Scott v Ferraro
2021 NY Slip Op 32679(U)
December 15, 2021
Supreme Court, Kings County
Docket Number: Index No. 516444/2019
Judge: Debra Silber

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

X

DARRYL SCOTT,

Plaintiff,

-against-

ARNALDO FERRARO,

Defendant.

DECISION/ORDER

Index No. 516444/2019
Motion Seq. No. 1
Date Submitted: 12/10/2021

X

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, Affirmations, Affidavits, and Exhibits Annexed…….	10-18
Affirmation in Opposition and Exhibits Annexed.....	22-27
Reply Affirmation.....	29

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

Defendant moves, pursuant to CPLR 3212, for summary judgment and an order dismissing plaintiff's complaint, in this personal injury action arising from a motor vehicle accident, on the basis that plaintiff has failed to meet the threshold requirements necessary to recover under Insurance Law § 5102 (d).

This matter concerns injuries that plaintiff allegedly sustained as a result of an accident which took place on October 16, 2018 at or near the intersection of 17th Avenue and New Utrecht Avenue, in Brooklyn, New York. There is no police accident report in the record, but plaintiff testified at his EBT that the police were called to the scene by one of his co-workers. Plaintiff was working at the time of the accident, for the NYC Department of Transportation as an "assistant highway repairman" and was on 17th Avenue in the process of loading equipment onto a truck. There was a "road closed" sign on 17th Avenue, and plaintiff's co-workers had tried to stop defendant and

make sure he was aware that the road was closed, but he drove his vehicle through the road closure sign, hit some of the orange barrels, then hit plaintiff, who fell to the ground on his right side [EBT Doc 16 Pages 12-13], then "sped out . . . down New Utrecht Avenue [Page 17]." One of plaintiff's co-workers took down defendant's plate number. Plaintiff went home after the accident and went to his doctor shortly afterwards, where he complained of pain in his right hip, right shoulder, and right elbow. Plaintiff alleges, in his bill of particulars, that he sustained injuries to those body parts as a result of the accident. By the time of his EBT, he still complained of pain in his right hip.

Defendant contends that he is entitled to summary judgment dismissing the complaint as plaintiff has not sustained serious injuries as a result of the accident, as defined by Insurance Law § 5102 (d). Defendant supports the motion with an attorney's affirmation, the pleadings, plaintiff's deposition transcript and an affirmed IME report from one doctor, Dr. Gregory Chiaramonte, an orthopedist. Defendant also provides an affirmation from a radiologist, Dr. Jeffrey Warheit.

With regard to the "90/180 day" category of injury, defendant makes a prima facie case with plaintiff's EBT testimony that he left for home after the accident, but that was the only day he missed from work [Page 9]. He was not asked if his workers' compensation claim was approved, but since he did not miss any work, the court must assume it was not approved. When a plaintiff is in a work-related accident and receives Workers' Compensation or disability benefits for his loss of earnings, the court must conclude that he in fact had a medically determined injury which prevented him from returning to work (See *Peplow v Murat*, 304 AD2d 633 [2d Dept 2003]). This is not applicable here.

Dr. Warheit, Radiologist

Dr. Warheit states that he performed an independent evaluation of the MRI images of plaintiff's right elbow, right hip, and right shoulder (E-File Doc 18). In viewing those MRIs, he found, with regard to the right elbow, he concluded that he agreed with the radiologist at the facility that the films were "negative for fracture, ligamentous, tendinous, or muscular tear. Insertional tendinosis of the triceps tendon at the olecranon process. There is no evidence of a traumatic injury to the right elbow."

With regard to plaintiff's right shoulder, Dr. Warheit reviewed the MRIs, states that he agrees with the radiologist at the facility, and his impression is "Supraspinatus tendinosis which appears secondary to an impingement syndrome. There is no evidence of a traumatic injury to the right shoulder."

With regard to plaintiff's right hip, Dr. Warheit reviewed the MRIs taken on December 29, 2018, states that he agrees with the "interpretation of the radiologist at the facility" and found the films to be "Negative for fracture, ligamentous, tendinous, muscular or labral tear. Insertional tendinosis of the right hamstring without evidence of a traumatic etiology. There is no evidence of a traumatic injury to the right hip."

Dr. Chiaramonte, Orthopedist

Dr. Chiaramonte performed an independent orthopedic evaluation of plaintiff on July 13, 2020 (E-File Doc 17). Dr. Chiaramonte notes that plaintiff was still complaining of pain in his right hip, which has not improved since he was knocked to the ground by defendant's car. He told the doctor he was treated with physical therapy four times per week for an unspecified period of time. Plaintiff told the doctor that he has been instructed by his doctor to not "climb, bend or squat."

Dr. Chiaramonte found normal range of motion in plaintiff's shoulders, right elbow, and hips. His impression is "right shoulder sprain/strain, right elbow sprain/strain, resolved, right hip normal examination." He reviewed plaintiff's MRIs and other medical records and opines that "there is evidence of preexisting condition to the right shoulder and right elbow."

Defendant maintains that these reports satisfy his burden of proof with regard to the significant limitation of use and permanent consequential limitation of use categories in the statute. Further, defendant maintains that he has made a prima facie case under the 90/180 category, as plaintiff did not testify that he missed any work as a result of the accident. At his EBT, held March 5, 2020, plaintiff states that he did not miss any time from his job as a truck driver [Doc 16, Page 9].

The court finds that defendant has made a prima facie case for summary judgment dismissing the complaint. The burden of proof then shifts to the plaintiff to overcome the motion and raise a triable issue of fact.

The court notes that defendant's attorney argues in his affirmation in reply [Doc 12] that the court should deem all of the statements of material fact submitted by defendant pursuant to the Uniform Rules for Trial Courts 22 NYCRR 202.8-g as admitted, as plaintiff failed to submit any statement controverting such facts. While this is what the rule appears to state, defendant's counsel included as "facts" statements which are not facts, but improper summaries of the defendant's doctors' affirmed reports. Therefore, the court need not consider these statements as uncontroverted by plaintiff despite plaintiff's counsel's failure to oppose. Plaintiff submitted his doctors' affirmation in opposition. That is sufficient. A "fact" is the date, place, and time of an accident, not (¶ 10) that the radiologist "concluded that there was no evidence of a traumatic injury."

Plaintiff's Submissions

Plaintiff submits an affirmation of counsel, his bill of particulars, his EBT transcript, and the affirmations of three doctors, Dr. Narkhede [Doc 25], Dr. Hedrych [Doc 26] and Dr. Tice [Doc 27].

Dr. Nitin Narkhede provides an affirmation authenticating his initial report, ten days after the accident, which indicates that plaintiff solely complained of pain in his right hip, that he tested plaintiff's range of motion in his right hip, which was significantly restricted, and he referred plaintiff for physical therapy. He lists plaintiff's prior accidents, some work-related, some not. Plaintiff testified that he was referred to this doctor by his Workers' Compensation attorney.

Dr. Gideon Hedrych provides an affirmation authenticating his eleven affirmed reports, provides the dates of the reports and states that he used a handheld goniometer for all of his testing and states which reference he used for "normative values." Plaintiff went to see Dr. Hedrych a few days after he saw Dr. Narkhede. Plaintiff testified that he was also referred to this doctor by his Workers' Compensation attorney.

At the initial visit, Dr. Hedrych sent plaintiff for an MRI of his right hip and prescribed a muscle relaxant and ibuprofen. At the next visit on 12/20/18, he states that plaintiff has a "50% partial disability" following his range of motion testing. His report states that he told plaintiff "No repetitive or prolonged climbing up or down stairs or ladders. No repetitive or sustained kneeling, squatting, or crawling. No repetitive walking or prolonged walking (more than 1-2 blocks at a time)." He told plaintiff to continue the prescriptions. At the next visit, 1/18/19, he had received the MRI report. His "diagnostic impression" is "Right hip derangement with partial tear right hamstring tendon. The

preceding diagnosis represents an injury causally related to the accident of 10/16/18." He continued the prescriptions, the restrictions, and the physical therapy. Skipping to the last report, dated August 20, 2021, and seemingly prepared to oppose this motion, Dr. Hedrych summarizes his treatment of plaintiff and states that he re-examined plaintiff on August 19, 2021. He found pain with limitation in the range of motion in his right hip, and states that "Given the medical records, history, examinations, consultations, and imaging studies performed to date, I can state with medical certainty that Mr. Scott was significantly injured in the accident of 10/16/18. His injury has altered his ability to function as he did prior to the accident and will result in chronic and exacerbative symptoms, with limitations upon his activities of daily living. A derangement is an injury or, more specifically, a disruption, i.e., torn supporting structures of a joint, which is composed of ligaments, tendons, and cartilage. Such an injury, involving rupture and avulsion of the ligaments, tendons, cartilage, and other structures attendant to Mr. Scott's right hip joint, if it heals, does so by deposition of a fibrous, non-elastic scar tissue. This is associated with painful dysfunction." Dr. Hedrych opines that "Mr. Scott has objective MRI-proven evidence in his right hip of a partial tear of the right hamstring tendon. This is directly attributable to the trauma of 10/16/18. As a result, he will be subject to recurrent bouts of pain and limitation of range of motion of his right hip and may require arthroscopic surgery to repair the torn tendon. Despite such surgery, however, it is unlikely that he would ever regain the full and pain-free function that he enjoyed in his right hip prior to the accident of 10/16/18."

Dr. Harold M. Tice, the radiologist who read the MRI films of plaintiff's right hip MRI taken on December 31, 2018 provides an affirmation authenticating his report,

which states “Right hamstring insertional tendinopathy with superimposed intrasubstance partial tear. Mild right hip effusion.”

Plaintiff’s evidence raises a triable issue of fact with regard to the categories of injury “a permanent consequential limitation of use of a body organ or member” and” a significant limitation of use of a body function or system” as well as the 90/180 category of injury in § 5102 (d).

In conclusion, plaintiff’s treating doctors’ affirmed reports 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]). These reports opine as to significant, quantified restrictions in plaintiff’s range of motion, both contemporaneously with the accident and more recently, and these doctors opine that plaintiff’s injuries were caused by the subject accident. Thus, they raise a “battle of the experts.” This is sufficient to raise an issue of fact which requires a trial.

Accordingly, it is **ORDERED** that defendant’s motion for summary judgment dismissing the complaint is denied.

This constitutes the decision and order of the court.

Dated: December 15, 2021

ENTER:

Hon. Debra Silber, J.S.C.