

Cohen v Sabir

2017 NY Slip Op 32258(U)

October 24, 2017

Supreme Court, Kings County

Docket Number: 506471/14

Judge: Debra Silber

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of October, 2017

P R E S E N T :

HON. DEBRA SILBER,

Justice.

JASON COHEN,

Plaintiff,

DECISION / ORDER

-against-

Index No. 506471/14

Mot. Seq. # 2

NAFIS Z. SABIR,

Submitted: 10/5/17

Defendant.

Papers numbered 1 to 35 were read on this motion:

Papers Numbered:

Notice of Motion/Order to Show Cause/Exhibits_____

1-20

Affirmation in Opposition/Exhibits_____

21-32

Reply Affirmation/Exhibits_____

32-34

Memo of Law_____

35

Defendant Nafis Sabir moves for summary judgment dismissing plaintiff Jason Cohen's action, pursuant to CPLR 3212, in that plaintiff has failed to sustain "serious injuries," as defined by Insurance Law § 5102(d). The case concerns a motor vehicle accident which occurred on November 2, 2013. For the reasons which follow, the

motion is denied.

Plaintiff's bill of particulars claims he sustained injuries to his cervical and lumbar spine and to his right shoulder. On the day of the accident, plaintiff was thirty-six years of age and was the front seat passenger in an NYPD vehicle which was transporting a prisoner when the vehicle was "T-boned" at the plaintiff's passenger door by defendant. Plaintiff has had spinal fusion surgery, which he claims was necessitated by this accident. He has retired from his position as a detective with the NYPD and was granted a disability retirement.

Movant has not made a *prima facie* case with objective medical findings with regard to any of the applicable categories of injury.

With regard to "a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident," plaintiff testified at his EBT that, as a result of the injuries he sustained in the accident, he was put on light duty and he never returned to full duty (Pages 56-57). He testified that about two and a half months after the accident, the NYPD doctor said he could return to full duty, but his private doctor said he could not return to full duty, so he remained in the precinct and never returned to the field. In October of 2014, he was in a lot of pain and he could not walk. He was out of work again and he was told he needed surgery. His back fusion surgery was in December of 2014, a year after the accident, and he was again out of work for a time. He testified that he stopped working for the NYPD on August 10, 2016. Defendant's IMEs were performed in 2017, so do not support defendant's motion with regard to this category of

injury. Defendant has included some of plaintiff's medical records in the motion. They do not support the motion with regard to this category of injury. Exhibit O is a form from the NYPD placing plaintiff on "assignment to limited capacity" on November 26, 2013. There is no indication plaintiff returned to full duty within the six months following the date of the accident.

In addition, movant has not made a *prima facie* showing with regard to "a permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system." Defendant's independent orthopedist, Dr. Gregory Montalbano, examined plaintiff on January 10, 2017. His report is very long and single spaced.¹ He states that he tested plaintiff's range of motion in his cervical, lumbar and thoracic spine, as well as his shoulders and elbows. He does not say what tool he used. He states that he relied on "reference value obtained from the New York State Office of Temporary and Disability Assistance."² He does not report a normal orthopedic exam. Nor does his report comport with the NYS "Range of Motion Chart," as is explained below.

With regard to plaintiff's cervical spine, Dr. Montalbano reports that he detected "tenderness . . . on the right in the cervical paraspinals and periscapular muscles." His

¹ Section 202.5 of the Uniform Rules for Trial Courts requires that "every paper filed in court . . . if typewritten, shall have at least double space between each line, except for quotations and the names and addresses of attorneys appearing in the action, and shall have at least one-inch margins."

² Presumably he means the range of motion chart issued by the New York State Office of Temporary and Disability Assistance, Reporting Requirements, Appendix Q at: otda.ny.gov/contracts/2017/SBPCE/17-SBPCE-AppQ.doc.

range of motion test results are abnormal, but he compares the results to an “average” instead of the normal range of motion, resulting in a useless report. For example, it states “cervical extension, 35 degrees (average 30 degrees).” However, the normal range of motion on the chart for cervical extension is to be able to move from zero degrees (upright head) to fifty degrees. Providing “averages” is not helpful, as the “average” is not indicated on the chart he claims to have used, nor does the doctor say who the pool of people that result in these averages is. Further, he includes tests for the cervical spine which are not on the chart, such as “bending lateral left 25 degrees (average 40 degrees).”

With regard to plaintiff’s lumbar spine, Dr. Montalbano examined plaintiff several years after his spinal fusion surgery at L5-S1. Again, he has tests not on the chart, such as “rotation left 30 degrees (average 45 degrees).”

With regard to plaintiff’s right shoulder, Dr. Montalbano’s test results are also abnormal. For abduction, he states the result was “120 degrees (average 150 degrees)” and he again lists tests not on the chart, such as “flexion 140 degrees (average 150 degrees).” He does not test for forward elevation or adduction, which are on the chart.

Dr. Montalbano lists numerous medical records for plaintiff that he says he would have liked to have reviewed, including the ambulance call report, the photos of the vehicles [seriously], the operative report and photos, records of various doctors, records of a prior accident, physical therapy records, and “I am requesting independent radiology reports for my review, on all studies performed . . . so I may formulate a more definitive opinion about a spinal disability as it relates to the accident.”

Next, defendant provides an IME from a neurologist, Dr. Mitchell Raps, who examined the plaintiff on February 28, 2017. He claims to have timed the exam and that it was two hours and twenty four minutes long. Dr. Raps too provides a very long single spaced report without page numbers. He seems to be a frustrated writer, and writes as though writing a book instead of a medical report. Plaintiff's current complaints are not described until page four, after we learn of his mother's death and his pending divorce. Plaintiff complained of continued problems and pain with his neck, right shoulder and back. He also reported continuing headaches which he had not had before the accident and problems with his memory. Dr. Raps then summarizes all the plaintiff's medical records that he reviewed, which extends for a number of pages. It seems he received many of the records that Dr. Montalbano complained that he would have liked to have seen, including the operative report and physical therapy records. He then discusses the "antecedent records" of plaintiff's on the job injuries in the eighteen years he was employed by the NYPD. Plaintiff had an MRI of his right knee in the past, but not of the body parts he claims he injured in this accident.

Finally, after many pages, Dr. Raps describes his examination of the plaintiff. With regard to plaintiff's cervical spine, he states "he presented an approximately 10% reduction to bilateral lateral rotation, flexion, and extension . . . [with regard to the lumbar spine] he forward bent, at the waist, to about 80 degrees." Dr. Raps does not say what the test results were for the cervical spine, nor what is normal, just that he had a 10 percent reduction in his range of motion. He does not say what is normal for the one lumbar spine test, nor did he state that he performed any other tests to the lumbar spine other than straight leg raising, which caused "low back pain, at about 80 degrees

bilaterally.” He does not state what the “normal” would be. As a neurologist, he did not examine plaintiff’s right shoulder, but only his spine, and with regard to his spine, his testing was not properly reported. With regard to the plaintiff’s shoulder he “defers to orthopedics.” He concludes that there were no studies to confirm plaintiff’s claim of having radiculopathy, and thus “his reported symptoms are entirely subjective.”

Since the defendant has failed to meet his prima facie burden as to all of the claimed injuries and all of the applicable categories of injury, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition are sufficient to raise a triable issue of fact. See, *Yampolskiy v Baron*, 2017 NY App Div Lexis 3492 [2d Dept]; *Valerio v Terrific Yellow Taxi Corp.*, 2017 NY App Div Lexis 3141 [2d Dept]; *Koutsoumbis v Pacciocco*, 2017 NY App Div Lexis 3121 [2d Dept]; *Aharonoff-Arakanchi v Maselli*, 2017 NY App Div Lexis 2898 [2d Dept]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949; *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].

Therefore, as defendant has failed to make a prima facie case for dismissal, the motion is denied.

This constitutes the decision and order of the court.

ENTER :



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court