

Hodge v Cappelli
2020 NY Slip Op 34240(U)
December 21, 2020
Supreme Court, Kings County
Docket Number: 511586/17
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

EMANUEL HODGE and IBNZAKIY HINDS,

Plaintiffs,

-against-

SHERYL CAPPELLI and SONJA MELLYNCHUCK,

Defendants.

DECISION / ORDER

Index No. 511586/17

Motion Seq. No. 5

Date Submitted: 11/12/20

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>75-87</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>124-131</u>
Reply Affirmation.....	<u>134</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 that occurred on April 10, 2017 in Brooklyn, NY. Plaintiff Hodge was driving his mother's car at the time. The car was rear-ended while he was waiting for a red light. He refused medical attention at the scene, and then went to an emergency room near his home (Mercy Medical Center) a few hours later on the same day. Summary judgment has been granted on the issue of liability. In his bill of particulars, plaintiff alleges that as a result of the accident, he sustained injuries to his cervical and lumbar spine, to his left knee, his right wrist and to his left hip. He subsequently reported that the right wrist and left hip injuries have healed.

The movants contend that plaintiff did not sustain a "serious injury" as a result of this accident; that plaintiff's alleged injuries "do not find support in the medical evidence,

are degenerative/pre-existing in nature, have completely resolved, and/or did not result in any residual disability or permanency. These injuries are therefore incapable of supporting a cause of action.” The court notes that the co-plaintiff was a passenger in the plaintiff’s car, but is not mentioned in this motion. Thus, the court will only be referring to plaintiff Hodge hereafter.

Movants support their motion with an affirmation of counsel, the pleadings, plaintiff’s bill of particulars, plaintiff’s EBT transcript, affirmed IME reports from their examining orthopedist and neurologist, and affirmed reports from a radiologist.

Plaintiff testified at an EBT taken on March 8, 2019 (E-File Doc. 86). He said he was unemployed at the time of the accident, as he had quit a job in the construction industry about a month earlier. He did not work again until sometime in 2018, when he started a new job as a “fire guard.” His testimony about his medical care after the accident can only be described as vague and unprecise. He said “I’m bad with names.” His passenger, the co-plaintiff referred him to a place called Advanced Multi Medicine Rehabilitation, where he went a few days after the accident, complaining of sharp pain in his back and an inability to walk. He treated there for some period of time, and then switched to a doctor closer to his home, Dr. Stan Avshalumov, of Advanced Orthopedics and Joint Preservation, mostly complaining about his back and his left knee (page 78). He treated there for a time and then Dr. Avshalumov performed arthroscopic surgery on his left knee. He used crutches for three months after the surgery. He continued to treat for about eight months after the surgery, for his lower back and his left knee, at a place called Starrett City Medical. His wrist injury healed without treatment (Page 89). They did various forms of therapy and gave him a knee brace and a back brace. He still uses them when the pain is bad. The facility sent a car to pick him up and take him to New Jersey for injections to his lower back, as they did not perform them in their offices in

Brooklyn. He had them two or three times. He also received about five injections to his left knee, which was not pain free nor working properly after the surgery. He took pain medications for a few months then stopped as he did not think they helped. He stopped all treatment in March 2018, he said (Page 105). At that point, he told his doctor "I told him some days are better than others, but it ain't never been the same [as before]" (Page 108). He testified that he can no longer run, play sports or sleep well due to the pain and problems with his lower back and his left knee.

From plaintiff's testimony, the court cannot conclude 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]). Plaintiff's knee surgery was on May 30, 2017.

Dr. Edward Toriello, an orthopedist, examined plaintiff on May 5, 2019, two years after the accident (Doc 82). Plaintiff told him that he was still experiencing pain in his lower back and left knee. Dr. Toriello's range of motion testing of plaintiff's neck, back, and knees did not produce normal results. For plaintiff's cervical spine, he says he found "flexion of 30 degrees (normal is 45-50 degrees), extension of 30 degrees (normal is 55-60 degrees). For his left knee, he states "left knee reveals pain-free flexion of 0 to 90 degrees (normal is 0-15 to 130-150 degrees). There is no erythema, ecchymosis, swelling, or tenderness of the left knee." He found a normal range of motion in plaintiff's lumbar spine. Dr. Toriello states "range of motion is a subjective finding under the voluntary control of the individual being tested. Variables such as body habitus, age, conditioning as well as the claimant's effort may affect the observed results." Dr. Toriello concludes that "the claimant reveals evidence of a resolved cervical strain, resolved low back strain, resolved left knee contusion, resolved right wrist sprain, and resolved left hip

contusion. The claimant reveals no objective evidence of continued disability. He is able to return to work and normal daily living activities without restriction. No further orthopedic intervention or treatment is indicated.

Based on the history as given by the claimant, review of records, and the physical examination, the resolved injuries are causally related to the accident.” Dr. Toriello then adds at the end of his conclusions “It is my opinion that the surgery that was performed on the claimant's left knee addressed a preexisting unrelated condition in the left knee that did not occur as a result of the accident dated April 10, 2017, nor was it exacerbated by this accident. My opinion is based on the fact that the MRI of the left knee that was done shortly after the accident revealed findings consistent with a chronically torn anterior cruciate ligament. Aside from a bone contusion, the MRI did not demonstrate any evidence of an acute injury to the left knee, and certainly no evidence of an acute injury to the left knee that would have required surgery. It is, therefore, my opinion that the claimant did not sustain any injury to his left knee on April 10, 2017 that would have required surgical intervention.”

Michael J. Carciente M.D., a neurologist, examined plaintiff on May 21, 2019 (Doc 83). He says “the claimant states that he has pain in the left knee and in the lower back. He also complains of neck stiffness. . . [he] walks normally and without difficulty. He said that he could not walk on heels and toes as this would cause pain in the left knee.” He examined plaintiff, although he did not do any range of motion testing, or if he did, he does not report the findings. His final “impression” is that “the claimant has a completely normal neurological exam. There were no objective neurological findings. . . There is no evidence of an ongoing neurological injury, disability or permanency.”

Dr. Melissa Sapan Cohn, a radiologist, reviewed the plaintiff's x-rays, CT-scans

and MRIs (Doc 84). The x-rays and CT-scans basically confirm the absence of fractures. She reports that plaintiff's post-accident left knee MRI shows "a chronic tear of the anterior cruciate ligament. . . . The anterior cruciate ligament is an important stabilizer of the knee. Without an intact anterior cruciate ligament, degenerative changes of the knee will develop due to the lack of instability [sic]. There is, in fact, advanced degenerative osteoarthritis, more than anticipated for a 39-year-old male. . . . There is severe cartilage loss within the medial compartment. This is commencement of osteoarthritis. There are large osteophytes involving both the medial femorotibial and patellofemoral compartments. This requires actual bone formation and takes years to develop. There is subchondral edema and cystic change within the medial compartment. This indicates that the process of arthritis is so advanced that it is actually affecting the subchondral bone. This advanced degenerative change is consistent with chronic ACL tear that has lead to severe arthritis due to lack of stability of the knee.

There is a tear of the medial meniscus. The meniscus is a structure which sits interposed within the joint space. These are frequently involved in the setting of arthritis. As joint space narrowing progresses, there is abnormal stress upon the underlying menisci. This leads to degenerative fraying and tearing. The exact age of the meniscal tears are indeterminate based exclusively upon their MRI appearance. Once the meniscus is torn, it can remain stable in appearance for a long period of time. There are no additional findings on this study such as hemarthrosis, bone contusion or soft tissue swelling to confirm an acute injury to the knee. In my opinion, there is a chronic anterior cruciate ligament tear which has lead to advanced arthritis of the knee and underlying degeneration and tearing of the menisci. There are no findings to confirm an acute traumatic related injury on the submitted examination." The court notes that Dr. Toriello

reports that there is a bone contusion shown in the films, but Dr. Sapan Cohn says there is not, and if there were, it would "confirm an acute injury."

Dr. Sapan Cohn also reviewed the left knee MRI taken July 13, 2017, after the knee surgery. She says "there has been interval surgery with repair of ACL tear. An obliquely oriented interferent screw is noted within the proximal tibia. Screw tracks are noted within the medial condyle. The posterior cruciate ligament, medial lateral and collateral ligament and extensor mechanism remain intact. There continues to be abnormal signal intensity within the posterior horn of the medial meniscus likely representing post surgical change. The lateral meniscus is intact. There is marrow edema associated with the surgical hardware. This is likely post surgical in nature. This may also be partially artifactual. Severe tricompartmental osteoarthritis is again noted with narrowing of all three compartments of the joint space and marginal osteophyte formation. Diffuse loss of cartilage within the medial compartment with subchondral cystic change and edema is again identified."

With regard to the cervical spine, Dr. Sapan Cohn reviewed the July 13, 2017 MRI and reports "in my opinion, there is a tiny left parasagittal disc herniation at the C6-7 level. This is associated with underlying degenerative changes indicating it is chronic in nature. There are no findings to indicate acute traumatic related injury on the submitted examination."

The lumbar spine MRI was taken on July 6, 2017 and she concludes it is a "normal study."

Finally, defendants provide a hundred pages of plaintiff's medical records from the federal Bureau of Prisons, for the period March 2018 to May 2018. This was after the accident. Since a defendant is permitted to use a plaintiff's own medical records in a

serious injury motion without a certification or otherwise submitting them in admissible form, the court has considered these. However, they do not support defendant's motion. He reported pain in his lower back and left knee from the motor vehicle accident. He was prescribed Meloxicam, a nonsteroidal anti-inflammatory drug (NSAID). The court did not read all of the one hundred pages, but wonders if perhaps the unrelated information should have been redacted before putting it on the internet, as much of it is personal information. Perhaps a stipulation to seal this document would be appropriate. Defendants' counsel states in his affirmation that these records indicate that plaintiff had a full range of motion in these medical reports, which undercuts his claim of permanent injuries. He refers, in paragraph 18 of his affirmation, to the reports of 4/10/18, 5/4/18 and 5/10/18. The 4/10/18 report states that he had "full range of motion" in his knee, without stating what that number is or how it was determined, and this report says nothing about his back. The notes say he went to the medical office because of pain in his lower back and an "unspecified joint." The notes says they will try to obtain his MRIs and other medical records. The report for 5/4/18 says he reported joint pain and low back pain, and notes that he was given a knee brace. The record for 5/10/18 also notes that he was previously given a knee brace for his left knee, and that his spine ROM was "full" in a list of body parts, without explanation.

The court finds that the defendants have not made out a prima facie case for dismissal of the complaint by establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. See, *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002].

Defendants do not provide any medical evidence for the time period of the first six months after the accident. There is nothing in the pleadings, the bills of particulars or the

EBT transcript that supports defendants' claim that plaintiff was not prevented from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. To be clear, plaintiff's EBT statements do not support defendants' motion. When a plaintiff does not testify that his activities were not restricted, the defendant needs medical evidence with regards to the 90/180-day category of injury. Here, there is none. Plaintiff had knee surgery in the first six months after the accident and testified that his daily activities were severely restricted.

As to the other applicable categories of injury, Dr. Carciente did not perform any range of motion testing and Dr. Toriello reports some significantly abnormal results. He doesn't adequately explain and substantiate, with competent medical evidence, his belief that the reported 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; *Mondesir v Ahmed*, 175 AD3d 1291, 1291; *Rivas v Hill*, 162 AD3d 809, 810-811).

As the defendants have failed to meet their burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiffs 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]).

In any event, had defendants made a prima facie case for dismissal, plaintiff's treating doctors' affirmations 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]).

Plaintiff's doctors, including Dr. Stan Avshalumov, who performed the knee surgery, Alexander Zhuravkov M.D., a treating doctor, and the radiologists who read his films, provide affirmations. Dr. Stan Avshalumov's affirmation reports significant and quantified restrictions in plaintiff's ranges of motion in his spine and left knee, both contemporaneously with the accident and recently, and opines that plaintiff's injuries were caused by the subject accident. Thus, they raise a "battle of the experts," requiring a trial.

Accordingly, it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: December 21, 2020

ENTER:



Hon. Debra Silber, J.S.C.