

**Jackson v Mariam Et Alassane Car Serv., Inc. v**

2014 NY Slip Op 33293(U)

February 18, 2014

Supreme Court, Bronx County

Docket Number: 302182/2011

Judge: Mary Ann Brigantti-Hughes

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

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DON JACKSON,

**DECISION/ORDER**

Plaintiff,

-against-

Index No.: 302182/2011

MARIAM ET ALASSANE CAR SERVICE, INC., et als.

Defendants.

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The following papers numbered 1 to 7 read on the below motions noticed on July 30, 2013 and duly submitted on the Part IA15 Motion calendar of **November 18, 2013**:

<u>Papers Submitted</u>	<u>Numbered</u>
Defs.'affirmation in support of motion, exhibits	1,2
Def. Bonicoro's affirmation in support, exhibits	3,4
Pl's' affirmation in opposition, exhibits	5,6
Defs.' affirmation in reply	7

In an action seeking damages for personal injuries arising out of a motor vehicle accident, defendants Miriam El Alassane Car Service, Inc., Mohammed Adam, and Michael A. Bonicoro (hereinafter collectively referred to as "Defendants") all move for summary judgment, dismissing the complaint of the plaintiff Don Jackson ("Plaintiff") for failure to prove "serious injury" as required by New York Insurance Law §§5102 and 5104. Plaintiff opposes the motion. In the interest of judicial economy, the two pending motions are consolidated and disposed of in the following Decision and Order.

*Background and Party Submissions*

According to the complaint, Plaintiff allegedly sustained personal injuries as a result of an automobile accident that occurred on November 25, 2009, at or near the intersection of Allerton Avenue in the Bronx, New York. According to his verified bill of particulars, as a result of the

accident, Plaintiff sustained the following injuries, among others: (1) tear of the posterior horn of the lateral meniscus of the right knee, along with chondromalacia patella and synovitis of the right knee, (2) disc bulging in the lumbar spine as well as paravertebral tenderness, spasms, and straightening of the normal lumbar lordosis, (3) decreased range of motion in the lumbar and cervical spine. The right knee injuries allegedly forced Plaintiff to undergo arthroscopic surgery.

In support of the motion, Defendants submit the affirmed report of Jeffrey N. Lang, M.D., a neuroradiologist who examined the MRIs of Plaintiff's right knee, cervical spine, and lumbar spine. With respect to the right knee, Dr. Lang opined that there were no post-traumatic findings secondary to this accident. Rather, there were chronic changes of the patellar tendon. With respect to the cervical spine, Dr. Lang opined that there were no abnormalities or post traumatic findings related to the accident. As for the lumbar spine, Dr. Lang again found no post-traumatic findings and opined that it was a "normal MRI of the lumbosacral spine."

Defendants also submit the sworn report of Alan M. Crystal, M.D., who conducted an independent orthopedic examination of Plaintiff on January 24, 2013. At the exam, Plaintiff admitted to an earlier 2008 motor vehicle accident which resulted in "minor injuries." Plaintiff told Dr. Crystal that he had previous right knee surgery in 2002 or 2003. Notably, Dr. Crystal reviewed MRI exam reports of Plaintiff's right knee and lumbar spine as interpreted by "Dr. Leadon." The MRI report of the right knee stated under "impression" that Plaintiff had "intrasubstance degeneration changes" in the "medial and lateral menisci," and found "high position of the patella, which can be due to a partial tear of the patellar ligament, which has abnormal signal proximally. Please correlate clinically." An MRI report of the lumbar spine found "straightening of the usual lordosis" and a disc bulge at L4-L5. The report makes no opinion as to causation. Dr. Crystal also reviewed and annexed Plaintiff's right knee operative report. He highlighted that the report found a "tear of the posterior horn lateral meniscus" and "grade III to IV changes along the inferior pole of the patella along the medial facet."

Dr. Crystal then conducted a physical range of motion examination of Plaintiff. With respect to the lumbar spine, Plaintiff demonstrated forward flexion to 80 degrees (80 normal), extension to 20 degrees (20-30 normal), lateral flexion to 35 degrees (35 normal), lumbar/thoracic rotation was 45 degrees (45 normal). Plaintiff demonstrated full motor extremity

motor strength and knee motor strength. Dr. Crystal examined Plaintiff's left and right knees. With respect to the left knee, he found full range of motion with flexion to 135 degree. As for the right knee, Plaintiff was able to sit on the examination table and flex 100 degrees, but when he was in the supine position, he "resisted flexing his right knee beyond 45 degrees." There were no other abnormalities to the knees, or the foot/ankle. Dr. Crystal also examined Plaintiff's cervical spine, and found full or normal range of motion upon movement in all directions.

Dr. Crystal ultimately opined that Plaintiff's alleged injuries were not causally related to this accident. With respect to the cervical and lumbar spine, Dr. Crystal noted that Plaintiff had "no objective findings of a symptomatic herniated disc at a lumbar or cervical level causing nerve root impingement." Plaintiff also lacked any neurological findings or MRI findings of a nerve root impingement. Because of this, Dr. Crystal opined that there is "no basis to causally related the alleged injuries of record of the cervical and lumbar spine" to this accident. As for the right knee, Dr. Crystal notes that an impact to the anterior knee "does not have the biomechanics to cause a tear of the posterior horn of the lateral meniscus." He states that Plaintiff's 1/14/10 MRI of the right knee showed degenerative signals in the medial and lateral menisci, which is not unusual in a young population. Dr. Crystal also noted that the MRI had "zero findings of bone edema (contusion or bruise) of the patella-femoral joint, thus negating an claim of causality" of the findings to the impact injury. Upon consideration of the MRIs and the operative report, Dr. Crystal ultimately opines that there is no basis to causally relate the injuries to the accident because the injuries were degenerative in nature and not traumatically induced.

Defendants also submit Plaintiff's deposition transcript, where he testified that he was not confined to a bed or his home for any period of time following the accident.

Plaintiff opposes the motion. Although Plaintiff labels his submission as both opposition and a "cross-motion," the affirmation in support contains no request for affirmative relief aside from denial of the main motion. As "Exhibit A," Plaintiff submits his medical records from various providers. The unsworn records are annexed to an affirmation from Sonia Armengol, M.D., who affirms that the records are true and accurate. It does not appear, however, that Dr. Armengol rendered any treatment herself to the Plaintiff.

Plaintiff submits a sworn report from Mark C. McMahon, M.D. dated July 25, 2013. Dr.

McMahon reviewed Plaintiff's medical records and performed a physical examination. With respect to the right knee, Plaintiff complained of ongoing pain and stiffness, numbness and weakness. Plaintiff also complained of ongoing pain and weakness in the lumbar spine. He asserted that these injuries have restricted his normal daily activities. Dr. McMahon noted that Plaintiff ambulated with a cane and told him he could no longer play sports or stand/walk for a prolonged period of time. He noted that Plaintiff tore his anterior cruciate ligament playing basketball in 2003, requiring surgery, and also injured his right knee and lumbar spine in a 2008 motor vehicle accident. Upon physical examination, Plaintiff exhibited range of motion in the right knee to 90 degrees (normal 130) with positive objective testing and lowered motor strength. With respect to the lumbar spine, Plaintiff could flex to 75 degrees with pain (90 normal), extend to 10 degrees with pain (20 normal), bend to the left to 10 degrees with pain (25 normal), and to the right 20 degrees with pain (25 normal). Dr. McMahon ultimately diagnosed Plaintiff with various injuries to the right knee, a lumbar spine disc bulge at L4-5, and "cervical spine injury." He states that "the above diagnoses occurred as a result of the motor vehicle accident of November 25, 2009" and opines that the condition is "permanent."

Plaintiff also submits his own affidavit, wherein he asserts that he previously injured his right knee and lower back, but the injuries were resolved before the November 25, 2009 accident. Plaintiff states that he continues to have pain to this day, and cannot do things like he used to before the accident, like run and play basketball.

#### *Discussion*

Where a plaintiff is claiming serious injury arising from "permanent consequential limitation of use of a body organ, member, function or system" or "significant limitation of use of a body function or system" the determination of whether the limitation is "significant" or "consequential" relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose, and use of the body part (*Pommells v. Perez*, 4 N.Y.3d 566 [2005]; *Toure v. Avis Rent-A-Car Systems, Inc.*, 98 N.Y.2d 345 [2002]). Thus, to establish a claim under either of these categories, a plaintiff must submit medical proof containing objective, quantitative evidence with respect to diminished

range of motion or a qualitative assessment comparing plaintiff's present limitation to the normal function, purpose, and use of the affected body organ, member, function or system (*Toure, supra*). See also *Guzman v. Paul Michael Management*, 266 A.D.2d 508 [2<sup>nd</sup> Dept. 1999]). Expert medical evidence in the form of physician assessments must be supported by objective medical evidence such as MRI reports, CT scan reports and observations during examination (*Toure, supra*.)

When a defendant seeks summary judgment alleging that a plaintiff does not meet the threshold required to maintain a lawsuit, the burden is on the defendant to first establish that plaintiff's injuries are not serious (*Franchini v. Plameri*, 1 N.Y.3d 536 [2003]; *Brown v. Achy*, 9 A.D.3d 30 [1<sup>st</sup> Dept. 2004]). To meet their burden, defendants' medical evidence must not be conclusory and must be based on objective testing (*see Nix v. Xiang*, 19 A.D.3d 227 [1<sup>st</sup> Dept. 2005]). With regard to range-of-motion issues, defendant's medical doctor is required to specify the degree of plaintiff's range of motion and what constitutes normal range of motion (*Webb v. Johnson*, 13 A.D.3d 54 [1<sup>st</sup> Dept. 2004]). Where defendant's medical expert finds restricted range-of-motion, and a doctor believes they are self-imposed, the doctor must explain the reasons for the restricted range of motion and why the same are not related to the accident (*Style v. Joseph*, 32 A.D.3d 212 [1<sup>st</sup> Dept. 2006]).

Once defendant meets the burden of prima facie entitlement to summary judgment, such relief is warranted unless plaintiff can establish the existence of a serious injury through competent evidence. Plaintiff must, of course, establish that the injuries alleged were the result of the accident claimed and that the limitations alleged are the result of those injuries (*Noble v. Ackerman*, 252 A.D.2d 392 [1<sup>st</sup> Dept. 1998]). Plaintiff's evidence must be objective, contemporaneous with the accident, showing qualitative evidence of what restrictions, if any, plaintiff was afflicted with (*Blackmon v. Dinstuhl*, 27 A.D.3d 241 [1<sup>st</sup> Dept. 2006]). A medical expert's opinion establishing a serious injury which is based solely on plaintiff's subjective complaints will not be credited and will not preclude summary judgment in favor of defendant (*Zoldas v. Louise Cab Corporation*, 108 A.D.2d 378 [1985]). In order to be sufficient to establish a prima facie case of serious injury, the medical affirmation or affidavit proffered must contain medical findings, which are based on the physician's own examination, tests and

observations and review of the record rather than manifesting only the plaintiff's subjective complaints (*Bent v. Jackson*, 15 A.D.2d 46 [1<sup>st</sup> Dept. 2005]; *Thompson v. Abassi*, 15 A.D.3d 95 [1<sup>st</sup> Dept. 2005]).

Through their submissions, Defendants have established entitlement to summary judgment as a matter of law regarding Plaintiff's claims that he sustained a permanent consequential limitation of use of a body organ or member, or significant limitation of a body function or system. Defendants' medical expert Dr. Crystal has provided a sworn report indicating that there was no objective evidence of a herniation and any findings of a bulge were degenerative in nature and not causally related to this accident. Defendants' radiologist reviewed Plaintiffs' spine MRIs and concluded that they were "normal" with no post-traumatic findings. With respect to the right knee, Dr. Crystal reviewed Plaintiff's medical and operative records and opined that the injuries were degenerative, pre-existed this accident, and thus were not causally related. Likewise, Defendants' radiologist opined that the right knee contained "chronic degenerative changes of the patellar tendon."

In opposition, Plaintiff has failed to raise an issue of fact. The stack of "certified" medical records submitted are not in admissible form. Those records, containing reports from Dr. Hadassah Orenstain and Dr. R. Della Badia, are unsworn. Dr. Armengol does not affirm that the statements made in those records are true (CPLR 2106). Records containing medical opinions and diagnosis cannot be admitted as business records under CPLR 4518 (*Rickert v. Diaz*, 112 A.D.3d 451 [1<sup>st</sup> Dept. 2013]; *Komar v. Showers*, 227 A.D.2d 135 [1<sup>st</sup> Dept. 1996]). This is true where, as here, the plaintiff is offering those records to demonstrate a medical opinion as to causation (*cf. Salman v. Rosario*, 87 A.D.3d 482 [1<sup>st</sup> Dept. 2011]). The MRIs of Plaintiff's lumbar, cervical spine, and right knee taken in the months following the accident contain no opinion as to causation (*Ferber v. Madorran*, 60 A.D.3d 725 [2<sup>nd</sup> Dept. 2009]).

Moreover, the report of Dr. McMahon, who first examined Plaintiff some time in 2013, does not sufficiently address causation. Dr. McMahon's opinion is conclusory and speculative given the fact that it is based on a single examination of Plaintiff conducted almost five years after the accident (*Vaughn v. Baez*, 305 A.D.2d 101 [1<sup>st</sup> Dept. 2003]; *See also Guadalupe v. Blondie Limo, Inc.*, 43 A.D.3d 669 [1<sup>st</sup> Dept. 2007]). Further, even though he expressly reviewed

Dr. McMahon failed to address the defendants' experts' non-conclusory opinion that the spinal and knee injuries were degenerative in nature and pre-existed this accident (*see Lopez v. American United Trans, Inc.*, 66 A.D.3d 407 [1<sup>st</sup> Dept. 2009]). It also appears that Dr. McMahon did not examine Plaintiff's cervical spine. Under these circumstances, Dr. McMahon's opinion that Plaintiff's cervical, lumbar, and right knee injuries were related to this accident is insufficient to raise an issue of fact (*Cruz v. Martinez*, 106 A.D.3d 482 [1<sup>st</sup> Dept. 2013]).

Defendants have also met their burden of proof regarding Plaintiff's "90/180" claim, through medical evidence that the injuries and restrictions are not causally related to this accident (*see Venegas v. Sighn*, 103 A.D.3d 562 [1<sup>st</sup> Dept. 2013]). Again, in opposition, Plaintiff's experts failed to rebut or even address these assertions. Accordingly, Defendants are entitled to dismissal of these claims as well (*Jimenez v. Polanco*, 88 A.D.3d 604 [1<sup>st</sup> Dept. 2011]). Even if there were an issue with respect to causation, Plaintiff testified that he was not confined to bed or home following this accident (*see Martin v. Portexit Corp.*, 98 A.D.3d 63 [1<sup>st</sup> Dept. 2012]; *Seck v. Balla*, 92 A.D.3d 543 [1<sup>st</sup> Dept. 2012]).

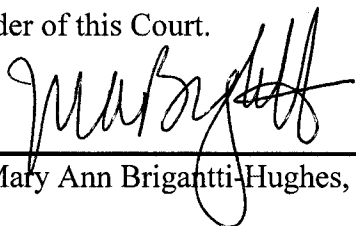
*Conclusion*

Accordingly, it is hereby

ORDERED, that Defendants' motion for summary judgment, dismissing the Plaintiff's complaint for failure to meet the "serious injury" threshold, is granted, and Plaintiff's complaint is dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: 2/18, 2014

  
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Hon. Mary Ann Brigantti-Hughes, J.S.C.