

Young v Fine
2020 NY Slip Op 31239(U)
April 23, 2020
Supreme Court, Kings County
Docket Number: 525078/2017
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

_____x

KAREEM J. YOUNG and TANAYIA GIDDIENS,

Plaintiffs,

-against-

NORMA FINE,

Defendant.

_____x

DECISION / ORDER

**Index No. 525078/2017
Motion Seq. No. 5,6
Date Submitted: 3/5/20**

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

Papers	NYSCEF Doc.
Notices of Motion, Affirmations and Exhibits Annexed.....	<u>95-129, 116-128</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>130, 133</u>
Reply Affirmation.....	<u>135</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 which took place on October 7, 2017. Plaintiffs were putting their baby into a child seat in the rear of their car in a parking lot when defendant hit their parked car. The force of the impact caused plaintiffs to fall from the car to the ground, sustaining injuries. Summary judgment on the issue of liability was previously granted. Each plaintiff started a separate action, and the actions were consolidated by an order dated 5/9/19. Each plaintiff has his or her own attorney. The Note of Issue has been filed, and these motions followed.

Each of the plaintiffs claim to have sustained “serious injuries” from the accident, as defined by Insurance Law § 5102(d). They seek an order from the court to that effect, thereby taking that issue away from the jury at the trial on damages.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Kareem J. Young

Plaintiff supports his motion with an attorney’s affirmation, an affirmation from his treating doctor, the pleadings, plaintiff’s deposition transcript, an affidavit from plaintiff and numerous medical records and reports.

Defendant opposes the motion with solely an attorney’s affirmation. Thus, if plaintiff makes a prima facie case for summary judgment, defendant cannot overcome it, as defendant does not submit any evidence with her opposition.

In his Bill of Particulars, and his Supplemental Bill of Particulars, plaintiff, who was thirty-seven years old at the time of the accident, alleges that as a result of the accident, he sustained injuries to his lumbar, thoracic and cervical spine, as well as to his left shoulder. Plaintiff has had arthroscopic surgery to his left shoulder following the accident, and surgery to his lumbar spine.

Plaintiff provides a certified copy of the ambulance call report, which states that plaintiff was removed from the scene by ambulance and taken to Coney Island Hospital. He told the EMTs he was in pain, particularly in his left shoulder. Plaintiff provides his emergency room records. They are not certified and thus are not in admissible form and could not be considered.

Next, plaintiff provides certified MRI reports, for his cervical and lumbar spine and his left shoulder. The plaintiff's spine is reported to have numerous bulges and herniations, and the left shoulder report indicates abnormalities as well.

Next, plaintiff provides certified copies of handwritten physical therapy records which indicate he treated regularly until August of 2018, ten months after the accident.

Plaintiff provides an affirmed IME report obtained by defendant, from Ira Chernoff, M.D., an orthopedist. Dr. Chernoff examined plaintiff on June 20, 2019, almost two years after the accident and after both surgeries. He tested plaintiff's range of motion in his spine and left shoulder and obtains abnormal results, with significant restrictions. He states that "The claimant is clearly capable of working light duty at the present time." Dr. Chernoff does not offer any opinion on the issue of causation.

Dr. Viviane Etienne provides an affirmation, sixteen pages long, in which she states that she has been treating plaintiff since October 9, 2017, two days after the accident. At that first visit, he complained of pain to his left shoulder, neck and back.

She states that his back had spasms, and his range of motion was severely restricted. She found radiculopathy in his spine. His testing was positive, including Spurling's and straight leg raise. She referred him for nerve conduction/EMG studies, physical therapy and MRIs. The EMG confirmed that there was radiculopathy in plaintiff's cervical and lumbar spine. At the December 2017 visit, she still found significant restrictions in the range of motion in plaintiff's spine, and states "On January 9, 2018 the patient, who had been diagnosed with left shoulder impingement and SLAP tear, underwent a SLAP tear repair with hardware and an acromioplasty." She continued to see plaintiff regularly and tested his range of motion at each visit. She states, "at four months post-accident, he is temporarily fifty percent impaired."

Dr. Etienne then states "[b]ecause of the lack of improvement with conservative treatment to the patient's lower back, on March 23, 2018, Jonathan Simhaee, M.D., with the Brooklyn Premier Orthopedic Group, performed a:

- a) discography at L4-L5;
- b) percutaneous discectomy at L4-L5;
- c) right L4-L5 transforaminal epidural steroid injection; and
- d) contrast injection and evaluation of nucleograms."

Dr. Etienne states that at six months post-accident, plaintiff was still fifty percent impaired. At her most recent exam, on November 7, 2019, she reports that plaintiff's range of motion in his left shoulder was normal, and the range of motion in his cervical and lumbar spine were each mildly restricted in one plane,¹ but were normal in others. She felt he had improved considerably but says he could not return to his job as an

¹ Cervical lateral flexion was 40 degrees out of 50 (normal) and lumbar flexion was 80 degrees out of 90 (normal).

elevator mechanic as that job required him to lift heavy loads and required a great deal of agility.

Dr. Etienne concludes that “It is my opinion, with a reasonable degree of medical certainty, that the automobile accident of October 7, 2017 was the cause of the injuries to Kareem Young's left shoulder, cervical spine and lumbar spine.” She also states “It is my opinion, with a reasonable degree of medical certainty, that as a result of the October 7, 2017 accident, Kareem Young sustained a medically determined injury to his left shoulder, cervical and lumbar spine which prevented him from performing substantially all of his usual and customary daily activities for at least 90 of the first 180 days following the accident: in his case, over 180 days following the accident.”

Plaintiff provides his EBT transcript. He testified that at the time of the accident, he was working for an elevator repair company, full time. He has not returned to work since the accident. Dr. Etienne told him he could return to “light duty” in 2018, but his supervisor said there is no light duty job in elevator repair [EBT Page 97].

The court finds that plaintiff makes a *prima facie* case for summary judgment on the issue of serious injury, as defined by Insurance Law §5102(d). The burden of proof then shifts to the defendant. As stated above, defendant has not provided anything in opposition other than an attorney's affirmation. Therefore, the motion is granted with regard to plaintiff Kareem Young, and the issue of “serious” injury shall not be submitted to the jury at the damages trial.

Tanayia Giddiens

Plaintiff supports her motion with an attorney's affirmation, plaintiff's deposition transcript, an affidavit from plaintiff and numerous medical records and reports.

Defendant opposes the motion with solely an attorney's affirmation. Thus, if plaintiff makes a prima facie case for summary judgment, defendant cannot overcome it, as defendant does not submit any evidence with her opposition.

Plaintiff does not provide a copy of her Bill of Particulars. The facts of the matter are only available from her EBT transcript. She testified that she was thirty-four years old at the time of the accident, she missed three weeks from work after the accident [Pages 68- 69], she was working full time at a different job by the date of the EBT, and she injured her back and her right shoulder in the accident. She testified that she was removed from the scene of the accident in an ambulance and was taken to the emergency room at Coney Island Hospital.

Plaintiff provides her emergency room records. They are not certified and thus are not in admissible form and could not be considered.

Next, plaintiff provides MRI reports and operative reports. They are not certified and thus are not in admissible form and could not be considered.

Next, plaintiff provides certified copies of handwritten physical therapy records from Paramount Medical Services, P.C. (Doc. 124) which indicate she treated there until June of 2018, eight months after the accident. The certification (Doc 126) is signed by Dr. Viviane Etienne, but the doctor does not provide an affirmation describing plaintiff's treatment, and the records do not contain any reports, affirmed or otherwise. While there are some results indicated for range of motion testing in these handwritten forms, there is no indication what tool was used, or where the "normals" come from. It is not the court's job to interpret medical records. Why there is no affirmation from Dr. Etienne, when she provides one that is sixteen pages long for the co-plaintiff, is not explained.

The court finds that plaintiff fails to make a *prima facie* case for summary judgment on the issue of serious injury, as defined by Insurance Law §5102(d). In order to prevail on this motion, plaintiff needed to provide medical evidence in admissible form establishing that she sustained a serious injury in one of the categories of injury contained in Insurance Law §5102(d). She has not done so. Therefore, the motion is denied with regard to plaintiff Tanayia Giddiens, and the issue of “serious” injury will need to be decided by the jury at the damages trial.

In conclusion, it is

ORDERED that Kareem Young’s motion is granted, and the issue of “serious” injury shall not be submitted to the jury at his damages trial; and it is

ORDERED that Tanayia Giddien’s motion is denied, and the issue of “serious” injury must be submitted to the jury at her damages trial.

This constitutes the decision and order of the court.

Dated: April 23, 2020

ENTER :



Hon. Debra Silber, J.S.C.