Polanco v Holkmann
2017 NY Slip Op 30929(U)
April 6, 2017
Supreme Court, Bronx County
Docket Number: 305993/10
Judge: Joseph E. Capella
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 23

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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Index #: **305993/10**

JOEL POLANCO,

DECISION/ORDER

Plaintiff,

- against -

Present:
Hon. Joseph E. Capella
J.S.C.

MANDEZ HOLKMANN,

Defendant.

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The following papers numbered 1 to 3 read on this motion and cross-motion noticed on June 15, 2015, and duly submitted as no. _____ on the Motion Calendar of _____.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1
ANSWERING AFFIDAVIT AND EXHIBITS	2
REPLY AFFIDAVIT AND EXHIBITS	3
MEMO OF LAW	- -

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS GRANTED AS FOLLOWS:

The defendant seeks dismissal (CPLR 3212) of this personal injury action,[1] which stems from an automobile accident from June 21, 2009, based on an alleged failure to meet the serious injury threshold of Insurance Law § 5102(d).[2] According to the bill of

[1] This motion was referred to Judge Capella on March 17, 2017.

[2] There were no memos of law included in any of the motion papers, and instead the attorney affirmations were replete with legal arguments. Counsel are reminded that "[a]ttorneys should not discuss cases in attorney's affirmations . . . [they must argue] the law in separate memorandums of law." (McKinney's Forms Civil Practice Law and Rules § 5.18(d); *see* 22 NYCRR § 202.8(c); *Armendariz v Tiramisu*, 170 AD2d 334 [1st Dept 1991].) Here, one of the attorney affirmations went so far as to quote an entire decision. An attorney affirmation should briefly summarize counsel's legal position, and avoid citing case law. As clearly set forth in the NY Uniform Rules, affidavits and attorney affirmations shall be for a statement of those relevant facts within their knowledge, and briefs/memos of law shall be for a

particulars, the plaintiff has a herniated disc at L5-S1, subcutaneous edema palmar to proximal fifth digit of right hand, cervical/lumbar radiculopathy, and cervical/lumbar/ right hand sprain/strain. In support of the motion, the defendant's orthopedist, Dr. Berman, examined plaintiff on September 26, 2013, and found, *inter alia*, normal range of motion to the cervical and lumbar spine, right and left shoulders, right and left wrist, right and left hands, and overall no orthopedic disability. The defendant also notes that plaintiff was involved in an earlier accident on February 25, 2000, in which he suffered a disc herniation to the same area in this action, specifically L5-S1. Given this, the defendant argues that plaintiff's allegation that the L5-S1 disc herniation resulted from the instant accident is devoid of merit. The defendant also challenges 90/180 by citing to plaintiff's examination before trial ("EBT") transcript, in which plaintiff testified that he was confined to home only one day, and only missed two weeks of work as a result of the accident. Based on the aforementioned, the court is satisfied that defendant established an entitlement to summary judgment and the burden now shifts to the plaintiff to establish material issues of fact, (*Zuckerman v City of NY*, 49 NY2d 557 [1980]), regarding serious injury.

The opposition papers include an affirmation from plaintiff's initial treating physician, Dr. Konon, and some of the records from Dr. Konon's office, SS Medical Care PC. There is an initial report from Dr. Konon dated June 23, 2009, showing restricted range of motion to the cervical and lumbar spine, and according to Dr. Konon's affirmation, range of motion tests taken August 10, 2009, also revealed reductions to the cervical and lumbar spine. There were no range of motion tests of the wrist included in the report dated June 23, 2009, or in the affirmation. Also included in the opposition papers were a variety of *inadmissible* (emphasis added) reports from other medical providers such as JC Healing Touch, ZG Chiropractic Care and Healing Art Acupuncture.

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statement of the relevant law. (22 NYCRR § 202.8(c).)

According to the plaintiff, he stopped receiving physical therapy and treatment when his no-fault benefits ended. Although his affidavit and Dr. Konon's affirmation do not provide a specific date as to when plaintiff stopped going for treatment, it appears from the various reports submitted that this occurred some time in December 2009. The burden is upon the plaintiff to adequately explain any significant lapse or cessation of treatment (*Pommel v Perez*, 4 NY3d 566 [2005]), and here, neither the plaintiff nor Dr. Konon provide any proof that the no-fault benefits had actually terminated (*Gomez v Ford*, 10 Misc3d 900 [Sup Ct, Bx Cty 2005]).

In addition to the initial exam results, the plaintiff must still provide recent quantitative objective findings with an opinion(s) as to the significance of the injuries in order to show that these alleged permanent disabilities still exist. (*Thompson v Abbasi*, 15 AD3d 95 [1st Dept 2005]; *Grossman v Wright*, 268 AD2d 79 [2nd Dept 2000].) There is no recent report by the treating physician, Dr. Konon, and instead plaintiff provides an initial and supplemental neurological report by Dr. Bhatia, who examined plaintiff one time on March 10, 2015, which is some 5 years after the last physical therapy and/or treatment. Dr. Bhatia's range of motion test of the cervical spine was normal, but the lumbar spine revealed a 20% reduction in flexion and 10% reduction in extension. Except for specifically referring to an MRI "image" of the lumbar spine showing an L5-S1 disc herniation, and an MRI "image" of the cervical spine, Dr. Bhatia's initial and supplemental reports do not specify what other medical records were reviewed as part of her evaluation. It should be noted that the radiological reports associated with the aforementioned MRI images do not proffer a conclusion as to causation. (*Garcia v Feigelson*, 130 AD3d 498 [1st Dept 2015].) Given that Dr. Bhatia only alleges that the lumbar spine injury is permanent (*Franchini v Palmieri*, 1 NY3d 536 [2003]), the plaintiff's other alleged injuries must be dismissed.

Turning back to the lumbar spine, Dr. Bhatia alleges that "there is a clear exacerbation from [sic] a herniated disc at L5-S1 in 2000." However, this allegation is of

no probative value in that Dr. Bhatia failed to explain how she measured the exacerbation. *(Garcia v Feigelson*, 130 AD3d 498 [1st Dept 2015].) We also do not know whether Dr. Bhatia relied upon the inadmissible reports from those other medical providers, such as JC Healing Touch and ZG Chiropractic Care. Without knowing that Dr. Bhatia specifically reviewed the initial medical records by Dr. Konon, her finding that plaintiff's condition is permanent and causally related to an accident that occurred more than five years earlier is purely speculative (*Melendez v Feinberg*, 306 AD2d 98 [1st Dept 2003]).

Lastly, as to plaintiff's 90/180 claim, he alleges in very general terms that he has difficulty lifting, standing/sitting for long period of times, sleeping, bending, exercising and driving. However, in light of the fact that he only missed two weeks of work after the accident, the court is not convinced that these subjective complaints establish a *great curtailment* (emphasis added) of his activities during the relevant time period. (*Gaddy v Eyler*, 79 NY2d 955 [1992].) Moreover, there is no proof that plaintiff's 90/180 claim is supported by any medical determination. (*Nakamura v Montalvo*, 137 AD3d 695 [1st Dept 2016].) Based on the aforementioned, the instant motion is granted, and this action is dismissed accordingly.

The defendant is directed to serve a copy of this decision/order with notice of entry by first class mail upon plaintiff within 60 days of receipt of copy of same. This constitutes the decision and order of this court.

___4/6/17_____
Dated

Hon._____
Joseph E. Capella, J.S.C.

HON. JOSEPH E. CAPELLA