

**Reid v Stewart**

2022 NY Slip Op 30004(U)

January 3, 2022

Supreme Court, Kings County

Docket Number: Index No. 500380/2020

Judge: Debra Silber

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

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**ANDREW REID,**

**Plaintiff,**

**DECISION/ORDER**

**-against-**

**Index No. 500380/2020**

**OKEME TAMBO STEWART,**

**Defendant.**

**Motion Seq. No. 1**

**Date Submitted: 10/14/2021**

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

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>12-27</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>32-36</u>
Reply Affirmation.....	<u>37</u>

**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 November 14, 2018 on the Belt Parkway westbound near Francis Lewis Boulevard in Queens, NY. Plaintiff claims he was rear-ended by defendant in stop and go traffic. Plaintiff exchanged information with the other driver, the defendant, and continued on his way. He testified [Doc 19 Page 17] that his wife "lost a family member, and I was going with them to grieve with the family." Plaintiff alleges, in his bill of particulars, that he sustained injuries to his cervical and lumbar

spine as a result of the accident. At the time of the accident, plaintiff was thirty-five years old.

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, a statement of material facts, the pleadings, plaintiff's deposition transcript an affirmed IME report from one doctor, Dr. Jeffrey Passick, an orthopedist, and an affirmation from a radiologist, Dr. Alan B. Greenfield, as well as some of plaintiff's treating doctor's medical records.

With regard to the "90/180 day" category of injury, defendant makes a prima facie case with plaintiff's EBT testimony. Plaintiff testified that he had been employed in the same job since 2013, as a mental health care coordinator for Well Life Network, a not-for-profit in Brooklyn [Page 10]. Plaintiff was not able to say whether he missed any time from work after the accident [Doc 19 Page 13], only that "I believe I did" [id] and that he left the job, a full-time job, in April of 2020, more than a year after the accident, due to the Covid -19 Pandemic.

Dr. Jeffrey Passick performed an independent orthopedic evaluation of plaintiff on January 25, 2021 (E-File Doc 25). Dr. Passick notes that plaintiff was still complaining of pain in his back, which he described as "sharp and stabbing, radiating between the shoulder blades." He also reported experiencing weakness and tingling. He told the doctor he was treated with physical therapy for an unspecified period of time. Dr. Passick lists having reviewed records of plaintiff's physical therapy at one facility from 11/20/18 to 6/28/19, and at another place from 11/19 to 12/19.

Dr. Passick found normal range of motion in plaintiff's cervical, thoracic, and lumbar spine. His diagnosis is "cervical spine strain, resolved. Thoracic spine strain, resolved. Clinically normal examination of the lumbar spine." He concludes that "He was treated with physical therapy and pain management. The claimant has not had treatment for about a year. He states he feels ok now. . . I find no orthopedic disability based on the physical examination. This is also based upon the available medical documentation, which was reviewed."

Dr. Greenfield states that he performed an independent evaluation of the MRI images of plaintiff's cervical spine taken on December 16, 2018 (E-File Doc 26). In reviewing the MRIs, he found, "[t]here is normal cervical lordosis. There is disc desiccation and dehydration at nearly all disc levels, from C2 through C7, indicating underlying degenerative disc disease. There is also background underlying degenerative disc bulging from C2 through T1 with flattening of the dural sac. There is a small coexistent central disc protrusion at C6-C7, just barely indenting the dural sac at the midline. There is no neural foraminal encroachment. Cord signal is normal, without cord contusion or myelomalacia and there is no spinal stenosis. No fracture, bone marrow edema or replacement is seen. There are small degenerative bone spurs from C5 through C7. The paraspinal soft tissues are intact where there is no contusion, abrasion or hematoma and no penetrating injury or foreign body is seen. . . There is degenerative disc disease at all disc levels from C2 through C7 and associated with underlying disc bulging resulting in flattening of the dural sac, all of which are degenerative findings, as are the degenerative bone spurs from C5 through C7. These findings have developed over a period of years and are unrelated to the accident of 11/14/18. There is a small central disc protrusion, just barely indenting the dural sac at C6-C7, and is seen on a

background of underlying degenerative bone spur formation and degenerative discopathy, with no specific evidence of recent trauma to this region, including no evidence of cord contusion, fracture, annular rupture or paraspinal hematoma. This minimal disc protrusion is most likely degenerative, and cannot be attributed to an accident occurring on 11/14/18 to any reasonable degree of medical certainty. There are no findings on this study which can be attributed to the accident of 11/14/18 to any reasonable degree of medical certainty, with the constellation of the above noted findings in the aggregate either definitively or highly likely to be degenerative, chronic and longstanding findings as outlined above.”

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 November 17, 2020, plaintiff could not state whether he missed any time from his job as a result of this accident, as discussed above.

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.

Plaintiff submits an affirmation of counsel, his response to defendant’s statement of material facts, an affirmation of his treating doctor, Dr. Raj Tolat, [Doc 34] and an MRI report [Doc 35], which was not submitted in admissible form and could not be considered.

Dr. Tolat provides an affirmation dated September 21, 2021. He states that he works at Premiere Physical Medicine & Rehabilitation P.C., and is board certified in physical medicine and rehabilitation. He states that plaintiff came under his care on

November 20, 2018 and describes the initial visit. He examined plaintiff and gave him “an initial diagnosis of cervical spine strain/sprain with suspected cervical spine disc herniation(s), thoracic spine strain/sprain, and post-traumatic headaches. In the meantime, Mr. Reid was advised to refrain from strenuous activities until advised otherwise. In addition, he was advised to begin a regimen of passive physical therapy treatment at my offices, accompanied by periodic re-evaluations. The therapy regimen would initially be 5 days a week, with a possible reduction to 3 days a week if the patient's condition warranted it. I also advised Mr. Reid to undergo an MRI of the cervical spine to evaluate for any disc herniations causing his pain and limited range of motion. I also advised him to continue taking the two pain medications prescribed by his primary care doctor on an as needed basis.” He tested plaintiff’s range of motion in his cervical spine and found “gross decreases accompanied by pain” and he lists the results.

Dr. Tolat states that “Mr. Reid treated with my office and received physical therapy, moist heat treatment, cold packs, electrical stimulation, ultrasound, and massage therapy, from approximately November 20, 2018, until approximately June 28, 2019. He treated at a frequency of approximately 5 times per week initially, and the frequency decreased as the months went by to 2-3 times per week.”

The visit with Dr. Tolat on March 12, 2019 is written up by the doctor and provided by defendant in his motion as Doc 22. Therein, Dr. Tolat states the MRI of plaintiff’s cervical spine indicated “Multiple cervical spine disc herniations, cervical spine disc bulge, and a left C6 radiculopathy. Thoracic spine strain/sprain.”

In his affirmation, Dr. Tolat states that “These results, as delineated in the above-referenced MRI report, together with the above-referenced examination results, helped further confirm my diagnosis of Mr. Reid's cervical and thoracic injuries. These injuries,

which consist of mostly herniated discs, as well as a bulge, at several levels as described above, are not degenerative in origin, and were solely the result of the trauma sustained by the patient in the November 14, 2018 accident. I state this conclusion with a reasonable degree of medical certainty on account of the patient's relatively young age, as well as the complete absence of any relevant prior medical or lifestyle history which could have contributed to such extensive injuries. My opinion is further supported by the fact that Mr. Reid was completely asymptomatic before the November 14, 2018 accident. Simply put, his cervical spine could not have been rendered in its present state on account of the simple passing of time and "normal" wear & tear" [Doc 34 Page 4].

Next, the doctor says "On or about June 28, 2019, I made a determination that Mr. Reid had reached maximum medical improvement from a physical medicine and rehabilitation standpoint, though I did suggest to Mr. Reid that he may want to consult with a pain management doctor going forward. On that day, Mr. Reid was able to move his cervical spine at full range of motion. However, this cannot, and should not be interpreted as him having fully recovered from his injuries. Such a simplistic conclusion would have no basis in physical medicine and rehabilitation and is unsupported by the medical evidence at hand. The only reason why Mr. Reid was able to move his neck at full range was due to the continued physical therapy he was still undergoing, as well as the pain medication he continued to take on an as-needed basis."

At the most recent exam, "on August 31, 2021 Mr. Reid presented at my offices for a follow-up physiatric evaluation. He denied any additional injuries since the last time I had seen him. He further advised that he had treated towards the end of 2019 at another facility for pain management, something which I had suggested he do. There he had undergone several trigger-point injections to manage his pain. He also advised that he

continued his daily home exercise program. At the August 31, 2021 visit, Mr. Reid complained of intermittent neck pain and mid back pain. Complete detailed postural, spinal, orthopedic and neurological examinations of the patient were performed. There was some tenderness present to palpation over the thoracic paraspinal musculature.” Dr. Tolat tested plaintiff’s range of motion and found significant restrictions in all planes. He concludes “Based upon the fact that these restrictions are occurring nearly three years past his injury date, they obviously constitute a permanent loss. Based upon this permanent loss, my prognosis for any full recovery of the cervical spine and thoracic spine remains extremely poor. . . It is my opinion that within a reasonable degree of medical certainty the injuries caused by this accident, are to the patient’s cervical and thoracic spines (including intervertebral discs and spinal ligaments). The trauma that Mr. Reid sustained when his vehicle was struck in the rear on November 14, 2018 caused his cervical and thoracic vertebrae to be misaligned, muscles to be overstretched, nerves to be irritated, and various soft tissues to be inflamed. Scarring can result. These scars are less elastic and less functional than the original tissue they replace. This serves to reduce inter-segmental motion. The noticeable result is a permanently reduced range of motion to the affected body parts” [Pages 7-8].

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.”

In conclusion, plaintiff’s treating doctor’s affirmation (and his affirmed reports provided by defendant) 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]). The affirmation and these

reports describe significant, quantified restrictions in plaintiff's range of motion, both contemporaneously with the accident and recently, and plaintiff's doctor opines that plaintiff's injuries were caused by the subject accident. Thus, he raises a "battle of the experts" with defendant's doctor. 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: January 3, 2022

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Hon. Debra Silber, J.S.C.