

Fondechene v DMC Servs. LLC
2019 NY Slip Op 30700(U)
March 20, 2019
Supreme Court, New York County
Docket Number: 500452/2017
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

ANDLY FONDECHENE,

Plaintiff,

-against-

DMC SERVICES LLC AND CARLOS MONTOYA,

Defendants.

DECISION / ORDER

Index No. 500452/2017

Motion Seq. No. 2

Date Submitted: 1/24/19

Cal No. 16

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

Papers	NYSCEF Doc.
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	<u>18-30</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>39-44</u>
Reply Affirmation.....	<u>45</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. On March 3, 2016, on Coney Island Avenue at the intersection with Church Avenue, plaintiff claims his UPS truck was struck in the rear by a truck owned by defendant DMC Services and operated by defendant Carlos Montoya while he was stopped at a red light.

The plaintiff's bill of particulars alleges that, as a result of the accident, he sustained injuries to his cervical and lumbar spine, with restricted range of motion, "paresthesias of bilateral hands," and "carpal tunnel syndrome on both sides of hands."

The movants contend that objective medical evidence, combined with plaintiff's

own testimony, demonstrates that plaintiff did not sustain either a permanent consequential limitation of use or a significant limitation of use as defined by Insurance Law § 5102(d), nor was he prevented from performing substantially all of the material acts which constituted his usual and customary daily activities for more than 90 of the 180 days following the accident.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat summary judgment, the opposing party must come forward with admissible evidence showing that there are material issues of fact that require a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Defendants have made a prima facie showing of their entitlement to summary judgment with the affirmed report of P. Leo Varriale, M.D. and plaintiff's own EBT testimony (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). Dr. Varriale conducted an orthopaedic IME examination of plaintiff on February 20, 2018, and found plaintiff to have normal range of motion in his cervical, lumbar and thoracic spine and wrists, with completely normal test results. He diagnosed plaintiff with resolved cervical strain, resolved lumbosacral strain, and resolved strain to both wrists. He found that there was no causally related disability (see *Paul v Allstar Rentals, Inc.*, 22 AD3d 476, 477 [2d Dept 2005] [“The affirmations of the respondents' orthopedist and neurologist which indicated that the plaintiff had a full range of motion were sufficient to make a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d)”]). In addition,

plaintiff's EBT testimony was that he returned to work in less than three months, with his doctor's approval, and he identified only minor limitations which his injuries had on his usual and customary activities, making a prima facie showing that plaintiff was not prevented from performing substantially all of his customary daily activities for 90 out of the first 180 days after the accident (*see Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007]).

However, the court finds that plaintiff has overcome the motion and has raised a triable issue of fact as to whether he sustained a "serious injury," based upon the affirmed reports of his doctor, his radiologist and the affidavit, records and sworn reports of his treating chiropractor, Mitchell Faer, D.C., who last examined plaintiff on November 9, 2018. Dr. Faer, who notes the MRIs found that plaintiff, who was 33 years old at the time of the accident, had bulging discs at C3/4 through C6/7 and L5/S1, and plaintiff's EMG/NCV test found carpal tunnel syndrome bilaterally. Further, more than two and a half years after the accident, Dr. Faer measured significant limitations in plaintiff's range of motion in both his cervical and lumbar spine, with other abnormal test results. Dr. Faer found that plaintiff still had marked pain with significant loss of function in his cervical and lumbosacral spine, along with the decreased range of motion. He opines that the accident was the competent producing cause of the plaintiff's present symptoms and of his permanent impairment (*see Chul Koo Jeong v Denike*, 137 AD3d 1189, 1190 [2d Dept 2016]).

Contrary to defendants' contentions, Dr. Faer, who has treated plaintiff since his first visit six days after the accident, is in a relatively good position to assess causation. Further, in light of the foregoing, it is not necessary to reach the question defendants raise as to whether plaintiff's affidavit in opposition is an attempt to raise a feigned issue

of fact or whether it is contrary to his deposition testimony as to the 90/180 category.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: March 20, 2019

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**