

151 A.D.3d 594
Supreme Court, Appellate Division, First Department, New York.

Ariel CABRERA, Jr., Plaintiff–Appellant,
v.
APPLE PROVISIONS, INC., et al., Defendants–Respondents.

No. 4311.
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Index No. 302984/13.
|
June 20, 2017.

Synopsis

Background: Passenger in motor vehicle brought negligence action against owner and operator of other vehicle, seeking recovery for personal injuries allegedly sustained when vehicles collided. The Supreme Court, Bronx County, [Ben R. Barbato](#), J., granted summary judgment to owner and operator. Passenger appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] owner and operator of motor vehicle established prima facie that passenger did not sustain serious injuries meeting no-fault law’s threshold for tort recovery, and

[2] opinion of passenger’s treating physician was speculative, and thus insufficient to raise triable issue of fact.

Affirmed.

West Headnotes (4)

[1]	Judgment Torts
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	Owner and operator of motor vehicle established prima facie that passenger in other vehicle did not sustain serious injuries meeting no-fault law's threshold for tort recovery, on summary judgment motion in passenger's negligence action seeking recovery for personal injuries allegedly sustained when vehicles collided; owner and operator submitted expert report of orthopedist, who found full range of motion in passenger's allegedly injured spine and left knee and opined that alleged injuries had resolved, expert also opined that passenger's MRI reports of spine were unremarkable and that MRI report of knee showed injuries that were not causally related to accident. McKinney's Insurance Law § 5102(d). Cases that cite this headnote
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[2]	Judgment Matters of fact or conclusions
	Opinion of passenger's treating physician was speculative, and thus insufficient to raise triable issue of fact on motion for summary judgment as to whether passenger sustained serious injury to cervical spine meeting no-fault law's threshold for tort recovery in passenger's action against owner and operator of vehicle that collided with passenger; physician failed to explain inconsistencies between her findings of deficits before and after findings of full range of motion. McKinney's Insurance Law § 5102(d). Cases that cite this headnote

[3]	Automobiles Nature of injury; serious or permanent injury
	Under no-fault law, five-degree deficit in range of motion of passenger's left knee was too minor in extent, degree, and duration to support a serious injury claim involving significant limitation of use, in passenger's action against owner and operator of vehicle that collided with passenger. McKinney's Insurance Law § 5102(d). Cases that cite this headnote

[4]	Automobiles Nature of injury; serious or permanent injury
	Passenger did not sustain 90/180–day category of injury meeting no-fault law’s threshold for tort recovery against owner and operator of motor vehicle that collided with passenger’s, where passenger admittedly stayed home for just two days after the accident before returning to work and his left knee injury resolved within about two months after the accident. McKinney’s Insurance Law § 5102(d). Cases that cite this headnote

Attorneys and Law Firms

Sim & Record, LLP, Bayside ([Sang J. Sim](#) Of counsel) for appellant.

Picciano & Scahill, P.C., Bethpage (Andrea E. Ferrucci of counsel), for respondents.

FRIEDMAN, J.P., [RENWICK](#), [MANZANET–DANIELS](#), [KAPNICK](#), [GESMER](#), JJ.

Opinion

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered July 7, 2016, which granted defendants’ motion for summary judgment dismissing the complaint based on plaintiff’s inability to establish a serious injury within the meaning of [Insurance Law § 5102\(d\)](#), unanimously affirmed, without costs.

[1] Defendants established entitlement to judgment as a matter of law in this action where plaintiff alleges that he suffered serious [injuries to his spine](#) and left knee as a result of a motor vehicle accident that occurred in January 2013. Defendants submitted an expert report of an orthopedist, who found full range of motion in those body parts and opined that the alleged injuries had resolved (see [Clementson v. Price](#), 107 A.D.3d 533, 967 N.Y.S.2d 357 [1st Dep.2013]). The expert also opined that plaintiff’s MRI reports of the spine were unremarkable and that the MRI report of the knee showed injuries that were not causally related to the accident.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff submitted no evidence of any medical examination after March 2013, and therefore did not demonstrate any permanent consequential limitation of use of any body part (see [Kang v. Almanzar](#), 116 A.D.3d 540, 984 N.Y.S.2d 42 [1st Dept.2014]; see also [Vega v. MTA Bus Co.](#), 96 A.D.3d 506, 507, 946 N.Y.S.2d 162 [1st Dept.2012]).

[2] As to the cervical spine claim, plaintiff’s treating physician found normal range of motion in February 2013, but some limitations a month later. The physician’s failure to explain the inconsistencies between her findings of deficits before and after the findings of full range of motion, renders her opinion speculative (see [Santos v. Perez](#), 107 A.D.3d 572, 574, 968 N.Y.S.2d 43 [1st Dept.2013]; [Colon v. Torres](#), 106 A.D.3d 458, 965 N.Y.S.2d 90 [1st Dept.2013]). As to the lumbar spine, plaintiff’s treatment records showed that he had normal or near-normal lumbar spine range of motion within two months after the accident, which is insufficient to support a serious injury claim (see [Gaddy v. Eyler](#), 79 N.Y.2d 955, 957, 582 N.Y.S.2d 990, 591 N.E.2d 1176 [1992]; [Eisenberg v. Guzman](#), 101 A.D.3d 505, 506, 956 N.Y.S.2d 21 [1st Dept.2012]).

[3] Regarding the left knee, plaintiff presented medical evidence of a lateral [meniscal tear](#), which his physician stated was causally related to the subject accident. However, his physician failed to make any measurements of his knee, relying on unaffirmed records of his surgeon, which was impermissible (see [Malupa v. Oppong](#), 106 A.D.3d 538, 539, 966 N.Y.S.2d 9 [1st Dept.2013]). In any event, the last measurement found in the surgeon’s records showed only a five-degree deficit in range of motion, which, again, was too minor in extent, degree and duration to support a serious left [knee injury](#) claim involving significant limitation of use (see [Gaddy v. Eyler](#), 79 N.Y.2d at 957, 582 N.Y.S.2d 990, 591 N.E.2d 1176; [Vasquez v. Almanzar](#), 107 A.D.3d 538, 539–540, 967 N.Y.S.2d 361 [1st Dept.2013]).

[4] As for the 90/180-day claim, defendants met their prima facie burden of refuting plaintiff's allegations in his bill of particulars that he was confined to bed for two months and home for six months after the accident, by submitting his deposition testimony that he stayed home for just two days after the accident and returned to work by May 2013. They also submitted the opinion of their expert, who opined that plaintiff's medical records did not demonstrate a [knee injury](#) caused by the accident or a spinal injury that would result in deficits. In opposition, plaintiff submitted no evidence to demonstrate he sustained a "medically determined" injury ([Insurance Law 5102](#) [d]). Instead, his medical records show he was able to work shortly after the accident and that his left [knee injury](#) resolved within about two months after the accident (see [Figueroa v. Ortiz](#), 125 A.D.3d 491, 492, 4 N.Y.S.3d 172 [1st Dept.2015]).

All Citations

151 A.D.3d 594, 57 N.Y.S.3d 471, 2017 N.Y. Slip Op. 05044

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