

Michel v Blackwill

2023 NY Slip Op 31790(U)

May 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 500562/2020

Judge: Debra Silber

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

X

ETZER MICHEL,

Plaintiff,

-against-

NEIL M. BLACKWILL,

Defendant.

DECISION/ORDER

Index No. 500562/2020

Motion Seq. No. 2

Date Submitted: 3/30/2023

X

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>23-30</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>32-37</u>
Reply Affirmation.....	<u>38</u>

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

This is a personal injury action arising from an automobile accident that occurred on March 18, 2019 on Franklin Avenue, at or near the intersection with Sullivan Place in Brooklyn, New York. At the time of the accident, plaintiff was an Uber driver, driving his car with a passenger. He testified at his EBT that he turned onto Franklin Avenue and proceeded down the street when defendant pulled out of a parking spot and hit his vehicle on the passenger side. He [Doc 28 Page 40] said the two passenger side doors were "destroyed." The police came to the scene and took a report. The plaintiff left the scene of the accident in an ambulance, and was taken to Kings County Hospital.

In his bill of particulars, the plaintiff claims that, as a result of the accident, he sustained injuries to his lumbar spine. At the time of the accident, the plaintiff was 46 years old.

The defendant moves for summary judgment dismissing the complaint [MS #2], contending that the plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102(d). In support of his motion, the defendant submits an attorney’s affirmation, copies of the pleadings, the plaintiff’s bill of particulars, the plaintiff’s deposition transcript, and an affirmed report from Dr. Twee T. Do, an orthopedist, who examined the plaintiff on behalf of the defendant.

Dr. Do examined the plaintiff on October 28, 2021, two and a half years after the accident [Doc 29]. He tested the strength and range of motion in the plaintiff’s cervical spine, thoracic spine, lumbar spine, and both shoulders, as well as the plaintiff’s hips, knees, ankles, elbows, wrists and hands, and reports that plaintiff’s cervical and lumbar spine strains, and his left shoulder strain, have resolved. He notes that plaintiff had fractured his left shoulder in 2016, and that this was a pre-existing injury. He states that “from an orthopedic standpoint, there is no permanency.”

Plaintiff testified at his EBT that he injured his cervical and lumbar spine, as well as his left shoulder, in the accident [Doc 28 Page 39]. While the bill of particulars [Doc 40] only references the lumbar spine, the court reviewed Dr. Do’s findings with regard to the plaintiff’s cervical, thoracic and lumbar spine, and left shoulder. It is noted that he states that he used a goniometer to measure plaintiff’s range of motion, and that his normal values “are based on the NYS WC guidelines as well as the AMA guidelines.” As they are not the same, it is not clear what he means.

For the plaintiff’s cervical spine, Dr. Do reports significant restrictions in the plaintiff’s range of motion, such as extension was 40 degrees, when 60 is normal, and left rotation was 70 degrees when 80 is normal.

For the plaintiff's thoracic spine, Dr. Do reports significant restrictions in the plaintiff's range of motion, such as right and left lateral bending were 30 degrees, when 45 is normal.

For the testing of plaintiff's lumbar spine, Dr. Do reports significant restrictions in the plaintiff's range of motion in all planes. Flexion was 50 degrees of 60, extension was 20 degrees of 25, right and left lateral bending were 15 of 25.

For the plaintiff's left shoulder, Dr. Do found significant restrictions in his range of motion, such as forward flexion of 155 degrees when 180 is normal, and abduction of 145 degrees when 180 is normal. He states "[e]xamination of the left shoulder revealed no tenderness. Muscle atrophy was negative. No crepitus was noted. Impingement sign was positive. Jobe's test was positive. Apprehension test was negative. Obrien's test was negative."

Conclusions of Law

With regard to the 90/180-day category of injury, the plaintiff's deposition testimony is clear that he missed about a week from work as an Uber driver in the six months following the accident, but, oddly, he also testified that he made a claim to Workers' Compensation, that he was paid by them, and "the money they gave me was more than the money during the week" [Doc 28 P. 67]. As such, the court finds that the defendant has made a *prima facie* case with regard to the 90/180 category of injury.

The affirmed reports from Dr. Do also establishes that the plaintiff has not sustained "a permanent loss of use of a body organ, member, function or system."

However, the court finds that the defendant has not made a *prima facie* showing of his entitlement to summary judgment with regard to the other applicable categories of

injury claimed by the plaintiff in his bill of particulars (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

Specifically, the court finds that the IME report of Dr. Do is insufficient to establish that the plaintiff did not sustain a “serious injury” to his spine, in that it does not establish that plaintiff did not, as a matter of law, sustain a “permanent consequential limitation of use of a body organ or member” or “a significant limitation of use of a body function or system,” the remaining applicable categories of injury in Insurance Law § 5102(d). He tested the plaintiff’s range of motion, found significant restrictions, and provides not one word of explanation. His findings are completely inconsistent with his conclusion that the plaintiff’s “strains” have “resolved.”

When a defendant has failed to make a prima facie case with regard to all of the plaintiff’s claimed 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]).

Even if the defendant had met his prima facie burden for summary judgment, plaintiff would have been found to have overcome the motion, as there are triable issues of fact raised by his submissions in opposition to the motion. Plaintiff’s doctor’s affirmation [Doc 36] creates a “battle of the experts” sufficient to overcome the motion. Dr. Christopher

Kyriakides saw the plaintiff on July 11, 2022, describes his chiropractic treatment and physical therapy treatment, and pain injections under ultrasound guidance for his left shoulder pain. He reports that plaintiff “has residual shoulder pain and he is unable to use the left shoulder properly and he has continued low back pain.”

Dr. Kyriakides examined the plaintiff and tested his range of motion with a goniometer. He reports “normal gait. He relays a detailed accurate history. Examination of the skin does not reveal any open active lesions. In the lumbar spine, he has spasms noted low at L4-L5 and L5-S1 with limited mobility and flexion at 26 degrees (normal is 60 degrees), extension is at 10 degrees (normal is 25 degrees), side bending is 15 degrees to the right and 13 degrees to the left (normal is 25 degrees) with rotation at 20 degrees bilaterally (normal is 20 degrees). There are deficits to pinprick and light touch in the left lower extremity in an L4 dermatomal pattern and he also demonstrates positive straight leg raising sign on the left at 45 degrees. DTRs are decreased and asymmetrical. At the left shoulder, there is prominent impingement noted with acromioclavicular tenderness. Abduction is limited to 105 degrees (normal is 180 degrees) and anterior flexion at 110 degrees (normal is 180 degrees). He has external rotation at 45 (normal is 90 degrees) and internal at 55 degrees (normal is 70 degrees). Hawkins is positive, as is Neer sign.” His assessment is “Status post traumatic motor vehicle accident with resultant: Lumbosacral derangement with clinical evidence of radiculopathy and neuropathy. Left shoulder impingement.”

Dr. Kyriakides’ conclusion is that “[t]his patient clearly sustained a partially permanently disabling injury as a direct result of this motor vehicle accident. He has discomfort in the lumbar spine that would be benefited from a medial branch block, which has been recommended to him in the past and I would recommend a pain management

program to be re-instituted. Regarding the left shoulder, an MRI is necessary as there is evidence of a tear in the rotator cuff as the patient may be a surgical candidate. The injection was only mildly beneficial and he would require additional treatment, possibly a bone marrow aspirate injection which might serve him best, although ultimately surgery may be required; of course, this will depend upon the MRI.”

Accordingly, it is **ORDERED** that the defendant’s motion is denied.

This constitutes the decision and order of the court.

Dated: May 24, 2023

ENTER :



Hon. Debra Silber, J.S.C.