

Cunningham v Saeid
2021 NY Slip Op 31071(U)
April 5, 2021
Supreme Court, Kings County
Docket Number: 518303/2019
Judge: Debra Silber
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

-----X

JIMMIE CUNNINGHAM,

Plaintiff,

DECISION / ORDER

Index No.: 518303/2019

-against-

Motion Seq. No. 1 & 2

MOHAMED M. SAEID and SHAFIO M. CHAUDHARY,

Defendants.

-----X

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of defendant Chaudhary's motion and defendant Saeid's cross motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, and Exhibits Annexed	<u>10-18</u>
Notice of Cross Motion, Affirmations, and Exhibits Annexed	<u>20-26</u>
Affirmation in Opposition and Exhibits Annexed	<u>31-34</u>

Upon the foregoing cited papers, the Decision and Order on these motions is as follows:

This is an action for personal injuries arising from a motor vehicle accident that occurred on December 1, 2018 at the intersection of Hoyt and Dean Streets in Brooklyn, NY. Plaintiff alleges that his vehicle was struck by the vehicle "owned, operated and controlled by the defendant, Mohamed M. Saeid, while operating same with the knowledge, permission and consent of defendant, Shafio M. Chaudhary" (Doc 12 [Complaint]). Plaintiff asserts that he sustained injuries to his lumbar, thoracic, and cervical spine, as well as to his right shoulder. At the time of the accident, plaintiff was twenty-six years old. The certified police report indicates that it was a "T-bone" collision at plaintiff's passenger side, and that defendant Saeid told the police officer at the scene that he couldn't stop at the red light because his "breaks were defected [sic]."

In Motion 1, defendant Chaudhary moves for summary judgment and an order dismissing the complaint and the co-defendant's cross claims on the basis that plaintiff did not sustain a serious injury as a result of the accident within the meaning of Insurance Law § 5102 (d). In Motion 2, defendant Saeid cross-moves for the same relief on the same grounds. Plaintiff opposes both motions.

Defendants' motion and cross motion

In Motion 1, Chaudhary's counsel submits the pleadings, plaintiff's EBT transcript, and two medical doctors' affirmed reports (Dr. Pierce Ferriter [orthopedist] and Dr. Darren Fitzpatrick [radiologist]). In support of Motion 2, Saeid's counsel submits the same documents (both defendants use the same doctors). Defendants argue that summary judgment is appropriate here because their independent medical examinations demonstrate that plaintiff's injuries have resolved, there are no permanent injuries or any disability, and alternatively, that any injuries were not caused by the subject accident.

Dr. Ferriter opines that plaintiff's alleged injuries to his cervical spine, thoracic spine, lumbar spine, and right shoulder have all resolved (see Doc 16 [Dr. Ferriter's 7/27/20 IME Report]). He concludes that plaintiff "presents with a normal orthopedic examination on all objective testing. The orthopedic examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined. The examinee is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including work duties. There is no permanency or disability" (*id.*).

Dr. Fitzpatrick performed a radiological evaluation of the MRI films of plaintiff's cervical spine, thoracic spine, lumbar spine, and right shoulder, which were taken about two weeks after the accident on 12/6/18 and 12/13/18 (Doc 17 [Dr. Fitzpatrick's Report]).

Dr. Fitzpatrick opines that the plaintiff's right shoulder MRI films demonstrate: "[n]ormal marrow signal. The rotator cuff is intact with diffuse tendinosis. There is anterior and lateral downsloping of the acromion with a small, broad-based enthesophyte which abuts the bursal surface of the rotator cuff with underlying bursitis" (*id.* at 1). His impression is "Rotator cuff tendinosis with findings of subacromial impingement," and he opines that plaintiff sustained no traumatic injury. He states that "Tendinosis is a non-traumatic entity that is the result of chronic overuse, resulting in protracted tendon degeneration over the course of months to years . . . [which] results in . . . painful range of motion" (*id.* at 1). He explains that subacromial impingement "is an acquired degenerative condition with no traumatic basis" (*id.* at 1-2).

With regard to plaintiff's thoracic spine MRIs (taken 12/13/18), Dr. Fitzpatrick finds "[n]ormal marrow signal. Normal alignment. No ligamentous edema. Normal signal and morphology of the thoracic cord No disc bulge, canal stenosis or neural foraminal narrowing" (*id.* at 3). His impression is "[m]inimal thoracic degenerative disc disease" and concludes "[n]o traumatic injury. As the disc degenerates and loses its elastic properties, the adjacent bone of the vertebral body margins adapts to the decreased absorptive properties of the disk by forming new bone to help dissipate increased load and forces applied across the vertebral bodies. This results in osteophyte formation." He continues "the presence of endplate osteophytes or productive changes suggests chronic disc degeneration as this type of new bone formation requires at least 6 months to develop" (*id.* at 3).

With regard to plaintiff's cervical spine, Dr. Fitzpatrick finds that the MRI films (taken 5 days after the accident, on 12/6/18) demonstrate "[m]oderate lower cervical degenerative disc disease." He states that there is "[d]iffuse loss of disc height and disc

signal spanning C5-C6 Prominent disc osteophyte complexes at C5-C6 and C6-C7 . . . with mild central canal stenosis” (*id.* at 4). He concludes that there was “[n]o traumatic injury,” as “[c]ervical intervertebral disc degeneration is an age-related, drying out and loss of the disc substance, desiccation, which occurs over a protracted time course of at least 6-months duration” and results in “loss of . . . disc signal and/or height, with no traumatic basis” (*id.*). He states that this process can “progress to disc thinning and ultimately disc herniation,” also a degenerative process (*id.*).

Dr. Fitzpatrick’s review of plaintiff’s lumbar spine MRI films (taken 5 days after the accident) concludes that they show “[m]ultilevel disc bulges with . . . endplate productive changes spanning L2-L3 through L5-S1” and his impression is “[m]ild lumbar degenerative disc disease” (*id.* at 5). He concludes there was “[n]o traumatic injury” as “[l]umbar intervertebral disc degeneration is an age-related [condition] . . . which occurs over . . . at least [6 months]” (*id.*). Lumbar disc degeneration “can progress to disk thinning and ultimately disc herniation,” also a degenerative condition (*id.*).

Dr. Fitzpatrick concludes each of his four affirmed reports by stating that plaintiff’s MRIs show “no traumatic injury.”

As defendants have not provided any medical records generated during the first six months after the accident, the court must turn to plaintiff’s EBT transcript to determine whether defendant has submitted admissible evidence with regard to the 90/180 category of injury. Here, plaintiff testified that he did not go to an emergency room for the alleged injuries. However, he stated that he had physical therapy until July 2019. Plaintiff also stated that he was not confined to his bed or home after the accident and he did not miss any time from work (*see id.* at 9, 72-73) and that, at the time of the EBT (3/3/20) he was

able to engage in the activities of daily living (dressing, bathing, feeding, cooking, cleaning, laundry, and shopping) (*id.* at 78-79).

Defendants thus contend that they have made a prima facie case for dismissal of the complaint, that the accident was not the cause of the plaintiff's alleged injuries, that there are no permanent or significant consequential limitations, and the proof submitted establishes that the 90/180-day category is "ruled out."

Plaintiff's opposition to the motions

Plaintiff opposes the motions. His attorney submits plaintiff's own affidavit, the affirmation of Dr. Gideon Hedyrch with medical records and reports, and affirmations from Dr. Harold M. Tice, with documents annexed which were produced in the parties' discovery exchange. Plaintiff argues that defendants' motions fail to demonstrate prima facie that either defendant is entitled to summary judgment as a matter of law. His attorney first contends that plaintiff's deposition transcript is inadmissible as it is not signed by the plaintiff and there is no proof that the transcript was forwarded for plaintiff's review. Plaintiff next argues that defendants have failed to eliminate all triable issues of fact with regard to the 90/180 category of injury, as neither of defendants' doctors specifically addressed that time period; specifically, he argues that Dr. Ferriter's examination was conducted almost two years after the accident and Fitzgerald's report, which evaluating the MRIs taken less than two weeks after the accident is "replete with language of equivocation and hesitation" (Doc 31 at 10-11). Plaintiff further argues that defendants' doctors' reports fail to eliminate all issues of fact concerning the plaintiff's claim that the accident "activate[d] or exacerbate[ed] quiescent or dormant conditions" (*id.* at 11).

Plaintiff further contends that his doctors' reports raise triable issues of fact that overcome the motion and preclude summary judgment. Dr. Hedyrch, plaintiff's treating physician, treated plaintiff from December 2018 to October 2020. He submits an affirmation with plaintiff's medical records attached (as business records). He initially examined plaintiff five days after the accident and notes plaintiff's complaints of neck pain/limitations, upper back pain/limitations, and severe lower back pain/limitations with weakness and numbness in his right leg, which plaintiff claimed were caused by the accident (Doc 33 [Dr. Hedyrch Aff.]). He notes "ambulation with spine splinted, mildly to moderately antalgic gait favoring his right lower extremity; heel and toe walking were moderately limited by right lower extremity weakness" (see *id.* ¶ 7; see also *id.* ¶ 3). Dr. Hedyrch also noted a positive Babinski sign on the right (supporting an "Upper Motor Neuron damage diagnosis") and positive Lhermitte's sign on the right (a "sensation [that] occurs when the neck is moved in a wrong way or rather flexed") (*id.*).

Dr. Hedyrch found that plaintiff had significant restrictions in his range of motion in his spine at the exam performed five days after the accident. He noted cervical spine limitations (30% decrease in flexion; 92-84% decrease in extension; 55 / 55-45% decrease in lateral flexion right and left; and 50 / 38-50 / 44% decrease in rotation right and left) as well as "moderate right and moderate to marked left paravertebral, trapezius and suprascapular muscle spasm with tenderness from C3 to T5/6. All movement with pain" (*id.* ¶¶ 9-10). With regard to the plaintiff's lumbar spine, he found a 50% decrease in flexion, 80% decrease in extension, 72-58 / 75% decrease in lateral flexion "r/l," and 78-66 / 66-56% decrease in rotation "r/l." He noted "moderate right and moderate marked left paravertebral muscle spasm from T6-7 to S1. He also observed "objective findings" of a 78% limitation in the "straight leg raising test," a positive right "flip test" (to

determine whether there is nerve tension), and a positive Bragard's sign on the right (to determine whether pain is likely generated by the nerves of the muscles) (*id.* ¶ 13). He also found that the range of motion in plaintiff's right shoulder was limited: 42% decrease in abduction; 17% decrease in adduction; "minimal limitation" in external rotation; 8% decrease in internal rotation; 39-37% decrease in flexion; and 66-59% decrease in extension. An "objective Hawkins sign" (indicating that an impingement is likely) was positive and Dr. Hedyrch notes "neurologic/sensory" limitations (*id.* ¶ 15).

Dr. Hedyrch initially diagnosed the plaintiff with: "cervical spine derangement with traumatic myofascitis, cervical and/or cervical spinal cord myelopathy; thoracic spine strain; lumbosacral spine derangement with traumatic myofascitis, lumbar radiculopathy and right shoulder derangement with traumatic tendinitis" (*id.* ¶ 16).

Dr. Hedyrch avers that plaintiff's treatment continued for about a year after the accident. He referred plaintiff to physical therapy, which he attended until further physical therapy would be "palliative" in nature (Dr. Hedyrch's opinion). Plaintiff had follow-up appointments with Dr. Hedyrch on January 23, 2019, February 21, 2019, May 16, 2019, June 28, 2019, October 4, 2019, and January 17, 2020. On January 17, 2020, plaintiff still complained of neck, back, and shoulder pain/limitations as well as "daily" right shoulder pain/limitation "accentuated with exertions" (*id.* ¶ 23). Dr. Hedyrch found "the spine splinted on ambulation; mildly to moderately antalgic gate . . . ; markedly limited heel-walking; [and] moderately limited toe walking" (*id.*). He again found significant limitations in plaintiff's range of motion. His cervical spine exam indicated that plaintiff's flexion was decreased by 40-32%; there was an 84% decrease in extension; a 55-45 / 45-33% decrease in lateral flexion "r/l"; and a 50 / 50% decrease in rotation "r/l" (*id.* ¶ 24). Plaintiff's lumbar spine's range of motion was also limited: there was a 38% decrease in

flexion; an 80% decrease in extension; a 72-58 / 85-72% decrease in lateral flexion “r/l”; and a 56-66 / 66% decrease in rotation “r/l” (*id.* ¶ 25). Dr. Hedyrch notes “moderate to marked muscle spasm” and limitations demonstrated by the straight leg raising test. Upon examining plaintiff’s right shoulder, he had a 23% decrease in abduction; a 16% decrease in adduction; an 8% decrease in internal rotation “r/l”; a 17% decrease in flexion; and a 42% decrease in extension (*id.* ¶ 26).

On October 15, 2020, plaintiff saw Dr. Hedyrch again, and presented with additional complaints of pain, reported he was having trouble sitting, standing, and ambulating. Dr. Hedyrch examined plaintiff and tested his range of motion. He reports substantially the same limitations in plaintiff’s range of motion as he found following plaintiff’s January 2020 exam (*see id.*).

Dr. Hedyrch now diagnoses plaintiff with “[c]ervical spine derangement: C2-3, C3-4 C4-5 C5-6 C6-7 disc herniations,” “cervical radiculopathy and cervical spinal cord myelopathy,” “[t]horacic spine derangement with T6-7 and T7-8 disc herniations” “[l]umbosacral spinal derangement with L5-S1 dis herniation . . . and L4-5 disc bulge,” “lumbar radiculopathy,” and “[r]ight shoulder derangement with tear of . . . labrum” and “tendinopathy” (*id.* ¶ 33). He opines that plaintiff has “a substantial and permanent impairment/ disability due to the injuries sustained in said accident,” and the injuries “altered his ability to function as he did prior to the accident and will result in chronic and exacerbate symptoms, with limitations upon his activities of daily living” (*id.* ¶¶ 35-36).

Dr. Hedyrch opines in his affirmation, following his most recent exam held October 15, 2020, to a reasonable degree of medical certainty, that the plaintiff’s injuries were caused by the accident and that the diagnoses are supported by the MRI studies.

Dr. Hedyrch next addresses the reports submitted by defendants' doctors. Dr. Hedyrch opines that plaintiff's injuries are "not static in nature, but have intermittent periods of exacerbation and quiescence," therefore Dr. Ferriter's range of motion measurements are "not medically inconsistent" (*id.* ¶ 44). Dr. Hedyrch concurs with Dr. Fitzpatrick's statement that plaintiff "suffered mild to moderate cervical and thoracic (distal) / lumbar injury and radiculopathy," but opines that these injuries are not resolved as Dr. Fitzpatrick concludes, and that the positive findings in the plaintiff's spine and right shoulder are not degenerative in nature (*id.* ¶¶ 45-46). He opines that plaintiff's spinal herniations were caused by a traumatic injury, and the MRI films in fact "indicate an acute traumatic event" (*id.* ¶ 46). Alternatively, Dr. Hedyrch opines that the accident activated and aggravated plaintiff's degenerative condition (*id.*).

Plaintiff's second affirmation is from Dr. Harold M. Tice, the radiologist who reviewed plaintiff's MRI films after they were taken at Stand-up MRI of Brooklyn, P.C. and wrote the MRI reports. He provides an affirmation to authenticate his reports. Dr. Tice's impression, with regard to the plaintiff's spine MRIs, is: "L5/S1 disc herniation deforming the thecal sac . . . bilaterally, right greater than left" and L4/5 disc bulge [lumbar]; "C2-3, C3-4, C5-6 and C6-7 disc herniations . . . with C5-6 bilateral neural foraminal narrowing and C5-6 and C6-7 mild central spinal stenosis in conjunction with hypertrophic changes," as well as C4-5 disc bulge [cervical]; and "T6/7 and T7/8 disc herniations . . . with T7/8 cord abutment and T6/7 left paracentral orientation" [thoracic]. For the plaintiff's right shoulder MRI, he states he sees "Intrasubstance tear anterior glenoid labrum," "Acromioclavicular hypertrophic changes associated with impingement syndrome," and "Distal supraspinatus tendinopathy" (Doc 34 [Dr. Tice's Aff.]).

Discussion

The court finds that the defendants have made a prima facie case for summary judgment, but that the plaintiff has overcome the motion and raised a triable issue of fact as to whether he sustained a “serious injury” as a result of the accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). Dr. Hedyrch opines that plaintiff had significant, quantified restrictions in his range of motion, both contemporaneously with the accident and recently, and his opinion is supported by the radiologist’s reports, which Dr. Tice has authenticated. Further, Dr. Hedyrch opines as to the permanent nature of plaintiff’s injuries and states that, with a reasonable degree of medical certainty, that plaintiff’s injuries were caused by the subject accident (or the accident activated and exacerbated an underlying condition). Thus, the parties’ doctors raise a “battle of the experts.” This is sufficient to raise an issue of fact which requires a trial.

Accordingly, it is **ORDERED** that Motion 1 (Chaudhary’s motion for summary judgment) and Motion 2 (Saeid’s motion for summary judgment) are both denied.

This constitutes the decision and order of the court.

Dated: April 5, 2021

ENTER:



Hon. Debra Silber, J.S.C.