SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Adam Silvera Part 22

LAWRENCE COLLEYMORE,

Plaintiff,

-against-

TWENTY FIRST STREET VEHICLE CORP. and ABOU SANOH,

Defendants.

DECISION/ORDER

INDEX NO. 151714/16
MOTION SEQ. NO. 002

Defendants Twenty First Street Vehicle Corp. (Vehicle Corp.) and Abou Sanoh move, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint on the grounds that plaintiff Lawrence Colleymore did not suffer a "serious injury," within the meaning of Insurance Law § 5102 (d), when the vehicle that he was driving on December 22, 2014, was struck by a vehicle owned by Vehicle Corp. and driven by Sanoh. The accident (Accident) occurred at, or near, the intersection of East 117th Street and Park Avenue in Manhattan. For the reasons that follow, the motion is denied.

The No-Fault Law, Insurance Law § 5102, et seq., guarantees to a person injured in an automobile accident recovery of basic economic loss, including payment of medical bills, while barring litigation to recover for non serious physical injuries. "Serious injury" is defined as:

> "permanent loss of a body organ, member, function or system; permanent consequential limitation 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 90 days during the 180 days immediately following the occurrence of the injury or impairment,"

Insurance Law § 5102 (d).

Plaintiff contends that, as the result of the Accident, he suffered injuries to his neck, back, and left knee. He submits MRIs of his cervical and lumbosacral spine, and of his left knee. Defendants' expert A. Robert Tantleff, M.D., a board certified radiologist who reviewed these MRIs, concludes that all of the injuries that they show are degenerative in nature, rather than having been caused by a trauma, such as an automobile accident. Accordingly, defendants have made a prima facie case for dismissal of the complaint.

It is undisputed that the MRI of plaintiff's left knee shows a linear meniscal tear and a slight supra patellar effusion. Dr. Robert Schepp, who performed the subject MRIs, does not opine about the cause of the injuries shown on them. However, Kenneth McCulloch, M.D., a board certified orthopedic surgeon, to whom plaintiff was referred, states in his affidavit as follows that he examined plaintiff's left knee on February 10, 2015 and found medial joint line tenderness over the posterior aspect of the knee. McMurray's test, which ascertains whether the meniscus is torn, was positive. A range of motion test showed a restriction of motion from 0 to 130 degrees, as compared to a normal range of 0 to 150 degrees. Plaintiff returned for a follow-up examination on February 23, 2015, complaining of continuing persistent pain in his left knee, and of difficulty walking, kneeling, squatting, and using stairs. On March 26, 2017, Dr. McCulloch performed a left knee arthroscopic partial medial meniscectomy, partial lateral meniscectomy, and arthroscopic tricompartmental synovectomy on plaintiff's left knee. At that time, plaintiff's range of motion was restricted to 0-110 degrees. After six weeks of post-operative physical therapy, plaintiff reported a large improvement in his left knee, but continuing pain with prolonged periods of standing and sitting, kneeling, squatting, or twisting. His range of motion was limited to 0 to 130 degrees, compared to the normal range of 0 to 150 degrees. Dr. McCulloch's professional opinion is that, in view of his diagnostic findings, and in view of the

consistency of plaintiff's complaints, plaintiff's left knee injuries prevent plaintiff from performing his normal daily activities; those injuries are serious; they were causally related to the December 22, 2014 accident; and their effects are permanent.

In addition, Denny X. Rodriguez, M.D. avers that, on December 29, 2014, he conducted testing on plaintiff, using a handheld goniometer. Range of motion of the cervical spine was to 45 degrees, as compared to a normal range of 55 degrees. Flexion was to 40 degrees (normal 45 degrees), left rotation was to 50 degrees (normal 70 degrees), right rotation was to 20 degrees (normal 70 degrees) left lateral bending to 30 degrees (normal 40 degrees), right lateral bending to 10 degrees (normal 40 degrees). Testing of the lumbar spine showed flexion to 70 degrees (normal 90 degrees), extension to 15 degrees (normal 30 degrees), left and right rotation to 20 degrees (normal 30 degrees), and left and right lateral bending to 15 degrees (normal 35 degrees). On February 4, 2015, plaintiff underwent EMG testing that showed evidence of bilateral C5, C6 cervical nerve root irritation.

Thereafter, plaintiff remained in physical therapy for five months, followed by a home exercise program. Plaintiff returned to Dr. Rodriguez's office on June 1, 2017, complaining of continuing pain in his neck, lower back, and left knee. Dr. Rodriguez performed range of motion testing of plaintiff's cervical spine, which showed extension to 35 degrees (normal 55 degrees), flexion to 40 degrees (normal 45 degrees), left lateral bending to 25 degrees (normal 40 degrees), and right lateral bending to 20 degrees (normal 40 degrees). Dr. Rodriguez notes that, as compared to the range of motion testing performed on December 29, 2014, plaintiff's condition, and his restriction of motion, have worsened. Dr. Rodriguez adds that range of motion studies of plaintiff's lumbar spine showed minimal improvement, as compared to December 2014, and range of motion testing of plaintiff's left knee, which showed flexion to 120 degrees (normal 150

degrees) showed no improvement since that time. Dr. Rodriguez opines, on the basis of his diagnostic findings and of plaintiff's complaints, that plaintiff's injuries are serious and permanent in nature, and that they are causally related to the Accident.

The affidavits of doctors McCulloch and Rodriguez suffice to raise a triable issue as to whether plaintiff suffered serious injuries as the result of the Accident. Citing *Reyes v Brito* (57 AD3d 395 [1st Dept 2008]) *Reyes v Esquilin* (54 AD3d 615 [1st Dept 2008]), and *Becerril v Sol Cab Corp* (50 AD3d 261, 261 [1st Dept 2008]) defendants argue that, because neither Dr. McCulloch, nor Dr. Rodriguez, discuss the opinion of Dr. Tantleff, their opinions must be disregarded. None of those cases holds that a plaintiff's expert must expressly discuss the testimony of a defendant's expert. Indeed, the Appellate Division, First Department, has repeatedly held to the contrary.

> "To the extent that defendants raised an issue as to degeneration, plaintiff's physicians adequately addressed the issue by ascribing her injuries to a different, yet equally plausible explanation—the accident."

Morcira v Mahabir, 158 AD3d 518, 519 (1st Dept 2018)(internal citations omitted).

Accordingly, it is

ORDERED that the motion of defendants Twenty First Street Vehicle Corp. and Abu Sanoh for summary judgment is denied; ad it is further

ORDERED that, within thirty days of entry, plaintiff shall serve a copy of this order upon all parties, together with notice of entry.

Dated: June 18, 2018

ENTER:

Hon. Adam Silvera, J.S.C.