling's records note that plaintiff's symptoms began after plaintiff's MVA of 5/20/17 however, his records state that plaintiff had never had a prior neck or back disorder and note that he has no known past medical history. The same is true of Ex. 5 to plaintiff's opposition, wherein, Dr. Goldman attributes plaintiff's injuries to the car accident of May 20, 2017 in his affirmation, however, his report states that plaintiff's "past medical history reveals no prior injuries to his spine or extremities requiring hospitalization or surgery." Per plaintiff's testimony, he was in a motor vehicle accident approximately three (3) years prior to his deposition taken on August 15, 2018 and that he injured his upper back. Ex. H to defendant's motion, pages 9-10. Plaintiff went to St. Barnabas when the accident happened and underwent approximately six (6) months of therapy for his upper back. Ex. H to defendant's motion, page 11.

Annexed to defendant's motion as Ex. L, is the independent radiological interpretation of

MRI's taken of plaintiff's cervical spine on July 19, 2017, left elbow on September 7, 2017, and lumbar spine on May 2, 2018. Marc Katzman M.D., neuro-radiologist, found, as a result of his examination of the aforementioned MRIs, that plaintiff's cervical and lumbar disc injuries were degenerative in nature and that "there is no evidence of recent post-traumatic injury on the basis of this MRI exam. With regard to the MRI of plaintiff's elbow, Dr. Katzman found that plaintiff suffered "mild insertional tendinosis of the distal biceps tendon, which may either be degenerative or post-traumatic."

In their motion, defendant's demonstrated that the claimed cervical and lumbar spine injuries were not causally related to the accident by submitting the report of their neuro-radiologist Dr. Katzman who reviewed plaintiff's MRIs and opined that all of plaintiff's cervical and lumbar injuries were degenerative conditions not related to the accident. (*Rosario v. Gonzalez*, 2020 NY Slip Op 00492 [1<sup>st</sup> Dept. 2020]). Defendants also submitted IME reports from Geico, plaintiff's no-fault carrier (Ex. K of defendant's motion). Chiropractor Gerald Silverman examined plaintiff on September 11, 2017 and found plaintiff to have resolved cervical and thoracolumbar sprains/strains. On September 27, 2017, plaintiff was examined by Orthopedic Surgeon, Howard Kiernan, M.D., who found plaintiff's ranges of motion within normal limits and found that plaintiff's cervical, lumbar, and shoulder sprains were resolving and that plaintiff's left elbow contusion was resolved. Dr. Kiernan suggested additional PT for 8 weeks. (Ex. K of defendant's motion) Thereafter, plaintiff was seen again by Dr. Kiernan on January 3, 2018. At that time, Dr. Kiernan found that plaintiff's cervical sprain was resolved; sprain of the left elbow and left shoulder, resolved; Lumbar spine sprain, resolving. Dr. Kiernan suggested plaintiff do core exercises and did not restrict him from household activities or work.

In opposition, plaintiff fails to raise an issue of fact as to causation. While plaintiff's doctors find more recent limitations in plaintiff's range of motion than the IME doctors submitted by defendant as discussed above, plaintiff's doctors provide only conclusory opinions that plaintiff's injuries were caused by the accident. The admissible medical evidence submitted by plaintiff fails to address plaintiff's pre-existing cervical back injuries stemming from the car accident he was in approximately 3 years prior to this accident. The admissible medical evidence also fails to address the finding from defendant's neuro-radiologist who found that plaintiff's cervical and lumbar injuries

were degenerative and not traumatically caused and that his elbow was either degenerative or post-traumatic. Dr. Gerling's affirmation similarly states that plaintiff's injuries were caused by the subject accident, but neither his medical records, nor his affirmation address plaintiff's prior medical history or the finding of degeneration. Ex. 3 to plaintiff's opposition. Dr. Goldman is the same. Ex. 5 to plaintiff's opposition. Despite having only examined plaintiff once on March 13, 2019, Dr. Goldman attributes plaintiff's injuries to the car accident of May 20, 2017 in his affirmation, however, his report states that plaintiff's "past medical history reveals no prior injuries to his spine or extremities requiring hospitalization or surgery." The doctor's conclusory opinions, which do not address plaintiff's pre-existing injuries or degeneration are not sufficient to raise an issue of fact. (*Rosario v. Gonzalez*, 2020 NY Slip Op 00492 [1<sup>st</sup> Dept. 2020]; *Augilla v. Singh*, 162 A.D.3d 463 [1<sup>st</sup> Dept. 2018]).


Defendant's met their prima facie burden as to plaintiff's 90/180-day claim, because they demonstrated that plaintiff's injuries were not causally related to the accident. (*Massillon v. Regalado*, 176 A.D.3d 600 [1<sup>st</sup> Dept. 2019]).

Based on the foregoing, the defendant motion is granted and this matter is dismissed.

Defendants are directed to serve a copy of this order, with notice of entry, upon plaintiff within 30 days of the entry date. This constitutes the decision and judgment of the Court.

Dated:

  
Bronx, New York

  
HON. MITCHELL J. DANZIGER, J.S.C.