Oyewole v Richmond
2019 NY Slip Op 30705(U)
March 20, 2019
Supreme Court, Kings County
Docket Number: 506855/2017
Judge: Debra Silber

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

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DANIEL O. OYEWOLE,

Plaintiff,

-against-

ROLANDA K. RICHMOND,

Defendant.

---x

DECISION / ORDER

Index No. 506855/2017
Motion Seq. No. 4
Date Submitted: 1/24/19
Cal No. 37

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 Cross Motion, Affirmation and Exhibits Annexed.....	58-73
Affirmation in Opposition and Exhibits Annexed.....	76-81
Reply Affirmation.....	82

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 October 19, 2016, on Sutphin Boulevard near 111th Road in Queens, New York, plaintiff claims his vehicle was hit in the rear by defendant Rolanda K. Richmond's vehicle.

The plaintiff's bill of particulars alleges that, as a result of the accident, plaintiff, who was 32 years old at the time, sustained injuries to his cervical and lumbar spine and his right shoulder.

The movant contends that objective medical evidence and plaintiff's own EBT testimony establishes that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d). Plaintiff counters that defendant failed to make a prima facie

showing of entitlement to summary judgment as defendant's medical reports are inconclusive on the issue of serious injury in so far as defendant's examining doctor found deficits in plaintiff's range of motion and that some improvement in plaintiff's pain does not mean he did not continue to suffer from deficits in his range of motion. Moreover, plaintiff maintains that the affirmed records of his physicians are sufficient to defeat defendant's motion.

"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]).

Defendant has not made a prima facie showing that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). Edward A.Toriello, M.D. conducted an orthopaedic IME of plaintiff on June 20, 2018. He reports that he found normal ranges of motion in plaintiff's lumbosacral spine and right shoulder, with otherwise negative test results. He concludes that plaintiff's cervical and lower back sprains and strains and his right shoulder contusion have resolved, and found that there was no evidence of continued disability. However, Dr. Toriello measured significant limitations in the range of motion in plaintiff's cervical spine. While Dr. Toriello notes that the decreased range of motion on the exam was "subjective and not correlated with objective findings," Dr. Toriello fails to adequately explain or

substantiate his basis for disregarding the restricted range of motion he measured in plaintiff's cervical spine (*see Chang Ai Chung v Levy*, 66 AD3d 946 [2d Dept 2009]; *Chum Ok Kim v Orourke*, 70 AD3d 995, 995-996 [2d Dept 2010]). Plaintiff, a student, testified that he missed only two weeks from school after the accident (Plaintiff's EBT, exh D, at 40-41, 57, 62), which makes a prima facie showing that plaintiff was not prevented from performing substantially all of his 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]).

Nonetheless, even if Dr. Toriello's explanation for his test results, indicating a restricted range of motion in plaintiff's cervical spine, was adequate to make a prima facie showing of defendant's entitlement to summary judgment, plaintiff has overcome the motion and raised an issue of fact with the affirmations and affirmed reports of plaintiff's treating doctor John Velez, MD.

Dr. Velez notes, based upon his examination findings, including plaintiff's decreased range of motion in his cervical and lumbar spine, measured as recently as October 8, 2018, plaintiff's medical history and a review of plaintiff's other medical records and test results, including MRIs and EMG/NCS studies, that plaintiff has sustained a cervical disc bulge, with right C6 radiculopathy, and multiple lumbar disc bulges, with L5 radiculopathy, as well as right shoulder rotator cuff tendinopathy and adhesive capsulitis, as result of this accident. Dr. Velez concludes that these injuries were traumatically induced by the October 19, 2016 accident and are permanent (*see Chul Koo Jeong v Denike*, 137 AD3d 1189, 1190 [2d Dept 2016]).

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