Hawkins v Ahmed
2019 NY Slip Op 30171(U)
January 22, 2019
Supreme Court, Kings County
Docket Number: 504261/17
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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JOSEPH HAWKINS,

Plaintiff,

-against-

ROMANA AHMED and BABU KHAN,

Defendants.

---x

DECISION / ORDER

Index No. 504261/17
Motion Seq. No. 1
Date Submitted:11/15/18
Cal No. 28

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.....	14-22
Affirmations in Opposition and Exhibits Annexed.....	31-39
Reply Affirmations.....	41

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

This is a personal injury action arising out of a pedestrian-knockdown motor vehicle accident that occurred on December 1, 2015 at around 7:00 P.M. on Seventh Avenue near 38th Street in Manhattan. Plaintiff was working for Federal Express and unloading parcels from a truck, wearing a FedEx uniform, when he was knocked to the ground by a yellow cab owned by defendant Ahmed and driven by defendant Kahn, which was traveling down Seventh Avenue. Plaintiff was removed from the scene in an ambulance and taken to the Bellevue Hospital emergency room. At the time of the accident, plaintiff was 25 years old.

In his bill of particulars, plaintiff alleges that as a result of the accident, he

sustained a concussion and injuries to his cervical and lumbar spine and to his left knee.

The movants contend that plaintiff did not sustain a "serious injury" as a result of this accident; that plaintiff only had cervical and lumbar sprains and strains as a result of the subject accident, which have resolved with no continuing disability. Movants support their motion with an affirmation of counsel, the pleadings, plaintiff's bill of particulars, plaintiff's EBT transcript and affirmed IME reports from their examining neurologist, Dr. Chandra M. Sharma, M.D., (exam June 26, 2018) their examining orthopaedic surgeon Pierce Ferriter, M.D., (exam July 20, 2018) and a radiologist, Scott Springer, M.D., who reviewed the MRIs of plaintiff's cervical and lumbar spine.

Doctor Sharma examined plaintiff and reports that plaintiff's lumbar sprains and strains had resolved, and that it was a "normal neurological exam." However, the results of her range of motion testing of plaintiff's cervical and lumbar spine was far from normal. None of the numerical test results are normal. For example, for cervical extension, Dr. Sharma reports a result of 20 degrees, with 60 degrees being normal. For lumbar flexion, plaintiff's range of motion was reported as 30 degrees, with 60 degrees being normal. Dr. Sharma concludes that "these are subjective mechanical limitations due to perception of pain not confirmed on objective examination and do not represent neurological problems. Ranges of motion are normal during spontaneous activities." In other words, it appears that Dr. Sharma is saying that plaintiff was faking the test results.

Dr. Ferriter, an orthopedist, examined plaintiff three years after the accident and a month after Dr. Sharma examined him. Plaintiff told him, as plaintiff told Dr. Sharma, that he was experiencing regular pain in his neck, back and left knee. Dr. Ferriter's range of motion testing of plaintiff's neck, back and left knee produced completely

normal results. He concludes that plaintiff's sprains and strains have all resolved.

Putting aside the review of the MRI films, it is not clear to the undersigned whether the report of Dr. Sharma, in which the doctor claims the plaintiff faked his test results, can demonstrate a prima facie case for dismissal. This issue need not be determined however, as the defendants do not make a prima facie case with regard to the category "a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident."

Plaintiff testified at an EBT taken on May 14, 2018. He said he lives with his mother in Brooklyn, and had been employed by a subcontractor of FedEx Ground for about a year and a half at the time of the accident. His job entailed unloading a specific FedEx truck at Seventh Avenue and 38th Street and delivering the packages so the driver could remain in the truck. He testified that after the accident he received Worker's Compensation benefits weekly, after first receiving a lump sum months after the accident, until June or July of 2017 [Page 33 Lines 10-14]. He did not return to the same job, but started a different job in 2017 after his Worker's Compensation benefits ended. He is now a night security guard at a bank and is not required to lift heavy packages, or to lift anything, while he is working.

Defendants' attorney avers that they have made a prima facie case with regard to this category of injury because "this category requires proof that there was a causally related, medically determined injury . . . plaintiff testified that post accident he made no efforts to return back to work. In addition, plaintiff's bill of particulars set forth that plaintiff was . . . confined to his home for one month" [¶35]. This is insufficient as a

matter of law. Defendants do not acknowledge that on the same page of the transcript [Page 26] plaintiff was asked if he "received a salary payment through workers' compensation?" and answered "yes." When a plaintiff does not return to work for more than three months after the accident and receives Workers' Compensation benefits for loss of earnings, the court must conclude that he in fact had a medically determined injury which prevented him from returning to work. (*See Peplow v Murat*, 304 AD2d 633 [2d Dept 2003].)

As the defendants have not sustained their prima facie burden as to all of the applicable categories of injury in Insurance Law §5102(d), it is unnecessary to determine whether the papers submitted by the plaintiff in opposition to the motion are sufficient to raise a triable issue of fact. (*See, Yampolskiy v Baron*, 150 AD3d 795, 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140, 1140 [2d Dept 2017]; *Koutsoumbis v Pacciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011].

Accordingly it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: January 22, 2019

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court