

Parsan v Moore

2020 NY Slip Op 31117(U)

March 24, 2020

Supreme Court, Kings County

Docket Number: 500231/2018

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

SURENDRA PARSAN,

Plaintiff,

-against-

QUINESHA MOORE and KASHAUN RICHARDSON,

Defendants.

_____x

DECISION / ORDER

Index No. 500231/2018

Motion Seq. No. 2

Date Submitted: 2/20/20

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>25-39</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>41-46</u>
Reply Affirmation.....	<u>49</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 which took place on August 9, 2017 when the vehicle he was operating northbound on Coney Island Avenue was in a sideswipe collision with a vehicle owned by defendant Quinesha Moore and operated by defendant Kashuan Richardson near the intersection with Foster Avenue. Defendants moves for summary judgment contending that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d).

In his Bill of Particulars, plaintiff, who was 62 years old at the time of the accident, alleges that as a result of the collision he sustained injuries to his cervical spine including herniated and bulging discs, injuries to his lumbar spine including a compression fracture of the superior endplate of L1, and bulging discs, as well as a

concussion and a rotator cuff tear to his left shoulder. Plaintiff had approximately five months of medical treatment after the accident including chiropractic adjustments and electrical stimulation.

The movant contends that plaintiff did not sustain a “serious injury” as a result of this accident, and claims plaintiff’s neck, back, and shoulder injuries are degenerative in nature and/or pre-existing and/or unrelated to the subject accident. In addition, movant contends that plaintiff testified that he returned to his work duties immediately after the accident, undercutting any claim under the 90/180 category of injury.

Plaintiff counters that there are triable issues of fact as to whether plaintiff suffered a serious injury under Insurance Law § 5102(d). Plaintiff relies on range of motion testing during treatment after the accident that shows significant restrictions in range of motion in plaintiff cervical and lumbar spine with cervical radiculopathy and MRI reports finding herniated and bulging discs and a rotator cuff tear. Further, plaintiff’s treating doctor Jacob Nir, M.D. opined that the herniated discs in plaintiff’s cervical and lumbar spine and his decreased cervical and lumbar flexion and rotation are casually related to the motor vehicle accident on August 9, 2017.

Conclusions of Law

Defendants have made a prima facie showing of their entitlement to summary judgment (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyster*, 79 NY2d 955, 956-957 [1992]). Defendants’ orthopedist, Dr. Pierce J. Ferriter examined plaintiff on February 28, 2019, finding specified normal ranges of motion in plaintiff’s cervical and thoracolumbar spine and left shoulder with negative test results. He diagnosed plaintiff with resolved strains of the cervical spine, lumbar spine and left

shoulder with pre-existing lumbar strain and pain and found no orthopedic disability. In addition, plaintiff's own testimony and medical records indicate that plaintiff suffers from degenerative and pre-existing neck and back injuries. A radiological report for a lumbar spine x-ray from 8/16/2017, shortly after the subject accident, notes an old compression fracture at L1 with no other abnormalities. Reports in connection with a cervical x-ray on 8/16/2017 finds multi-level degenerative disc disease with degenerative spurring, while a report from cervical x-ray taken on 8/17/2013 found multilevel degenerative changes without radiographic evidence for acute osseous abnormality. Further plaintiff testified that he was involved in a prior work-related accident about 30 years ago where he injured his lower back for which he received workers' compensation benefits and was still treating with pain medication at the time the subject accident. See Exhibit "F", pp. 11-13; 67; 71-72, 83. Plaintiff also testified that he sustained pre-existing injuries to his neck and head from a prior incident in 2016 where he fell down and hit his head in the basement for which he received treatment. See Exhibit "F", p. 83-84. Further, plaintiff testified at his EBT that he manages income producing properties that he owns and that as a result of the subject accident he only missed a couple of hours of work because of doctors' appointments, that he was confined to bed for only two or three days and he was not confined to his home (see See Exhibit "F", p 11-12, 77). This 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]).

In opposition plaintiff relies mostly on inadmissible uncertified medical records of his treatment during the five months after the accident (see *Grasso v Angerami*, 79

NY2d 813, 814–15 [1991]; *Irizarry v Lindor*, 110 AD3d 846, 847 [2d Dept 2013]; *Diaz v Chaudhry*, 91 AD3d 590, 591 [2d Dept 2012]) and an affidavit from plaintiff's treating doctor, Jacob Nir, MD, who is certified in physical medicine and rehabilitation. Dr. Nir found specified reductions in the range of motion in plaintiff's cervical and lumbar spine when he examined plaintiff in August 2017, and reiterates the reduced range of motion found in plaintiff's cervical and lumbar spine by his treating chiropractor in September, October and November of 2017 and January 2018. Upon reexamining plaintiff in November 2017, Dr. Nir noted for the first-time a decreased range of motion in plaintiff's left shoulder noting "restricted motion 90 degrees on flexion, extension and abduction" without reference to normal ranges for those motions. In January 2018, he examined plaintiff for the last time noting continued complaints of neck pain with tingling and numbness to plaintiff's bilateral extremities with pain during flexion, extension and lateral rotation and complaints of limited motion in the cervical region. Dr. Nir reviewed his EMG/NCV report and found cervical radiculopathy. While he opines that the herniated discs in plaintiff's cervical and lumbar spine and his decreased cervical and lumbar flexion and rotation are casually related to the motor vehicle accident on August 9, 2017, in the absence of a recent examination it is insufficient to raise an issue of fact as any subjective complaints of pain and limitation of motion must be substantiated by verified objective medical findings based on a recent examination of the plaintiff (*Sham v B & P Chimney Cleaning & Repair Co.*, 71 AD3d 978, 979 [2d Dept 2010] ["While the plaintiff's treating physician reported that he had treated the plaintiff from August 8, 2007, about one month after the accident, until February 8, 2008, and had most recently examined her on March 17, 2009, he only recorded the results of the

objective testing he performed at the initial visit on August 8, 2007]; see *Borino v Little*, 273 AD2d 262, 263 [2d dept 2000] [“reports submitted by the plaintiff’s treating chiropractor and orthodontist were not based upon a recent examination of the plaintiff and are therefore insufficient”]). Indeed, even if Dr. Nir’s affidavit is sufficient to raise an issue of fact as to whether there is a causal relationship between the subject accident and plaintiff cervical and lumbar injuries, it fails to controvert defendant’s doctor’s finding that plaintiff no longer suffers any disability from those injuries; it is insufficient to raise an issue of fact as to whether plaintiff suffered a permanent consequential limitation or a significant limitation (see *Lively v Fernandez*, 85 AD3d 981, 982 [2d Dept 2011]). Nor does it counter the showing that the compression fracture to plaintiff’s vertebra predates the accident. Consequently, it does not overcome defendants’ prime facie showing of entitlement to summary judgment.

Accordingly, it is

ORDERED defendants are granted summary judgment and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: March 24, 2020

ENTER :



Hon. Debra Silber, J.S.C.