Francois v Big Team Inc.
2019 NY Slip Op 35132(U)
October 2, 2019
Supreme Court, Bronx County
Docket Number: Index No. 21646/2018E
Judge: John R. Higgitt
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: **PART 14**

--X

FRANCOIS, CHERUBIN

Index №. **21646/2018E**

- against -

Hon. **JOHN R. HIGGITT**,
A.J.S.C.

BIG TEAM INC., et ano

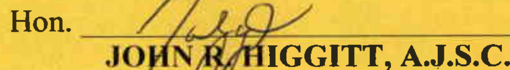
--X

The following papers in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (DEFENDANT)**, noticed on **June 12, 2019** and duly submitted as No. **32** on the Motion Calendar of **September 25, 2019**

	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	18-29
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	32-34
Replying Affidavit and Exhibits	36
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, defendants' motion for summary judgment on the ground that plaintiff did not sustain a "serious injury" in the subject July 13, 2015 motor vehicle accident is granted in part, in accordance with the annexed decision and order.

Dated: **10/02/2019**

Hon. 
JOHN R. HIGGITT, A.J.S.C.

Check one:
☐ Case Disposed in Entirety
■ Case Still Active

Motion is:
☐ Granted ■ GIP
☐ Denied ☐ Other

Check if appropriate:
☐ Schedule Appearance
☐ Fiduciary Appointment
☐ Referee Appointment
☐ Settle Order
☐ Submit Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14
---X
CHERUBIN FRANCOIS,

Plaintiff,

- against -

BIG TEAM INC. and DANHAI D. MARTIN,

Defendants.
---X

DECISION AND ORDER

Index No. 21646/2018E

John R. Higgitt, J.

Upon defendants' May 10, 2019 notice of motion and the affirmation, exhibits and memorandum of law submitted in support thereof; plaintiff's undated affirmation in opposition and the exhibit submitted therewith; defendants' September 25, 2019 affirmation in reply; and due deliberation; defendants' motion for summary judgment on the ground that plaintiff did not sustain a "serious injury" in the subject July 13, 2015 motor vehicle accident is granted in part.

Plaintiff alleges injuries to the cervical and lumbar aspects of his spine.[1] Although he declined to particularize the Insurance Law § 5102(d) categories under which he claims "serious injury" (*see* CPLR 3043[b][6]), it is apparent from the injuries alleged that the relevant categories include permanent consequential limitation, significant limitation and 90/180-day injury (*see Khamidov v Chase Manhattan Bank, N.A.*, 18 Misc 3d 137[A], 2008 NY Slip Op 50283[U] [App Term 2d Dept 2008]).

In support of the motion, defendants submit the affirmed reports of orthopedic surgeon Dr. Denton and neurologist Dr. Elkin, the uncertified police accident report, and the transcript of

[1] Plaintiff's bill of particulars also alleges unspecified injuries to plaintiff's head, right leg, "left rib," chest and abdomen. Plaintiff's proof in opposition mentioned only cervical, lumbar and right knee complaints and assessments; accordingly, claims of "serious injury" premised on any other alleged injury are deemed abandoned (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *Henry v Carr*, 161 AD3d 424 [1st Dept 2018]), and the "serious injury" claims based on those alleged injuries are therefore dismissed (*see Ng v NYU Langone Med. Ctr.*, 157 AD3d 549 [1st Dept 2018]).

plaintiff's January 24, 2019 deposition testimony.

Dr. Denton examined plaintiff on February 20, 2019, approximately three and a half years after the accident. Dr. Denton measured full, greater than normal and decreased ranges of motion in the tested planes of plaintiff's cervical and lumbar spine, albeit without tenderness, spasm or positive results on objective provocative testing. Straight-leg raising was negative bilaterally, and Dr. Denton's neurological exam yielded normal results, with symmetrical reflexes, normal motor strength and intact sensation. With respect to plaintiff's right knee, Dr. Denton measured a minor limitation in range of motion, and all objective provocative testing yielded negative results. Dr. Denton concluded that plaintiff had sustained resolved cervical, lumbar and knee sprain/strain without objective evidence of orthopedic disability, and that any decreased ranges of motion were not correlated by positive objective findings.

Dr. Elkin examined plaintiff on March 20, 2019. Dr. Elkin measured full ranges of motion in all tested planes of movement of plaintiff's right knee and the cervical and lumbar aspects of his spine. Dr. Elkin's examination yielded no objective findings of neurological injury attributable to the accident, plaintiff's symptoms being consistent with muscle sprain. Dr. Elkin did not opine as to plaintiff's knee injury, deferring same to the appropriate specialist.[2]

With respect to plaintiff's right knee injury, defendants' proof was sufficient to meet their prima facie burden (*see Diakite v PSAJA Corp.*, 173 A.D.3d 535 [1st Dept 2019]; *Riollano v Leavey*, 173 AD3d 494 [1st Dept 2019]; *Tejada v LKQ Hunts Point Parts*, 166 AD3d 436 [1st

---

[2] Dr. Elkin noted that a cervical CT scan conducted in the emergency room following the accident showed degenerative changes and opined that, in the absence of objective neurological evidence, degeneration was the cause of plaintiff's pain and restriction in motion. Defendants, however, did not argue a lack of causation with respect to plaintiff's alleged cervical injuries, and merely raising facts that might potentially support a particular theory with actually arguing the theory is insufficient to deem the theory argued and properly before the court (*see e.g. Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492 [1st Dept 2016]). It is improper for the court to grant relief on the basis of a theory not raised by the parties (*see Collucci v Collucci*, 58 NY2d 834 [1983]; *see also Jones v U.S. Healthcare*, 282 AD2d 347 [1st Dept 2001], *lv dism* 96 NY2d 897 [2001]).

Dept 2018]), and plaintiff failed to raise an issue of fact, the recent examination of plaintiff, submitted in opposition, disclosing no evidence of limitation (*see Hayes v Gaceur*, 162 AD3d 437 [1st Dept 2018]). Defendants' experts were not required to review plaintiff's medical records (*see Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]) or films from imaging studies (*see Chintam v Fenelus*, 65 AD3d 946 [1st Dept 2009]) prior to forming their opinions. Dr. Denton's finding of a range-of-motion deficit was neither significant nor consequential within the meaning of the Insurance Law (*see Il Chung Lim v Chrabaszcz*, 95 AD3d 950 [2d Dept 2012]; *McLoud v Reyes*, 82 A.D.3d 848 [2d Dept 2011]).[3]

With respect to plaintiff's cervical and lumbar claims, defendants failed to meet their burden. Dr. Denton's findings of decreased ranges of motion conflicted with his opinion that plaintiff's injuries were resolved (*see Lewis v Revello*, 172 AD3d 505 [1st Dept 2019]; *Rosario v Cablevision Sys*., 160 AD3d 545 [1st Dept 2018]). Although Drs. Denton and Elkin found that plaintiff's injuries were resolved without objective evidence of orthopedic or neurological injury to support the limitations found by Dr. Denton, Dr. Denton's opinion that plaintiff's ranges of motion were subjective was conclusory (*see Johnson v Salaj*, 130 AD3d 502, 502 [1st Dept 2015]; *cf. Alston v Elliott*, 159 AD3d 575 [1st Dept 2018]; *Swift v N.Y. Transit Auth*., 115 AD3d 507 [1st Dept 2014]).

With respect to plaintiff's 90/180-day injury claim, defendants failed to meet their prima facie burden. The deposition testimony to which defendants referred did not encompass the relevant statutory time period, and defendants did not point to any potentially fatal allegations in plaintiff's bill of particulars (plaintiff alleged that he had been confined to home intermittently

---

[3] If it is found that plaintiff sustained any injury that constitutes a "serious injury," plaintiff is entitled to recover damages for any other injury causally related to the accident (*see Singer v Gae Limo Corp*., 91 AD3d 526 [1st Dept 2012]; *Rubin v SMS Taxi Corp*., 71 AD3d 548 [1st Dept 2010]; *see also Linton v Nawaz*, 14 NY3d 821 [2010]).

since the accident) (*see Sampson v Vinlo Cab Corp.*, 70 AD3d 405 [1st Dept 2010]). The defense experts' examinations of plaintiff, occurring years after the accident, were not probative on this claim (*see Quinones v Ksieniewicz,* 80 AD3d 506 [1st Dept 2011]; *Manrique v Warshaw Woolen Assocs*., 297 AD2d 519 [1st Dept 2002]).

Accordingly, it is

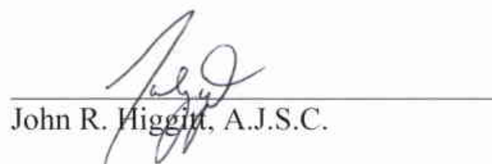
ORDERED, that the aspects of defendants' motion for summary judgment dismissing plaintiff's claims of "serious injury" to his right knee, head, right leg, "left rib," chest and abdomen are granted, and such claims are dismissed; and it is further

ORDERED, that the motion is otherwise denied.

The parties are reminded of the January 24, 2020 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: October 2, 2019



John R. Higgitt, A.J.S.C.