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| Stankov v DGA Sec. Sys., Inc. |
| 2018 NY Slip Op 30482(U) |
| January 5, 2018 |
| Supreme Court, Queens County |
| Docket Number: 7007/15 |
| Judge: Leslie J. Purificacion |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS Part 39

OS

VOJISLAV STANKOV,

Index Number: 7007/15

Plaintiff,

-against-

DGA SECURITY SYSTEMS, INC. and
JONATHAN N. BERNAL,

Defendants.

FILED
JAN 17 2018
COUNTY CLERK
QUEENS COUNTY

DECISION/ORDER

Seq: 2

The following papers numbered 1 to 4 read on defendants' motion pursuant to CPLR §3212 dismissing the complaint of the plaintiff Vojislav Stankov ("Stankov") for failure to meet the serious injury threshold requirement of Insurance Law §5102.

Papers
Numbered

- N.M., Aff., Exhibits and Service.....1-4
- Opp, Aff., Exhibits and Service.....5-8

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action commenced by summons and complaint to recover for personal injuries allegedly sustained by plaintiff in a rear-end motor vehicle accident that occurred on Queens Blvd. on October 14, 2014. Issue was joined upon defendants' answer on July 1, 2015. In the instant motion, defendants contend that plaintiff's alleged injuries do not meet the threshold requirement of Insurance Law §5102, and based upon the findings of the independent medical examinations and plaintiff's prior history, that plaintiff can never prove causation.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact, (see CPLR §3212[b]; Alvarez v Prospect Hosp., 68 N.Y.2d 320; Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851; Zuckerman v City of New York, 49 N.Y.2d 557). The question of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment and defendant in seeking same has the burden to show that plaintiff's injuries do not rise to the level of those set forth in the statute (see Gaddy v Eyler, 79 N.Y.2d 955; Licari v Elliot, 57 N.Y.2d 230). This may be accomplished through submission of plaintiff's deposition testimony and/or affidavits, affirmations or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiff's claim (see Grossman v Wright, 268 A.D.2d 79; Toure v Avis Rent A Car Sys., 98 N.Y.2d 345).

In the instant motion, defendants submit, among other documents, the transcript of plaintiff's sworn deposition testimony, the verified bill of particulars, the supplemental bill of particulars, an affirmed report from an orthopedic surgeon, Dr. Edward Toriello, dated September 16, 2016, and a sworn independent medical examination report by Dr. Anthony Spataro dated December 29, 2014. The bill of particulars, in sum, allege plaintiff suffered cervical and lumbar herniations, bulges and sequela, and right knee tear without surgery, and right hip sprain.

On September 16, 2016, Dr. Toriello conducted an orthopedic examination of the plaintiff's cervical spine, lumbar spine, knees, hips, and right and left wrists and hands. He reviewed a series of reports from Dr. Hostin dated in 2014, 2015 and 2016, an x ray

report dated November 17, 2014, and a MRI report dated November 25, 2014. A MRI report dated November 17, 2014 revealed a linear cartilage tear of the patella with marrow edema and evidence of intramodullary rodding of the femur with a joint effusion and popliteal cyst.

A range of motion was conducted according to AMA Guidelines and measured with a goniometer and inclinometer. The physical exam of plaintiff's lumbar spine, knees, hips, both wrists and hands were all within normal range of motion. Plaintiff's cervical spine revealed bilateral bending of 45 degrees (normal is 45 degrees), cervical extension of 22 degrees (normal is 60 degrees), cervical flexion was 30 degrees (normal is 50 degrees) and cervical rotation of 45 degrees (normal is 80 degrees). There were complaints of pain by plaintiff at the extremes of motion. There was no muscle spasm or atrophy.

Dr. Toriello found that plaintiff's cervical strain, lower back strain, right knee contusion and right hip contusion had resolved. Dr. Toriello opined that the plaintiff exhibited no objective evidence of continued disability, that the resolved injuries are not causally related to the injury, and that plaintiff had significant degenerative changes in his right knee which antedated this accident, and were not causally related or exacerbated by this accident.

In a March 23, 2017 addendum to this report, Dr. Toriello reaffirms that his earlier opinion of September 2016 remains unchanged, and concludes plaintiff has fully recovered from his injuries sustained in the October 30, 2014 accident.

The IME conducted by Dr. Spataro on December 29, 2014 of plaintiff's cervical spine, lumbar spine, knees, hips, and right and left wrists and hands revealed normal

range of motion. Dr. Spataro reviewed the reports of Dr. Pappas dated November 3, 2014. Dr. Perper dated November 26, 2014, Dr. E. Hostin dated November 12, 2014, therapy notes and other documents. Dr. Spataro opined plaintiff's cervical, thoracic and lumbar strain, right hip/knee contusion had resolved and that there was no evidence of orthopedic disability, no medical necessity of physical therapy, and plaintiff was able to perform all activities of daily living and can seek employment without restrictions or limitations.

Dr. Toriello and Dr. Spataro's affirmations establish prima facie that the plaintiff did not sustain a "serious injury" as a result of the motor vehicle accident. Thus, the burden shifts to the plaintiff to come forward with sufficient evidence that he sustained serious injuries (see, Gaddy v Eyler, 79 NY2D 955).

In opposition to the motion, plaintiff submits the affirmations of Dr. Mike Pappas and Dr. Emmanuel Hostin dated June 19, 2017 and Dr. Narayan Paruchuri dated June 7, 2017.

Plaintiff was treated on November 3, 2014 and further examined on November 24, 2014, December 22, 2014, February 2, 201[5], March 19, 2015, May 7, 2015, June 18, 2015, March 10, 2016, May 5 2016, June 16, 2016, July 2016 and April 25, 2017 by Dr. Pappas. Plaintiff gave prior history to Dr. Pappas of two prior accidents. At plaintiff's deposition, he testified to had been in two prior accidents where he was riding a motor cycle. He suffered injuries to his neck and right leg and jammed his finger from an accident in October 2004, and he suffered a femur fracture to his right leg from an accident in 2005. Dr. Pappas states that plaintiff informed him that plaintiff underwent

surgery for the 2005 accident and underwent a MRI which revealed herniated discs in the 2004 accident which plaintiff stated was resolved 3-4 years afer that accident.

Dr. Pappas measured the range of motion of the cervical and lumbar spine which revealed 30% or more in limitation. An examination of plaintiff's spine revealed a lumbar extension of 19 degrees (normal is 30 degrees), lumbar flexion was 62 degrees (normal is 90 degrees), right cervical rotation of 54 degrees (normal is 80 degrees), left cervical rotation of 47 degrees (normal is 80 degrees), and cervical extension of 35 degrees (normal is 60 degrees). There was pain to palpation over the right cervical and lumbar paraspinal musculature and tenderness to the right knee/leg. There was pain with the hip flexion and external and internal rotation.

Upon review of the radiology report Dr. Paruchuri and examinations of plaintiff, Dr. Pappas opined that this accident exacerbated plaintiff's cervical spinal injuries (cervical disc herniations at C3/4, C4/5, C5/6 and C6/7, and disc bulges at C4/5, and caused significant neurological compromise (lateral recess stenosis and foraminal impingement within the thecal sac impaingment at C6/7), as the direct factor of plaintiff's pain, loss of function and loss of range of his lower back and right knee. He further states that plaintiff has suffered permanent significant limitations of use and a loss of function in this lumbar, cervical spine and right knee caused by the motor vehicle accident on October 30, 2014.

With respect to plaintiff's right hip and knee injuries, plaintiff was treated on November 12, 2014 by Dr. Emmanuel Hostin. Plaintiff gave his history of two prior accidents. Plaintiff was treated and further examined on February 5, 2015, March 23, 2016 by Dr. Hostin. Dr. Hostin measured the range of motion of the right knee which

revealed a 16% loss, or more in limitation. Dr. Hostin opined that the accident of October 2014 was a direct factor of plaintiff's injury to his right knee and plaintiff sustained an exacerbation to his right hip injury.

Plaintiff received epidural injections from pain from Dr. Perper; one to the neck on February 14, 2015 and two to the back for the pain on January 15, 2015 and February 28, 2015. Plaintiff also received trigger shots to the back once or twice. Plaintiff was on pain medication prescribed by Dr. Perper for a couple of months.

Dr. Pappas, Dr. Hostin and Dr. Spataro examined plaintiff in November 2014 less than a month after the accident. In sum, Dr. Pappas and Dr. Hostin arrived at contrary conclusions from that of Dr. Spataro and Dr. Toriello on the issue of whether plaintiff has suffered a serious injury, and on causation due to plaintiff's prior accidents. Dr. Spataro found no limitations in range of motion, and Dr. Pappas found more than 30% limitation in range of motion in certain areas of plaintiff's spine. In 2016, two years after the accident, Dr. Toriello examines plaintiff and finds limitations in certain areas of plaintiff's cervical spine and concludes plaintiff has fully recovered. Dr. Toriello further opines that plaintiff's resolved injuries are not causally related to the accident. However, Dr. Pappas acknowledging plaintiff's prior accident history states that his injuries were exacerbated.

The crux of defendants' motion is that plaintiff will be unable to prove causation. However, plaintiff has provided sufficient evidence through doctor affirmations supported by medical records which may give rise to an opinion on the issues of serious injury and on causation. As material issues of fact exist, defendant's motion for summary judgment pursuant to CPLR § 3212 is denied.

This is the decision and order of the court.

Dated: January 5, 2018



Hon. Leslie J. Purificacion, J.S.C.

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