

Pierre-Lys v Hossain
2021 NY Slip Op 32446(U)
November 22, 2021
Supreme Court, Kings County
Docket Number: Index No. 509397/2019
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

_____x

ZAIREGAMEL PIERRE-LYS,

Plaintiff,

-against-

JAKIR HOSSAIN and MARK BOCHEVER,

Defendants.

_____x

DECISION / ORDER

Index No. 509397/2019

Motion Seq. No. 1

Date Submitted: 11/4/21

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>13-21</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>26-30</u>
Reply Affirmation.....	<u> </u>

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 December 4, 2016 at the intersection of East 34th Street and First Avenue in Manhattan. Apparently, defendants' yellow cab hit plaintiff's car on the passenger side, causing his car to spin and hit a tree. Plaintiff testified (EBT Doc 20) that his airbags deployed, that his car was towed away, and he left the scene in an ambulance. At the time of the accident, plaintiff was approximately thirty-six years of age. In his Bill of Particulars, plaintiff claims that as a result of the accident, he sustained injuries to his cervical, thoracic, and lumbar spine and to his head, both shoulders and to his right knee.

Defendants contend that they are 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). Defendants support their motion with an attorney's affirmation, the pleadings, plaintiff's deposition transcript, and the affirmed IME reports from an orthopedist and a radiologist.

Dr. John Denton, an orthopedist, examined plaintiff on August 21, 2020 on behalf of the defendants. This was almost four years after the accident. Plaintiff told him that he did not have any surgery as a result of the accident, that he had physical therapy and uses a back brace. Plaintiff told him that he still has pain in the neck, mid back, low back, right knee, and right shoulder. Dr. Denton did not review any of plaintiff's medical records. He tested the plaintiff's range of motion with a goniometer and reports that plaintiff had abnormal ranges of motion in his cervical spine, specifically, "50 degrees of extension (60 degrees normal); right lateral flexion at 40 degrees (45 degrees normal); left lateral flexion at 40 degrees (45 degrees normal); right rotation at 70 degrees (80 degrees normal); and left rotation at 70 degrees (80 degrees normal)." Dr. Denton tested the range of motion in plaintiff's thoracic spine and reports that it was normal. He tested the range of motion in plaintiff's lumbar spine and found some tests were normal, but others were abnormal, specifically "extension at 20 degrees (25 degrees normal)." He examined the plaintiff's shoulders, and found some tests were normal, but not all, with "external rotation at 80 degrees (90 degrees normal)" for both shoulders. Finally, he reports that the range of motion in plaintiff's right knee was normal. He concludes that all of the plaintiff's sprains and strains have resolved, and that "there is no objective evidence of an orthopedic disability, permanency or residuals. Limited ranges of motion are considered subjective in the absence of any positive objective findings."

Dr. Darren Fitzpatrick, a radiologist, reviewed the MRIs of plaintiff's cervical spine and lumbar spine. The cervical spine MRI was performed on January 13, 2017, and he states, after reviewing the films, "Normal marrow signal. Normal alignment. No ligamentous edema. Normal signal and morphology of the cervical cord. Normal disc height and disc signal. No disc bulge, canal stenosis or neural foraminal narrowing. . . No traumatic injury. Unremarkable MRI of the cervical spine."

After reviewing the MRI of plaintiff's lumbar spine, Dr. Fitzpatrick states he observed "Normal disc height and disc signal. Minimal disc bulges with minimal reactive endplate productive changes are noted spanning L2-L3 through L5-S1 which have minimal mass impression on the ventral thecal sac at these levels without central canal stenosis or neural foraminal narrowing. . . No traumatic injury. . . Minimal, multilevel lumbar degenerative disc disease."

Defendants contend that their medical evidence, combined with plaintiff's testimony at his EBT, eliminate all categories of injuries in the statute. Plaintiff testified at his EBT [held June 18, 2020] that he did not miss any time from work as a Security Guard after the accident [EBT Pages 11-13], and he was still employed by the same company on the date of his EBT. The defendants argue that this testimony rules out the 90/180-day category of injury.

The court finds that defendants have not 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 Eyer*, 79 NY2d 955, 956-957 [1992]). While plaintiff's testimony that he did not miss any work after the accident other than "some days when I didn't feel good" [Page 12] 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”]), defendants have not made a prima facie case with regard to the other categories of injury.

The court finds that the IME report of Dr. Denton, which finds significant limitations in plaintiff’s range of motion in his cervical spine, lumbar spine and both shoulders, cannot be interpreted by the court as he proposes, that “the measurement itself is, therefore, an objective measurement of the claimant’s subjective efforts.” This raises the issue of the doctor’s credibility, which cannot be decided by the court. Credibility issues are for the jury (see *Ocampo v Boiler*, 33 AD3d 332 [1st Dept 2006]; *Bradley v Soundview Healthcenter*, 4 AD3d 194, [1st Dept 2004]). In addition, he does not make any mention of plaintiff’s head injury. Plaintiff’s counsel argues that this alone merits denial of the motion, citing several cases.

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 plaintiff 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, Nitin Narkhede, M.D. provides an affirmation and office records (Docs 28 and 29) indicating "mild traumatic brain injury" indicated on the brain MRI report, disc bulges in both his cervical and lumbar spine, sprain/strain of the shoulder, and significant and quantified restrictions in plaintiff's ranges of motion in his spine and shoulder, from tests performed contemporaneously with the accident and during the November 2020 exam conducted to respond to this motion. He opines that plaintiff's injuries are "clearly causally related to the accident of 12/4/16". He states in his affirmation "I am of the opinion that the trauma to the cervical and lumbar spine and left [sic] shoulder, as well as the weakness created in the supporting structures of the cervical and lumbar spine and left [sic] shoulder, will most likely predispose these areas to degeneration, as well as recurrent pain syndromes of a muscular, ligamentous or neurological nature. The injuries are permanent in nature with regards to the left [sic] shoulder, neck and back. He would benefit from epidural injections for his radicular symptoms and if that does not help, he will need surgical intervention on the lumbar spine." Thus, his affirmation clearly raises a "battle of the experts," requiring a trial.

Accordingly, the motion is denied.

This constitutes the decision and order of the court.

Dated: November 22, 2021

ENTER:



Hon. Debra Silber, J.S.C.