Lawrence v Beranbaum
2018 NY Slip Op 30477(U)
March 16, 2018
Supreme Court, Kings County
Docket Number: 513235/15
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of March, 2018

P R E S E N T :

HON. DEBRA SILBER,
Justice.

ANTHONY LAWRENCE and JELANI MARS,

Plaintiffs,

-against-

NANCY BERANBAUM and RAWLE SCOTT,

Defendants.

DECISION / ORDER

Index No. 513235/15
Mot. Seq. # 4 & 5
Submitted: 2/22/18

Papers numbered 1 to 38 were read on these motions:	Papers Numbered:
Notice of Motion/Order to Show Cause/Exhibits	1-14, 15-18
Affirmation in Opposition/Exhibits	19-33
Reply Affirmation/Exhibits	34-38

Defendant Scott Rawle, sued as Rawle Scott, moves, (Motion Sequence #4) and defendant Nancy Beranbaum cross-moves, (Motion Sequence #5) for summary judgment and dismissal of plaintiff Anthony Lawrence's complaint, pursuant to CPLR Rule 3212, on the grounds that plaintiff failed to sustain a "serious injury," as defined in Insurance Law § 5102(d). Plaintiff Anthony Lawrence opposes both motions. There is

no mention in the motion papers of the other plaintiff, who has also sued for injuries she claims she sustained in the accident.

The subject auto accident took place on August 24, 2014 at or near the intersection of East 16th Street and Glenwood Road in Kings County. At the time of the accident, plaintiff was a rear seat passenger in a vehicle driven by his friend, defendant Scott Rawle, and the other plaintiff was in the front passenger seat. Their vehicle was involved in a collision at the intersection with a vehicle owned and driven by defendant Nancy Berenbaum. Plaintiff claims he sustained injuries from the accident to his right knee as well as to his cervical and lumbar spine as a result of the accident (bill of particulars). At the time of the accident, plaintiff was twenty years old.

Movants have made a *prima facie* case with objective medical findings with regard to the following applicable categories of injury:

- a permanent consequential limitation of use of a body organ or member
- a significant limitation of use of a body function or system
- a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident

As regards plaintiff's claim, set forth in his bill of particulars, that he sustained "a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident," the plaintiff's EBT indicates that the accident happened during his summer break from college, and he would have returned to school a few

weeks later, when school started in September, except he did not have the funds for the tuition [Page 67]. In his bill of particulars, plaintiff claims he was confined to his home for one week following the accident.

Defendant Rawle's IME doctor, orthopedist Edward A. Toriello, M.D., examined plaintiff on January 25, 2017 and reports a completely normal exam. [Exhibit K] He tested the range of motion in plaintiff's lumbar and cervical spine as well as in his left knee, and the results are all within normal limits. Dr. Toriello claims that plaintiff has fully recovered from the strains he sustained to his spine and the contusion to his knee as a result of the collision.

Defendant also provides affirmations from Dr. Melissa Sapan Cohn, a radiologist, who reviewed the plaintiff's MRIs. [Exhibits H, I and J] With regard to the plaintiff's lumbar MRI, taken on October 2, 2014, she states that it is a normal exam. With regard to the MRI of the plaintiff's cervical spine, taken October 9, 2014, she reports there is a "minimal disc bulge" at C5-C6. With regard to the plaintiff's right knee MRI, taken September 11, 2014, Dr. Cohn states "there is signal abnormality within the posterior horn of the medial meniscus. This does not clearly intercept the articular surface and is most consistent with intrameniscal mucoid degeneration. This represents degeneration of the meniscus which is due to chronic wear and tear. In my opinion, there is mild degeneration of the posterior horn of the medial meniscus. There are no findings consistent with an acute traumatic related injury."

Defendant Rawle also provides a record of Dr. Ksenia Pavlova's initial examination of plaintiff, on October 27, 2014. She reports that plaintiff's range of motion in his spine was completely normal, but she noted that his right knee had a

reduced range of motion, although she does not state the numeric test result. She referred plaintiff for physical therapy.

The defendants have thus met their burden of proof and demonstrated that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the subject accident.

Plaintiff opposes the motion. His papers include an attorney's affirmation, his affidavit, an affirmation from a doctor and his medical records with a certification from the records custodian. Also included are inadmissible MRI reports.

Chronologically, plaintiff first provides the medical records of doctors Pavlova and Parisien, who were practicing in the same facility at the time plaintiff was treating. [Exhibit 2] The certification of the records as business records pursuant to CPLR 4518 is only applicable for those records that are in fact day-to-day business records and not narrative reports prepared for litigation. Nor does the certification turn other facilities' records into admissible records. As the Second Department states in *Irizarry v Lindor*, 110 AD3d 846, 847 [2d Dept 2013]:

> "Contrary to the plaintiff's contention, the certification of the medical records and reports by the records custodian of the subject medical facility was not sufficient to properly place the medical conclusions and opinions contained in those records and reports before the court, since those opinions must be sworn to or affirmed under the penalties for perjury (see McLoud v Reyes, 82 AD3d 848, 919 NYS2d 32 [2011]; Buntin v Rene, 71 AD3d 938, 896 NYS2d 894 [2010]; Pagano v Kingsbury, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). Consequently, the various unaffirmed conclusions and opinions of the plaintiff's treating physicians were not submitted in a form necessary to oppose the motion (see Grasso v Angerami, 79 NY2d 813, 588 NE2d 76, 580 NYS2d 178 [1991]; Balducci v Velasquez, 92 AD3d 626, 627-628, 938 NYS2d 178 [2012]; Scheker v Brown, 91 AD3d 751, 751-752, 936 NYS2d 283 [2012]). . .the plaintiff demonstrated no excuse whatsoever for failing to meet the 'strict requirement of tender in admissible form' (Zuckerman v City of New York, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; see Merriman

v Integrated Bldg. Controls, Inc., 84 AD3d 897, 899, 922 NYS2d 562 [2011])."

The initial exam of Dr. Parisien was two days after the accident, August 26, 2014. Plaintiff reported that his right knee hit the back of the front seat and he was experiencing considerable pain in his neck, lower back and right knee. Dr. Parisien tested the range of motion of plaintiff's cervical and lumbar spine and his right knee and found significant restrictions. He referred plaintiff to physical therapy and prescribed a cervical collar, an orthopedic pillow, a knee support and other items. The nerve conduction studies performed yielded normal results. The contemporaneous records of plaintiff's physical therapy indicates he was treating regularly until February of 2015.

By March 24, 2015, plaintiff reported to Dr. Parisien that he was feeling better and wanted to be discharged from physical therapy. On that date, Dr. Parisien tested the range of motion of plaintiff's cervical and lumbar spine and of his right knee. He reports that plaintiff's range of motion was normal and his pain was "minimal" so he instructed plaintiff to continue his exercises at home. On this date, both Dr. Parisien and plaintiff signed this "discharge" report. There is nothing else in this exhibit with a later date.

Plaintiff's doctor's affirmation is from Dr. Francis Joseph Lacina, dated May 15, 2017. Dr. Lacina states that plaintiff is under his care, but it is clear that he did not examine plaintiff until May 10, 2017, three years after the accident. He has not rendered any treatment to plaintiff, or at least he does not describe any. He summarizes the findings of plaintiff's first doctor, Dr. Jules Parisien, and plaintiff's subsequent doctors, and of plaintiff's MRIs, but this part of his report is inadmissible hearsay and cannot be considered. See *Shmerkovich v Sitar Corp.*, 61 AD3d 843 [2d

Dept 2007]; *Randio v Thomas*, 270 AD2d 767 [3d Dept 2000].

Dr. Lacina reports his findings, after testing the plaintiff's range of motion on May 10, 2017. He reports significant restrictions in the range of motion of plaintiff's lumbar and cervical spine and of plaintiff's right knee. He does not state what tool he used, nor does he state which entity's guidelines he used for the "normals."

Dr. Lacina then states that "I came to the final conclusion that [plaintiff] is suffering from the following: partial tear of anterior cruciate ligament; linear tear in the posterior horn of the medial meniscus; disc bulge impinging upon ventral thecal sac at L4-L5; disc bulge indenting the ventral thecal sac at C5-C6 level; sprain of ligaments of cervical and lumbar spine." Finally, Dr. Lacina states "assuming the facts presented by him are accurate . . . I confirm that there exists a direct causal relationship between the conditions described and the accident . . . to a reasonable degree of medical certainty."

This May 10, 2017 exam is insufficient to overcome the motion and raise an issue of fact, as a doctor who first sees a plaintiff three years after the accident cannot establish causation. Particularly where the plaintiff informed his treating doctor on March 24, 2015 that he was feeling better and did not need any further treatment, and then did not return for any further treatment. This creates what is known as a "break in the chain of causation." While Dr. Lacina avers that the plaintiff's injuries were indeed caused by the subject motor vehicle accident, the court must consider whether his conclusion is legally competent or if the gap in time between the accident on August 24, 2014 and his May 10, 2017 exam "breaks the chain of causation." The court concludes that it does, as Dr. Lacina has not relied on any medical record created after March 24, 2015 in reaching his conclusions. (*Cornelius v Cintas Corp.*, 50 AD3d 1085 [2d Dept

2008].)

The court concludes that plaintiff has not overcome the motion and raised a triable issue of fact as to whether he sustained a "serious injury" pursuant to Insurance Law § 5102(d) with regard to any of the applicable categories of injury.

Therefore, defendant's motion and cross motion for summary judgment are granted, and the complaint is dismissed as to plaintiff Anthony Lawrence.

This constitutes the decision and order of the court.

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court