Zahn v Tetteh
2020 NY Slip Op 30362(U)
February 4, 2020
Supreme Court, Kings County
Docket Number: 501187/2017
Judge: Debra Silber

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

---x

ROBERT ZAHN, JAMEL ALSTON and MICHAEL HEXENBAUGH,

Plaintiffs,

-against-

QUASHIE A. TETTEH and IGAL HACKING CORP.,

Defendants.

---x

DECISION / ORDER

Index No. 501187/2017
Motion Seq. No. 3
Date Submitted: 11/14/19
Cal No. 60

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	40-51
Affirmation in Opposition and Exhibits Annexed.....	54-88,117-118
Reply Affirmation.....	121

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 which took place on October 21, 2015. Plaintiff Robert Zahn was the driver of a vehicle owned by Con Edison which was stopped for a light on Atlantic Avenue at the intersection with Euclid Avenue in Brooklyn, New York when it was struck in the rear by a yellow taxi owned by defendant Igal Hacking Corp. and operated by defendant Quashie A. Tetteh. Summary judgment on the issue of liability was granted by the court on March 1, 2017. The court notes that this motion is only brought by defendant Igal Hacking Corp., as defendant driver Tetteh has a different attorney. Further, this motion is only addressed

to plaintiff Zahn's claims, as defendant made a separate motion (Seq. # 2) with regard to plaintiff Alston's claims.

In his Bill of Particulars plaintiff Zahn alleges that as a result of the accident he sustained injuries to his cervical and lumbar spine and to his right shoulder. The latter injury required arthroscopic surgery. Plaintiff alleges he sustained a permanent consequential limitation of use and a significant limitation of use of his injured body parts, as well as a non-permanent injury which prevented him from performing substantially all of his usual and customary daily activities for 90 of the 180 days following the accident. Plaintiff was taken to the emergency room at Jamaica Medical Center in an ambulance. On the date of the accident, he was 50 years old.

Defendant contends that plaintiff Zahn did not sustain a serious injury as defined by Insurance Law § 5102(d). Defendant argues that plaintiff's alleged injuries are all either a pre-existing degenerative condition or were caused by one or both of his two prior accidents. Defendant contends that plaintiff Zahn's normal orthopedic and neurological examinations, combined with defendant's independent radiologist's review of plaintiff's MRI studies of plaintiff's spine and right shoulder, which only indicate degenerative changes, establish that plaintiff did not sustain a serious injury as a result of the subject accident under any of the applicable categories of injury. Defendant submits the pleadings, plaintiff's EBT transcript, and affirmed IME reports from Michael J. Carciente, M.D., who examined plaintiff Zahn on August 28, 2018, Darren Fitzpatrick, M.D., who reviewed the MRIs of Zahn's cervical and lumbar spine and right shoulder taken on May 5, 2016, January 13, 2016, and May 22, 2016, respectively, and Alan Zimmerman, M.D., who examined plaintiff Zahn on November 14, 2018.

Dr. Carciente, a neurologist, reports that plaintiff had a normal neurological examination with no objective neurological findings, no objective evidence of either radiculopathy or sciatica and no ongoing neurological injury, disability or permanency. Dr. Fitzpatrick, a radiologist, reports that plaintiff has severe cervical and lumbar degenerative disc disease, not from a traumatic injury, and rotator cuff tendinosis in his right shoulder, with subacromial impingement and bursitis, none of which was caused by a traumatic injury. Dr. Zimmerman, an orthopedist, reports that plaintiff had normal ranges of motion in his lumbar spine but the range of motion in his cervical spine indicates deficits in right and left rotation, which Dr. Zimmerman states is 70 degrees, with 80 being normal. He offers an explanation that "the minor degree of restriction is due to the claimant's cervical degenerative disc disease." He tested the range of motion of plaintiff Zahn's right shoulder,[1] and reports a 20-degree deficit in abduction and extension and a 10-degree deficit in internal rotation. Dr. Zimmerman concludes that his examination was "objectively normal," with "no findings which would result in orthopedic limitations in use of the body parts examined." Dr. Zimmerman then states that the deviations from normal on this exam relate to the claimant's two prior accidents and plaintiff's degenerative disc disease. Dr. Zimmerman further opines that the plaintiff's right shoulder surgery was not for an injury that resulted from this accident, as being struck in the rear could not cause a rotator cuff tear.

Plaintiff Zahn opposes the motion, contending defendant has failed to establish its entitlement to summary judgment insofar as the defendant's examining orthopedist,

---

[1]Plaintiff's right shoulder arthroscopy was performed in January 2017.

who claimed the rotator cuff injury was not causally related to the accident, never examined plaintiff's actual MRI films or plaintiff's treatment notes or the surgeon's operative report. Further, plaintiff Zahn maintains his medical records and the report of his treating orthopedic surgeon Dr. Cory Chapman raise issues of fact as to whether he has sustained a serious injury as contemplated by Insurance Law § 5102(d).

Conclusions of Law

Defendant has not made a prima facie showing of its entitlement to summary judgment. Together, Dr. Carciente, Dr. Fitzpatrick and Dr. Zimmerman all assert 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, neither of the defendant's examining doctor's affirmations are sufficient to make a *prima facie* case for dismissal.

The defendant's examining neurologist, Dr. Carciente, does not specify his quantitative findings with regard to plaintiff's range of motion, nor does he state what tests he performed (*see Connors v Flaherty*, 32 AD3d 891, 893 [2d Dept 2006] ["examining physician failed to specify the degrees of range of motion in the plaintiff's cervical spine"]; *see also McFadden v Barry*, 63 AD3d 1120, 1120–21 [2d Dept 2009] ["defendants' examining neurologist and orthopedist, however, both failed to address whether there were any limitations in the injured plaintiff's range of motion in the rotation of her lumbar spine"]; *Whittaker v Webster Trucking Corp.*, 33 AD3d 613 [2d Dept 2006] ["The affirmed medical reports of the defendants' examining orthopedic surgeon and neurologist merely noted that the plaintiff had a full range of motion in his

cervical spine without setting forth the objective test or tests performed supporting their conclusions"]). In addition, the defendant's orthopedist does provide quantitative findings, but provides abnormal results and dismisses them as from plaintiff's prior accidents or his pre-existing degenerative disc disease. He then states that a rotator cuff tear in the shoulder could not be caused by a rear-end collision. This sort of "opinion," that the plaintiff's abnormal test results are attributable to a pre-existing injury or a prior accident, or that it is not possible that the force of the accident could have caused the claimed injuries, puts the doctor's credibility at issue, which must be evaluated by the finders of the facts, not the court, and compared with the medical opinion evidence to the contrary.

With regard to the 90/180 category of injury, the only evidence is plaintiff's EBT testimony. It does not make out a *prima facie* case for dismissal. He testified that he did not return to work after the accident on October 21, 2015 until sometime in January of 2016, under his chiropractor's instructions that he could return to work [Page 24], but after a few weeks, he was in too much pain and in February of 2016, he stopped working again, as advised by his doctors [Pages 26-27]. In this period from January to February, he was placed on "light duty" [Page 73]. He said he returned to work in April of 2016, then stopped working entirely after some 27 years working for Con Edison, in June of 2016 when he was diagnosed with cancer. By the time of the EBT, July 10, 2018, he was on Social Security Disability. He testified that he made a claim for Workers' Compensation as a result of the accident. He wasn't asked how long he received Workers' Compensation payments, but he said he received short term disability for a total of six months [Page 20]. When a plaintiff does not return to work for

more than three months after a motor vehicle accident and receives Workers' Compensation or disability benefits for his 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 defendant has failed to make a prima facie case with regard to all of plaintiff's injuries and all of the applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by 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]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

The court finds that even if defendant had made a prima facie case for dismissal, plaintiff has overcome the motion and raised triable issues of fact (*White v Dangelo Corp.*, 147 AD3d 882). Plaintiff provides an affirmed report from his treating orthopedic surgeon, Cory Chapman, M.D., who performed the arthroscopic surgery on plaintiff's shoulder on January 16, 2017. He examined plaintiff as recently as April 1, 2019, and found significant limitations in plaintiff's range of motion in his right shoulder. He diagnosed plaintiff with a right shoulder rotator cuff tear and proximal biceps tendon rupture, as well as neck and low back soft tissue injuries. He opines that Zahn's "right shoulder, neck and back pain was causally related to his work-related accident on

10/21/15" and that Zahn sustained a permanent injury to his right shoulder resulting in pain, swelling and loss of function which necessitated the surgery and will require future intermittent physical therapy, cortisone injections, and possibly, revision surgery.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: February 4, 2020

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court