Cano v City of New York
2020 NY Slip Op 34070(U)
December 11, 2020
Supreme Court, New York County
Docket Number: 156859/2017
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** 52

Justice

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HECTOR CANO,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SANITATION, JIMMY MOSCOSO

Defendant.

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INDEX NO. 156859/2017

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 38, 39, 40, 41, 42, 43, 44, 45, 48

were read on this motion to/for DISMISSAL.

This is a personal injury action arising out of injuries allegedly sustained by plaintiff when he was involved in a motor vehicle accident on November 10, 2016. Plaintiff alleges that as a result of the accident, he has sustained serious physical injuries as defined by Insurance Law §5102(d).

Defendants move for summary judgment pursuant to CPLR 3212, on the grounds that the evidence establishes the plaintiff has a degenerative condition not casually related to the underlying incident in this action. Plaintiff opposes the instant motion on the grounds that defendants have failed to establish a prima facie entitlement to judgment as a matter of law and that there are questions of fact as to the cause of plaintiff's injuries. For the reasons set forth below, defendants' motion is granted, and the complaint is dismissed.

"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 from the case". *Winegrad v New York University Medical Center*, 64

NY2d 851, 853 [1985]. Once such entitlement has been demonstrated by the moving party, the burden shifts to the opposing party to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]". *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980].

This action involves the no-fault law, which allows for first party benefits for those parties who can establish serious injuries sustained in vehicular accidents. Section 5102 (d) of the Insurance Law provides the relevant categories:

> "... permanent loss of use of a body organ, member, function or system; 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 and eighty days immediately following the occurrence of the injury or impairment."

After the collision plaintiff was transported to the hospital in an ambulance. While at the hospital, x-rays were taken, no fractures were found, and plaintiff was discharged and instructed to take over the counter pain medication. Plaintiff testified that he missed three to four days from work from his job as an air condition and heating technician and was working with another technician, when he ordinarily worked alone, for approximately one month after this accident.

Here, defendants contend that they have established that plaintiff did not sustain a serious injury pursuant to Insurance Law §5102(d). In support of this position, defendants rely upon the independent medical examination by defendants' doctor and an objective examination by the doctors at New York Presbyterian hospital, that treated plaintiff immediately after the subject accident. The x-ray reports from New York Presbyterian with respect to the cervical spine state that "there are multilevel degenerative changes with disc space narrowing."

Defendants' doctor, Dr. Morgenstein performed various tests and found plaintiff's range of motion to be normal and found that cervical sprains/strains are attributable to pre-existing degenerative disc disease. Based upon the medical records and doctor's affidavit, and plaintiff's sworn testimony, defendants have met their initial burden of establishing that plaintiff did not sustain a "serious injury" pursuant to Insurance Law §5102(d), and the burden shifts to plaintiffs to raise a triable issue of fact.

In opposition, plaintiff proffers the affirmations of Dr. Payne, Dr. Ushyarov and Dr. DeMoura, physicians that treated plaintiff after the subject motor vehicle accident. Preliminarily, the Court notes that Dr. DeMoura began treatment of plaintiff on June 3, 2019, over 2 years after the subject accident. Dr. Payne's affidavit does not state that plaintiff suffered a serious injury. Noticeably absent from all affidavits is any mention of plaintiff's degenerative condition. The affidavits are silent as to what objective tests were used to test plaintiff's range of motion. The Appellate Division First Department has consistently held that "affirmation of plaintiff's treating physician…[which fail to] state what objective tests, if any, were used to determine any restriction of motion" is insufficient to create questions of fact to defeat a motion for summary judgment. *Chen v Marc*, 10 AD3d 295, 296 [1st Dept 2004]. Thus, both Dr. DeMoura and Dr. Ushayrov's affidavits are "deficient because [they] failed to identify the objective tests […] employed to measure plaintiff's range of motion". *Nagbe v Minigreen Hacking Group*, 22 AD3d 326 326, [1st Dept 2005]. Thus, plaintiff has failed to raise a triable issue of fact sufficient to preclude summary judgment.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and this action is dismissed; and it is further

ORDERED that the clerk of the Court shall enter judgment accordingly.

12/11/2020
DATE

LYLE E. FRANK, J.S.C.
HON. LYLE E. FRANK
J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE