

Ramirez v Stafford

2019 NY Slip Op 30228(U)

January 30, 2019

Supreme Court, Kings County

Docket Number: 504260/16

Judge: Debra Silber

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

NIGEL RAMIREZ,

Plaintiff,

-against-

SEAN M. STAFFORD,

Defendant.

DECISION / ORDER

**Index No. 504260/16
Motion Seq. No. 1
Date Submitted: 1/10/19
Cal No. 46**

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>11-18</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>21-25</u>
Reply Affirmations.....	<u>26</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 that occurred on January 26, 2016 at around 7:45 A.M. on Bradley Avenue near Van Dam Street in Queens. Plaintiff's vehicle was stopped for a red light when it was rear-ended by a vehicle owned and driven by defendant. Plaintiff was working at the time, but drove himself after the accident to the closest emergency room. He waited for several hours and was not seen, so he left [EBT Page 24]. He said he went instead to P. R. Medical, where he treated for seven to eight months. At the time of the accident, plaintiff was 37 years old. In his bill of particulars, plaintiff alleges that as a result of the accident, he sustained injuries to his cervical and lumbar spine.

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. Movant supports his motion with an affirmation of counsel, the pleadings, plaintiff's bill of particulars, plaintiff's EBT transcript and an affirmed IME report from an examining orthopedist, Edward Toriello, M.D.

The court notes that defendant seeks the court's permission to consider his motion despite the fact that it was filed late. Counsel avers that plaintiff failed to appear for his IME exam until July 18, 2018, which had been rescheduled several times, and that as soon as she received the IME report, she filed the motion the same day. This is supported by the court file, which indicates that the motion was prepared on July 31, 2018, and e-filed on August 3, 2018. The Compliance Conference Order, for example, states that the EBTs had been held and the plaintiff's IME was to take place prior to January 2, 2018. Thus, the court has considered the motion on its merits, even though it was filed later than 60 days from the date the Note of Issue was filed (April 6, 2018).

Dr. Toriello examined plaintiff on July 18, 2018, two and a half years after the accident. Plaintiff told him that he was still experiencing pain in his neck and back. Dr. Toriello's range of motion testing of plaintiff's neck and back (as well as his shoulders, elbows, wrists and hands) produced completely normal results. He concludes that plaintiff's back strains have resolved.

Plaintiff testified at an EBT taken on September 5, 2017. He said he lives with his wife, his mother and his kids in Brooklyn. On the date of the EBT, he was driving a truck for his employment, and had started that job in March of 2017. On the day of the accident, he was working for Ahern Equipment Rental, also as a truck driver. On the

day of the accident, he was driving a tow truck owned by his company. He had been employed by that company for two years prior to the accident. He did not miss any time from work as a result of the accident [Pages 13-14]. Subsequent to the accident, he had another motor vehicle accident, in January or February of 2017, when he rear-ended another vehicle that stopped short. He testified that he was not hurt in that accident and that he was driving his own car at the time. When asked if any lawsuit arose as a result of that accident, he said "no." [Page 31]. When asked whether this accident had any effect on his daily activities, plaintiff testified that he cannot work out at the gym as he used to, and he experiences discomfort when he plays basketball. Sometimes, he wakes up with a "stiff neck" and needs to stretch. If he sits or bends for a long period of time, he needs to stretch before walking [Page 36]. He has lost weight from lost muscle as he cannot do calisthenics any more.

The court finds that defendant has made a prima facie case with regard to all of the applicable categories of injury, including "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 opposes the motion with an attorney's affirmation, an affidavit from plaintiff, an affidavit from his chiropractor, an affirmation from his treating doctor and an affirmation from a radiologist.

Dr. Pervaiz Quershi, of P.R. Medical, P.C., states that plaintiff came to his facility on January 28, 2016, two days after the accident, complaining of pain to his neck and back. His initial diagnosis was that plaintiff had sustained sprains, and he prescribed physical therapy, which plaintiff began on February 3, 2016. Plaintiff came for physical

therapy three times a week for two months and then stopped because he told the doctor he was too busy. Then, plaintiff came to the facility for chiropractic treatment from May 2, 2016 to August 16, 2016. He referred plaintiff to have a CT scan of his cervical spine, which took place on February 18, 2016, and the doctor was informed that plaintiff had three bulges and one herniation in his cervical spine. He then changes his diagnosis after the follow up visit on February 29, 2016 from sprains to sprains and disc bulges and herniations, all of which impinged on the thecal sac anteriorly, which he states were all causally related to the accident. He concludes that these injuries are permanent and that plaintiff was disabled. Plaintiff did not see Dr. Quershi between April and August of 2016. In April, plaintiff complained of pain in his lower back, and pain radiating into his buttocks. When he went to see him on August 4, 2016, seven months after the accident, plaintiff reported pain in his lower back and numbness in his toes.

Nonetheless, plaintiff did not return to the doctor until September 10, 2018, two years later, so Dr. Quershi could prepare an affirmation to oppose the motion. He informed the doctor of his subsequent accident in February 2017, and told him he was not injured in that accident. Dr. Quershi examined plaintiff on September 10, 2018, and performed range of motion testing. He had done prior range of motion testing, but does not state what those results were. On this date, plaintiff had significant restrictions in the range of motion of his cervical spine, with pain and tenderness and spasm. The doctor repeats his diagnosis and states that "the injuries, impairment and disability sustained by the patient are causally related to the motor vehicle accident of January 26, 2016 and the mechanism of injury is entirely consistent with the clinical presentation in my office." He also states "it is my expert medical opinion, with a reasonable degree

of medical certainty, that as the patient continues to present with persistent neck and upper back pain and lower back pain as well as ongoing restricted range of motion of the cervical and thoracic spine, as well as lumbar radiculopathy, cervical radiculopathy . . . for more than two years after the instant motor vehicle accident, his injuries and limited range of motion findings are permanent.” Lastly, Dr. Quershi states “he remains disabled, and the injuries as diagnosed will continue to inhibit his ability to carry out his normal activities of daily living, such as work, household chores and other strenuous activities.”

Dr. Narayan Paruchuri, a radiologist, confirms that he read the CT scan of plaintiff’s cervical spine, and that he found a bulge at C3-4 with anterior thecal sac impingement, a herniation at C4-5, with anterior thecal sac impingement, a bulge at C5-6 with anterior thecal sac impingement, and a bulge at C6-7 with anterior thecal sac impingement.

Joon Lim-Germano, a chiropractor, confirms in his affidavit that plaintiff came to him for chiropractic treatment from May 2016 to August 2016. He too states that when he last examined plaintiff, “the injuries, impairment and disability sustained by the patient are causally related to the motor vehicle accident of January 26, 2016 and the mechanism of injury is entirely consistent with the clinical presentation in my office.”

The court finds the plaintiff was not telling the truth at his EBT with regard to his subsequent accident. That accident took place on June 21, 2016, according to the complaint filed by the plaintiff in that action against plaintiff here and Ahern Equipment Rentals, Kings County Ind. #520999/2016. The complaint states that Mr. Ramirez, the plaintiff herein, was driving a flatbed truck when he rear-ended the plaintiff in that action. Plaintiff herein was served with the lawsuit well before his EBT in this action,

and had answered the complaint. Nonetheless, it is not for the court to determine whether plaintiff was injured in that subsequent accident, which took place while plaintiff was still being treated for this accident. Issues of credibility are for the trier of fact.

The court finds that plaintiff has overcome the motion and raised a triable issue of fact as to whether he sustained a "serious injury" in his cervical spine, based upon the affirmed report of Dr. Quershi, who treated plaintiff and then examined plaintiff recently, on September 10, 2018. He concludes that the injuries to the plaintiff's cervical spine are causally related to the January 26, 2016 motor vehicle accident, are permanent, and that plaintiff still has significant restrictions in his range of motion as a result (*see Chul Koo Jeong v Denike*, 137 AD3d 1189, 1190 [2d Dept 2016]).

Accordingly it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: January 30, 2019

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court