Gibbs v Navillus Tile, Inc.
2020 NY Slip Op 34197(U)
December 18, 2020
Supreme Court, Kings County
Docket Number: 516313/16
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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MICHAEL GIBBS,
Plaintiff,
-against

NAVILLUS TILE, INC., d/b/a NAVILLUS CONTRACTING and WILSON TAZA-BERMEO,

Defendants.

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DECISION / ORDER

Index No. 516313/16
Motion Seq. No. 5
Date Submitted: 11/5/20

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..................	60-72
Affirmation in Opposition and Exhibits Annexed.........................	81-84, 89-103
Reply Affirmation..	105

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 occurred on May 10, 2016. Plaintiff was taken from the scene in an ambulance to Interfaith Medical Center, and he was treated and released later that day. In his Bill of Particulars, plaintiff alleges that as a result of the accident, he sustained injuries to his cervical and lumbar spine, right shoulder, both knees, and left ankle. He has had arthroscopic surgery to both of his knees.

Defendants move for summary judgment on the issue of liability, claiming that plaintiff was the "sole proximate cause" of the accident, and defendants also contend that if that branch of their motion is not granted, that the complaint should be dismissed on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d).

The branch of the motion for summary judgment on the issue of liability is denied. Plaintiff claims he was double-parked and waiting for a parking space when defendant came along in a large truck and "side-swiped" his vehicle. Plaintiff had two passengers in his car, and they have brought a suit as well, which has been joined for trial with this action. It is under index number 840/2018. Defendants provide the EBT transcripts of plaintiff and defendant, as well as plaintiff's two passengers. Ms. St. Fort testified that the plaintiff's car was not moving at the time of the impact [Page 60]. Mr. Greaves also said the plaintiff's car was not moving. There was a car that was about to leave a parking space and Mr. Gibbs was waiting for it, but his vehicle was not moving at the time of the impact [Page 65].

Defendant Taza-Bermeo testified that he drove this truck every day for his job. He testified that (EBT Page 24) he was driving a tractor-trailer and plaintiff pulled out into the roadway from the right side as he was going past plaintiff's car, and the front bumper of plaintiff's car hit the passenger side rear of the trailer, which was behind the tractor he was driving. They were on Bedford Avenue, near Putnam Avenue, which is a one-way street with two lanes for moving traffic and parking on both sides of the street. He testified that his tractor was about 10 feet long, and the trailer was about 45 feet long [Pages 14-15]. The police report is not certified, and thus is not in admissible form, and defendant has no corroborating evidence, not even photos, to support his version of the accident.

Defendants' submissions include plaintiff's version of the accident as well as defendant's, which highlights the conflicting accounts regarding how the accident occurred. Viewing the evidence in the light most favorable to plaintiff, as the nonmoving party, the court concludes that there are triable issues of fact as to whether defendant driver was negligent, and if so, whether his negligence was a proximate cause of the accident (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004] ["Credibility determinations, the

weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment"] [internal citations omitted]; *see also Scott v Long Is. Power Auth.,* 294 AD2d 348 [2002]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997] ["It is not the court's function on a motion for summary judgment to assess credibility"]).

The court must next address the branch of the motion for summary judgment dismissing the complaint on the basis of "serious injury". Defendants submit an affirmation of counsel, the pleadings, plaintiff's EBT transcript, and affirmed reports from a neurologist, Allan E. Rubenstein, M.D., an orthopedist, Dorothy Scarpinato, M.D. Defendants also submitted a report from a biomechanical engineer which could not be considered because it was notarized without the state, and while accompanied by a purported certificate of conformity, it does not have the requisite language to qualify as a certificate of conformity (*see* CPLR 2309[c]; *Attilio v Torres*, 181 AD3d 460, 461 [1st Dept 2020]); *Midfirst Bank v Agho*, 121 AD3d 343, 350 [2d Dept 2014]).

Dr. Scarpinato examined plaintiff on October 3, 2019. Her range of motion testing produced completely normal results, assuming the one deviation in the right shoulder test is a typo, which it must be in light of her conclusion. Her conclusion is:

> "My examination of the neck, back, right shoulder, bilateral knees and left ankle was normal revealing subjective complaints of tenderness with no positive objective findings. My impression is resolved cervical spine strain, resolved lumbar spine strain, resolved right shoulder sprain, S/p bilateral knees arthroscopic surgeries - resolved and resolved left ankle sprain. There is no orthopedic disability noted upon today's examination. The claimant is currently working and can continue to do so as well as performing normal activities of daily living without orthopedic restriction. He is not receiving any active treatment and no further orthopedic treatment is indicated and/or warranted as a result of this reported accident."

Dr. Rubenstein, who examined plaintiff on September 12, 2019, reports that plaintiff's range of motion testing in his cervical spine was normal, but the flexion in plaintiff's lumbar spine was 30 degrees, when 60 degrees is normal. He did not test plaintiff's shoulders, knees or ankles. His "Impression and Diagnosis" is:

> "Mr. Gibbs claims persistent pain in multiple joints in addition to headaches and lower back pain subsequent to a MVA over 3 years ago despite a surgical procedure to both knees, trigger point injections. chiropractic and acupuncture treatment. I defer opinion on Mr. Gibbs' joint complaints to an orthopedic specialist.
>
> Mr. Gibbs' neurologic examination is characterized by substantial symptom exaggeration and is otherwise normal. There are no objective focal clinical findings to support a claim of L/S spinal cord, root or paraspinal muscle disfunction. There are no objective findings to support a claim of post-traumatic headaches. Mr. Gibbs claims he was evaluated by a neurologist and had a Brain MRI, but no records were provided of such. He was out of work for 1 day as a maintenance worker and presently works full-time. He does not require further evaluation or treatment from a neurologic point of view."

Defendants contend [Aff. ¶ 65] that these two affirmed IME reports make a prima facie case with regard to the permanent loss of use, permanent consequential limitation of use, and significant limitation of use categories of Insurance Law § 5102(d). Defendants further argue that plaintiff's testimony [EBT Pages 176-179] that he missed only a few days of work and then returned full time as a maintenance supervisor at Atlantic Center Mall, without any need for "light duty" or any accommodation, is determinative of the 90/180 category of injury.

It is not clear whether the defendants meet their prima facie burden of demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. The defendants' orthopedist reports that "examination of the bilateral shoulders reveals range of motion of forward elevation to 180 degrees (80 degrees normal)" which may or may not be a typographical error. But the defendants'

neurologist found a significant restriction in the plaintiff's lumbar spine, and he opines that plaintiff was intentionally "faking it." He has failed to adequately explain and substantiate, with competent medical evidence, his belief that the reported limitation was self-imposed (*see McGee v Bronner*, ___AD3d___, 2020 NY Slip Op 06772 [2020]; *Singleton v F & R Royal, Inc.*, 166 AD3d 837, 838, 88 N.Y.S.3d 81; *Mondesir v Ahmed*, 175 AD3d 1291, 1291, 105 N.Y.S.3d 910; *Rivas v Hill*, 162 AD3d 809, 810-811, 79 N.Y.S.3d 225). Thus, with the conflicting medical reports, it is not clear whether defendants have demonstrated that plaintiff has not 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.

With regard to the 90/180-day category of injury, the defendant has made a prima facie case, as plaintiff testified that he only missed a few days of work after the accident, and a few days after each of the arthroscopic knee surgeries. It has been held that a movant makes a prima facie showing that a plaintiff was not prevented from performing substantially all of his or her daily activities for 90 out of the first 180 days after the accident when the plaintiff was not told by a doctor to stay home from work for ninety days or more after the accident (*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"]; see also *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013]).

Whether or not defendant has made a prima facie case as to all claimed injuries and all applicable categories of injury, however, the court finds that plaintiff has overcome the motion and raised a triable issue of fact, so the motion must be denied.

Plaintiff opposes the motion with affirmations from his treating doctors (Doc. 95, 97), the surgeons who performed the two knee arthroscopic surgeries, who attach their operative reports (Doc. 101 and 102), affirmed MRI reports for all of his MRIs (Doc. 98,99,100), an affirmation from his pain management doctor (Doc. 103), and his ER records (Doc. 96), which are not in admissible form and were not considered.

Dr. Mark S. McMahon, the surgeon who performed plaintiff's right knee surgery in September, 2016, examined plaintiff most recently on June 4, 2020, and provides an affirmed report dated June 18, 2020 (Doc. 95). He tested plaintiff's range of motion and found significant restrictions in plaintiff's range of motion in his neck, back, right shoulder and both knees. He states "at this time he continues to report pain and discomfort that limits his activities. His physical examination is significant for decreased range of motion, and positive provocative tests. He reports continued debilitating symptoms that impair his function on a daily basis."

Dr. McMahon continues "based upon the history given by the patient and the above objective findings, it can be stated with a reasonable degree of medical certainty that the motor vehicle accident that occurred on May 10, 2016 was the competent producing cause of the above-noted injuries. It must be noted that the patient was asymptomatic prior to the accident when his symptoms began. He had no complaints of pain or dysfunction prior to this traumatic event. It is my opinion with a reasonable degree of medical certainty that the accident caused the above noted injures, requiring treatment and ultimately operative intervention."

Dr. McMahon then comments on defendants' IME reports, and says "I have read the examination report by Dorothy Scarpinato, M.D. dated 10/3/2019 and I respectively [sic] disagree with reviewing physicians' opinion that all of Mr. Gibb's injuries have resolved. My

physical examination is significant for limitations in range of motion, as well as multiple positive provocative tests to Mr. Gibbs' injured areas. Dr. Scarpinato did not examine the patient fully and is basing her opinion on an incomplete knowledge of the situation, whereas my decision for surgery and conclusions in this report are based on multiple full physical examinations of Mr. Gibbs in conjunction with any salient imaging studies.

I have also read the examination report by Dr. Allan Rubenstein dated 9/12/2019 and I respectfully disagree with reviewing physicians' opinion that the patients neurological symptoms are normal. Significantly, in Dr. Rubenstein's evaluation, Dr. Rubenstein finds limitation in the range of motion of Mr. Gibbs lumbar spine.

Dr. Rubenstein did not examine the patient fully and is basing his opinion on a one-time encounter, which cannot produce a complete knowledge of the situation, whereas my conclusions in this report are based on multiple full physical examinations of Mr. Gibbs in conjunction with salient imaging studies."

In conclusion, plaintiff has come forward with sufficient evidence to overcome the motion and raise issues 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 caused by the subject accident (*White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]).

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

This constitutes the decision and order of the court.

Dated: December 18, 2020

ENTER:

Hon. Debra Silber, J.S.C.