

Warders v Christian Ambulette Inc.

2019 NY Slip Op 32371(U)

August 7, 2019

Supreme Court, Kings County

Docket Number: 509987/16E

Judge: Debra Silber

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

X

NICOLE WARDERS and PATRICK WARDERS,

Plaintiffs,

-against-

**CHRISTIAN AMBULETTE INC. and
R.O. TORRES-CONCHA,**

Defendants.

X

DECISION / ORDER

**Index No. 509987/16E
Motion Seq. No. 6 & 7
Date Submitted: 7/11/19**

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>114-130</u>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>131-148</u>
Answering Affirmation and Exhibits Annexed	<u>149</u>
Reply Affirmation.....	<u>151</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action arising out of a motor vehicle accident. On March 9, 2016, plaintiff Nicole Warders was a front seat passenger and plaintiff Patrick Warders was the driver in a vehicle owned by plaintiffs, which was involved in an accident with a vehicle owned by defendant Christian Ambulette Inc. and driven by defendant Concha. The plaintiff's vehicle was hit on the passenger side, when he exited a parking lot in front of an oncoming vehicle. The accident took place at the intersection of Bushwick Avenue and Conway Street in Brooklyn, NY. Plaintiff drove the car home after the accident and later

sought medical care. Plaintiff Patrick Warders was thirty-four years old at the time of the accident. Plaintiff's bill of particulars alleges that he sustained injuries to his neck and back as a result of the accident.

Defendants have brought two separate motions for summary judgment, one for each plaintiff, pursuant to CPLR Rule 3212, on the ground that neither of the plaintiffs sustained a "serious injury" as defined by Insurance Law § 5102(d). Plaintiff Nicole Warders has not opposed the motion addressed to her claims (Mot. Seq. # 6), despite several adjournments, and thus her claims are dismissed. With regard to plaintiff Patrick Warders, defendants support their motion (Mot. Seq. #7) with the pleadings, the plaintiffs' bills of particulars, plaintiff's EBT transcript, an affirmation from an orthopedist and an affirmation from a neurologist.

Dr. Jonathan S. Garay, a doctor of osteopathy, examined plaintiff on May 30, 2018, two years after the accident. He states that he reviewed many of plaintiff's medical records, both from this accident and prior, as plaintiff had x-rays and MRIs in 2015 as well as in 2017. Dr. Garay states that plaintiff reported to him that on the date of the accident, he was in the process of receiving treatment for injuries to his neck and back which resulted from a prior (March 3, 2015) motor vehicle accident. Plaintiff also reported a third motor vehicle accident, in 2012.¹ He continued to receive treatment until the end of 2017, when he stopped. Plaintiff reported that his lower back only bothered him occasionally, but his neck (cervical spine) was painful and stiff. He stated that he recently began having pain in his

¹Plaintiff testified at his EBT that he is a bus dispatcher for the NYC Transit Authority. The 2012 accident was work-related and he received Workers' Comp benefits and lost some time from work [Page 66]. He was driving a City bus, which was struck by another City bus [reported to Dr. Bender at his IME]. He said he did not miss any time from work as a result of this 2016 accident [Page 15] or the 2015 accident [Page 67].

upper arm, shoulder and scapula, and numbness in his entire right arm. Dr. Garay states that plaintiff told him he was a bus dispatcher for the Transit Authority and did not miss any time from work as a result of the accident.

Dr. Garay's examination of plaintiff indicates plaintiff's range of motion was restricted in his cervical spine. The range of motion of his lumbar spine was normal, as were the test results for plaintiff's shoulders, elbows, forearms, wrists, fingers and thumbs. Dr. Garay reviewed the MRI images of plaintiff's cervical and lumbar spine for 2015 and 2017. He concludes "the [cervical and lumbar MRIs taken after this accident are essentially unchanged from 2015." Dr. Garay opines that plaintiff had degenerative disc and spine disease that predated the accident, as well as congenital scoliosis. He states "his current complaints, exam findings, future medical needs are related to the prior accident and are pre-existing, congenital, developmental and degenerative changes and are unrelated to the 3/9/16 accident." He further states that plaintiff sustained sprains and strains which were "superimposed upon a prior accident and prior [disc disease] that was symptomatic at the time of the 3/9/16 accident." Dr. Garay concludes that "there is no causally related impairment."

Dr. Adam N. Bender, a neurologist, examined plaintiff on July 12, 2018. He summarizes the plaintiff's prior accidents and the plaintiff's medical records. He tested the range of motion of plaintiff's cervical, thoracic and lumbar spine and reports that his range of motion was completely normal, with no tenderness or spasm. He concludes that plaintiff has no neurological problem causally related to this accident, and that there "is no objective evidence of any neurological problem that would explain his ongoing subjective complaints." Dr. Bender notes that plaintiff "had two prior motor vehicle accidents, both of which involved neck and back injuries," and that at the time of [this accident], he "was still experiencing

lower back and neck pain.” He also states that “injuries, if any, from the incident of record were relatively minor since the claimant recalls that he felt no pain or any other symptom at the time, no injuries were recorded on the police report, he was able to drive the car home, and he missed no work after the [accident].”

The court finds that defendants have made a prima facie case with regard to all of the applicable categories of injury, including “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.” With regard to this latter category, plaintiff testified at his EBT that he did not miss any work as a result of the accident.

Plaintiff opposes the motion with only an attorney’s affirmation, which cannot overcome the motion and raise a triable issue of fact.

Accordingly, it is

ORDERED that the motions are both granted and the complaint is dismissed as to both plaintiffs.

This constitutes the decision and order of the court.

Dated: August 7, 2019

ENTER :



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**