

White v Euro Design & Maintenance Corp.
2022 NY Slip Op 30005(U)
January 3, 2022
Supreme Court, Kings County
Docket Number: Index No. 505192/2020
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

TREVOR WHITE,

Plaintiff,

DECISION/ORDER

-against-

Index No. 505192/2020
Motion Seq. No. 4 & 5
Date Sub.: 9/23/21

EURO DESIGN & MAINTENANCE CORP.,
PEDRO NUNO ESCALEIRA
and BOBAN MILUTINOVIC,

Defendants.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Milutinovic's motion and co-defendants cross motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>38-51</u>
Notice of Cross Motion, Affirmations, Affidavits, and Exhibits Annexed...	<u>52-57</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>72-79, 80-87</u>
Reply Affirmation.....	<u>88, 90</u>

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

In this personal injury action arising from a motor vehicle accident, defendants move and cross-move for summary judgment and an order dismissing plaintiff's complaint, pursuant to CPLR 3212, based upon their contention that the plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d).

The accident in question occurred on January 28, 2020, on Willoughby Avenue near its intersection with Sandford Street, in Brooklyn, New York. At the time of the accident, the plaintiff was, he claims, a rear-seat passenger in the middle car of this three-car chain collision, a livery cab driven by defendant Milutinovic, when it was hit in the rear by the pick-up truck driven by defendant Escaleira and owned by defendant Euro Designs, and then was pushed into the front vehicle, owned and driven by non-party Glenn Glover. Plaintiff

complained of back pain to the EMTs at the scene, which is noted on the police report, but declined treatment and walked the few blocks to his home. He testified at his EBT that he went to the chiropractor the next day [Doc 44 Page 29]. Plaintiff claims (in his Bill of Particulars) that he sustained injuries to (and exacerbation of injuries to) his cervical, thoracic, and lumbar spine, to both knees, both shoulders, both hips, and to his left wrist and left hand. He was approximately sixty-three years old on the date of the accident.

The defendants' motion and cross motion rely upon the same proof and arguments. In support of the motions, the defendants offer affirmations in support, statements of material facts, the pleadings, the plaintiff's bill of particulars, plaintiff's EBT transcript, and affirmed reports from two doctors, Dana A. Mannor, M.D., an orthopedist, and Audrey Eisenstadt, M.D. a radiologist.

The IME report is from Dr. Dana Mannor, an orthopedist. He examined plaintiff on February 25, 2021, a little over a year after the accident. He states that plaintiff "reports that he has complaints of pain in his neck, mid back, low back, bilateral shoulders, left wrist, left hand, bilateral hips, and bilateral knees. He states that he has bilateral hip pain radiating from lower back." Dr. Mannor was not given any of plaintiff's medical records to review. He says plaintiff ambulated with a cane and had to remove a lumbar brace and a left wrist brace for the exam. He tested the range of motion in plaintiff's cervical, thoracic, and lumbar spine, and reports that all tests had normal results. There was no spasm or tenderness, he reports. He also tested the range of motion in plaintiff's shoulders, and also found normal results, with full range of motion and no tenderness or swelling. He tested the range of motion in plaintiff's hips and knees, and also found full and normal range of motion. Finally, he tested the range of motion in plaintiff's left wrist and hand, and also found full range of motion and normal grip strength. He concludes that, from the accident, plaintiff

sustained sprains and strains, which had all resolved by the date of his exam. He states, “There is no evidence of orthopedic disability, permanency, or residuals” and “Mr. Trevor C. White can perform his activities of daily living as he was doing prior to the accident.”

Dr. Audrey Eisenstadt, a radiologist, reviewed the MRI films taken of plaintiff’s lumbar, thoracic, and cervical spine, of both of his shoulders, of both of his knees, and of his left wrist. Her affirmed reports are located at Document 47. In every report, she reports that she found no traumatic injuries in reviewing plaintiff’s MRIs and concludes that he did not sustain any injuries as a result of this accident. She states that the films of the spine show no traumatic injury, but only degenerative changes, including desiccation, osteophytes, bony spurring, discogenic ridging, with disc bulges and one herniation at L1-2, all of which she opines must have predated the accident.

The left shoulder MRI indicates “hypertrophic bony spurring with subarticular degenerative signal change and capsular expansion seen at the acromioclavicular joint, none of which could have developed in less than six months’ time and due to their extent are more likely years in origin. Distal to the narrowing of the subacromial space there is an impingement syndrome or a pinching action on the subacromial region and structures passing through it. This results with tendinopathy and a partial distal supraspinatus tendon tear noted. No subacromial-subdeltoid bursal fluid is seen and no insertional bone marrow edema to indicate a traumatic etiology for the tendinopathy and partial tear noted. An incidental bone cyst is seen, a common developmental variant in the skeletal system.” She reaches similar conclusions for the plaintiff’s right shoulder. Again, degenerative, pre-existing, or congenital injuries only, in her opinion, with no evidence of a traumatic injury.

The left wrist MRI is reported to indicate congenital abnormalities and bone cysts, which “predispose” to degenerative joint disease. She also reports seeing degenerative

changes and concludes that “No traumatic bone injury is seen and no dislocation, ligamentous or tendinous disruption noted.”

Plaintiff’s left knee, according to Dr. Eisenstadt, demonstrates degenerative joint disease, Grade III meniscal tears, and cysts. She opines that the meniscal tears are commonly caused by degenerative joint disease, and that there is no indication of any traumatic injury. The right knee has no meniscal tears, the doctor reports, but does also have degenerative joint disease and cysts. She concludes that “Any traumatic meniscal injury occurring one-and-a-half months prior to this examination would be associated with bony contusion, ligamentous and tendinous disruption and a large joint effusion rather than the trace joint effusion seen. The meniscal structures are intact, and no ligamentous/tendinous disruption is noted. The changes seen are consistent with longstanding degenerative joint disease with no acute or recent posttraumatic osseous, meniscal, tendinous or ligamentous changes seen.”

With regard to the “90/180” category of injury, it is unclear if defendants have established that plaintiff did not have an injury that meets the requirements of the statute. Plaintiff testified at his EBT that he was retired on the date of the accident [Doc 44, Pages 9-10]. He said he was collecting Social Security Disability for “depression” since 2016 [Page 10]. He was asked if there were “certain activities you could do before the accident that you can no longer do or have difficulty doing?” The question was not directed to the six months after the accident. Plaintiff said he could not sleep consistently, but that depression has affected his sleep for forty years [Page 71], he hasn’t “worked out” since the accident, he pays people to clean his house, and “I don’t lift [my three-year-old grandson], pick him up, run behind him, get down on the floor and play with him.” None of these adjustments to his chores and activities were stated to have been pursuant to a doctor’s instructions.

If the court were to find plaintiff's EBT testimony to support defendants' claim that he did not sustain an injury in the 90/180 category, as counsel for defendant argues [Doc 39], stating "the plaintiff testified that he was not employed at the time of the accident and had been on SSD prior to the subject incident. He was not confined to bed or home for a substantial period of time as a result of the subject incident," the burden would shift to plaintiff to overcome the defendants' prima facie case for dismissal.

Here, plaintiff opposes the motions with an affirmation of counsel, an affidavit of plaintiff, and numerous affirmed medical records. Plaintiff does not submit a counter-statement of material facts, but the court, in its discretion, will overlook this, as movant's statement [Doc 49] does not contain any facts, just opinions.

Dr. Charles Kaplan provides an affirmation dated August 3, 2021, which states that he works at Livingston Physical Medicine PC, and that plaintiff first came to this facility on February 5, 2020, which was a week after the accident. He states that plaintiff received physical therapy for almost 14 months at their facility. He states that he has reviewed the plaintiff's file, and that his findings are as follows:

"Prior to this accident, Mr. White maintains that he was asymptomatic regarding his cervical spine, thoracic spine, bilateral shoulders, bilateral knees, and left wrist, and denies any pre-existing trauma or illness to these body parts. Based upon the history as relayed to me by the patient, my physical examinations of the patient, my review of the patient's certified MRI studies, certified EMG/NCV studies and aforementioned medical records, it is my opinion that Mr. White sustained the following permanent injuries as a result of the motor vehicle accident that occurred on January 28, 2020: left paracentral broad-based disc herniation and disc bulge at CS-6 level indenting the thecal sac and foramina and abutting the bilateral existing C6 nerve roots; disc bulges at C3-C4, C4-C5, and C6-C7 levels indenting the thecal sac and foramina, abutting the bilateral existing C4 nerves, bilateral existing C5 and exiting left C7 nerve roots; bilateral cervical radiculopathy more severe at the right C5-C6 nerve root; straightening of the cervical lordosis; right foraminal herniation at the T2-T3 level narrowing the right foramina and abutting

the exiting right-sided nerve root; left paracentral broad-based disc herniation and disc bulge at the T7-T8 level indenting the thecal sac and foramina; right foraminal herniation and disc bulge at the T11-T12 level indenting the thecal sac and foramina, abutting the bilateral existing nerve root; disc bulges at the T3-T4, T4-T5, T5-T6, T6-T7 and T8-T9 levels indenting the thecal sac and foramina; disc bulge at the T10-T11 level causing spinal canal stenosis and foraminal narrowing; right paracentral broad-based disc herniation and disc bulge at L1-2 indenting the thecal sac, lateral recesses and foramina; disc bulges at L2-L3, L3-L4, L4-L5 and L5-S1 levels indenting the thecal sac, lateral recesses, and foramina, abutting the bilateral existing L3, L4 and L5 nerve roots; bilateral facet inflammation at L2-L3 level and left facet inflammation at L4-L5 level; straightening of the normal lumbar lordosis; anterior and posterior superior labral tear with the posterior labral tear extending inferiorly of the right shoulder; mild diffuse rotator cuff tendinosis with distal supraspinatus and infraspinatus tendinitis of the right shoulder; subacromial bursitis and glenohumeral joint effusion of the right shoulder; acromioclavicular capsular hypertrophy of the right shoulder; posterior and inferior labral tears of the left shoulder; partial-thickness undersurface infraspinatus tendon insertional tear with rotator cuff tendinosis of the left shoulder; mild long head of the biceps tenosynovitis of the left shoulder; subacromial bursitis and glenohumeral joint effusion of the left shoulder; acromioclavicular capsular hypertrophy abutting the supraspinatus complex of the left shoulder; oblique tear of the anterior horn of the medial meniscus of the right knee; suprapatellar joint effusion of the right knee; oblique tear of the posterior horn of the medial meniscus of the left knee; oblique tear of the posterior horn of the lateral meniscus of the left knee; suprapatellar joint effusion of the left knee; oblique tear of triangular fibrocartilage of the left wrist; Grade 1 sprain of the scapholunate ligament of the left wrist; interstitial tear of the proximal first carpometacarpal radial collateral ligament of the left wrist.

Furthermore, I opine that Mr. White's injuries as described above are traumatically induced, permanent in nature and causally related to the accident of January 28, 2020."

Plaintiff provides physical therapy records, acupuncture records, and chiropractic records. Dr. Anson Moise, of Health East Medical Group, treated plaintiff for pain management. He authenticates the records with an affirmation. He took a history, and reports that plaintiff had pre-existing chronic lower back pain for ten years, unrelated to any accident. But the remainder of his complaints of pain were not from any pre-existing injury, and plaintiff wanted to continue with conservative treatment. This office summarizes the

initial visit, about eight months after the accident, as “ASSESSMENT: Mr. Trevor White is a 63-year-old male, who is suffering from cervicalgia, thoracic spine derangement, lumbago, cervical, thoracic and lumbar herniated nucleus pulposus, cervical radiculopathy, and lumbar facet syndrome, which was a direct result of injuries he sustained during a motor vehicle accident that occurred on January 28, 2020. PLAN: I had a long discussion with this patient regarding his options from an interventional pain management standpoint. Risks, benefits, and alternatives of the care plan were discussed; however, the patient would like to continue with conservative management. Lifestyle modifications were discussed with the patient. He was educated on ways to avoid exacerbating his pain.”

In conclusion, whether or not defendants make out a prima facie case for summary judgment dismissing the complaint, plaintiff’s submissions raise a triable issue of fact sufficient to defeat the motion by creating a “battle of the experts.”

Accordingly, it is **ORDERED** that defendants’ motions for summary judgment are both denied.

This constitutes the decision and order of the court.

Dated: January 3, 2022

ENTER :



Hon. Debra Silber, J.S.C.