Robinson v New York Cross Docking LLC
2019 NY Slip Op 32592(U)
August 28, 2019
Supreme Court, Kings County
Docket Number: 500504/17
Judge: Debra Silber

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

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OMARLO ROBINSON,

Plaintiff,

-against-

NEW YORK CROSS DOCKING LLC and RAFAEL A. ORTIZ,

Defendants.

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DECISION / ORDER

Index No. 500504/17
Motion Seq. No. 4
Date Submitted: 8/1/19

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.....	73-85
Affirmation in Opposition and Exhibits Annexed.....	87-92
Reply Affirmation.....	93

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 June 27, 2016 at around 12:50 P.M. on the Brooklyn Queens Expressway eastbound in Brooklyn, N.Y. Plaintiff testified that after the police came to the scene and wrote a report, he declined medical attention and was able to drive his car off the highway, pulled over, and called for a tow truck. He testified that the car was towed to his mother's home and one tire was replaced. His Infiniti has not otherwise been repaired. At the time of the accident, plaintiff was forty years old.

In his bill of particulars, plaintiff alleges that as a result of the accident, he sustained injuries, as well as "aggravation and/or exacerbation" of prior injuries, to his cervical, thoracic and lumbar spine, including multiple bulges and herniations. Two days

after the accident, he went to the emergency room at Kingsbrook Jewish Medical Center and commenced treatment for his injuries.

The movants contend that plaintiff did not sustain a "serious injury" as a result of this accident, and plaintiff suffered only sprains and strains as a result of the subject accident, which have resolved with no continuing disability. They further contend that plaintiff injured his back in two prior work-related accidents, neither of which were motor vehicle accidents, and in two prior motor vehicle accidents, and that his injuries are pre-existing and/or degenerative.

Movants support their motion with an affirmation of counsel, the pleadings, plaintiff's bill of particulars, plaintiff's EBT transcript as well as defendant driver's EBT and the responding police officer's EBT, and affirmed IME reports from their examining neurologist and a radiologist. The officer was deposed to explain why she reported on the police report that nobody was injured in the accident and other items thereon.

Dr. Richard Lechtenberg, a neurologist, examined plaintiff on September 18, 2017, a year after the accident. He also reviewed many of plaintiff's medical records. Plaintiff told him that he was still experiencing pain on a regular basis in his neck and back, with numbness in his left arm and hand. He was experiencing dizziness. He was having trouble sleeping. Dr. Lechtenberg was not provided with any information about plaintiff's prior accidents. Dr. Lechtenberg's range of motion testing of plaintiff's cervical and thoracic spine produced completely normal results, but his testing of plaintiff's lumbar spine indicated significant restrictions in his range of motion, which Dr. Lechtenberg attributes to plaintiff having "voluntary restricted excursions of the lumbar spine because of complaints of pain. Incidental movements revealed a largely normal range of motion of the lumbar spine." This puts the doctor's credibility at issue, which is

not for the court to decide. He also tested plaintiff's shoulders, ankles, hips, wrists, elbows and his knees. The results were normal. His "diagnosis/impression" is that "status post cervical, thoracic and lumbar spine sprains, per history, resolved." He concludes that "from a neurologic standpoint he is not disabled and can work . . . and perform his normal activities of daily living. . . . The MRIs [of the cervical, thoracic and lumbar spine report bulging and herniations in all three areas] . . . I personally reviewed the MRIs . . . from 7/21/16 and observed disc bulging at C3/C4, C4/C5, C5/C6, primarily to the left [not a herniation at C5/C6] . . . no substantial disc bulges or herniations [to the thoracic spine] and disc bulging at L3/L4, L4/L5, and L5/S1. There were no objective, clinical, neurologic deficits on my examination correlating with these findings."

Defendants also provide an affirmation from Marc J. Katzman, MD, a radiologist. It is single spaced, has half-inch margins and the font size is too small. The court has overlooked this, but asks that future motion papers comply with the rules. Section 202.5 (a) of the Uniform Rules for Trial Courts clearly states that all papers must be double spaced and have at least a one inch margin. CPLR 2101 unfortunately permits the font size to be 10 points, but custom and usage is to use 12 point type. Dr. Katzman seems to have used 8 point type. Dr. Katzman reviewed plaintiff's x-rays from the ER and his MRIs of his cervical, thoracic and lumbar spine.

Dr. Katzman finds that plaintiff has "multilevel degenerative disc disease of the cervical spine without evidence of recent post-traumatic injury, . . . no focal disc herniation, bulge, extrusion or annular tear [of the thoracic spine] . . . minimal chronic two-level degenerative disc disease of the lumbar spine without evidence of recent post-traumatic injury . . . [all of] which are clearly chronic, pre-existing and unrelated to the accident on 6/27/16."

Plaintiff testified at an EBT taken on August 15, 2017. He said he was in between jobs on the date of the accident. He had stopped working a month before the accident, in May of 2016. On the date of his EBT, plaintiff was working as a bus driver for a private school bus company. He testified that he had started that job in November of 2016, five months after the accident. Before that, he was a counselor at young Adult Institute for two years, until May of 2016. He does not have a claim for lost earnings. He testified that after the emergency room visit two days after the accident, he went to another facility a week after the accident and commenced a course of physical therapy, had the MRIs and nerve testing. He has not had any surgery or any injections, although it was recommended that he have injections to his spine by one doctor, and advised against having them by another doctor. It is unclear whether he received any prescriptions from any of the treatment providers, as Pages 91 and 92 are missing from the transcript and the question is asked at the bottom of Page 90. Omitted page 92[1] apparently includes the question about the activities plaintiff cannot do at all as a result of the accident. On Page 93, he lists the things he cannot do as well but still can do. There were no questions focused on the 90 days right after the accident, unless they are on the missing pages.

The court concludes that defendants have not made a prima facie case for dismissal under this category of injury, as they have not established that plaintiff was not prevented from performing substantially all of his daily activities for 90 out of the first 180 days after the accident (*see Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007]). There is nothing in the motion papers,

[1]These pages are also omitted from the transcript which was e-filed.

including plaintiff's EBT transcript which supports defendants' claim with regard to this category of injury.

Further, with regard to the categories of injury "a permanent consequential limitation of use" and "a significant limitation of use" as defined by Insurance Law § 5102(d), defendants' motion also fails to make a prima facie case for dismissal. Dr. Lechtenberg's affirmation is insufficient with regard to plaintiff's lumbar spine. Dr. Katzman, a radiologist, cannot make a prima facie case solely from a review of films. It is not possible to grant summary judgment solely on the affirmation of a radiologist who did not examine the plaintiff. The New York Court of Appeals has held that a defendant's allegations of a pre-existing condition based solely upon the defendant's radiologist's "conclusory notation" of a degenerative condition following review of an MRI and nothing more is "itself insufficient to establish that plaintiff's pain might be . . . unrelated to the accident" *Pommells v Perez*, 4 NY3d 566, 577-579 [2005]. See also *De La Cruz v Hernandez,* 84 AD3d 652 [1st Dept 2011].

Since the defendants have failed to meet their burden of proof as to all applicable categories of injury in Insurance Law §5102(d), the motion must be denied. It is unnecessary to consider the papers submitted by the plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 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]; and *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Nonetheless, for the purpose of a complete review, the court has considered plaintiff's papers in opposition and has determined that had the defendants made a prima facie case for dismissal, plaintiff overcomes the motion and raises triable issues of fact.

Plaintiff opposes the motion with an affirmation from counsel, an affidavit from plaintiff, an affirmation from Yolande Bernard, M.D., plaintiff's treating physician, accompanied by some of her office records, certified MRI reports, and certified records of Dr. Leon Reyfman, another of plaintiff's doctors.

Dr. Bernard states in her affirmation that plaintiff first came to her office at DHD Medical PC on July 5, 2016 and he treated there until December 4, 2017. Dr. Bernard states that plaintiff's injuries "are traumatically induced, permanent in nature and causally related to the accident of June 27, 2016." She states that following her exam on September 26, 2017, she determined that plaintiff had reached maximum medical improvement and was unlikely to improve further. She certifies to the accuracy of the records of his treatment annexed to her affirmation. The last item is a list of all of the dates he went for physical therapy, which encompasses the period from 7/5/16 to 12/4/17. Dr. Bernard examined plaintiff on April 15, 2019, presumably to prepare an affirmation in opposition to this motion. Plaintiff was still in considerable pain in his neck and back. She conducted range of motion testing and reports that plaintiff had a significant loss in his range of motion in his cervical and lumbar spine. Dr. Bernard states that the MRIs show bulges and herniations in plaintiff's spine, "degenerative finding are minimal" and which are "the causative factor of the patient's symptoms. Which explains the patient's radicular symptoms and restricted range of motion noted on my physical examination. It is my opinion that this is causality [sic] related to the patient

symptoms which began after the accident of 6/27/16." Dr. Bernard concludes "based on today's evaluation, with ongoing symptomatology and 2 years plus post his accident, and up to 13% loss of range of motion of the cervical spine and 17% loss of range of motion of the lumbar spine, it is my opinion with a reasonable degree of medical certainty that the patient has sustained a significant and permanent injury to cervical, thoracic and lumbosacral spine."

Dr. Leon Reyfman provides an affirmed report following an exam on January 3, 2017. His stationery indicates he is a pain management doctor. His report is in a type size even smaller than that employed by defendant's radiologist. He states that plaintiff came to see him for pain in his neck and back. He recommended epidural steroid injections, which plaintiff testified he declined. He recommended that plaintiff continue with physical therapy. He provides a diagnosis of "cervical disc displacement [and] lumbar radiculitis secondary to disc displacement."

The court finds that even had defendants made a prima facie case for dismissal, plaintiff has overcome the motion and raised a triable issue of fact as to whether plaintiff has sustained a "serious injury" as a result of the accident. Plaintiff has raised a "battle of the experts" sufficient to overcome the motion. (*See Burke v I Om Atif Hacking Corp.*, 146 AD3d 747 [2d Dept 2017]; *Hamdan v Taggart*, 154 AD3d 743 [2d Dept 2017].)

Accordingly it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: August 28, 2019

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court