Fall v Bunce
2019 NY Slip Op 35135(U)
November 25, 2019
Supreme Court, Bronx County
Docket Number: Index No.: 24468/2018E
Judge: John R. Higgitt
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NEW YORK SUPREME COURT – COUNTY OF BRONX

Mtn. Seq. # 04

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

---X

FALL, MOUHAMADOU

Index №. **24468/2018E**

- against -

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

BUNCE, ANDREA T.

---X

The following papers in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (DEFENDANT)**, noticed on **September 12, 2019** and duly submitted as **No. 29** on the Motion Calendar of **October 21, 2019**

	Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	54-62
Notice of Cross Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits, Memorandum of Law	72-83
Reply Affidavit	96

Upon the foregoing papers, defendants' motion for summary judgment on the ground that plaintiff did not sustain "serious injuries," as defined in Insurance Law § 5102(d), is granted in part, in accordance with the annexed decision and order.

Dated: 11/25/19

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
MOUHAMADOU FALL,

Plaintiff,

- against -

ANDREA T. BUNCE, HECTOR CASTILLO AQUINO and CHRISTIAN JOHAN CASTILLO FRANCO,

Defendants.
---X

DECISION AND ORDER

Index No. 24468/2018E

John R. Higgitt, J.

Upon the August 14, 2019 notice of motion of defendants Hector Castillo Aquino and Christian Johan Castillo Franco (the "Franco defendants") and the affirmation and exhibits submitted in support thereof; plaintiff's September 9, 2019 affirmation in opposition and the exhibits submitted therewith; and due deliberation; defendants' motion for summary judgment on the ground that plaintiff did not sustain "serious injuries," as defined in Insurance Law § 5102(d), in the subject March 15, 2018 motor vehicle accident is granted in part.

As a result of the subject accident, plaintiff alleges injuries to his head, knees, left shoulder and the cervical and lumbar aspects of his spine. Plaintiff alleges "serious injury" under the categories of significant limitation and permanent consequential limitation.

The Franco defendants submitted the affirmed expert reports of an orthopedic surgeon, Joseph C. Elfenbein, M.D., and a radiologist, Mark J. Decker, M.D., and the transcript of plaintiff's January 22, 2019 deposition testimony.

The Franco defendants demonstrate, prima facie, that plaintiff did not sustain significant or permanent consequential limitations to his left shoulder, cervical spine or lumbar spine as a result of the accident (*see Thompson v Bronx Merchant Funding Servs., LLC*, 166 AD3d 542, 543 [1st Dept 2018]; *Fernandez v Hernandez*, 151 AD3d 581, 581 [1st Dept 2017]). Dr. Elfenbein examined

plaintiff on February 18, 2019, finding normal ranges of motion in the cervical spine and lumbar spine and negative provocative testing. Dr. Elfenbein's examination of plaintiff's left shoulder revealed range-of-motion restrictions in forward flexion and abduction, both to 170 degrees of a normal 180 degrees. Dr. Elfenbein diagnosed plaintiff with cervical spine, lumbar spine and left shoulder sprains that he deemed resolved. The 10-degree deficits noted by Dr. Elfenbein are not "significant" within the meaning of the statute (*see Gaddy v Eyler*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230 [1982]; *Stevens v Bolton*, 135 AD3d 647, 648 [1st Dept 2016]; *Style v Joseph*, 32 AD3d 212, 214, n [1st Dept 2006]) and do not defeat the Franco defendants' prima facie showing (*see Karounos v Doulalas*, 153 AD3d 1166, 1167 [1st Dept 2017]; *Sone v Qamar*, 68 AD3d 566 [1st Dept 2009]).

Moreover, the Franco defendants demonstrated, prima facie, that plaintiff's left shoulder and lumbar spine injuries were not causally related to the subject accident by submitting evidence that such injuries were due to preexisting degenerative conditions (*see Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]; *Linton v Nawaz*, 62 AD3d 434, 439 [1st Dept 2009], *affd* 14 NY3d 821 [2010]; *see also Sosa-Sanchez v Reyes*, 162 AD3d 414, 414 [1st Dept 2018]; *Hessing v Carroll*, 161 AD3d 462, 462 [1st Dept 2018]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Dr. Decker reviewed films from the March 24, 2018 MRIs of plaintiff's lumbar spine and left shoulder. Dr. Decker opined that plaintiff's lumbar spine MRI revealed facet hypertrophy at the L3-L4 and L4-L5 levels, which he deemed longstanding and not causally related to the subject accident. In the left shoulder, Dr. Decker found capsular thickening, more prominent in the anterior, and degeneration and tears of the superior labrum and anterior inferior labrum. Dr. Decker concluded that these findings were longstanding and not causally related to the subject accident.

The Franco defendants also assert that there is an unexplained gap in plaintiff's treatment that severs any causal connection between the accident and plaintiff's injuries (*see Pommells v Perez*, 4

NY3d 566, 574 [2005] ["a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so"]). The Franco defendants note plaintiff's testimony that he stopped all treatment related to the claimed injuries approximately two months following the accident, and that he feels "better." However, plaintiff also testified that he scheduled further medical appointments, but he could not return for treatment because insurance stopped paying and he did not have insurance. Plaintiff's testimony that he ceased treatment when coverage was terminated constitutes "the bare minimum required to raise an issue regarding 'some reasonable explanation' for the cessation of physical therapy" (*Windham v NY City Tr. Auth.*, 115 AD3d 597, 598-599 [1st Dept 2014], quoting *Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 907 [2013]). Moreover, plaintiff testified that on his January 2019 trip to his native country of Senegal he pursued "traditional medicine" treatments for his back on three occasions.

The Franco defendants failed to establish, prima facie, that plaintiff did not sustain a "serious injury" of his head or knees under the categories of "permanent consequential" and "significant" limitations. Plaintiff's bill of particulars alleges that the accident caused plaintiff's head and knees to hit the driver's seat and that plaintiff briefly lost consciousness. Plaintiff claimed that he sustained a cerebral concussion and post-concussion syndrome as a result of the subject accident causing blurry vision, dizziness and worsening of his preexisting stuttering. Plaintiff also testified that the injury to his head caused memory loss.

Here, the Franco defendants' expert, Dr. Elfenbein, reviewed plaintiff's verified bill of particulars and examined plaintiff on February 18, 2019 but offered no opinion as to whether plaintiff sustained a "serious injury" as result of the claimed head or knee injuries. Because the Franco defendants failed to address plaintiff's claim of "serious injury" based upon the head and knee injuries, the court need not consider the sufficiency of plaintiff's opposition papers on these claims

(*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Vishevnik v Bouna*, 147 AD3d 657, 658 [1st Dept 2017]; *Perez v Hilarion*, 36 AD3d 536, 537 [1st Dept 2007]; *Han v BJ Laura & Son, Inc.*, 122 AD3d 591, 593 [2d Dept 2014]).

In opposition, plaintiff submitted the affirmations of a physiatrist, Dina Nelson, M.D., a neurologist, Peter C. Kwan, M.D., a radiologist, David Payne, M.D., a neuroradiologist, Karl L. Hussman, M.D., and an orthopedic surgeon, Gabriel L. Dassa, D.O., F.A.A.O.S.; medical records from St. Barnabas Hospital and Physical Medicine & Rehabilitation of NY, P.C. ("PMR"); plaintiff's affidavit dated September 12, 2019; and photographs of the subject vehicles.

Plaintiff's evidence is sufficient to raise an issue of fact as to whether he sustained "permanent consequential" and "significant" limitations of use of his lumbar spine as a result of the accident (*see Holloman v American United Transp. Inc.*, 162 AD3d 423, 424 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518 [1st Dept 2018]; *Perdomo v City of NY*, 129 AD3d 585, 586 [1st Dept 2015]; *Rosado v Wadolowski*, 128 AD3d 454, 455 [1st Dept 2015]; *Kang v Almanzar*, 116 AD3d 540, 541 [1st Dept 2014]). On March 20, 2018, Dr. Nelson examined plaintiff, finding tenderness in the bilateral sacroiliac joint and bilateral gluteal muscle, range-of-motion limitations in the lumbar spine and positive straight-leg raising on the left. On April 24, 2018 and July 31, 2018, Dr. Nelson re-examined plaintiff's lumbar spine, finding continuing range-of-motion restrictions that Dr. Nelson causally related to the subject accident. Dr. Nelson opined that plaintiff had reached maximum medical improvement with formal physical therapy and diagnosed plaintiff with a partial disability. Dr. Payne reviewed films from the March 24, 2018 MRI of plaintiff's lumbar spine, finding a right foraminal herniation at T12/L1 and multilevel bulging discs, all with impingement.

On May 3, 2019, Dr. Dassa examined plaintiff, finding muscle spasm from L1 through L5, decreased range of motion in the lumbar spine, and a positive straight leg raising on the right side at 10 degrees. Dr. Dassa concluded that plaintiff sustained musculoligamentous injury and traumatic

disc displacement to his lumbar spine. Dr. Dassa opined that plaintiff's injuries were permanent.

Plaintiff's submissions are sufficient to raise a triable issue of fact as to whether plaintiff sustained a significant, but not permanent, limitation of use of the left shoulder as a result of the subject accident (*see Kang v Almanzar*, 116 AD3d at 541; *Kone v Rodriguez*, 107 AD3d at 538). Dr. Nelson examined plaintiff's left shoulder initially on March 20, 2018, finding anterior tenderness, impingement and range-of-motion restrictions with pain. Dr. Nelson causally related plaintiff's shoulder injuries to the subject accident and recommended an MRI and an orthopedic consultation of the left shoulder. Dr. Payne reviewed films from the March 24, 2018 MRI of plaintiff's left shoulder, finding tendinosis of the anterior fibers of the supraspinatus and an anteroinferior labral tear. On April 24, 2018 Dr. Nelson examined plaintiff, finding continuing symptoms and range-of-motion limitations in the left shoulder and diagnosed plaintiff with left shoulder derangement, a labral tear and tendinosis. Dr. Nelson found plaintiff partially disabled and directed him to continue physical therapy.

However, Dr. Nelson's July 31, 2018 examination of plaintiff's left shoulder revealed full range of motion without restrictions. While Dr. Dassa's May 3, 2019 examination of plaintiff found range-of-motion limitations in the left shoulder and positive provocative testing, Dr. Dassa's opinion that such limitations are causally related to the subject accident and that plaintiff sustained a permanent left shoulder injury is rendered speculative by his failure to reconcile Dr. Nelson's earlier findings of normal range of motion with his recent findings (*see Alverio v Martinez*, 160 AD3d 454, 455 [1st Dept 2018]; *Rose v Tall*, 149 AD3d 554, 555 [1st Dept 2017]; *Khanfour v Nayem*, 148 AD3d 426, 427 [1st Dept 2017]; *Booth v Milstein*, 146 AD3d 652, 652-653 [1st Dept 2017]).

With respect to plaintiff's claimed cervical spine injuries, plaintiff's March 15, 2018 CT Scan noted findings of mild degenerative disc disease at the C5-6 and C6-7 levels. Dr. Dassa further noted that plaintiff's CT scan did not demonstrate any traumatic findings. Plaintiff failed to raise a triable

issue of fact as to whether the claimed cervical spine injuries were causally related to the subject accident because his experts fail to address or contest the evidence of degeneration, noted in plaintiff's own records, or explain why the preexisting degenerative condition could not have been the cause of his conditions (*see Auquilla v Singh*, 162 AD3d 463, 464 [1st Dept 2018]; *Hessing v Carroll*, , 161 AD3d at 463; *Farmer v Ventkate Inc.*, 117 AD3d 562, 562 [1st Dept 2014]).

Accordingly, it is

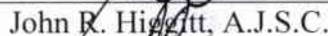
ORDERED, that the aspects of defendants' motion seeking summary judgment dismissing (1) plaintiff's claims under the permanent consequential limitation category of Insurance Law § 5102(d) with respect to his cervical spine and left shoulder, and (2) plaintiff's claims under the significant limitation category of Insurance Law § 5102(d) with respect to his cervical spine, are granted, and these claims are dismissed; and it is further

ORDERED, that the motion is otherwise denied.

The parties are reminded of the December 6, 2019 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: November 25, 2019



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