Carabajo v Quinones
2020 NY Slip Op 34092(U)
December 9, 2020
Supreme Court, Kings County
Docket Number: 515087/2018
Judge: Debra Silber

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

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CESAR CARABAJO,

Plaintiff,

-against-

JESUS M. QUINONES,

Defendant.

---x

DECISION / ORDER

Index No. 515087/2018
Motion Seq. No. 2
Date Submitted: 11/5/20

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, Affirmation and Exhibits Annexed.....	21-34
Affirmation in Opposition and Exhibits Annexed.....	35-37
Reply Affirmation.....	38-39

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

This is a personal injury action which arises from a motor vehicle accident which took place on April 4, 2018 on the Belt Parkway in Brooklyn, NY. At the time of the accident, plaintiff was approximately thirty-four years of age and was employed as a plumber. In his Bill of Particulars, (E-File Doc. 26), plaintiff claims that as a result of the accident, he sustained injuries to his cervical and lumbar spine, his right shoulder and his right wrist.

Defendant contends that he is entitled to summary judgment dismissing the complaint as plaintiff did not sustain serious injuries as a result of the accident, as defined by Insurance Law § 5102(d). Defendant supports his motion with an attorney's affirmation, the pleadings, plaintiff's deposition transcript and the affirmed IME report from an orthopedist, as well as an

independent review of plaintiff's MRIs by a radiologist.

Dr. Dorothy Scarpinato, an orthopedist, examined plaintiff on July 25, 2019 on behalf of the defendant, and reports that plaintiff had normal ranges of motion in his cervical and lumbar spine, his right shoulder and his right wrist, with otherwise negative test results. Dr. Scarpinato states that plaintiff made "subjective complaints of tenderness" during her exam. She concludes that plaintiff's sprains and strains have resolved. For her "Impression" she states "This is a 35-year-old male who was the restrained driver of a vehicle that was struck in the front and the rear on 4/4/18. He did not receive any emergency medical treatment that day and states that he injured his neck, back, right shoulder, bilateral wrists resulting in CTS. The claimant was referred for physical therapy, acupuncture and chiropractic treatment. He had injections, EMG/NCV and MRI studies performed and had no surgery as a result of the accident. My examination of the neck, back, right shoulder, bilateral wrists was normal, revealing subjective complaints of back and right shoulder tenderness with no positive objective findings. My diagnosis is resolved cervical spine strain, resolved lumbar spine strain, resolved right shoulder sprain and resolved bilateral wrists sprain with no symptoms of carpal tunnel syndrome. If the history provided is accurate, and based on the medical records provided and my examination performed today, there is a causal relationship between the claimant's initial complaints of neck, back, right shoulder and bilateral wrist [pain] and the accident of record. The claimant is currently working full time as a plumber. There is no orthopedic disability noted upon today's examination."

Defendant contends that his medical evidence, combined with plaintiff's testimony at his EBT, eliminates all categories of injuries in the statute. Plaintiff testified at his EBT that he

missed only a few days from work after the accident [EBT Pages 44-45], and defendant argues that this testimony rules out the 90/180-day category of injury.

The court finds that 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 Eyler*, 79 NY2d 955, 956-957 [1992]). The affirmed report of the orthopedist who examined plaintiff indicates that he did not sustain a serious injury as a result of the subject accident. Further, plaintiff's testimony that he missed only a few days of work after the accident makes a prima facie showing on the 90/180-day category of injury (*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"]; *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013] [plaintiff returned to work on a partial basis during the relevant period of time]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007] ["The plaintiff testified at trial that he missed only one month of work, that he then returned to work on a part-time basis, and that, after another month, he had resumed working on a full-time basis"]). The burden of proof then shifts to plaintiff.

Plaintiff contends that the medical evidence he has submitted overcomes the motion and raises a triable issue of fact as to whether he sustained a serious injury under Insurance Law § 5102(d). However, the medical "evidence" submitted is not in admissible form. Neither E-File Doc. 36 nor 37 are affirmed by Dr. Etienne. Plaintiff's opposition was filed almost a year after defendant's motion. The court must conclude that plaintiff has not come forward with sufficient evidence to overcome the motion and raise an issue of fact as to whether he 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 (*White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]).

Accordingly, it is **ORDERED** that the motion is granted, and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: December 9, 2020

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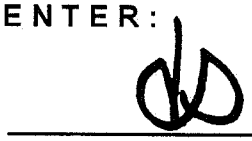

Hon. Debra Silber, J.S.C.