

Josey v Zaib

2020 NY Slip Op 33743(U)

November 6, 2020

Supreme Court, Kings County

Docket Number: 508170/2017

Judge: Debra Silber

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

_____ X

DENNIS JOSEY,

Plaintiff,

DECISION/ORDER

-against-

Index No. 508170/2017

ALI ZAIB,

Motion Seq. No. 1

Defendant.

Date Submitted: 09/17/2020

_____ X

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 Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>9-18</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>21-29</u>
Reply Affirmation.....	<u>30</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Defendant moves, pursuant to CPLR 3212, for summary judgment and an order dismissing plaintiff's complaint, in this personal injury action arising from a motor vehicle accident, on the basis that plaintiff has failed to meet the threshold requirements necessary to recover under Insurance Law § 5102 (d).

This matter concerns injuries that plaintiff allegedly sustained as a result of an accident which took place on July 17, 2016 at or near the intersection of Crescent Street and Weldon Street in Brooklyn, New York. There is no police accident report in the record. Plaintiff was taken by ambulance to the Emergency Room at Jamaica Medical Center, where he complained of pain in his neck, back, right knee, and right shoulder. Plaintiff alleges, in his bill of particulars, that he sustained injuries to those body parts as a result of the accident.

Defendant contends that he is entitled to summary judgment dismissing the complaint as plaintiff has not sustained serious injuries as a result of the accident, as defined by Insurance Law § 5102 (d). Defendant supports the motion with an attorney's affirmation, the pleadings, plaintiff's deposition transcript and the affirmed IME reports from three doctors: Dr. Mark J. Decker, a radiologist; Dr. Jeffrey Guttman, an orthopedist; and Dr. Timothy G. Haydock, an emergency medicine specialist.

Dr. Decker, Radiologist

Dr. Decker states that he performed an independent evaluation of the July 27, 2016 MRI images of plaintiff's cervical spine on April 9, 2018 (E-File Doc 15). In viewing those MRIs, he found "[r]eversal of lordosis," no fracture, and "[r]etroisthesis" of cervical discs. Dr. Decker further found a disc herniation and foraminal encroachment at C4-C5 and otherwise "[n]o herniation" or "foraminal encroachment" (instead, he notes "[b]road bulge[s]") at C2-C3, C3-C-4, C5-C-6, and C6-C7. His impression is "[d]iffuse degenerative disc disease with reversal of lordosis and degenerative retroisthesis of C4 on C5 and C5 on C5"; "[d]iffuse degenerative multilevel bulging with degenerative . . . herniation at C4-C5 contacting the cord" and "degenerative herniation at C5-C6." Dr. Decker states that all of these findings are "degenerative, longstanding and not causally related to the date of the accident of 07/17/2016." Further, he observed "[n]o evidence to suggest that an acute traumatic injury was sustained."

With regard to plaintiff's right shoulder, Dr. Decker reviewed the July 27, 2016 MRIs and his impression is that there is "no evidence to suggest an acute traumatic injury was sustained," and notes "joint hypertrophy with rotator cuff tendinopathy as well

as a cyst,” noting that these findings are “longstanding and not causally related to the date of [the] accident.”

With regard to plaintiff’s right knee, Dr. Decker reviewed the July 27, 2016 MRIs of plaintiff’s right knee and found “no evidence to suggest an acute traumatic injury was sustained,” “[n]o acute tear,” and no fracture. Rather, Dr. Decker’s impression is “[m]edial collateral ligament sprain at the femur,” “[a]nterior cruciate ligament mucoid change,” and “[h]amstring and gastrocnemius tendinopathy,” all “longstanding and not causally related to the date of the accident.”

Dr. Guttman, Orthopedist

Dr. Guttman performed an independent orthopedic evaluation of plaintiff on December 13, 2018 (E-File Doc 16). Dr. Guttman notes that plaintiff was treated at the ER following the accident and was released with a neck collar. He then followed up with his physician and was treated with physical therapy and acupuncture three times per week, initially. Plaintiff then underwent right knee and right shoulder arthroscopic surgery “as a result of the alleged accident.” As of December 13, 2018, plaintiff was no longer receiving treatment, but was still taking pain medications. Plaintiff was not working and presented with complaints of pain in his neck, lower back, right shoulder, and right knee.

Dr. Guttman found normal range of motion in plaintiff’s cervical spine. He found that plaintiff’s range of motion in the lumbar spine and right shoulder were also normal and notes that shoulder impingement and rotator cuff tear signs were not present. With regard to plaintiff’s right knee, Dr. Guttman noted healed arthroscopy portals and found plaintiff’s range of motion to be normal.

Dr. Guttman's impression is: "[a]lleged" injuries to the cervical spine, lumbar spine, right shoulder with arthroscopy surgery, and right knee with arthroscopy surgery, all resolved." He opines that "there is no objective medical evidence in the medical chart or imaging which substantiates that [plaintiff] incurred traumatic injury to [his] body" in the accident. He further found "no objective evidence that indicates a present disability or functional impairment that prevents plaintiff from engaging in his daily living activities or working." He concludes that there is "no permanency as a result of the claimed injuries listed on the bill of particulars."

Dr. Haydock, Emergency Medicine

Dr. Haydock states that he reviewed plaintiff's bill of particulars, the police report, the EMS report, and the ER records in preparing his April 30, 2018 report (E-File Doc 17). Dr. Haydock notes that plaintiff, who was 49 at the time of the accident, complained of pain in his neck, right shoulder and back immediately following accident, but there was no swelling or bruising in those locations. When plaintiff was seen in the ER, he again complained of neck and right shoulder pain, which he then rated more severely (8 out of 10), as well as back pain. The reviewing physician there noted tenderness but did not note any swelling, bruising, deformity, midline bony tenderness or restriction of range of motion in the neck or spine. That physician further failed to document any difficulty ambulating or shoulder pain or knee pain. CT scans taken at Jamaica Medical Center "showed no acute cervical spine injury" but noted spondylosis and "straightening of the upper cervical lordosis." There were other notations concerning plaintiff's cervical spine, including disc protrusion, left paracentral disc

osteophyte complex, and foraminal narrowing. The X-rays were normal. "There was no significant degenerative disease."

Dr. Haydock opines that there is "no indication that the plaintiff sustained any significant injury as a result of this motor vehicle accident other than neck and back pain." Further, he states that the injuries claimed in the plaintiff's bill of particulars are "inconsistent with the initial presentation and documentation in the medical record." Specifically, he says, plaintiff would have had immediate, severe pain in his right knee if he had sustained the alleged knee injuries in the accident; plaintiff was ambulatory when EMS arrived and was ambulating when he left the hospital. Dr. Haydock opines that there would have been notes and further diagnostic tests if plaintiff had complained of a severe knee injury at the ER, but such complaints and tests are not reflected in the ER records.

Likewise, he states that plaintiff would have had immediate, severe pain if he had sustained the right shoulder injuries alleged in the bill of particulars, and there would also have been evidence of an injury, such as swelling or bruising and further tests (MRIs) ordered. Again, Dr. Haydock opines that there would have been immediate, severe pain if plaintiff had sustained the alleged cervical and lumbar spine injuries asserted, and evidence of injury, such as swelling and bruising, restricted range of motion, and evidence of acute injury in the CT images. Instead, the CT scan showed "multi-level degenerative changes." In sum, he states that the records are inconsistent with the alleged injuries and that the "claimed injuries do not have an acute traumatic origin related to the accident," and plaintiff's only causally-related injuries from the accident were "neck and back pain."

Defendant contends that his evidence eliminates any alleged serious injury within the ambit of the statute. Defendant also argues that the medical evidence eliminates this accident as the cause of the conditions alleged in the plaintiff's bill of particulars, thereby eliminating all applicable categories of injury in the statute. Further, defendant maintains that plaintiff is barred as a matter of law from recovery under the 90/180 category, as he did not testify that he missed any work as a result of the accident.

Plaintiff's Submissions

Plaintiff submits his own affidavit, certified medical records, and the affirmations and reports of various doctors, including: Dr. Steven Ross, plaintiff's physical therapy and rehabilitation specialist; Dr. Dov Berkowitz, an orthopedist; and Dr. Narayan B. Parachuri, a radiologist.

Plaintiff's evidence raises a triable issue of fact with regard to the categories of injury "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system" as well as the 90/180 category of injury in § 5102 (d). Specifically, Dr. Ross, who first saw plaintiff in July 2016, avers that plaintiff received care at Ross's facility for 18 months following the accident, including physical therapy and pain management treatment (see *a/so* E-File Doc 28 [Dr. Ross' records]). Dr. Ross further states that he examined plaintiff on August 22, 2019, at which time plaintiff reported continued pain in his neck, back, right shoulder, and right knee, and that such pain is worse with activity. On his first evaluation on July 20, 2016, plaintiff reported neck, back, knee, and shoulder pain, which likewise worsened with activity. Plaintiff had no prior medical history of pain in his neck, back, right shoulder, or right knee.

Dr. Ross further notes that he found that plaintiff had a restricted range of motion in his neck, right shoulder, right knee, and back, upon first being examined in July 2016, and he continued to have a restricted range of motion in those body parts in August 2019. Plaintiff further had, according to the MRIs taken in July 2016, disc herniations, bulges, and impingements in the spine, as well as tears in his right shoulder and right knee, for which he later underwent surgeries. His testing of the range of motion in plaintiff's shoulder, knee, back, and neck in August 2019, using a goniometer indicated a 20% loss of cervical flexion; a 31% loss of left cervical rotation; an approximately 30% loss of lumbar flexion and lumbar extension; a 41% loss of right shoulder abduction and a 22% loss in right shoulder external rotation.

Dr. Ross diagnoses plaintiff, following his 2019 exam, with the following injuries, which he attributes to the motor vehicle accident: cervical myofascial derangement; lumbar myofascial derangement; cervical disc herniations at C4-C5 and C5-C6; lumbar disc herniation and disc bulge at L5-S1; right C5 radiculopathy; right L5 radiculopathy; a right shoulder supraspinatus tear; and right knee medial and lateral meniscus tears with hypertrophic synovitis. Dr. Ross further opines that plaintiff was restricted from performing his usual and customary daily activities for 90 days following the accident.

Dr. Ross disagrees with the conclusions of all three of defendant's IME doctors. He states, with regard to Dr. Decker's opinion that plaintiff's injuries are solely degenerative, that "I can state with a reasonable degree of medical certainty that trauma, rather than normal wear and tear or the degenerative process are the cause of Mr. Josey's cervical spine, lumbar spine, right shoulder and right knee pain which ultimately led to two (2) surgeries and cervical and lumbar herniations." He states that

trauma can cause both bulges and herniations, disagreeing with Dr. Guttman. He concludes that "it is my opinion within a reasonable degree of medical certainty that all of Mr. Josey's injuries are causally related to the motor vehicle accident of July 17, 2016 and that he sustained serious injuries pursuant to Insurance Law §5102(d), First, given the time that has passed since the accident, Mr. Josey's injuries to his cervical spine, lumbar spine, right shoulder and right knee functions are permanent, as evidenced by the fact among others, that surgery and other invasive procedures were medically necessary and he still requires more treatment and still suffers from effects of the injury suffered in the accident of July 17, 2016. Secondly, Mr. Josey also has a permanent consequential limitation regarding the use of his cervical spine, lumbar spine, right shoulder and right knee in that the associated ranges of motion are permanently impaired, and in his demonstrated marked permanent limitations with regard to mobility. Third, Mr. Josey has a significant limitation of the use of his cervical spine, lumbar spine, right shoulder and right knee, as evidenced by significantly limited range of motion, and positive MRI findings with regard to cervical spine, lumbar spine, right shoulder and right knee. Fourth, Mr. Josey sustained medically determined causally related to the accident, cervical and lumbar herniations with. radiculopathy and nerve pain and limited use of his right shoulder: and right knee that prevented him from performing all of his usual and customary activities for *90/180" days following the accident."

Dr. Ross further opines that Dr. Guttman's report is deficient in that Dr. Guttman failed to review any of plaintiff's medical records other than the ER records, which precludes Dr. Guttman from making a competent medical diagnosis. As to Dr. Decker's

report, Dr. Ross opines that the radiologist's report is deficient for considering only the MRI imaging studies and says he disagrees with Dr. Decker's finding that no tears were sustained in plaintiff's knee or shoulder. Dr. Ross states that, to the extent plaintiff had a degenerative condition in his back, knee, shoulder, or neck, such conditions were asymptomatic and that the "traumatic nature" of the accident exacerbated such conditions and led to plaintiff's injuries and the need to have two surgeries after the accident.

Dr. Ross further contests Dr. Haydock's report on the basis that Dr. Haydock fails to consider that plaintiff was asymptomatic at the time of the accident and failed to consider any records other than plaintiff's ER records, despite having access to three years of medical records available to him at the time that he wrote his report. Further, Dr. Ross says Dr. Haydock does not make any findings "within a reasonable degree of medical certainty," and says his findings are "speculative at best." Dr. Ross specifically attributes the permanent and significant limitations of use of plaintiff's right shoulder, right knee, and his spine to the accident.

Dr. Ross's affirmation is supported by the affirmation of Dr. Berkowitz, an orthopedist, who states that plaintiff sustained knee and shoulder injuries that restricted his ability to walk long distances and caused persistent and significant pain in those body parts. Additionally, Dr. Berkowitz opines that plaintiff's past medical history indicates hypertension and no significant prior surgical history; accordingly, the cause of plaintiff's alleged injuries was the subject accident, during which plaintiff recalled that his knee was "violently" twisted and "banged" into the steering column while he was seated in the driver's seat, causing his shoulder to "violently" hit the seat. Dr. Berkowitz opines

that the MRI report for plaintiff's right shoulder was positive for a rotator cuff tear and the report for his right knee was positive for a meniscus tear. Both tears were causally related to the accident and Dr. Berkowitz states he did not observe degenerative changes in the MRIs. Dr. Berkowitz performed the arthroscopic surgery to plaintiff's right knee in September 2016 and to his right shoulder in May 2017. Plaintiff still had a reduced range of motion in August 2019 and he complained of continued sharp pain in his shoulder and right knee. Notably, plaintiff's "interoperative findings did not demonstrate any degenerative joint disease, although" he is [now] "predisposed . . . to developing posttraumatic arthritis." Dr. Berkowitz states that plaintiff will require future surgeries and that his injuries are permanent in nature, have caused him to sustain significant limitations in use and in his daily activities, and were caused by the subject accident.

Dr. Parachuri, a radiologist, provides an affirmation which states that the MRIs conducted in July 2016 demonstrate right shoulder and right knee tears without any evidence of degenerative disease; rather, they were caused by trauma (E-File Doc 25). Additionally, he states that the MRIs indicate that plaintiff sustained herniated discs in his cervical and lumbar spine and other conditions, as a result of the accident, and the films show no evidence of a longstanding medical or degenerative condition.

Discussion

Defendant's emergency medicine expert cannot establish that plaintiff did or did not sustain serious injuries as a result of the accident, as he did not review plaintiff's treatment records for the period of 180 days following the accident. He cannot establish, as a matter of law, that plaintiff did not "sustain a medically-determined injury or

impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 of the 180 days following the accident” (see *Fils-Aime v Colombo*, 152 AD3d 493, 494 [2d Dept 2017] [“defendants’ submissions failed to eliminate triable issues of fact as to whether the plaintiff sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d)”]; *Sullivan v Illoge*, 50 AD3d 886 [2d Dept 2008] [“defendants’ motion papers did not adequately address the plaintiff’s claim . . . that [he] sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident]).

The court finds that the defendant has failed to meet his burden of proof as to all claimed injuries and all applicable categories of injury and that the motion must be denied. Accordingly, it is unnecessary to consider the papers submitted by the plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

The court notes, however, that had defendant made a *prima facie* case for dismissal, plaintiff’s treating doctors’ affirmed reports are sufficient to overcome the

motion and raise an issue of fact as to whether plaintiff sustained a “serious” injury” as a result of the subject accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). These reports opine as to significant, quantified restrictions in plaintiff’s range of motion, both contemporaneously with the accident and more recently, and these doctors opine that plaintiff’s injuries were caused by the subject accident. Thus, they raise a “battle of the experts.” This is sufficient to raise an issue of fact which requires a trial.

Accordingly, it is **ORDERED** that defendant’s motion for summary judgment dismissing the complaint is denied.

This constitutes the decision and order of the court.

Dated: November 6, 2020

ENTER :



Hon. Debra Silber, J.S.C.