Collado v King Fritz Cab Corp.
2020 NY Slip Op 33108(U)
September 21, 2020
Supreme Court, Kings County
Docket Number: 510863/2018
Judge: Debra Silber

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

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MARIO STALIN FERNANDEZ COLLADO,

Plaintiff,

-against-

KING FRITZ CAB CORP. and ASGHAR ALI,

Defendants.

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DECISION / ORDER

Index No. 510863/2018
Motion Seq. No. 2
Date Submitted: 9/21/20

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.....	23-29
Affirmation in Opposition and Exhibits Annexed.....	32-40
Reply Affirmation.....	41

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

This is a personal injury action which arises from a motor vehicle accident which took place on April 26, 2017 in Manhattan. Plaintiff had parked and was exiting his vehicle when defendant Ali "side swiped" plaintiff's car, car door and plaintiff. Both vehicles were damaged, and the plaintiff's driver's side mirror was broken. Plaintiff was removed from the scene of the accident in an ambulance and was taken to either Bellevue Hospital or Lenox Hill/Northwell, depending on which record one refers to. At the time of the accident, plaintiff was approximately twenty-two years of age. In his Bill of Particulars, plaintiff claims that as a result of the accident, he sustained an injury to his cervical spine, which causes radiating pain down his right arm and shoulder.

Defendants contend that they are entitled to summary judgment dismissing the complaint as plaintiff did not sustain serious injuries as a result of the accident, as defined by Insurance Law § 5102(d). Defendants support their motion with an attorney's affirmation, the pleadings, plaintiff's deposition transcript and the affirmed IME reports from a neurologist and an orthopedist.

Dr. Sarasavani Jayaram, a neurologist, examined plaintiff on October 1, 2019 on behalf of the defendants, and reports that "[w]ithin a reasonable degree of medical certainty, it is my professional opinion that, from a neurological perspective, there is no neurological disability and there is no disability at the cervical spine." Dr. Jayaram tested the range of motion in plaintiff's cervical spine and states that the results were normal.

Dr. Dana Mannor, an orthopedist, examined plaintiff on September 26, 2019 on behalf of the defendants, and reports that plaintiff had normal ranges of motion in his cervical spine, with otherwise negative test results. He concludes that plaintiff's sprains and strains have resolved.

Defendants contend that their medical evidence, combined with plaintiff's testimony at his EBT, eliminates all categories of injuries in the statute. Plaintiff testified at his EBT that he missed only a week and a half from work after the accident [EBT Page 69], and defendants argue that this testimony rules out the 90/180-day category of injury.

The court finds that defendants have made a *prima facie* showing of their entitlement to summary judgment (*see Toure v Avis Rent A Car Sys*., 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). The affirmed reports of the orthopedist and the neurologist, who both examined plaintiff, indicate that he did not sustain a serious injury as a result of the subject accident. Further, plaintiff's testimony that he missed only a week and a half of work after the accident makes a prima facie showing on the 90/180-day category of

injury (*see Dacosta v Gibbs*, 139 AD3d 487, 488 [1st Dept 2016] ["Plaintiff's testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked "light duty" is fatal to her 90/180–day claim"]; *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013] [plaintiff returned to work on a partial basis during the relevant period of time]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007] ["The plaintiff testified at trial that he missed only one month of work, that he then returned to work on a part-time basis, and that, after another month, he had resumed working on a full-time basis"]). The burden of proof then shifts to plaintiff.

Plaintiff contends that the medical evidence he has submitted overcomes the motion and raises a triable issue of fact as to whether he sustained a serious injury under Insurance Law § 5102(d).

Plaintiff opposes the motion with an attorney's affirmation, his own affidavit, an affirmed MRI report with regard to his cervical spine which indicates he has a herniated disc with impingement, an affirmation from Dr. Apple, his pain management doctor, who saw him three times in 2017 and administered epidural steroid injections, an affirmation and an affirmed report from his treating doctor, Dr. Sayeedus Salehin, and more than two hundred pages of inadmissible treatment records from the chiropractor, acupuncturist and other professionals who treated plaintiff.

Dr. Salehin first treated plaintiff shortly after the accident and he examined plaintiff most recently on July 22, 2020. In his affirmed report, he states that at his July 22, 2020 exam plaintiff "still experienced pain and spasm in his cervical and lumbar spine. The patient has significant restrictions in the cervical spine range of motion in all command directions, and significantly restricted range of motion of his lumbar spine in all command directions. Despite the treatment program being as adequate as possible, the patient did not achieve full

and complete recovery and is unable to perform tasks of daily living in the pre-accident capacity. As a result of the injuries sustained in the accident, the plaintiff sustained a significant loss of use of his cervical and lumbar spine and is left with a moderate permanent disability. The plaintiff's residual condition is permanent and subject to deterioration. Chronic pain and motion limitations in the patient's cervical and lumbar spine have negative effect on-the patient's activities of daily living. The cervical disc displacement was not a reversible condition and is likely to progress putting the patient at risk of developing osteoarthritis and greater progressive functional impairment and neurological deficits."

There is a problem with Dr. Salehin's opinion. Plaintiff was in a second automobile accident in June of 2018, and Dr. Salehin makes no mention of the second accident in either his affirmation or his affirmed "Final Narrative Report", although plaintiff received treatment for the second accident at Dr. Salehin's facility, Brooklyn Medical Practice, P.C. This undercuts the validity of his "Final Narrative Report" that opines that, as plaintiff told him that he had no prior injuries before the 2017 accident, and plaintiff had significant restrictions in his range of motion in his cervical and lumbar spine at his initial exam shortly after the accident, and that when he re-tested plaintiff on July 22, 2020, three years later, plaintiff still had significant restrictions in the range of motion in his cervical and lumbar spine, therefore the injuries were caused by this accident.

The plaintiff testified at his EBT [Page 58] that he stopped going for treatment in May 2018, as, after a year of treatment, he "felt better." This does not appear to be true, as the records plaintiff provides indicate that he kept going for physical therapy, chiropractic treatment and acupuncture throughout the months of May and June 2018. Plaintiff had a second automobile accident on June 19, 2018 [EBT Page 63]. Dr. Salehin's 2020 report summarizes each of the plaintiff's visits from his first visit in April of 2017 to the visit in May

2018, (for which Dr. Salehin states "[o]n May 21, 2018, the patient was seen for a follow up exam. He was complaining of severe pain to the neck and back."), then stops, and by implication, indicates that plaintiff did not come for treatment after May of 2018 until he conducted the July 22, 2020 exam for this motion. However, the list of physical therapy visits does not stop, which were conducted at the same facility, but the visits after May 2018 are "crossed out," presumably to support a claim in the second lawsuit that plaintiff had fully recovered by the date of the second accident, so the alleged injuries and treatment in June 2018 and afterwards could be attributed to the second accident [E-File Doc. 37 Page 90, E-File Doc. 38 Page 47]. Plaintiff testified that he continued to go to Dr. Salehin's facility for treatment from the date of the instant 2017 accident to the date of his EBT in August 2019. Dr. Salehin's affirmation is clearly inaccurate.

The 2018 accident resulted in a lawsuit filed in Kings County Supreme Court, Collado v Lin, et al, Ind. 524762/2019. That lawsuit was settled in June 2020 and a stipulation of discontinuance has been filed. Plaintiff testified [Page 66] that he hired the same law firm to represent him. To be clear, in the second lawsuit, plaintiff appears to have claimed to have recovered from the injuries he sustained in the first accident, but as the lawsuit has been settled for the second accident, plaintiff is now claiming he never recovered from the injuries he sustained in the first accident. Unfortunately, at his EBT in 2019, he told the attorneys for this accident that he had recovered by May of 2018, so he was fine when he had his second accident in June of 1018. Then, when he opposed this motion, he had already settled the case for the second accident, so he reports that he was miserable in May 2018 and is still miserable as a result of the pain he experiences from the first accident.

The court is faced with the issue of how to interpret the parties' responsibilities here in order to decide this motion. Was it incumbent upon the defendants herein to find out what

injuries the plaintiff claimed were caused by the 2018 accident? Was the plaintiff's lawyer obligated to ask Dr. Salehin to clarify his report to describe the injuries plaintiff sustained in the 2018 accident and to clarify the conclusions in his report by making specific reference to the 2018 accident and indicating whether it played any part in his diagnosis and treatment of plaintiff for the first accident? Clearly, the latter option is the correct one. It is unfortunate that plaintiff himself will suffer the consequences of this error, and others. For example, Dr. Salehin's records indicate that plaintiff was complaining all along of pain in his lumbar spine, and he was told at just about every visit to get an MRI of his lumbar spine, which he failed to do. The Bill of Particulars should have stated that plaintiff claimed injuries to his cervical and lumbar spine and to his right shoulder. It doesn't. Dr. Salehin should have made specific reference to the June 19, 2018 accident, and what plaintiff's injuries were. He should have explained whether the new injuries were to the same or different body parts, and how he modified his treatment of plaintiff after the second accident.

Plaintiff has not come forward with sufficient evidence to overcome the motion and raise an issue of fact as to whether he sustained a "permanent consequential limitation of use of a body organ or member" or "a significant limitation of use of a body function or system" as a result of the subject accident (*White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]). While Dr. Salehin finds significant and quantified restrictions in the plaintiff's range of motion, both contemporaneously with the accident and recently, and opines that these injuries were caused by the subject accident, his affirmation is unable to overcome the motion and raise a triable issue of fact requiring a trial. This is because the plaintiff testified that he was "better" in May of 2018 and stopped going for treatment, but that he had a second automobile accident in June of 2018, brought a lawsuit for it, and was still,

on the date of the EBT in August 2019, treating at Dr. Salehin's facility for the subsequent accident, thereby discrediting his own doctor's conclusions.

Accordingly, it is **ORDERED** that the motion is granted, and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: September 21, 2020

ENTER:

Hon. Debra Silber, J.S.C.