Femia v Astra Transp. Corp.
2022 NY Slip Op 33028(U)
July 21, 2022
Supreme Court, New York County
Docket Number: Index No. 159119/2017
Judge: James G. Clynes
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22M

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JOSEPH J. FEMIA,

Plaintiff,

- v -

ASTRA TRANSPORTATION CORP., JOSE D. CANELA MARTINEZ

Defendant.

---X

INDEX NO. 159119/2017

MOTION DATE 07/09/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. JAMES G. CLYNES:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70
were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury matter, defendants, Astra Transportation Corp. ("Astra") and Jose D. Canela Martinez ("Martinez") (collectively, "defendants"), move for summary judgment dismissing the complaint for failure to meet the serious injury threshold of Insurance Law 5102.

This action arises from a rear-end motor vehicle accident that occurred on July 14, 2017 on Saw Mill River Parkway in Westchester County, New York. Plaintiff was the driver of the lead vehicle, which was struck by a school bus owned by Astra and operated by Martinez. As a result of the impact, plaintiff's vehicle spun and hit a guard rail and the school bus flipped onto its side.

Plaintiff claims he sustained injuries to his left shoulder and cervical and lumbar spine due to the impact (affirmation in opposition, New York St Cts Elec Filing [NYSCEF] Doc No. 56 ¶ 2). Plaintiff missed three or four weeks of work as a financial advisor, plus an additional 2 weeks, sporadically, in the six months following the accident (Femia deposition, NYSCEF Doc No. 50 at 15-16). Following the motor vehicle accident, Femia treated with multiple providers, including physical therapists, pain management physicians, and spinal surgeons. .

Femia has a history of prior injuries to his left shoulder and lumbar spine due to his time as a college athlete (*id.* at 57, 62, 64). In December 2016 he underwent surgical intervention for a torn labrum in his left shoulder and was still experiencing pain at the time of the accident (*id.* at

56-57). Femia also admits that he has had chronic lower back pain for the ten years preceding the accident with prior imaging that showed multi-level disc herniations in his lumbar spine (*id.* at 62-64).

DISCUSSION

As a preliminary matter, the court first addresses the issue of plaintiff's failure to file a Counterstatement of Material Fact. Defendants argue that plaintiff's failure to comply should deem each statement made in defendants' Statement of Material Fact as admitted pursuant to 22 NYCRR 202.8-g (c) and its summary judgment motion granted. "While the rule gives a motion court the discretion to deem facts admitted, the court is not required to do so" (*Abreu v Barkin & Assoc. Realty, Inc.*, 69 AD3d 420, 421 [1st Dept 2010]). Furthermore, CPLR 2001 and Part 202.1 (b) of the Uniform Rules give the court discretion to overlook the defects in the plaintiff's papers. Here, in the exercise of discretion, this court will decide the motion herein on the merits.

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (*Licari v Elliott,* 57 NY2d 230, 237 [1982]). New York Insurance Law 5102 (d), defines "serious injury" as,

> "...a personal injury which results in . . . 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 party 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."

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright,* 268 AD2d 79, 83-84 [2d Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The burden then shifts to plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]). Unsworn reports of plaintiff's examining doctor will not be sufficient to defeat a motion for summary judgment (*see Grasso v Angerami,* 79 NY2d 813, 814-815 [1991]).

Defendants contend that plaintiff did not sustain a serious injury. They submit the affirmed report of Dr. Adam N. Bender, a neurologist, who examined plaintiff on January 7, 2021. Dr. Bender's examination revealed normal ranges of motion, as well as normal motor, sensory, coordination and cranial nerve tests. He opined that the MRIs of the cervical and lumbar spine show degenerative changes which could not have resulted from the incident of record. Moreover, he noted that plaintiff has a history of chronic low back pain with a pre-existing herniated lumbar disc, as well as multiple prior left shoulder injuries requiring surgical intervention in December 2016. Dr. Bender concluded that plaintiff's "neurological examination reveals nonanatomic sensory loss over his right lower extremity that could not have resulted from the incident of record, but is otherwise normal and with no objective evidence of any neurological problem that will explain his ongoing subjective complaints" (Dr. Bender IME report, NYSEF Doc No. 51 at 7). Dr. Bender further stated that there is no neurological disability and no further treatment or diagnostic testing needed for any neurological problem.

This proof satisfies defendant's initial prima facie burden of establishing, by competent medical evidence, that plaintiff did not sustain a serious injury caused by the accident (*see Toure*, 98 NY2d at 250-352). Defendants' neurologist's findings of normal range of motion, negative objective testing and resolved injuries establishes its prima facie case with respect to whether plaintiff sustained a "serious injury" (*see Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49-50 [2d Dept 2005]

> ["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 within the meaning of Insurance Law 5102 (d), despite the existence of an MRI which shows herniated or bulging discs."]).

Plaintiff in opposition submits an affirmed report of Dr. Gerard Philip Varlotta, an orthopedist, who treated plaintiff and administered injections on three separate occasions. Dr. Varlotta's examination of plaintiff's lumbar spine revealed a positive straight leg raise on the right and restrictions with flexion at 50 degrees, extension at 15 degrees, rotation 30 degrees and side bending 30 degrees (Dr. Varlotta narrative report, NYSCEF Doc No. 68 at 2). Dr. Varlotta's examination of plaintiff's cervical spine also revealed restricted range of motion, with a total loss of approximately 25% (*id.*). The cervical spine examination also revealed positive Spurling's maneuver to the left with radiation into the interscapular region, triceps and distal left

forearm/wrist and hand (*id.*). Atrophy was noted in the periscapular muscles on the right and deep tendon reflexes were diminished in the triceps bilaterally (*id.*). Dr. Varlotta diagnosed plaintiff with a cervical strain, cervical disc herniation C5-C6 and C6-C7, left C6 radiculopathy and lumbar disc herniations L3-L4 and L4-L5 with central and foraminal stenosis (*id.* at 3).

To the extent plaintiff seeks to oppose this motion based upon his assertion that he sustained an injury to his left shoulder as a result of the instant motor vehicle accident, the court will not consider the alleged injury in determining this motion, as he did not allege injury to this body part in his bill of particulars, supplemental bill of particulars or second supplemental bill of particulars.

a. Permanent Loss

To constitute a permanent loss, "[s]uch loss must be total" (*Byong Yol Yi v Canela,* 70 AD3d 584, 585 [1st Dept 2010], citing *Oberly v Bangs Ambulance*, 96 NY2d 295, 299 [2001]). Plaintiff's expert reports and other medical submissions do not show a total loss and fail to demonstrate the existence of a genuine issue of fact on this issue (*See Byong Yol Yi*, 70 AD3d at 585). For example, plaintiff's assertions that as a result of the accident he sustained certain permanent injuries, including inability to lift weights or play certain sports, do not demonstrate a genuine issue of fact regarding permanent loss.

As such, on the issue of whether plaintiff sustained a permanent loss, defendants met their prima facie burden and demonstrated that there are no remaining issues of fact and that they are entitled to dismissal of this claim as a matter of law. Plaintiff's opposing papers failed to defeat that showing.

b. Permanent Consequential Limitation and Significant Limitation

To establish a serious injury based on a significant limitation of use of a body function or system, plaintiff must prove that she suffered from "something more than a ... minor, mild or slight limitation of use" (*Licari,* 57 NY2d at 236).

Femia concedes at his deposition that he has a history of lower back pain from his time as a college athlete. Once a defendant has presented evidence of a pre-existing injury, even in the form of an admission made at a deposition, it is incumbent upon the plaintiff to present proof to

meet the defendant's asserted lack of causation (*see Baez v Rahamatali,* 6 NY3d 868, 817 [2006]; *see Becerril v Sol Cab Corp.,* 50 AD3d 261, 261-262, [1st Dept 2008] [where plaintiff conceded at his deposition that he sustained injuries to his neck and back in a prior accident, and an MRI showed degenerative disc disease, it was incumbent upon plaintiff to present proof addressing the asserted lack of causation]). However, Dr. Varlotta's narrative report explicitly states that Femia had no prior lower back problems prior to the subject accident (NYSCEF Doc No. 68 at 1). Dr. Varlotta's report fails to address the pre-existing lower back injury and completely ignores Femia's prior surgery to the same shoulder that he now claims he injured in the accident. While Dr. Varlotta's report opines to a reasonable degree of medical certainty that the instant motor vehicle accident caused Femia's injuries, it fails to adequately address how plaintiff's current medical problems, in light of his past medical history, are causally related to the subject accident (*Pommells v Perez*, 4 NY3d 566, 572 [2005] ["...[E]ven where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury- such as a gap in treatment, an intervening medical problem or . . .a preexisting condition- summary dismissal of the complaint may be appropriate"]). Had Dr. Varlotta reviewed plaintiff's medical records, he would find them replete with references to both his shoulder surgery and chronic lower back pain.

Plaintiff also submits a narrative report of Dr. Jeffrey M. Spivak, an orthopedic spine surgeon, which is unsworn and unaffirmed and would otherwise be disregarded as inadmissible evidence pursuant to CPLR 2106. However, in light of the fact that Dr. Bender, defendants' examining neurologist references Dr. Spivak's report, as well as plaintiff's other unaffirmed and unsworn medical records, these records are now properly before the court (*Ayzen v Melendez*, 299 AD2d 381, 381 [2d Dept 2002]).

Dr. Spivak's report is contrary to plaintiff's argument. Dr. Spivak notes that of the four surgical consultations he had with plaintiff, all but one was regarding his cervical spine pain, which plaintiff reported on October 15, 2021 had resolved (Dr. Spivak, narrative report, NYSCEF Doc No. 69 at 4). Moreover, on the only occasion Dr. Spivak examined plaintiff's lumbar spine, Dr. Spivak did not feel that Femia was a surgical candidate for lumbar spine surgery and recommended that he continue nonoperative care (*id.* at 5). Femia was examined by Dr. Spivak only one month after Dr. Varlotta's examination, and their lumbar spine range of motion findings are contradictory. Dr. Spivak's findings, in part, are as follows:

> "On physical exam at that time, gait was normal and he was able to heel and toe walk without difficulty. The lower back was nontender, and there was no spasm or deformity. Voluntary lumbar range of motion was flexion 90 degrees, extension 25 degrees, and lateral bend 25 degrees left and right. He complained of lower back pain on maximal extension. Straight leg raise exam was negative bilaterally. Neurologic evaluation noted intact sensation and full motor strength 5/5 for roots L2-S1 bilaterally. Reflexes were present and symmetric at the knees. Plantar responses were flexor and there was no clonus" (*id.* at 4).

This, contrasts with Dr. Varlotta's examination, which revealed a positive straight leg raise on the right, with paravertebral and right piriformis spasms and right knee pain with ambulation. (NYSCEF Doc No. 68 at 2).

A review of plaintiff's immediate treatment following the motor vehicle accident at DHD Medical P.C. on July 24, 2017, indicates ranges of motion in his cervical and lumbar spine that are commensurate with Dr. Spivak's findings. The records from DHD Medical P.C. state in part:

> Cervical Spine: The patient did have some tenderness to palpation on cervical paraspinal and trapezius musculature with evidence of myofascial trigger points on palpation and muscle spasming. Range of motion revealed: Cervical flexion 40 degrees out of normal 50 degrees. Cervical extension 50 degrees out of normal 60 degrees. Bilateral rotation was 70 degrees out of normal 80 degrees. He had a negative Spurling's test bilaterally.
> Lumbar Spine: The patient did have some tenderness to palpation on lower lumbar paraspinal musculature. Range of motion revealed: Lumbar flexion 75 degrees out of normal 90 degrees. Lumbar extension 15 degrees out of normal 30 degrees. Bilateral side bending 20 degrees out of normal 40 degrees. He had a negative straight leg raise bilaterally (DHD Medical records, NYSCEF Doc No. 60 at 2).

To accept Dr. Varlotta's report and future diagnostic outcomes would be to adopt the position that Femia was worse off four years post-accident than immediately after the incident, a conclusion completely unsupported by the record.

Dr. Seth L. Neubardt, plaintiff's orthopedist, examined him on October 18, 2017 and confirmed that while Femia has a herniated disc in his cervical spine, "he has absolutely no arm symptoms, therefore, his pain is more consistent with whiplash-type syndrome rather than related to nerve impingement on the left-side at C5-C6" (Dr. Neubardt records, NYSCEF Doc No. 63 at 2-3). While plaintiff argues that a herniated disc alone should warrant a denial of summary judgment, "[p]roof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to

establish a serious injury" (*Pommells,* 4 NY3d at 574). Rather, the plaintiff is required "to provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]).

Furthermore, Dr. Varlotta's report also fails to address plaintiff's degenerative disc disease, osteoarthritis and cervicalgia- diagnoses that appear on multiple reports from plaintiff's treating physicians (*see Dr. Posecion's records*, NYSCEF Doc No. 64 at 5 [cervical degenerative disc disease]; *see Dr. Kim's records*, NYSCEF Doc No. 66 at 3 [cervicalgia, osteoarthritis of spine with radiculopathy, cervical region and degenerative disc disease]). Like in *Hessing v Carrol* (161 AD3d 462, 463 [1st Dept 2018]), where the plaintiff presented the opinion of the examining physician who failed to address or contest the findings in plaintiff's own medical records that plaintiff suffered from cervical arthrosis, or degenerative disc disease, this court must also dismiss the claim that plaintiff suffered a permanent consequential limitation or significant limitation as a result of the motor vehicle accident.

Accordingly, plaintiff's proof is inadequate to raise a triable issue of fact as to whether plaintiff's current medical problems are causally related to the subject accident.

c. 90/180

Finally, as to plaintiff's claim that he sustained a serious injury under the category of 90/180, defendants presented plaintiff's deposition testimony that he missed only three or four weeks of work following the accident. In view of the plaintiff's deposition testimony that he was never confined to his bed and/or home or was unable to perform material acts which constitute his usual and customary activities for 90 days during the first 180 days following the occurrence, he has failed to raise a triable issue as to whether he sustained a serious injury under the 90/180 days category of Insurance Law § 5102 (d) (*see Jeongyi Kang v Bhullar*, 167 AD3d 726, 727 [2d Dept 2018]).

CONCLUSION

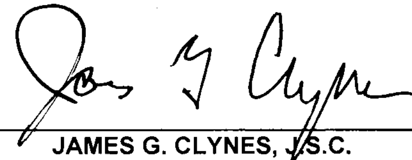
Accordingly, it is

ORDERED that the summary judgment motion of defendants Astra Transportation Corp. and Jose D. Canela Martinez is granted in its entirety and the complaint is dismissed and the Clerk is directed to enter judgment in favor of the defendants; and it is

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant shall serve a copy of this decision and order, with notice of entry, on the plaintiff, as well as the Clerk of the Court, who shall enter judgment, accordingly; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the Decision and Order of the Court.



7/21/2022
DATE

JAMES G. CLYNES, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED	☐ DENIED		GRANTED IN PART	☐	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE