

Doughty v McCray

2018 NY Slip Op 32344(U)

September 17, 2018

Supreme Court, Kings County

Docket Number: 509826/2017

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

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

_____ x

WILLIAM DOUGHTY,

Plaintiff,

-against-

KEITH McCRAY and LAVA TRUCKING CORP.,

Defendants.

_____ x

DECISION / ORDER

Index No. 509826/2017

Motion Seq. No. 2

Date Submitted: 7/26/18

Cal No. 16

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>17-28</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>29-31</u>
Reply Affirmation.....	<u>33</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 on December 21, 2016 at the intersection of 23rd Avenue and Benson Avenue in Brooklyn, New York. At the time of the accident, plaintiff was sitting in a parked backhoe, which was knocked onto its side as a result of being struck by defendants' vehicle. Plaintiff's bill of particulars alleges that, as a result of the accident, he sustained bulging discs with stenosis throughout his lumbar and cervical spine, with lumbar and cervical radiculopathy, as well as injuries to his left shoulder, right knee and left wrist. Plaintiff has not returned to work since the accident.

Defendants contend that plaintiff, who is now 72 years old, did not sustain a

“serious injury” as a result of this accident inasmuch as his alleged injuries were pre-existing and degenerative conditions.

Defendants have not really made a prima facie showing of their entitlement to summary judgment. They provide affirmed medical reports from Marshall J. Keilson, M.D., Victor Sasson, M.D., and Arthur Fruauff, M.D. who all aver that plaintiff’s claimed injuries are not causally related to the subject accident (see *White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]; *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). However, as is explained below, even if defendants had made a prima facie case for summary judgment, the plaintiff overcomes it.

Marshall J. Keilson, M.D. conducted a neurological examination of plaintiff on February 15, 2018 and found normal ranges of motion in his cervical spine, but not in plaintiff’s lumbar spine. Dr. Keilson notes that plaintiff removed his back brace for the exam. Dr. Keilson found “no objective neurological signs to correlate with the subjective symptomatology.” He states that plaintiff “was neurologically intact with no objective signs of cervical or lumbar radiculopathy.” Dr. Keilson opines that the decreased range of motion he found “can be subjective in nature as testing is voluntarily controlled by the patient.” Dr. Keilson concludes that there is “no neurologically related disability or permanency.” A statement that the plaintiff is faking his tests can only be considered conjecture. It cannot non-suit a plaintiff in a motion.

Victor Sasson, M.D., who conducted an orthopedic examination of plaintiff on February 12, 2018, found normal ranges of motion in plaintiff’s cervical and lumbar spine, left shoulder, right knee and left wrist. Dr. Sasson concludes that plaintiff’s cervical and lumbar sprains have resolved, as has the sprain of the left shoulder,

contusion of the right knee, and the sprain/contusion of the left wrist. Dr. Sasson concludes that the multiple bulging discs with moderate stenosis in plaintiff's lumbar and cervical spine are degenerative and pre-existing and he found no objective evidence of a disability or any limitations.

Finally, Arthur Fruauff, M.D., a board-certified radiologist, reviewed the CT scans of plaintiff's spine and describes severe degenerative disc disease at C4-C5, C5-C6 and L5-S1, and degenerative disc disease throughout the plaintiff's cervical and lumbar spine, with stenosis, but "no findings secondary to the accident of 12/21/16."¹

However, the court finds that plaintiff has overcome the motion and raised a triable issue of fact as to whether he sustained a "serious injury," based upon the affidavit of Scott Leist, D.C., plaintiff's treating chiropractor. Scott Leist, D.C., found significant restrictions in the range of motion in plaintiff's cervical and lumbar spine when he first examined plaintiff on December 30, 2016. While the plaintiff's range of motion increased somewhat over time, when he examined plaintiff most recently on April 9, 2018, he still found significant restrictions in plaintiff's range of motion in both his cervical and lumbar spine. Further, he concludes that,

"based upon my examination of the patient, objective range of motion testing, the affirmation of Michael Rhee, M.D., regarding the abnormal CT Scan of the Cervical and Lumbar spines and abnormal EMG/NCV of the upper and lower extremities, positive orthopedic testing, together with subjective complaint made by William Doughty, it can be stated within a reasonable degree of chiropractic

¹As to the 90/180 day category, defendants rely on the fact that the bill of particulars states plaintiff only missed three weeks of work. However, that is inconsistent with the next item in the bill of particulars that shows 29 weeks of lost earnings, and other evidence in the record that plaintiff did not return to work after the accident. However, to the extent defendants claim a lack of causation for plaintiff's injuries, that would undermine any claim that plaintiff was out of work as a result of the accident.

certainty that the accident of December 21, 2016, caused, aggravated, precipitated and/or exacerbated William Doughty's injuries. The accident also caused restriction on motion in the patient's cervical and lumbar spine. As a result of the accident, William Doughty continues to presently suffer from the above noted restrictions of motion of the cervical and lumbar spine."

Dr. Leist concludes that the bulging discs, stenosis and radiculopathy in the plaintiff's cervical and lumbar spine are post traumatic in nature and was caused, aggravated, precipitated and/or exacerbated by the December 21, 2016 motor vehicle accident, as the plaintiff was asymptomatic prior to the accident. He states that plaintiff is disabled from work and states that he advised him not to return to work because plaintiff was unable to sit for extended periods, bend, lift, turn, rotate his neck or hold his head in an upright position, as is required to operate a backhoe.

Accordingly, it is

ORDERED that the motion is denied.

This shall constitute the decision and order of the court.

Dated: September 17, 2018

ENTER :



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**