

Marei v Haque

2018 NY Slip Op 31815(U)

July 30, 2018

Supreme Court, Kings County

Docket Number: 501353/17

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

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

x

MAHMOUD MAREI,

Plaintiff,

-against-

EKRAMUL HAQUE and WESNER LEFEVRE,

Defendants.

x

DECISION / ORDER

Index No. 501353/17

Motion Seq. No. 2

Date Submitted: 5/31/18

Cal No. 37

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.....	<u>27-39</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>42-52</u>
Reply Affirmation.....	<u>53</u>

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. Defendants move for summary judgment dismissing the plaintiff's complaint, pursuant to CPLR Rule 3212, on the ground that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d).

On January 1, 2016, at approximately 4:00 A.M., plaintiff Mahmoud Marei was driving an automobile (taxi) and was stopped at a red light on East 23rd Street in Manhattan, at the intersection of Third Avenue, when he was struck in the rear by a vehicle operated by defendant Ekramul Haque and owned by defendant Wesner Lefevre. Plaintiff left the scene in his own vehicle, but went to the emergency room at

Montefiore Hospital at about 10:00 A.M., a few hours later, where he was examined and released. Plaintiff claims he sustained soft tissue injuries to his right and left shoulders, to his right hand and to his cervical, thoracic and lumbar spine. Plaintiff received chiropractic care and physical therapy. He then underwent arthroscopic surgery to his right shoulder on September 14, 2016 and to his left shoulder on March 20, 2017.

Defendants contend that plaintiff did not sustain a "serious injury" as a result of this accident, and that he only suffered from muscle strains as a result of the accident. Defendants claim that all of the other injuries plaintiff complains about are from pre-existing and degenerative conditions.

Plaintiff first contends the defendants' motion is untimely, as it was filed 69 days after the filing of the note of issue. Plaintiff also claims that defendants fail to meet their burden of proof for summary judgment because defendants' own submissions document objective evidence of significant limitations in plaintiff's range of motion and fail to dispute plaintiff's claims of causation and permanency. Plaintiff claims defendants do not address the 90/180 category, given plaintiff's inability to return to work and his prior activities of daily living. Alternatively, plaintiff maintains that he has submitted evidence sufficient to overcome the motion and raise a triable issue of fact as to whether he sustained a "serious injury" causally related to the January 1, 2016 accident.

With regard to plaintiff's procedural objection, the court finds that the motion was timely served by mail on December 26, 2017. The 60th day after the October 26, 2017 filing of the Note of Issue fell on a holiday - December 25, 2017 - extending the

deadline to the following business day (see General Construction Law § 25-a[1]). The date of service is what is counted, not the date of filing. In addition, as an e-filed case, the e-filing rules allow a party to utilize other service methods (22 NYCRR § 202.5-b[f][2][ii]), not applicable here.

Defendants have made a prima facie showing of their entitlement to summary judgment based upon the affirmed medical reports of Ronald A. Paynter M.D., Robert S. April, M.D., Barbara Freeman, M.D., and Michael Setton, D.O. that plaintiff's claimed injuries are not causally related to the subject accident (see *White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]; *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Ronald A. Paynter, M.D., who is board certified in Emergency Medicine, concludes that the emergency room records are inconsistent with the injuries alleged in the plaintiff's Bills of Particular and show that the claimed injuries do not have an acute (traumatic) origin and are not causally related to the plaintiff's accident on January 1, 2016. He states that there are no findings which causally relate the accident to the claimed injuries "other than cervicalgia, right wrist, right shoulder, right middle finger and lumbar/thoracic muscle strains," which are not serious injuries.

Similarly, Robert S. April, M.D., an examining neurologist, concludes that the accident of record did not produce a neurological diagnosis; that plaintiff is neither disabled nor limited and is in no need of any further treatment - including any further surgery. Barbara Freedman, M.D., an examining orthopaedist, concludes that the arthroscopic surgery to plaintiff's right shoulder was to address impingement syndrome, which, based on the records, pre-existed the instant motor vehicle accident and does

not correlate with the post-accident MRI findings. Similarly, she avers that the left shoulder arthroscopic surgery also addressed a pre-existing degenerative condition. Further, Dr. Freedman states that the MRI reports for the plaintiff's right hand and thumb as well as the MRIs for the cervical, thoracic and lumbar spine are consistent with plaintiff having pre-existing conditions without any indication of an acute traumatic injury. She concludes that there is no indication of an acute injury due to the subject accident.¹

In addition, Michael Setton, D.O., reviewed the MRI films of plaintiff's cervical, thoracic and lumbar spine, of both shoulders and of his right hand, all taken between eleven days and about two months after the accident. He found no evidence of acute trauma, but rather describes degenerative changes that predate and are unrelated to the accident.

Finally, plaintiff's own testimony indicates that, although he has not worked since the day of the accident, allegedly due to the pain in his neck, back and shoulders, and admits he received some Workers' Compensation benefits (Exhibit D at 11), he did not ask his doctor if he could go back to work (Exhibit D at 14) (*see Sougstad v Meyer*, 40 AD3d 839, 840 [2d Dept 2007]) ["Although the injured plaintiff also claimed to have missed seven months of work following the accident, he failed to tender sufficient objective medical evidence relating his inability to work to the injuries allegedly

¹Dr. April discounted plaintiff's claims of pain on range of motion as "contrary to plaintiff's fluid movement prior to and after the exam." Dr. Freedman also found limitations in plaintiff's range of motion, though she did not identify the normal ranges of motion. Given their conclusions that plaintiff had pre-existing degenerative conditions that are not causally related to the subject accident, these limitations in his range of motion are not dispositive.

sustained in the subject accident”)) and he acknowledged that he was confined to his home for only one month following the accident (Exhibit H at 58), after which he was able to ascend and descend the four flights of stairs to and from his apartment (Exhibit H at 68).

However, the court finds that plaintiff has overcome the motion and raised a triable issue of fact, based upon the affirmed medical report of plaintiff’s treating doctor, Gabriel L. Dassa, D.O., (Exhibit A) who performed the arthroscopic surgeries on plaintiff’s shoulders and examined plaintiff as recently as April 2, 2018. Dr. Dassa reports that plaintiff has “persistent orthopedic impairments to his neck, back, both shoulders, and right hand,” and that “the January 1, 2016 accident was a competent cause of the patient’s injuries and orthopedic impairments.” Dr. Dassa tested plaintiff’s range of motion at this latest exam in April of 2018 and reports significant restrictions in plaintiff’s range of motion in his cervical and lumbar spine as well as in plaintiff’s shoulders, more so in the right shoulder.

Even if Dr. Dassa’s failure to address the plaintiff’s subsequent accident and injury to plaintiff’s back in March of 2017 (he fell down some stairs) make his conclusions speculative with respect to causation regarding plaintiff’s neck and back injuries, as defendants allege, (*see Vickers v Francis*, 63 AD3d 1150, 1151 [2d Dept 2009] [“Dr. Saulle failed to address, in any of his affirmed reports, the fact that the plaintiff injured her neck and back in a subsequent accident in October 2007 . . . rendered speculative his conclusions that the range of motion limitations he noted in the plaintiff’s cervical and lumbar regions after October 2007 were caused by the subject accident”]; *D’Alba v Yong-Ae Choi*, 33 AD3d 650, 651 [2d Dept 2006] [“plaintiff’s

examining physician also failed to indicate an awareness that the plaintiff was involved in another accident which occurred two months after the instant one, in which he hurt his neck, lower back, and shoulder'), his conclusions as to causation with regard to the plaintiff's shoulder injuries are alone sufficient to raise an issue of fact to defeat summary judgment (see *White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]; *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]; *Greenberg v Macagnone*, 126 AD3d 937, 938 [2d Dept 2015]).

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: July 30, 2018

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court