

Toure v Vukdedaj

2018 NY Slip Op 30476(U)

March 19, 2018

Supreme Court, New York County

Docket Number: 451548/15

Judge: Adam Silvera

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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Adam Silvera Part 22**

SIDY TOURE,

Plaintiff,

-against-

PREKA VUKDEDAJ and MARIJAN VUKDEDAJ,

Defendants.

DECISION/ORDER

**INDEX NO. 451548/15
MOTION SEQ. NO. 001**

ADAM SILVERA, J. :

Plaintiff commenced this action to recover damages for injuries sustained in an automobile collision that occurred on December 12, 2012. Plaintiff was a taxi driver who was hit by defendants' vehicle on Tenth Avenue, at or near its intersection with West 53rd Street, in New York, New York. Plaintiff's bill of particulars alleges that plaintiff suffered the following injuries as a result of the accident: thickness tear of the supraspinatus tendon of the right shoulder with tendinitis; acromioclavicular joint hypertrophy with impingement of the right shoulder; sprain, strain and decreased range of motion of the right shoulder; and sprain, strain and decreased range of motion of the lumber and cervical spine. Plaintiff alleges that he was confined to bed for approximately three months following the accident, and that he missed three months of work as a result of the accident.

Defendants move for summary judgment dismissing the complaint on the ground that plaintiff's alleged injuries do not reach the threshold of "serious injury," as required by §5102(d) of the Insurance Law, to allow him to maintain a lawsuit such as this one.

In support, defendants submit a copy of plaintiff's deposition transcript. Plaintiff

primarily speaks French, and at his deposition, he was provided with a translator. Plaintiff testified that, as he approached the intersection, he did not see defendants' car prior to the accident. He testified that the impact pushed his car over two lanes and that he came into contact with a lamppost. He first saw the defendant-driver when he was speaking to a police officer. He further testified that he went home after the accident, but sought treatment that night. Plaintiff went to Bronx-Lebanon Hospital (Bronx-Lebanon), where he received X rays of his lower back, neck and shoulders. He was then prescribed pain medication and discharged after ten to twelve hours. Subsequently, plaintiff received treatment for his back, neck and shoulders at MedAlliance Medical Health Services (MedAlliance) for two to three weeks. He also received MRIs of his back and shoulders. At Montefiore Orthopedics Hospital (Montefiore), plaintiff received two cortisone injections and claims that he was diagnosed with a displaced right collar bone. Plaintiff stopped receiving treatment in 2014.

Plaintiff also testified that he was involved in a prior accident in 1997, where he injured his right knee and back. He stated that he received physical therapy for six to seven months.

Defendants submit an affirmation from Dr. Lisa Nason, a certified orthopedic surgeon who examined plaintiff on September 22, 2016. Dr. Nason affirmed that plaintiff told her that he had a sharp pain in his right shoulder that radiated to his back. Her examination of plaintiff's cervical spine revealed no spasms and no paraspinal tenderness to palpitation. The examination of plaintiff's lumbar spine also revealed no paraspinal spasms and no paraspinal tenderness upon palpitation. There was no atrophy of the intrinsic muscles and the Compression Test was negative. The Straight leg test was also negative. The examination of plaintiff's shoulders revealed no tenderness to palpitation or atrophy. Dr. Nason diagnosed plaintiff with a resolved sprain in the cervical spine, lumbar spine and the right shoulder, and noted that there were

findings of a decreased range of motion in the cervical spine. However, she affirmed that there were no positive objective findings from an orthopedic standpoint. She concluded that there was no applicable orthopedic disability and that plaintiff was able to continue working full duty with no applicable restrictions.

Defendants contend that the loss of range of motion to plaintiff's spine was minimal and not sufficient to establish a serious injury. Moreover, they contend that the affirmation reveals the normal condition of plaintiff at this time. Though plaintiff testified at his deposition that as a result of the accident, he cannot exercise or drive with his right hand for over an hour, defendants argue that this fails to satisfy any of the categories of serious injury set forth in §5102(d) of the Insurance Law.

Defendants argue that plaintiff has not explained the gap in his treatment, and did not resume any treatment after 2014. Defendants also argue that as plaintiff admitted to being involved in a prior accident in 1997, he failed to establish that his claimed injuries from the present accident are separate and distinct from those of the prior accident. Defendants contend that, since they have submitted objective medical evidence which disputes any claim of serious injury as a result of the present accident, they are entitled to summary judgment.

In opposition to this motion, plaintiff argues that he is still suffering from serious injuries caused by the present accident. He claims that, due to his injuries, he can no longer lift his right arm above his head, drive with his right hand, lift heavy objects, or perform household chores without some difficulty. Plaintiff points out that, in examining him, Dr. Nason found restrictive range of motion in his cervical spine and right shoulder. Dr. Nason also concluded that plaintiff's neck, lower back and right shoulder injuries were proximately caused by the present accident.

Plaintiff contends that Dr. Nason's report supports a finding of serious injury almost four years after the accident, and that this precludes a grant of summary judgment.

Plaintiff submits medical reports and records from Bronx-Lebanon, MedAlliance and Montefiore, where he was examined and subject to treatment and therapy after the accident. While acknowledging that some of the evidence is not affirmed or certified, plaintiff argues that since defendants' physician read and reviewed this material, said material would be admissible as long as it is not the "sole evidence" offered in opposition to the motion. The evidence includes MRIs of plaintiff's right shoulder, cervical and lumbar spine. Plaintiff states that he stopped receiving treatment at Montefiore on June 5, 2014, when he reached maximum medical improvement and was told to return on an as needed basis.

Plaintiff submits a personal affidavit which explains, that after being released from Bronx Lebanon, he continued to experience pain but, due to a family obligation, returned to his country in Africa. For that reason, he was unable to undergo immediate treatment for his injuries. Upon his return, plaintiff sought treatment at MedAlliance.

Plaintiff submits an affirmation from Dr. Mark McMahon, who examined him on March 20, 2017. Using a goniometer, Dr. McMahon examined plaintiff and found a decreased range of motion in his right shoulder, cervical spine and lumbar spine. Dr. McMahon concluded that these limitations were permanent in nature. He also concluded that plaintiff would require ongoing physical therapy, prescription and over-the-counter medications, as well as further radiologic studies and consultations. Dr. McMahon stated that plaintiff would benefit from right shoulder arthroscopic surgery.

Plaintiff argues that defendants have failed to make a case for summary judgment, or, alternatively, that plaintiff has raised an issue of fact precluding summary judgment.

In reply, defendants contend that Dr. Nason's report and affirmation are sufficient evidence to grant a motion for summary judgment. They also refer to plaintiff's deposition testimony, where they claim that he only missed one week of work following the accident and went back to work for a month before deciding to take a break.

Defendants argue that plaintiff's opposition is insufficient to establish an issue of fact concerning serious injury. They argue that Dr. McMahon's report was prepared for the sole purpose of opposing the motion and that he based his conclusions on inadmissible medical records. They claim that Dr. Nason's report was not based on these records. Defendants seek the exclusion of all records that are uncertified or unaffirmed, and thus, inadmissible as evidence.

Defendants seek the exclusion of plaintiff's affidavit, as it allegedly contradicts his prior deposition testimony. Defendants also argue that, since plaintiff is a foreign speaker, his affidavit is inadmissible without an affidavit from a qualified translator attesting to its accuracy.

Defendants contend that plaintiff did not provide a reasonable explanation as any proof that preexisting injuries from the prior accident would have any causal connection to his claimed damages. Moreover, they claim that plaintiff failed to offer substantive evidence of any permanent injuries.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law". *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dep't 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon the proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc [ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'". *People v Grasso*, 50 AD3d 535, 545 (1st Dep't 2008), quoting *Zuckerman v*

City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. See *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dep't 2002).

Courts have continually held that the question of whether a plaintiff has established a prima facie case for a "serious injury," as described in section 5102 (d) of the Insurance Law, remains an issue of law. See *Licari v Elliott*, 57 NY2d 230, 235 (1982). Claims of serious injury are to be supported by objective medical evidence demonstrating a significant physical limitation resulting from the accident. See *Pommells v Perez*, 4 NY3d 566, 574 (2005). Where a plaintiff's physician asserts a permanent injury and sets forth the findings upon which this opinion is based, such evidence is sufficient for denying summary judgment to a defendant. See *Lopez v Senatore*, 65 NY2d 1017, 1020 (1985).

Upon examining Dr. Nason's report, the court finds that she expressly states that, based on her examination of plaintiff, plaintiff's right shoulder, cervical and lumbar spine injuries are causally related to the December 22, 2012 accident; in fact, the accident is the proximate cause of his injuries. Therefore, defendants have conceded that plaintiff's injuries are causally related to this accident, and there is no issue of degeneration or preexisting injuries involved here.

With respect to the amount of time that plaintiff took off from work following the accident, plaintiff's deposition testimony provides that he did go back to work after a week of absence, but that after a month of work, was in too much pain to continue. Plaintiff thereafter took three months off while undergoing medical treatment.

Regarding unsworn or uncertified medical records, plaintiff has submitted such material in his opposition to the motion. This includes records from Bronx-Lebanon and Monterfiore, as well as MRI reports from Third Avenue Open MRI, P.C. (Third Avenue). There are consultation

reports from MedAlliance, but these are certified pursuant to CPLR 3122-a, and are deemed admissible by this court. Plaintiff argues that the uncertified records should be admitted because Dr. Nason, defendants' physician, acknowledged reviewing them in the course of her examination of plaintiff. Plaintiff also argues that these records do not constitute the sole evidence in opposition to summary judgment.

In her affirmation, Dr. Nason does state that she reviewed the records from Monterfiore and Third Avenue, as well as the certified MedAlliance reports. Defendants assert that Dr. Nason did not rely on this evidence when reaching her conclusions from the examination, but that is not necessary, as she acknowledged reviewing it in her affirmation, considering it relevant to plaintiff's diagnosis. The court shall admit this material. Plaintiff has submitted additional evidence in his opposition papers. *See Long v Taida Orchids, Inc.*, 117 AD3d 624, 625 (1st Dep't 2014); *Windham v New York City Tr. Auth.*, 115 AD3d 597, 598 (1st Dep't 2014).

Plaintiff's affidavit is submitted in opposition to the summary judgment motion. Plaintiff is deemed a foreign-language speaker because he depended on a French-speaking translator during his deposition. Although a French version of the affidavit is not submitted, the English affidavit is questionable. It is well settled that the absence of a translator's affidavit to attest to the accuracy of the English affidavit renders the English affidavit facially defective and inadmissible. *See CPLR 2101(b); Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 54 (2nd Dep't 2011). Therefore, the court shall disregard plaintiff's affidavit.

Plaintiff submits the affirmation of Dr. McMahon, who examined him after Dr. Nason. While Dr. Nason affirmed that plaintiff's restrictive range of motion was mild or minor, Dr. McMahon affirms that the restrictive range of motion was severe and permanent. While Dr. Nason states that plaintiff was taking no medication at the time of her examination, Dr.

McMahon states that plaintiff was continually taking painkillers at the time of his examination.

Both physicians conducted a thorough examination and provided a detailed report.

The court finds that summary judgment is not appropriate where there are conflicting affirmations by the parties' physicians. These affirmations raise a significant issue regarding the extent of plaintiff's injuries, specifically, the level of damage to his right shoulder and cervical spine as a result of the subject accident. Dr. McMahon's report and findings, while not as expansive as Dr. Nason's, are sufficient to raise the issue of serious injury for a trier of fact to determine.

Accordingly, it is

ORDERED that defendants Preka and Marijan Vukdedaj's motion for summary judgment is denied; and it is further

ORDERED that, within thirty days of entry, plaintiff shall serve a copy of this order upon all parties, together with notice of entry.

Dated: March 19, 2018

ENTER:



Hon. Adam Silvera, J.S.C.