

Magloire v Jarrett

2018 NY Slip Op 32227(U)

September 11, 2018

Supreme Court, Kings County

Docket Number: 506620/2016

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

CHRISTOPHER A. MAGLOIRE,

Plaintiff,

-against-

DOUGLAS E. JARRETT and ARNEL F. JOSEPH,

Defendants.

DECISION / ORDER

Index No. 506620/2016

Motion Seq. No. 3

Date Submitted: 6/21/18

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.

| Papers | NYSCEF Doc. |
|---|--------------------|
| Notice of Motion, Affirmation and Exhibits Annexed..... | <u>15</u> |
| Affirmation in Opposition and Exhibits Annexed..... | <u>17-26</u> |
| Reply Affirmation..... | <u>27</u> |

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising out of a motor vehicle accident.

Defendants move for summary judgment dismissing the plaintiff's complaint, pursuant to CPLR Rule 3212, on the ground that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d). For the reasons which follow, the motion is denied.

On December 11, 2015, plaintiff was riding a bicycle on Avenue I near the intersection of Brooklyn Avenue in Brooklyn, when he was hit by a motor vehicle owned by defendant Arnel F. Joseph and operated by defendant Douglas E. Jarrett that was making a left turn. The plaintiff's bill of particulars alleges that as a result of the collision,

plaintiff sustained injuries to his neck, back, knee and right shoulder.

Igor Rubinshteyn, M.D., an orthopedist who examined plaintiff on July 10, 2017 on behalf of the defendants, found mostly normal ranges of motion, with some reductions in the lumbar spine and hips, and concludes that as a result of the December 11, 2015 accident, plaintiff suffered only sprains to his cervical and lumbar spine, right shoulder and knees, which have resolved, undercutting any claim of a serious injury (*see Meely v 4 G's Truck Renting Co.*, 16 AD3d 26, 30 [2d Dept 2005]). In addition, plaintiff acknowledged in his deposition testimony that he missed less than one month of work and was confined to bed and home for less than a month (Exh D at 70, 72-73). Thus, plaintiff's own testimony defeats any claim that he was prevented from performing substantially all of his customary daily activities for 90 out of the 180 days following the accident (*see Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007]). However, Dr. Rubinshteyn does not explain the disc herniations or the knee and shoulder tears plaintiffs' doctors' diagnosed, nor does he explain the losses in plaintiff's range of motion which he observed.

The court finds that defendants have not made out a prima facie case for summary judgment with this one doctor's affirmation.

Even assuming defendants did make a prima facie showing of their entitlement to summary judgment, plaintiff has raised an issue of fact sufficient to defeat summary judgment, based upon the affirmation of Howard I. Baum, M.D. [Exhibit I] (*see White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]; *Young Chan Kim v Hook*, 142 AD3d

551, 552 [2d Dept 2016]; *Khaimov v Armanious*, 85 A.D.3d 978, 978–79 [2d Dept 2011]; *Duarte v Ester*, 247 AD2d 356, 357 [2d Dept 1998]). Dr. Baum last examined plaintiff on February 7, 2018. He states that, as a result of the plaintiff's injuries, diagnosed by MRIs and EMGs, which are described in plaintiffs' bill of particulars, plaintiff has symptoms of pain and clicking in the left knee and complained of pain while navigating stairs and conducting the activities of daily living. Plaintiff had symptoms of pain in the right shoulder, especially on overhead motion, and while attempting to reach behind his back with his right arm, and he had symptoms of lower back pain and neck pain radiating to the buttocks and shoulder regions, especially when bending. Dr. Baum found that compression of the plaintiff's knee elicited pain in the medial femoral condyle and patellofemoral pain, and that plaintiff had abnormal synovial thickening behind the knee cap and a limited range of motion in his knees, which is attributable to the trauma sustained in plaintiff's accident, with likely further deterioration requiring further medical intervention, including possible surgery. Similarly, Dr. Baum found significant restrictions in the range of motion in the plaintiff's right shoulder and positive signs in testing, indicating a labral tear and tendinitis, which is also likely to deteriorate and require surgery. Dr. Baum's examination of the plaintiff's lumbar spine demonstrated spasm, guarding and tenderness and plaintiff had significant limitations in his range of motion in all directions. The positive straight leg raising test is indicative, Dr. Baum states, that the plaintiff's back pain is produced by the herniated disc. The examination of the plaintiff's cervical spine also demonstrated significant limitations in plaintiff's range of motion, accompanied by spasms, guarding and tenderness. Dr. Baum diagnoses plaintiff with post-traumatic cervical and lumbar herniated disc syndrome with

radiculopathy. He found that plaintiff's disc injuries were "somewhat compensated" for by his young age (plaintiff is in his late 20s), but that further deterioration is expected, which will require future medical treatment. Dr. Baum concludes, based upon a review of plaintiff's medical records and radiological findings, plaintiff's medical history, the extent of his injuries and his relatively young age and the lack of prior trauma or symptoms, that the injuries to plaintiff's knees, right shoulder, lower back and neck and resulting pain and limitations of function of these body parts are of traumatic origin and were caused by the plaintiff's accident of December 11, 2015. He states that the plaintiff's condition is permanent and his functioning will not improve but rather will deteriorate with time.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: September 11, 2018

ENTER:



Hon. Debra Silber, J.S.C.
Hon. Debra Silber
Justice Supreme Court