Pakeman v Karekezi
2011 NY Slip Op 34035(U)
May 9, 2011
Supreme Court, Bronx County
Docket Number: 0309803/2009
Judge: Diane A. Lebedeff
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[* 1]

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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 17

Case Disposed ☒
Settle Order ☐
Schedule Appearance ☐

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

----------X

PAKEMAN,WINSLOW

Index №. **0309803/2009**

-against-

Hon. **DIANE A. LEBEDEFF** ,

KAREKEZI,VENANT

Justice

----------X

The following papers numbered 1 to _____ Read on this motion, **DISMISSAL**
Noticed on **October 06 2010** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

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Upon the foregoing papers this

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 5/5/2011

Hon. _____
DIANE A. LEBEDEFF, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 17
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WINSLOW PAKEMAN,

Plaintiff,

-against- Index No.: 309803/09

VENANT KAREKEZI and EFRAIM PANNSOU,

Defendants.

----------X

HON. DIANE A. LEBEDEFF:

Defendants Venant Karekezi and Efraim Pannsou move for summary judgment dismissing this action on the grounds that plaintiff Winslow Pakeman failed to sustain a "serious injury" within the meaning of the Insurance Law. This action seeks to recover for alleged personal injuries sustained in a motor vehicle accident which occurred on July 30, 2009.

Plaintiff, then 32-years old, was a pedestrian near the intersection of 8th Avenue and West 33rd Street in Manhattan, when he was knocked down by the vehicle owned and operated by defendants.

Pursuant to Insurance Law § 5102 (d), a "serious injury" is defined, in relevant part, as follows:

> "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 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."

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Courts have long recognized that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 350 [2002], internal citations omitted).

In support of defendants' motion to dismiss plaintiff's case for failure to meet the threshold, defendants submit: the affirmation of Dr. William Walsh, an orthopedic surgeon; the affirmation of Dr. Maria Audrie DeJesus, a neurologist; the affirmations of Dr. A. Robert Tantleff, a board certified radiologist; and plaintiff's deposition testimony. As will be discussed more fully, defendants' submissions are sufficient to meet their "initial burden to establish a prima facie case that plaintiff's alleged injuries did not meet the serious injury threshold under the No-Fault Law" (*id.*, 98 NY2d at 352). In opposition, plaintiff submits: the affirmation of Dr. Dov J. Berkowitz, an orthopedic surgeon, dated September 25, 2010; the affirmation of Dr. David H. Delman; and various medical records.

Plaintiff's Alleged Injuries

Based upon his physical examination of plaintiff's cervical, thoracic and lumbar spines, right knee and left knee and his review of, *inter alia*, plaintiff's Bill of Particulars and medical records, defendants' expert Dr. Walsh gives his opinion that "[t]here is no evidence of causally related disability" (Dr. Walsh's affirmation, dated June 22, 2010, p. 5).

Dr. Walsh used a goniometer and found normal ranges of motion for plaintiff's cervical, thoracic and lumbar spines, right knee and left knee. He also identified the various objective tests utilized during his examination. Dr. Walsh also noted as follows:

> "**Cervical Spine:** There is no muscle spasm noted at the paracervical muscles or at the trapezii bilaterally. There is no tenderness noted on palpation of the paracervical muscles bilaterally. ... **Thoracic Spine:** There is no paraspinal spasm. There is no tenderness noted on palpation. ... **Lumbar Spine:** There is no muscle

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> spasm noted on palpation at the paralumbar muscles bilaterally. ... **Right Knee:** There is no heat, swelling, effusion, erythema, or crepitus appreciated. There is no tenderness noted on palpation. ... **Left Knee:** Examination of the left knee reveals arthroscopic surgical scar. There is no heat, swelling, effusion, erythema, or crepitus appreciated. There is no tenderness noted on palpation." (Dr. Walsh's affirmation, pp. 2-4).

Dr. Walsh further noted that plaintiff "is able to take off his shoes without difficulty ... sits comfortably ... can move his head, neck, and body freely ... got on the examining table without assistance ... can turn freely from side to side and back to front [and] can dress and undress is outerwear without assistance" (Dr. Walsh's affirmation, p. 2).

Dr. DeJesus also performed a neurological examination of plaintiff's cervical and thoracolumbar spines, and she found normal ranges of motion with the use of a goniometer and certain objective tests that were negative. She further noted that plaintiff's "gait is normal and without limp or ataxia" (Dr. DeJesus' affirmation, dated June 29, 2010, p. 3). Dr. DeJesus found that her testing of plaintiff yielded a "[n]ormal neurologic examination," opining that "[t]here is no evidence of a neurologic disability" (Dr. DeJesus' affirmation, p. 4).

Defendants further substantiate their position by analyzing the plaintiff's MRI films – which are reliable objective medical tests. "An MRI constitutes objective evidence providing an ample medical foundation" in support of a party's claim on the question of serious injury (*Lesser v Smart Cab Corp.*, 283 AD2d 273, 274 [1st Dept 2001]).

Dr. Tantleff reviewed the MRI films that were taken of plaintiff's lumbar spine and right knee on August 18, 2009 and plaintiff's cervical spine and left knee on August 17, 2009. As to plaintiff's lumbar spine, Dr. Tantleff's impression was:

> "MRI examination of the Lumbar Spine reveals longstanding chronic degenerative discogenic disc disease and thoracolumbar spondylosis ... findings are consistent with the

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> individual's age and not causally related to the date of incident of 7/30/09, only 19 days prior to the performance of the MRI examination as the findings are chronic and longstanding processes requiring years to develop as presented and are consistent with wear-and-tear of the normal aging process." (Dr. Tantleff's affirmation, dated August 5, 2010, p. 5).

As to plaintiff's right knee, Dr. Tantleff's initial impression was that the "MRI examination of the Right Knee reveals an increased body habitus/obesity with associated red marrow proliferative changes" (Dr. Tantleff's affirmation, p. 2). He opined that "[c]onsidering the examination was performed nineteen days following the incident that occurred on 7/30/09, the MRI examination displays no evidence of any recent trauma. ... Moreover there is no evidence of acute or traumatic meniscal tear" (Dr. Tantleff's affirmation, p. 1). Dr. Tantleff concluded that "the examination is otherwise normal and unremarkable without evidence of traumatic tear or rupture of the regional ligaments, tendons or menisci" (Dr. Tantleff's affirmation, p. 2).

As to plaintiff's cervical spine, Dr. Tantleff's impression was: "MRI examination of the Cervical Spine reveals chronic degenerative discogenic disc disease and cervical spondylosis. ... [F]indings are consistent with the individual's age and are not causally related to the date of incident that occurred on 7/30/09, only 18 days prior to the MRI examination" (Dr. Tantleff's affirmation, p. 4). As to plaintiff's left knee, Dr. Tantleff's initial impression was that the "MRI examination of the Left Knee reveals an increased body habitus/obesity with associated red marrow proliferative changes" (Dr. Tantleff's affirmation, p. 1). He opined that "[c]onsidering the examination was performed eighteen days following the incident that occurred on 7/30/09, the MRI examination displays no evidence of any recent trauma. ... Moreover there is no evidence of acute or traumatic meniscal tear" (Dr. Tantleff's affirmation, p. 1).

Defendants also submit plaintiff's deposition testimony. Plaintiff testified that following

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the accident, he walked a block from 8th Avenue to 7th Avenue and took a bus to his office to "gather [him]self" before going to the hospital, where he complained of neck, back, knee, ankle and shoulder pains, and he was released a short time later (Pakeman deposition, dated May 3, 2010, pp. 26-29). The following week, plaintiff began attending physical therapy four to five times per week for approximately six months and thereafter one to two times per week (Pakeman deposition, pp. 28-34). He also saw an orthopedist who recommended and later performed surgery on plaintiff's left knee (Pakeman deposition, pp. 36-38).

In opposition to defendants' motion, plaintiff submits the affirmation of Dr. Berkowitz. Dr. Berkowitz noted that "[i]t is my opinion that the patient's injuries and subsequent treatment are related to the patient's motor vehicle accident on 7/30/09. The patient has sustained a permanent injury to his left knee" (Berkowitz's affirmation, dated September 25, 2010, p. 4). After performing surgery on plaintiff's left knee, Dr. Berkowitz diagnosed plaintiff as suffering from "hypertrophic synovitis and chondral erosion of the patella-femoral joint" (Berkowitz's affirmation, p. 3). Additionally, plaintiff submits the affirmation of Dr. Delman, who swore to the accuracy of plaintiff's various medical records. In a report affirmed by Dr. Delman, he noted that plaintiff "continues to have difficulty with many of his activities of daily living due to the injuries sustained in this accident ... I feel that his injuries and disabilities from this accident are significant, partial and permanent" (Dr. Delman's affirmation, dated May 4, 2010, p. 4).

However, "plaintiff's expert physician[s] failed to address the findings of defendants' experts that plaintiff's knee and spinal conditions were due to preexisting, degenerative changes unrelated to any traumatic injury attributable to the accident" (*DeJesus v Cruz*, 73 AD3d 539, 539 [1st Dept 2010]). Plaintiff's physicians' conclusory assertions that the injuries are causally

related to the accident are insufficient to defeat defendants' motion (*see Piperis v Wan*, 49 AD3d 840, 841 [2d Dept 2008], "the unexplained determination by the plaintiff's examining physician, David Delman, that the subject accident caused the injuries and limitations he noted in the plaintiff's cervical spine, lumbar spine, and left knee ... was speculative and conclusory, and therefore insufficient to raise a triable issue of fact").

Moreover, plaintiff fails to offer a sworn radiologist's affirmation to refute the determinations made by defendants' radiologist (Dr. Tantleff) concerning the MRI films. It is well-settled that a plaintiff's submissions are insufficient where, as here, "plaintiff's experts failed to address the findings of defendants' expert radiologist" (*Lopez v Abdul-Wahab*, 67 AD3d 598, 599 [2009]).

Finally, plaintiff cites *Clemmer v Drah Cab Corp.* (74 AD3d 660, 662 [1st Dept 2010]) in support of his argument that the affirmation of Dr. Walsh is inadmissible because it is not affirmed "under the penalties of perjury" (Roth Affirmation, dated November 1, 2010, ¶ 6). However, plaintiff's argument is unavailing. As defendants correctly argue, Dr. Walsh's affirmation is sufficiently affirmed with his use of the language "pursuant to the applicable provisions of the [CPLR] section 2106" (Dr. Walsh's affirmation, p. 5). Indeed, it is well settled that the use of such language in an affirmation is sufficient (*see John H. Dair Bldg. Const. Co. v Mayer*, 31 AD2d 835 [2d Dept 1969]; *see also Jones v Schmitt*, 7 Misc 3d 47, 48 [App Term, 2d Dept 2005], "since [the physician] referred to CPLR 2106 which contains the phrase under penalties of perjury and he also affirmed the truth of the affirmation").

Accordingly, plaintiff does not meet his burden to show that he sustained a "serious injury" pertaining to his alleged injuries.

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90/180 Category

In addition to Dr. Tantleff's conclusions regarding plaintiff's MRI examinations of his cervical and lumbar spines and his right and left knee, defendants submit plaintiff's deposition testimony in support of their position that plaintiff did not suffer a "serious injury" within the meaning of the category of 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 90 days during the 180 days immediately following the occurrence of the injury or impairment" [emphasis added]. In relation to this "serious injury" test, courts have "held that a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that he or she was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period" (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]).

In this regard, plaintiff admitted, for example, that he did not miss any time from work as a result of the accident (Pakeman deposition, p. 50). He testified that his work hours and duties were modified following the accident and that he has had some difficulty performing daily activities to the same degree as prior to the accident (Pakeman deposition, pp. 50-53, 57-60). However, "a minor, mild or slight limitation of use" is insufficient within the meaning of the Insurance Law (*Licari v Elliott*, 57 NY2d 230, 236 [1982]; *see also Gibbs v Hee Hong*, 63 AD3d 559, 560 [1st Dept 2009], "Plaintiff's statements that she could not run, go upstairs, or stand for very long do not constitute the loss of 'substantially all' of plaintiff's usual activities"). Thus,

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any "serious injury claim predicated on an alleged inability [of plaintiff] to engage in substantially all his daily activities for 90 of the first 180 days post-accident was refuted by his own testimony" (*Whisenant v Farazi, supra*, 67 AD3d at 536-537).

Also, there is no doctor's sworn statement validating any inability of plaintiff to perform *substantially all* of his normal daily activities, during the requisite period of time. "Having failed to offer the requisite competent medical proof to substantiate [his] claim," plaintiff "failed to raise triable issues of fact as to whether [he was] incapacitated from performing substantially all of [his] usual and customary activities for at least 90 of the first 180 days after the accident" (*Santiago v Bhuiyan*, 71AD3d 485, 486 [1st Dept 2010]).

Accordingly, this claim also has not withstood attack.

* * *

By these submissions, plaintiff failed to meet his consequent burden to "to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint" (*Thompson v Abbasi*, 15 AD3d 95, 97 [1st Dept 2005]; citations omitted). Under all the circumstances, plaintiff failed to raise a triable issue of fact that he sustained a "serious injury" within the meaning of the Insurance Law. Accordingly, defendants' motion to dismiss this action is granted.

This decision constitutes the order of the Court.

Dated: May 11, 2011

Diane A. Lebedeff, J.S.C.