

Roman v Chasity
2022 NY Slip Op 35174(U)
October 28, 2022
Supreme Court, Bronx County
Docket Number: Index No. 29436/2018e
Judge: Veronica G. Hummel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

-----X
JOHN NICHOLAS ROMAN and NYVIA ROMAN,

Plaintiffs,

-against -

Index No. 29436/2018e
DECISION/ORDER
Motion Seq. 3

SAMANTHA FELICIANO CHASITY and MARIA RAMIREZ,
Defendants.

-----X
HON. 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 relevant to the motion of defendants SAMANTHA FELICIANO CHASITY and MARIA RAMIREZ [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiffs JOHN NICHOLAS ROMAN and NYVIA ROMAN did not sustain a "serious injury" as defined by Insurance Law 5102(d).

This is a negligence action to recover damages for personal injuries that plaintiffs allegedly sustained as a result of a motor vehicle accident that occurred *seven years* ago on November 3, 2015 (the Accident).

Plaintiff John Roman

Plaintiff John Roman was in a subsequent accident seventeen days after the Accident on November 20, 2015 (the Subsequent Accident). Plaintiff reported that he sustained neck, back, and left shoulder injuries in the Subsequent Accident.

In the bill of particulars and opposition papers, in relevant part, plaintiff John Roman alleges that, as the result of the Accident, plaintiff suffered injuries to the left shoulder, lumbar spine, cervical spine, and right elbow that satisfy the Insurance Law 5102(d) threshold categories of permanent loss, permanent consequential limitation, significant limitation and 90/180 day categories. As plaintiff fails to allege a complete loss, the permanent loss ground is dismissed. *Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 29 (2001).

Defendants seek summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under Insurance Law 5102(d). Defendants argue that plaintiff’s claimed injuries are not “serious,” and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motion is supported by the pleadings, the bill of particulars, an attorney affirmation, a statement of material facts, deposition transcripts, plaintiff’s medical records, and the expert affirmation of Dr. Katz (orthopedist).

Dr. Katz (orthopedist) examined plaintiff six years post-Accident, on February 24, 2021. The expert reviewed the bill of particulars, the MRI reports (of the lumbar spine, cervical spine, thoracic spine, and left shoulder), All Medical Digital Diagnostics records, PC records, Mica Rehab progress notes (11/05/2015-01/14/2016), Physical Therapy notes (1/13/2016-1/14/2016), Leo Acupuncture P.C. progress notes (11/5/2015-12/16/2015). It appears that plaintiff did not receive treatment after January 2016.

Dr. Katz finds, in relevant part, limited flexion, extension, lateral left and right bending and rotation in the cervical spine, with negative test results. The thoracic spine and lumbar spines produced normal ranges of motion with negative objective tests. In the “diagnoses/impression” section, the expert finds the cervical spine, thoracic spine, and lumbar spine are “spine sprain/strain-resolved, subsequent injury” to the body parts from the Subsequent Accident.

The examination of the right shoulder, left shoulder, and right elbow produced normal results and negative objective tests. The right shoulder and the right elbow were “sprain/strain resolved”. The left shoulder was found to be “sprain/strain-resolved, subsequent injury to left shoulder” on the date of the Subsequent Accident.

In the Impression Section, the expert finds that there was no reported evidence of any prior injuries and plaintiff was in the Subsequent Accident. Plaintiff stated that he sustained neck, back and left shoulder injuries at the time of the Subsequent Accident. Plaintiff’s current complaints of pain in neck, back and left shoulder were aggravated by a Subsequent Accident. The type, frequency, and duration of rendered treatment for each injury has been reasonable, necessary, and related to the Accident and the mechanism of the injury supports the diagnoses. There is a causal relationship between the Accident and the diagnoses. There were no objective findings noted in the examination to support subjective complaints of pain. Further orthopedic care including physical therapy is not appropriate or medically necessary as plaintiff’s injuries have resolved

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body part under the permanent consequential limitation, significant limitation, and 90/180 days categories. *Stovall v. N.Y.C. Transit Auth.*, 181 A.D.3d 486 (1st Dep’t 2020); see *Olivare v. Tomlin*, 187 A.D.3d 642 (1st Dep’t 2020).

Plaintiff opposes the motion submitting an attorney affirmation, a response to the statement of material fact, a memorandum of law, and the report of Dr. Canty who examined plaintiff in May 2022 (orthopedic surgeon). Dr. Canty only addresses plaintiff’s complaints as to the lumbar spine and as such plaintiff fails to generate an issue of fact as to the other alleged injured body parts in terms of “serious injury”.

Based on the limited evidence submitted, plaintiff John Roman fails to generate a questions of fact as to the claims of “serious injury” as to the lumbar spine. *Morales v. Cabral*,

177 A.D.3d 556 (1st Dep't 2019). While in the report Dr. Canty sets forth range of motion limitations in the lumbar spine at the recent examination on May 31, 2022, and causally relates the findings to the Accident, the expert fails to mention or address plaintiff's injuries and limitations to the same parts of the body caused by the Subsequent Accident or explain why those injuries were different from those claimed as a result of the Accident. *Antepara v. Garcia*, 194 A.D.3d 513 (1st Dep't 2021); see *Bogle v. Paredes*, 170 A.D.3d 455 (1st Dep't 2019). Of note, the expert fails to address the Subsequent Accident in any way. *Antepara v. Garcia, supra*; see *Monahan v. Reyes*, 184 A.D.3d 460 (1st Dep't 2020). Although the physician found recent limitations in range of motion of the lumbar spine in 2022, his opinion that the alleged injuries were caused by the Accident was therefore conclusory. See *Antepara v. Garcia, supra*; *Tarjavaara v. Considine*, 188 A.D.3d 509 (1st Dep't 2020).

In addition, in setting forth the medical records that he reviewed and relied on in his report, the expert merely states that he reviewed the "attached medical records/reports and operative reports" of John Roman, which were written based on "my treatment of him at my office". No such records are attached, however, to the report. Dr. Ehrlich's 2022 examination and opinion, without any of proof of the expert's reliance on admissible medical evidence of plaintiff's condition and treatment contemporaneous with the Accident, are therefore too remote to raise an inference that any of the bodily limitations were causally related to the Accident. see *Chawdhury v. 3511 Systems, Inc.*, 193 A.D.3d 541 (1st Dep't 2021); *Jung Ung Moon v. Kumbee Ree P. Some*, 189 A.D.3d 628 (1st Dep't 2020). In any event, the expert failed to submit any of the cited underlying medical records (see *Chawdhury v. 3511 Systems, Inc., supra*; *Blake v Sanchez*, 198 A.D. 3d 527 (1st Dep't 2021)), and the sole expert's affirmed report describing said medical records not included in the record cannot be used to "bootstrap" those records into evidence. *Chawdhury v. 3511 Systems, supra*; *Malupa v. Oppong*, 106 A.D.3d 538, 539 (1st Dep't 2013).

As for the findings of the MRI report, this is no expression of an opinion as to causation in the reports. *Paudani v. Rodriguez*, 101 A.D.3d 470 (1st Dep't 2012). Furthermore, the report

of plaintiff's physician sets forth the results of a recent examination but does not explain plaintiff's lack of treatment for years, rendering his opinion as to causation of plaintiff's current limitations in range of motion speculative. *Acevedo v. Grayline N.Y. Tours, Inc.*, 2022 N.Y. Slip Op. 02860 (1st Dep't 2022); *Black v. Gordon*, 172 A.D.3d 580, 581 (1st Dep't 2019); *Vila v Foxglove Taxi Corp*, 159 A.D.3d 431, 431-432 (1st Dep't 2018). Based on the failure to address these issues of causation, the finding of plaintiff's expert of causation based on one of two accidents that occurred within weeks of each other many years ago is speculation. Accordingly, plaintiff Jackson fails to generate a question of fact as to causation.

As for plaintiff's 90/180-day claim, defendants establish entitlement to summary judgment by demonstrating a lack of causation. *Blumenberg v Lora*, 193 A.D.3d 445 (1st Dep't 2021).

Plaintiff Nyvia Roman

In the bill of particulars and opposition papers, in relevant part, plaintiff Nyvia Roman alleges that, as the result of the Accident, plaintiff suffered injuries to the right shoulder, lumbar spine, cervical spine, and will need future surgery so that her injuries satisfy the Insurance Law 5102(d) threshold categories of permanent loss, permanent consequential limitation, significant limitation and 90/180 day categories. As plaintiff fails to allege a complete loss, the permanent loss ground is dismissed. *Oberly v Bangs Ambulance, Inc.*, *supra*. Plaintiff received physical and chiropractic treatments for two months post-Accident.

Defendants seek summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" under Insurance Law 5102(d). Defendants argue that plaintiff's claimed injuries are not "serious," and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motion is supported by the pleadings, the bill of particulars, an attorney affirmation, a statement of material facts,

deposition transcripts, plaintiff's medical records, and the expert affirmation of Dr. Katz (orthopedist).

Dr. Katz (orthopedist) examined plaintiff almost six years post-Accident, on May 24, 2021. The expert reviewed the bill of particulars, the MRI reports of the lumbar spine, cervical spine, thoracic spine, and right shoulder, All Medical Digital Diagnostics records, PC records, Mica Rehab progress notes (11/05/2015-01/14/2016), Physical therapy notes (1/13/2016-1/14/2016), Leo Acupuncture P.C. progress notes (11/5/2015-12/16/2015). It appears that plaintiff received 21 PT treatments ending in January 2016.

The examination revealed some restriction in motion in the cervical and lumbar spines. There was loss of range of motion in the right shoulder and left shoulder in terms of flexion, extension, abduction and rotation. The expert found "minimal effort is observed with range of motion". As diagnoses, he finds cervical spine, thoracic spine, lumbar spine, bilateral shoulder and right hand to be "sprain/strain – resolved". The injuries and conditions diagnosed in the medical records are cervical spine, thoracic spine, lumbar spine, bilateral shoulders, and right hand. Plaintiff reported two subsequent accidents, one of them was in 2016 with right wrist injury sustained that resulted in right wrist surgery and a subsequent accident with neck and back injuries sustained, "no further information" reported.

The expert states that the plaintiff's complaints are solely attributable to the Accident and the type, frequency and duration of the rendered treatment was reasonable and medically necessary. The documentation provided supports causal relationship between the reported injuries and the Accident. The examination did not reveal any positive, objective, correlative findings. There is no medical necessity for additional treatment. There were no positive, objective, correlative findings to support subjective complaints of pain presented by plaintiff or decreased ranges of motion.

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body parts under the permanent consequential limitation, significant limitation, or 90/180 days categories. *Stovall v. N.Y.C. Transit Auth.*, *supra*; see *Olivare v Tomlin*, *supra*.

Plaintiff opposes the motion submitting an attorney affirmation, a response to the statement of material fact, a memorandum of law, and the report of Dr. Canty who first saw plaintiff in May 2022 (orthopedic surgeon). Dr. Canty only addresses plaintiff Nyvia's complaints as to the lumbar spine and as such plaintiff fails to generate an issue of fact as to the other alleged injured body parts in terms of "serious injury".

Based on the limited evidence submitted, plaintiff Nyvia fails to generate a question of facts as to the claims of "serious injury" under as to the lumbar spine. *Morales v Cabral*, *supra*. While in the report Dr. Canty sets forth range of motion limitations in the lumbar spine at the recent examination on May 31, 2022, and causally relates the findings to the Accident, the expert states that he reviewed the "attached medical records/reports and operative reports" of Nyvia Roman, which were written based on "my treatment of her in my office". No such records are attached, however, to the report. Dr. Ehrlich's 2022 examination and opinion, without any of proof of the expert's reliance on admissible medical evidence of plaintiff's condition and treatment contemporaneous with the Accident, are therefore too remote to raise an inference that any of the bodily limitations were causally related to the Accident. see *Chawdhury v. 3511 Systems, Inc.*, *supra*. In any event, plaintiff failed to submit any of the underlying medical records (see *Chawdhury v 3511 Systems, Inc.*, *supra*; *Blake v Sanchez*, *supra*), and the sole expert's affirmed report describing the medical records not included in the record cannot be used to "bootstrap" those records into evidence. *Chawdhury v 3511 Systems, supra*; *Malupa v. Oppong*, *supra*. Although the physician found recent limitations in range of motion of the lumbar spine, his opinion that the alleged injuries were caused by the Accident was conclusory. *Tarjavaara v Considine*, *supra*. As for the findings of the MRI report, this is no expression of an opinion as to causation in the reports. *Paudani v Rodriguez*, *supra*. The report of plaintiff's

physician sets forth the results of a recent 2022 examination but does not explain plaintiff's lack of treatment for years, rendering his opinion as to causation of plaintiff's current limitations in range of motion speculative. *Acevedo v Grayline N.Y. Tours, Inc., supra*. Accordingly, plaintiff Nyvia Roman fails to generate a question of fact as to causation.

As for plaintiff's 90/180-day claim, defendants establish entitlement to summary judgment by demonstrating a lack of causation. *Blumenberg v. Lora, supra*.

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 SAMANTHA FELICIANO CHASITY and MARIA RAMIREZ [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiffs JOHN NICHOLAS ROMAN and NYVIA ROMAN did not sustain a "serious injury" as defined by Insurance Law 5102(d) is granted; and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint; and it is further

ORDERED that the Clerk shall mark motion sequence 3 decided and the action disposed in all court records.

The foregoing constitutes the decision and order of the court.

Dated: October 28, 2022

E N T E R,

Hon. s/Hon. Veronica G. Hummel/signed 10/28/2022
Hon. Veronica G. Hummel, A.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