

Rollins v Buckheit

2020 NY Slip Op 34035(U)

December 8, 2020

Supreme Court, Kings County

Docket Number: 507912/2018

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**

DEXTER ROLLINS,

Plaintiff,

-against-

PAUL BUCKHEIT,

Defendant.

DECISION/ORDER

Index No. 507912/2018

Motion Seq. No. 2

Date Submitted: 12/8/2020

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>24-33</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>35-46</u>
Reply Affirmation.....	<u>48</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 15, 2017. Plaintiff alleges, in his bill of particulars, (Doc. 30) that he sustained injuries to his neck and back, to his right shoulder and to both knees and both hands 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 two doctors, an orthopedist and a neurologist.

The orthopedist, Dr. Edward A. Toriello, (Doc. 32) examined plaintiff on October 2, 2019, and reports that plaintiff had a completely normal exam, with full and pain-free range of motion in his neck, back and both knees. He states that he reviewed plaintiff's medical records from a prior accident, which took place on June 25, 2010. He says "the records revealed he sustained injuries to his neck, mid and lower back and bilateral knees. The records reveal the previous lumbar procedure [in October 2010] was a discectomy and decompression surgery." Dr. Toriello lists the forty-four items of medical records he reviewed and says his impression is "The claimant reveals evidence of resolved cervical strain, superimposed on a pre-existing degenerative condition, resolved low back strain, superimposed on a pre-existing degenerative condition, resolved knee contusion, resolved right shoulder contusion, superimposed on a pre-existing degenerative condition and resolved hand contusions." He incorrectly states that plaintiff complained of pain to both knees, but his bill of particulars only listed one knee. In fact, it lists both.

Dr. Richard Lechtenberg, a neurologist, examined plaintiff on August 12, 2019. He tested the range of motion in his cervical and lumbar spine as well as other parts of plaintiff's body. His findings with regard to plaintiff's cervical and lumbar spine are not full and pain free, but instead were limited. Dr. Lechtenberg states that the abnormal findings are because plaintiff "voluntarily restricted excursions of the cervical [and lumbar] spine because of complaints of pain. Incidental movements revealed a largely

normal range of motion of the cervical [and lumbar] spine. Note: incidental movements are all movements observed independently of the formal range of motion examination, i.e. walking into and out of the examination room, sitting and standing, removing outerwear, removing footwear etc.” He concludes that plaintiff is “Status post cervical and lumbar spine sprains, per history, resolved” and that he “had no objective, clinical, neurologic deficits on my examination. From a neurologic standpoint he is not disabled and can work at any job for which he is qualified. He did not sustain any permanent neurologic impairment or disability causally related to the accident of 7/15/17. There is no objective evidence of disability from a neurologic standpoint. There is no objective evidence of limitations from a neurologic standpoint. He can perform his usual and customary activities of daily living.”

With regard to the 90 out of 180 days category of injury, defendant’s attorney’s affirmation states that the medical records indicate that plaintiff went for physical therapy for seven months after the accident, but that the plaintiff’s EBT transcript states that he only missed two months of work after the accident. Counsel states “he alleges he missed ‘a few months’ of work following this accident; then defining it as six (6) months (p. 13). He then conceded that approximately two (2) months after this accident, he began a full-time job at A1 Fire Steel (p. 16). He worked at A1 Fire Steel until June 2019, and his job entailed construction ‘mechanical work’, installing fire insulation in floors and walls (pp. 16-18). He worked 40 hours per week. . . It was a ‘physical job’ and required climbing ladders and carrying tools and equipment (pp. 18-19).

Discussion

It is not clear whether the defendant met his prima facie burden of demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. The defendant's orthopedist found full and pain-free range of motion in plaintiff's neck and back, knees, shoulders and hands. But the defendant's neurologist found significant restrictions in the plaintiff's cervical and lumbar spine, and he opines that plaintiff was intentionally "faking it." He failed to adequately explain and substantiate, with competent medical evidence, his belief that the limitations were self-imposed (see *McGee v Bronner*, ___AD3d___, 2020 NY Slip Op 06772 [2020]; *Singleton v F & R Royal, Inc.*, 166 AD3d 837, 838, 88 N.Y.S.3d 81; *Mondesir v Ahmed*, 175 AD3d 1291, 1291, 105 N.Y.S.3d 910; *Rivas v Hill*, 162 AD3d 809, 810-811, 79 N.Y.S.3d 225). Thus, with the conflicting medical reports, it is not clear whether defendant has demonstrated that plaintiff has not sustained a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system as a result of the subject accident

With regard to the 90/180-day category of injury, the defendant has made a prima facie case, as plaintiff testified that he started a new, full time, job after two months. It has been held that a movant makes a prima facie showing that plaintiff was not prevented from performing substantially all of his or her daily activities for 90 out of the first 180 days after the accident when the plaintiff was not told by a doctor to stay home from work for ninety days or more (see *Dacosta v Gibbs*, 139 AD3d 487, 488 [1st Dept 2016] ["Plaintiff's testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked "light duty" is

fatal to her 90/180-day claim"]; see also *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013]).

Whether or not defendant has made a prima facie case as to all claimed injuries and all applicable categories of injury, the court finds that plaintiff has overcome the motion and raised a triable issue of fact, so the motion must be denied.

Plaintiff opposes the motion with an affirmed report from Dr. Leonard Bleicher, dated January 24, 2020, along with an affirmation from counsel, an affidavit from plaintiff and a number of other medical records. Dr. Bleicher is an orthopedist, and reports that he was plaintiff's treating doctor from shortly after the accident. He sent him for MRIs and nerve conduction studies in 2017, and for physical therapy. At this recent exam, he tested plaintiff's range of motion and reports significant restrictions in plaintiff's cervical and lumbar spine, in his right knee and in his right shoulder. Dr. Bleicher concludes as follows: "When taking into consideration the patient's history, past medical history, clinical progression, diagnostic studies and physical examinations, I am of opinion that there is a causal relationship between the patient's symptom complex and the motor vehicle accident on 07/15/17 in which he sustained injuries of the right shoulder, left wrist, right knee, cervical and lumbosacral spine creating malfunctioning of the motor units and of the nerves, leading to the accelerated posttraumatic osteoarthritis, muscular weakness and atrophy. Dexter Rollins remains to be symptomatic and continues to suffer from numerically and objectively determined restrictions to the range of motion of his right shoulder, right knee, cervical and lumbar spine. Significant and permanent injuries of his right shoulder, right knee, cervical and lumbosacral spine represent impairments with limitation of body functions and are

causally related to the motor vehicle accident on 07/15/17. The patient will benefit from symptomatic outpatient physical therapy to improve/prevent worsening adhesive capsulitis/"frozen" shoulder on the right, to prevent addictive pain medications and prevent urgent spinal operative treatment if worsening neurological deficits with sciatica/radiculopathy on the right. There is medical necessity of the repeat MRI of the right knee and L-spine . . . to assess natural progression of posttraumatic conditions. There is medical necessity of arthroscopic repair of the right knee and right shoulder. . . His prognosis is guarded with progressive downhill clinical course without definitive operative Tx. He will experience chronic pain with exacerbations affecting his activities of daily living. His quality of life is impaired, and he will need life-long outpatient physical therapy when there is a worsening of chronic musculoskeletal pain."

Plaintiff's doctor reports findings very different from those of Dr. Toriello. Thus, he raises 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 to dismiss the complaint is denied.

This constitutes the decision and order of the court.

Dated: December 8, 2020

ENTER:



Hon. Debra Silber, J.S.C.