Smalls v Cipriano Excavation Inc.
2019 NY Slip Op 33882(U)
December 24, 2019
Supreme Court, Kings County
Docket Number: 6399/2015
Judge: Devin P. Cohen

Supreme Court of the State of New York
County of Kings

Part 91

KENNETH SMALES

Plaintiff,

against

CIPRIANO EXCAVATION INC. AND DAVIDE VICARI,

Defendants.

Index Number 6399/2015
SEQ # 006

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	
Replying Affidavits.....	
Exhibits.....	
Other	

Upon the foregoing papers, defendants' motion for summary judgment on the issue of "serious injury" is decided as follows:

The moving party on a motion for summary judgment bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiff brings this action against defendants for personal injuries he claims to have sustained as a result of a June 7, 2012 motor vehicle accident. In order to prove damages, plaintiff must prove that he has injuries that satisfy one or more of the "serious injury" categories set forth in NY Insurance Law § 5102(d) (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]). In his bill of particulars, plaintiff alleges injuries to his neck, back, left shoulder, and left knee[1].

[1]Plaintiff only opposes defendants motion as to the left shoulder injuries. Plaintiff does not oppose defendants' motion as to the neck, back, and left knee injuries.

In support of their motion, defendants submit what they describe as records from Brooklyn Hospital Center. These records are not affirmed or certified and the moving defendants have offered no foundation for their admissibility. A defendant may only rely on unsworn medical records if they are provided by the plaintiff to the defendant in support of summary judgment (*Kearse v New York City Transit Authority,* 16 AD3d 45 [2d Dept 2005]). The affirmation of moving defendants does not set forth the basis for counsel's knowledge that the Brooklyn Hospital Center medical records are what defendants purport them to be. The records are, therefore, disregarded.

Defendants also submitted plaintiff's initial consultation report dated June 21, 2012, by Dr. R.C. Krishna, a neurologist. However, the report is unsworn and therefore, similarly inadmissible (*Yunatanov v Stein*, 69 AD3d 708, 709 [2d Dept 2010]).

Defendants also submit the unaffirmed report of Dr. Sukhbir Singh Guram, an orthopedic spine surgeon, pertaining to his examination of plaintiff on September 28, 2012. Dr. Gurman's report is unsworn and therefore inadmissible (*id*).

Additionally, defendants submit a sworn medical report of Dr. William B. Head Jr., a neurologist, certified in neuro-imaging, dated January 29, 2018. Dr. Head reviewed plaintiff's cervical spine MRI report and film, dated June 28, 2012 and plaintiff's lumbar spine MRI report and film, dated July 13, 2012. Both MRI reports by Dr. Parnes are unsworn[2]. Although the MRI reports are unsworn, Dr. Head's medical opinion relying on those MRI reports is sworn and thus competent evidence (see, *Grasso v Angerami*, 79 NY2d 813, 814 [1991]). According to Dr. Head's affirmation, he found no objective evidence of any permanent neurological condition or

[2]The unsworn reports generated by Dr. Parnes are submitted in support of defendants' motion.

June 7, 2012 motor vehicle accident. He also found that plaintiff's 2012 MRIs revealed evidence of a pre-existing degenerative disc disease. Dr. Head opined that plaintiff's degenerative disc disease is chronic, longstanding, and unrelated to the accident. Dr. Head further opined that there was no objective basis for further neurological treatment as a result of the accident. Notably, Dr. Head does not opine as to plaintiff's left shoulder[3].

Defendants also submit medical reports by Dr. Barry Katzman, an orthopedist, dated July 9, 2012, July 23, 2012, and October 3, 2012. However, these reports are unsworn and therefore inadmissible (*Yunatanov v Stein*, 69 AD3d 708, 709 [2d Dept 2010]).

Defendants also submit the sworn medical report of Dr. Joseph Marguelies, an orthopedic surgeon, dated October 17, 2012. Dr. Marguelies found that plaintiff sustained a left shoulder contusion. He also found that plaintiff suffers from limited range of motion in his left shoulder. Specifically, Dr. Marguelies found limited range of the motion in anterior flexion to 140 degrees, when normal is 170 degrees. He also found limited range of motion in abduction to 140 degrees, when normal is 180 degrees. Dr. Marguelies opined that plaintiff's injuries are causally related to the motor vehicle accident that occurred on June 7, 2012. However, based on his orthopedic clinical evaluation, Dr. Marguelies opined that plaintiff had no functional disability and may continue with activities of daily living, as well as present employment.

Defendants also submit the police accident report. This report is not certified as a business record and therefore constitutes inadmissible hearsay (*Hazzard v Burrowes,* 95 AD3d

[3] Defendants submit additional medical reports but they are unsworn and therefore inadmissible (*Yunatanov v Stein*, 69 AD3d 708, 709 [2d Dept 2010]).

829 [2d Dept 2012]), except for any portions of the report that contain party admissions[4] (see, *Jackson v Trust,* 103 AD3d 851, 852 [2d Dept 2013]).

In opposition, plaintiff submits the sworn medical report by Dr. Barry Katzman, dated September 9, 2019. In this report, Dr. Katzman describes his previous examinations of plaintiff, including the July 9, 2012, July 23, 2012, and October 3, 2012 examinations. According to his 2019 report, Dr. Katzman found that plaintiff sustained a left shoulder labral tear, SLAP tear, rotator cuff tear, and partial tear of biceps. He also found decreased range of motion in plaintiff's left shoulder. Specifically, he found plaintiff's left shoulder forward flexion to be limited to 80 degrees, when normal forward flexion is 180 degrees. Dr. Katzman opined that plaintiff's injuries are permanent and causally related to the motor vehicle accident that occurred on June 7, 2012.

Plaintiff submits additional medical reports but they are unsworn and therefore inadmissible (*Yunatanov,* 69 AD3d 708, 709).

Plaintiff and defendants have each submitted proof in evidentiary form sufficient to raise triable issues of fact as to whether plaintiff has suffered a serious injury as defined by Insurance Law § 5102(d) (*see, e.g., Chul Koo Jeong v Denike*, 137 AD3d 1189, 1190 [2d Dept 2016]; *Bakis v Cummings*, 133 AD3d 802, 803 [2d Dept 2015]).

For the foregoing reasons, defendants' motion for summary judgment is denied.

This constitutes the decision and order of the court.

December 24, 2019
DATE

DEVIN P. COHEN
Supreme Court Justice

[4]The police accident report indicates that the accident was witnessed by one person. However, the report contains no statements from the witness.