

Sooknanan v Pinales
2022 NY Slip Op 35083(U)
July 5, 2022
Supreme Court, Bronx County
Docket Number: Index No. 27829/2019E
Judge: Veronica G. Hummel
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 31**CHRISHNA SOOKNANAN and CAROL
SOOKNANAN,

Plaintiffs,

-against-

NELSON PINALES, KASHEEM MOYE, JOSEPH
CHUKE, and STEVEN JEAN,

Defendants.

Index No. 27829/2019E**HON. VERONICA G. HUMMEL, A.J.S.C.****DECISION & ORDER****Mot. Seq. No. 2**

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to: (1) defendant KASHEEM MOYE's ("Moye") motion (Seq. No. 2) seeking an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint on the ground that plaintiff CHRISHNA SOOKNANAN ("Plaintiff") did not suffer a "serious injury" as defined by Insurance Law § 5102(d); and (2) defendants NELSON PINALES's ("Pinales") and STEVEN JEAN's ("Jean") respective cross-motions (Seq. No. 2) seeking the same relief on the same grounds as asserted in the motion. For the reasons discussed below, the motion and the cross-motions are **GRANTED**.

This is a personal-injury action arising out of a multi-vehicle rear-end collision that occurred on May 7, 2018, on the northbound Harlem River Drive, at or near its intersection with 125th Street, in Manhattan, New York (the "Accident"). As a result of the Accident, Plaintiff alleges injuries to the cervical and lumbar aspects of his spine. Plaintiff alleges that he sustained "serious injury" under the § 5102(d) categories of dismemberment; significant disfigurement; fracture; permanent loss of use; permanent consequential limitation; significant limitation; and 90/180-days.

Moye submits the affirmed expert reports of an orthopedic surgeon, Richard Boccio, M.D., and a radiologist, Sheldon P. Feit, M.D., as well as the transcript of Plaintiff's October 21, 2020 deposition. In lieu of submitting copies of the pleadings, Moye provides the Court with references to their respective docket numbers on NYSCEF—which, contrary to Plaintiff's contention, is permitted under CPLR 2214(c).

Pinales and Jean both cross-move for summary judgment, relying on the expert reports that Moyer submits.¹

In opposition to the motion and cross-motions, Plaintiff submits his bills of particulars, deposition transcript, emergency-room records, MRI report, and the unsworn report of a chiropractor, Nadine Beach, D.C.

Upon a review of the parties' submitted papers, it is clear that five of the seven alleged § 5102(d) categories of "serious injury" are not genuinely in dispute here. Initially, the injuries that Plaintiff claims in his bills of particulars obviously do not qualify as dismemberment, significant disfigurement, or fracture, and none of the parties' submitted evidence supports that Plaintiff suffered any such injury.

Similarly, based on the parties' submissions, it is obvious that Plaintiff did not suffer a total loss of use of any body part, organ, or system as a result of the Accident, and thus his alleged injuries do not qualify as "serious" under the category of permanent loss of use. *See Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 297 (2001); *Byong Yol Yi v. Canela*, 70 A.D.3d 584, 585 (1st Dep't 2010).

Moyer has also established his entitlement to dismissal of Plaintiff's claim under the 90/180-days category through the submission of Plaintiff's bills of particulars and deposition testimony, in which Plaintiff testified that he was never confined to bed or home and did not miss any time at work following the Accident. *See Arias v. Martinez*, 176 A.D.3d 548, 549 (1st Dep't 2019). Plaintiff, in turn, has failed to come forward with any evidence raising a triable issue of fact as to the 90/180-days category.

The remaining § 5102(d) categories in question, then, are the categories of permanent consequential limitation and significant limitation. On December 21, 2020, Plaintiff attended an independent medical evaluation ("IME") with Dr. Boccio. At the IME, Dr. Boccio measured the range of motion in Plaintiff's thoracic and lumbar spines. With regard to Plaintiff's thoracic spine, Dr. Boccio found full range of motion on forward flexion and right and left lateral bending (45 degrees out of a norm of 45 degrees) and a slight limitation on right and left lateral rotation (25

¹ Although Pinales's and Jean's cross-motions are improper vehicles through which to seek relief against a nonmoving party such as Plaintiff, the Court nonetheless addresses the merits of the applications. *See Darambouskas v. Samlidis*, 84 A.D.3d 719, 721 (2d Dep't 2011).

degrees out of a norm of 30 degrees). With regard to the lumbar spine, Dr. Boccio found full range of motion on flexion (60 degrees out of a norm of 60 degrees) and limitations on extension and right and left lateral bending (10 degrees out of a norm of 25 degrees). Dr. Boccio also performed Kemp's, Lasègue's (straight-leg raise), and Heel-Toe Walk tests on Plaintiff, all of which were negative. Based on his examination, Dr. Boccio diagnosed Plaintiff with resolved thoracic and lumbar spine sprains/strains.

Dr. Feit reviewed the films and original radiology report of the MRI performed on Plaintiff's lumbosacral spine at Stand-Up MRI of Deer Park, P.C. ("Stand-Up") on July 6, 2018. In his resulting report, dated April 17, 2021, Dr. Feit agreed with the original radiology report's conclusion that disc bulges were present in Plaintiff's lumbar spine but disagreed that the MRI demonstrated evidence of herniations. Dr. Feit further concluded that the "[d]isc bulges are not posttraumatic but are degenerative secondary to annular degeneration and/or chronic ligamentous laxity" and that the MRI "findings are all chronic in nature and [that] there are no abnormalities causally related to" the Accident.

Moye's submissions are sufficient to meet his *prima facie* burden with respect to Plaintiff's thoracic spine.

If all that Moye had relied on was Dr. Boccio's IME report, however, he would not have met his *prima facie* burden with respect to Plaintiff's lumbar spine. Moye argues that any limitations that Dr. Boccio found were insignificant and should not preclude a finding that Plaintiff did not suffer a serious injury. In support of that argument, Moye relies on *Moore-Brown v. Sofi Hacking Corp.*, 151 A.D.3d 567 (1st Dep't 2017); *Paduani v. Rodriguez*, 101 A.D.3d 470 (1st Dep't 2012); *Morris v. Edmond*, 48 A.D.3d 432 (2d Dep't 2008), and *Waldman v. Dong Kook Chang*, 175 A.D.2d 204 (2d Dep't 1991). The limitations found in those cases, however, were in *one* plane of movement only and did not exceed 25%. Here, by contrast, Dr. Boccio found a 60% limitation in each of *three* planes of movement in Plaintiff's lumbar spine—flexion and both right and left lateral bending. Such limitations are not "minor" as a matter of law. See *Long v. Taida Orchids, Inc.*, 117 A.D.3d 624, 625 (1st Dep't 2014).

But, of course, Moye also relies on Dr. Feit's report, in which he opines, based on his review of Plaintiff's MRI films, that Plaintiff's spinal conditions are degenerative and chronic in nature and not causally related to the Accident. Although Plaintiff argues that Dr. Feit's opinions

are conclusory, the Court does not find them to be so. Instead, Dr. Feit's opinions are sufficient to shift the burden to Plaintiff to come forward with evidence establishing that his injuries were caused by the Accident. *See Santos v. UM Cab Corp.*, 176 A.D.3d 630, 630-31 (1st Dep't 2019); *Johnson v. Singh*, 82 A.D.3d 565, 565 (1st Dep't 2011); *Arroyo v. Morris*, 85 A.D.3d 679, 680 (1st Dep't 2011).

Moye also raises the issue of Plaintiff's cessation of treatment. Specifically, it is undisputed that, beginning one week after the Accident, Plaintiff received chiropractic treatments that ended after two months; that, in December 2018, he treated with another doctor on two occasions and received an injection in his back; that he treated with yet another doctor, who did not physically examine him or perform range-of-motion testing on his back, for two weeks; and that he did not receive any other treatment for his alleged injuries. Based on these undisputed facts, in order to maintain his claim under the § 5102(d) category of permanent consequential limitation, Plaintiff must "offer some reasonable explanation" for his cessation of treatment. *Pommells v. Perez*, 4 N.Y.3d 566, 574 (2005).

Plaintiff, in turn, has failed to come forward with sufficient evidence in admissible form to raise triable issues of fact and defeat the motion. Dr. Beach's report, on which Plaintiff primarily relies, is unsworn and, therefore, inadmissible. *Grasso v. Angerami*, 79 N.Y.2d 813, 814-15 (1991); *Barry v. Arias*, 94 A.D.3d 499, 500 (1st Dep't 2012); *Lazu v. Harlem Grp., Inc.*, 89 A.D.3d 435, 435-36 (1st Dep't 2011); *Petinrin v. Levering*, 17 A.D.3d 173, 174 (1st Dep't 2005); *see also Gibbs v. Reid*, 94 A.D.3d 636 637 (1st Dep't 2012) ("[C]hiropractors are not among those whose affirmations have the same force and effect as affidavits."). The emergency-room records are neither certified nor affirmed (or sworn), so they, too, are inadmissible. CPLR 4518(c); *Mensah v. Badu*, 68 A.D.3d 945, 945 (2d Dep't 2009); *Nociforo v. Penna*, 42 A.D.3d 514, 515 (2d Dep't 2007); *Dudek v. Sinisi*, 199 A.D.2d 800, 801 (3d Dep't 1993). And the original MRI report is unaffirmed, rendering it inadmissible as well. *Grasso*, 79 N.Y.2d at 814-15; *Hernandez v. Cespedes*, 141 A.D.3d 483, 484 (1st Dep't 2016). The fact that Moye's expert, Dr. Feit, reviewed the original, unaffirmed MRI report does not make that report admissible. *Acevedo v. Grayline N.Y. Tours, Inc.*, 204 A.D.3d 597, 598 (1st Dep't 2022). Dr. Feit's opinions are based not on his review of the original MRI report but on his review and analysis of the underlying MRI films. In his report, he merely states that, based on his review of the underlying films, he agrees with the original MRI report (in part). *See Clemmer v. Drah Cab Corp.*, 74 A.D.3d 660, 661 (1st Dep't

2010) (“To the extent plaintiff’s Dr. Qureshi’s conclusions are based on the unsworn chiropractic report and the unsworn MRI reports, those conclusions are inadmissible, because defendants’ experts did not submit those unsworn reports with their own reports or expressly rely on them in reaching their own conclusions.”). Finally, Plaintiff’s deposition testimony—the only admissible evidence he submits—provides no objective evidence of the severity of his alleged injuries or of their cause. Thus, Plaintiff fails to raise an issue of fact. *See Moctezuma v. Garcia*, 176 A.D.3d 578, 579 (1st Dep’t 2019) (a plaintiff’s “unsworn medical records were insufficient to raise an issue of fact as to whether she sustained a serious injury”).

Accordingly, Moye is entitled to dismissal of Plaintiff’s claims of “serious injury” under Insurance Law § 5102(d). And, because the evidence submitted in support of and in opposition to Pinales’s and Jean’s cross-motions is identical to the evidence submitted in support of and in opposition to Moye’s motion, Pinales and Jean are also entitled to dismissal of Plaintiff’s claims of “serious injury.” Moreover, although defendant JOSEPH CHUKE (“Chuke”; and, together with Moye, Pinales, and Jean, “Defendants”) has not moved or cross-moved for relief, the Court nonetheless searches the record and dismisses Plaintiff’s claims of “serious injury” as asserted against Chuke as well. CPLR 3212(b); *Morris v. Edmond*, 48 A.D.3d 432, 433-34 (2d Dep’t 2008).

Finally, because Plaintiff fails to raise an issue of fact not only as to the seriousness of his injuries but also as to their cause, Defendants are appropriately granted summary judgment dismissing Plaintiff’s complaint in its entirety (including his claim for economic loss and his wife’s claim for loss of services) as well as the various cross-claims for indemnity and contribution asserted between Defendants.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movant was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby:

ORDERED that defendant KASHEEM MOYE’s motion (Seq. No. 2) seeking an order, pursuant to CPLR 3212, granting him summary judgment dismissing the complaint is **GRANTED**; and it is further

ORDERED that defendants NELSON PINALES's and STEVEN JEAN's respective cross-motions (Seq. No. 2) seeking an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint are **GRANTED**; and it is further

ORDERED that the Court, upon searching the record on the instant motion and cross-motions, grants summary judgment to defendant JOSEPH CHUKE dismissing the complaint; and it is further

ORDERED that defendant MOYE's, PINALES's, JEAN's, and CHUKE's respective cross-claims are dismissed; and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint as well as any and all cross-claims asserted against or between any of defendants MOYE, PINALES, JEAN, and CHUKE; and it is further

ORDERED that the Clerk shall mark the motion and cross-motions (Seq. No. 2) disposed in all Court records; and it is further

ORDERED that the Clerk shall enter judgment dismissing this action and mark this action disposed in all Court records.

This constitutes the decision and order of the Court.

Dated: July 5, 2022

Hon.


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

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| 1. CHECK ONE..... | ☒ CASE DISPOSED IN ITS ENTIRETY | ☐ CASE STILL ACTIVE |
| 2. MOTION IS..... | ☒ GRANTED | ☐ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 3. CROSS-MOTIONS ARE..... | ☒ GRANTED | ☐ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 4. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER ☐ SUBMIT ORDER | ☐ SCHEDULE APPEARANCE |
| | ☐ FIDUCIARY APPOINTMENT | ☐ REFEREE APPOINTMENT |
| | ☐ CONVERT TO ELECTRONIC FILING | ☐ EDIT CAPTION |