Shalomov v Sumaliyeva
2021 NY Slip Op 31549(U)
May 5, 2021
Supreme Court, Kings County
Docket Number: 521075/2018
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9
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ROBERT SHALOMOV and DENNIS DULEVSKIY,

Plaintiffs,

-against-

VERONIKA SUMALIYEVA, GENNADIY GORELIK, RIVAROL MICHEL and BORO TRANSIT, INC.,

Defendants.
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DECISION / ORDER

Index No.: 521075/2018

Motion Seq. No. 7

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of defendants Sumaliyeva and Gorelik's motion for summary judgment

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmation, and Exhibits Annexed	100-116
Affirmation in Opposition, and Exhibits Annexed	124-127
Affirmation in Reply	128-130

Upon the foregoing cited papers, the Decision and Order on this motion is as follows:

This is an action for personal injuries arising from two different motor vehicle accidents. This motion only concerns the first one, which took place on March 28, 2017. Plaintiffs have discontinued the action as against the other defendants, who were involved in the second accident. Plaintiff Shalomov's car was rear-ended in this accident, and co-plaintiff Dulevskiy was his front-seat passenger. At the time of the accident, they were traveling in Brooklyn on the BQE westbound. Shalomov went to the emergency room at Brooklyn Hospital by ambulance after the accident, and Dulevskiy declined medical attention. Summary judgment has been granted on the issue of liability. In his bill of particulars, plaintiff Shalomov alleges that as a result of the accident, he sustained injuries to his cervical and lumbar spine, and to his right knee. Plaintiff Dulevskiy alleges

he injured his cervical, thoracic, and lumbar spine.

The movants contend that neither of the plaintiffs sustained a "serious injury" as a result of this accident. Movants support their motion with an affirmation of counsel, the pleadings, plaintiffs' bill of particulars, plaintiffs' EBT transcripts, affirmed IME reports from their examining orthopedist and some of plaintiffs' medical records.

Robert Shalomov

Plaintiff Shalomov testified at an EBT taken on February 27, 2020 (E-File Doc. 105). He was forty years old on the date of the accident. He said he was unemployed at the time of the accident [Page 30], as he had quit a job as a butcher a short time before the accident, and then bought a livery car service about five months after the accident. Then, he served as the dispatcher, part time. He had been in an earlier accident, in 2007. His testimony about his treatment after the earlier accident was vague. His testimony about his treatment after this accident was vague. He said he continued having treatment and he could not remember exactly when he stopped. By the beginning of August 2017, he testified that he was feeling a lot better. The second accident in this action was in December 2017.

From plaintiff's testimony, the court cannot conclude whether plaintiff Shalomov was 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]). He was not asked any questions about his activities at his EBT. The records from Brooklyn Hospital which defendants provide indicate that plaintiff complained in the emergency room of pain to his neck, back and right knee. Defendant provides Shalomov's MRI reports from Ocean Radiology (Doc 197), which indicate in relevant part that in his right knee, he had an "Intra meniscal tear in the posterior horn of the medial meniscus. Mild joint effusion consistent with recent trauma, in an

appropriate clinical setting." For the lumbar spine, the report says "Mild loss of L4-5 disc space height with a diffuse disc herniation with compression of anterior thecal sac and bilateral neural foramina and bilateral exiting nerve root. Posterior central LS-S1 disc herniation with compression of anterior thecal sac and impingement of descending nerve roots. There is an underlying annular tear."

Dr. Dorothy Scarpinato, an orthopedist, examined plaintiff on July 30, 2020, three years after the accident (Doc 111). Plaintiff told her that he was still experiencing pain in his right knee. Dr. Scarpinato's range of motion testing of plaintiff's neck, back, shoulders, hips and knees produced completely normal results. She reviewed the MRI films and concludes that all of the findings are "chronic, pre-existing and degenerative." She concludes that plaintiff has no orthopedic disability.

Next, defendants provide plaintiff's medical record from the United Medical Offices of Long Island, Doc 108. 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 it. This is a report from an initial visit on May 30, 2017, about 60 days after the accident. This report indicates that plaintiff complained of pain in his neck, lower back, and right knee. The range of motion testing performed of his cervical and lumbar spine did not produce normal results. He was told to see an orthopedist and a pain management doctor, and to continue with physical therapy, chiropractic treatment, and to have nerve conduction studies done. A copy of the nerve conduction study (done the same date) and the report is provided. The conclusion is "The above electrodiagnostic study reveals evidence of left C5 - C6, right C5 -C6 -C7 and bilateral S1 - 2, left L4 – L5 radiculopathy." This record does not support defendants' motion. There are also records generated after the second accident, which are not relevant to this motion.

Defendant next provides some of Dr. Tim Canty's treatment records (Doc 110). They indicate that plaintiff had lumbar epidural steroid injections for pain in June 2017.

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]. There is nothing in the pleadings, the bill 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 because he was not asked any questions applicable to this category of injury. The only item even tangentially relevant is his testimony that he was feeling a lot better by early August, but that was more than ninety days after the accident. When a plaintiff does not testify that his or her daily activities were not restricted, the defendants need medical evidence to prove the plaintiff did not have an injury in the 90/180-day category of injury. Here, there is none.

As the defendants have failed to meet their burden of proof as to all claimed injuries and all applicable categories of injury regarding Robert Shalomov, 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 doctor's affirmation is 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 doctor, Tim Canty M.D. provides an affirmation (Doc 125) indicating significant and quantified restrictions in plaintiff's ranges of motion, both contemporaneously with the accident and recently, and opines that plaintiff's injuries were caused by the subject accident. He specifically compares the MRI of the plaintiff's right knee taken after this accident with the one taken after the subsequent accident, and states that the knee is worse in the MRI taken six month later, indicating to him that the earlier findings were from this accident. He also disputes defendants' claim that plaintiff's positive findings are all degenerative. His affirmation clearly raises a "battle of the experts," requiring a trial.

Dennis Dulevskiy

This plaintiff also testified at an EBT on February 27, 2020. At that time, he was working for co-plaintiff's livery car service as a dispatcher. He was 32 years old at the time of the accident. He was asked this question [Page 57-58]: "During the three months after this accident were you prevented from doing any daily activities that you would normally do?" He answered "Most of the time I have a problem to get up from my bed, like, in the morning time. That was most of the time I was getting pain during, like, when I sleep. I guess when I wake up." He said he was working from home, and was asked "Were you able to do your job from home?" He answered "Yes, it was difficult to sit down. Like, I have to take a break because it was difficult for me to sit straight. I will start feeling the pain all of

time." He testified that he was working for New York Marketing Club Inc. He said [Page 10] "I did marketing for them from my house." His work was on a computer [Page 59]. He also said it was not full time. He did not say he missed any time from work, or that he could not do the work he was given by this company. He did not say he could not sleep, cook, shop, or do any other activity. He did not take any medication. This is sufficient proof for defendants to establish that plaintiff did not have a medically determined injury which prevented him from performing his usual and customary daily activities in the six months after the accident.

Defendants provide an IME from Dr. Dorothy Scarpinato, an orthopedist, who also examined this plaintiff on July 30, 2020, three years after the accident (Doc 115). Plaintiff told her that he was still experiencing pain in his back and his right knee. He did not claim any injury to his right knee in his bill of particulars. Dr. Scarpinato's range of motion testing of plaintiff's neck, back, shoulders, hips and knees produced completely normal results. She concludes that plaintiff has no orthopedic disability. She states "he was seen at United Medical Offices of Long Island on May 30, 2017 for reported complaints of neck and lower back pain. The report of this examination does not document any further areas of complaints other than the neck and back. The report is noted to document under upper and lower extremities – no reported injuries. . . . No surgery was performed as a result of the accident. He is no longer receiving treatment. I have reviewed the MRI of the cervical spine dated April 26, 2017 and the MRI of the lumbar spine dated June 15,2017 and they both revealed no acute pathology and degenerative changes."

Defendants also provide plaintiff's medical record from one visit to the United Medical Offices of Long Island, Doc 113. 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 it. This is a report from an initial visit on May 30, 2017, two months after the accident and the same date co-plaintiff Shalomov went to this facility. This report indicates that plaintiff complained of pain in his neck and back. The range of motion testing performed of his cervical and lumbar spine did not produce normal results. He was told to see an orthopedist and a pain management doctor, and to continue with physical therapy, chiropractic treatment, and to have nerve conduction studies done. A copy of the nerve conduction study (done the same date) and the report is provided. The conclusion is "The above electrodiagnostic study reveals evidence of bilateral C5 - C6 - C7 and left L4- L5 radiculopathy. The above electrodiagnostic study reveals evidence of bilateral sural sensory nerves neuropathy."

Next, defendants provide plaintiff's MRI reports from Ocean Radiology (Doc 114). They indicate five herniated discs and several bulging discs. Counsel states in her affirmation that he testified [Pages 46-48 and 55] he was involved in multiple (four) accidents before the subject accident and in two of them he injured his back. Thus, she argues, these films do not prove that he sustained any injuries in this accident.

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 orthopedist Dorothy Scarpinato, M.D., who also examined the MRIs taken, show that plaintiff did not sustain a serious injury as a result of the subject accident in any of the applicable categories of injury other than the 90/180 category. Plaintiff's deposition testimony makes a prima facie case for defendants with regard to the 90/180 category of injury. While his testimony indicates that he was somewhat uncomfortable at times in the months after the accident, it was not enough pain to take any over the counter medication [Page 62], and not enough to prevent

him from doing his work (*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 opposes the motion with an attorney's affirmation and a document (NYSCEF 126) which is described by counsel as an "affirmation" and contains affirmation language, but as it is from a chiropractor, Dr. Chris Rusek, counsel notarized it, but left out the jurat, the date, and the language for an affidavit. In any event, this chiropractor did not treat the plaintiff, but only examined him on March 8, 2021, four years after the accident, for purposes of opposing this motion. As a result of his obtaining an incomplete history from the plaintiff, his opinion on the issue of causation cannot be accepted. In the section of his report titled "past medical history" he says that based on "history presented on initial exam no significant notations were made and all history was determined non-contributory or related in any manner to complaints/injuries related to the incident that occurred on 3/8/17.[1] Thus, all symptoms and findings presented on comprehensive initial exam were determined to be entirely and directly related to accident." He states in another part of his report "In the absence of preexisting back or neck such findings are with most certainty related to indirect trauma to the spine such as caused by being in an automobile during an accident." Because he did not treat the plaintiff, and did not review any of his treatment records, if there are any,

[1] This is the date on the police report, but plaintiff's counsel says it is incorrect.

his report, which finds significant restrictions in plaintiff's range of motion, cannot connect plaintiff's injuries to the accident four years prior. Therefore, plaintiff fails to overcome defendants' prima facie case and raise a triable issue of fact, entitling defendants to summary judgment dismissing the complaint.

Conclusion

It is **ORDERED** that the branch of the motion which seeks leave to amend the defendants' answer to include an affirmative defense of set off pursuant to General Obligations Law 15-108 is granted without opposition. Whether this statute is applicable is not before the court in this motion and no opinion is rendered. An amended answer with this addition shall be e-filed within 30 days.

It is further **ORDERED** that the branch of the motion which seeks summary judgment dismissing plaintiff Shalomov's complaint is denied; and it is further

ORDERED that the branch of the motion which seeks summary judgment dismissing plaintiff Dulevskiy's complaint is granted.

This constitutes the decision and order of the court.

Dated: May 5, 2021

ENTER:

Hon. Debra Silber, J.S.C.