

Kramer v Jean-Baptist
2022 NY Slip Op 30774(U)
February 2, 2022
Supreme Court, Orange County
Docket Number: Index No. EF003656-2019
Judge: Sandra B. Sciortino
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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NICHOLAS KRAMER,
Plaintiff,

-against-

**DECISION AFTER TRIAL
(DAMAGES)
INDEX NO.: EF003656-2019**

JAMILE JEAN-BAPTIST,
Defendant.

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SCIORTINO, J.

This personal injury action arises out a motor vehicle accident which took place on December 2, 2018. A liability trial was held on May 25 and 26, 2021. On May 26, the jury returned a verdict finding plaintiff and defendant each 50% liable for the accident. On October 7, 2021, the parties requested a summary bench trial on the issue of damages. By letter dated October 19, 2021, the Court scheduled a summary trial on November 30, 2021. On the day of trial, prior to commencement, the parties stipulated, on the record, to the summary bench trial, admission into evidence of all exhibits, and zero-\$50,000 damage award parameters. Both parties waived costs and disbursements and the right to appeal.

Each party submitted pre-trial arguments and exhibits. All were stipulated into evidence. Plaintiff's evidence included the pleadings; records of plaintiff's treating physicians, John Handago and Michael Robinson; MRI reports from March 9, 2017 (pre-accident) and April 2 and May 24, 2019 (post-accident), and the narrative reports of Sathish Modugu, a consulting physician engaged by plaintiff. (See NYSCEF Docs. 55 - 66)

Defendant's evidence included plaintiff's original and supplemental bills of particulars; a copy of the police report; the deposition transcripts of the parties; the IME report of Dr. Robert

Hendler; the plaintiff's expert reports; photos of the vehicles; a copy of the liability judgment; and medical and hospital records for pre-existing injuries sustained by plaintiff. (See NYSCEF Docs. 42 - 44)

TRIAL TESTIMONY

Parties' testimony as to the accident:

Plaintiff Nicholas Kramer testified that, on December 2, 2018, he was stopped to make a sharp right turn. As he was making the turn, he was "t-boned." As a result, he was jolted to the right in his seat. On cross examination, he testified that he felt an impact about three-quarters of the way into the turn while moving about five miles per hour. He was wearing a seatbelt and did not strike any part of his body against the interior of the vehicle. When the police arrived, he declined an ambulance and was able to drive his vehicle home.

Defendant Jamile Jean-Baptist testified that, at the time of the accident, she was stopped with a large pick-up truck in front of her, to her left. She saw the truck veer off a little bit to the left. As soon as she saw the truck mov left, she took her foot off the brake and, almost immediately, came into contact with plaintiff's vehicle. She was moving less than five miles per hour at the moment of contact.

Plaintiff's testimony as to injury:

Plaintiff described an extensive previous treatment history. He first injured his lower back in or around 2008, lifting heavy boxes at work. He eventually underwent a discectomy in the lumbar spine and returned to work two or two and a half weeks later. He was next injured in a rear-end motor vehicle accident in or around 2012. From that accident, he suffered herniations to C3-C4 or C4-C5. He underwent a laminectomy with Dr. Oppenheim; discs were removed and steel plates

inserted in his neck. He returned to work within three or four weeks after that surgery.

Plaintiff testified that he was injured in 2015 (medical records show 2017) when carrying a heavy piece of glass up a flight of stairs. A stair tread broke and he fell backwards down eight steps, the glass landing on top of him. He injured his knees and aggravated his neck and lower back. He was out of work for a little over a year; he returned to full-time employment in 2018, approximately three months before the accident which is the basis for this litigation.

Plaintiff missed two weeks of work after the 2018 accident. He returned to work as a project manager, a position he maintained through the date of trial. Plaintiff alleges that, prior to this accident, he would be involved in the glass installation, despite his position as project manager. Pain he experiences after the 2018 accident prevents him from installing glass; his duties are therefore limited to his job as project manager.

According to the plaintiff, after the 2018 accident, Dr. Handago mentioned surgery, but plaintiff did not want to undergo another surgery. Physical therapy was prescribed and plaintiff attended at least twice a week until the pandemic began in or around March 2020. At physical therapy, he did stretching, massage and used a TENS unit. The therapies gave him short-term relief. Although he did not return to a physical therapist, he continues to do home stretching exercises and uses the TENS unit daily.

The plaintiff has not seen Dr. Handago since March of 2020; visits stopped with the pandemic. Dr. Handago retired in January 2021. Plaintiff then saw Dr. Robinson, for one or two visits. Like Dr. Handago, according to the plaintiff, Dr. Robinson recommended either surgery or continued physical therapy.

Plaintiff also saw a consultative doctor, Dr. Modugu, on two occasions. Dr. Modugu

examined him and checked his ranges of motion in his neck, legs and joints.

The plaintiff underwent a defense physical with Dr. Robert Hendler.

Plaintiff testified that, since the 2018 accident, he has developed daily radiating pain starting in his neck and going down his arms and legs. He also gets tingling and numbness in his fingers and toes. He experiences the pain more in his right leg and left arm. He now takes daily pain medication, formerly Percocet and now Suboxone. The medication was changed because his body developed an addiction to Percocet, and the Suboxone was longer-acting.

Plaintiff tries to avoid physical activities, because, although he can do “most stuff,” he feels the after effects of lifting something 20 pounds or more. He now requires his wife’s help with yard work, and she does what he cannot physically do. His only athletic activity was golfing, but he had not golfed in a long time. Plaintiff is unable to be physically active with his sons. He cannot wrestle with them or kick a soccer ball.

In general, plaintiff claims that his physical condition has changed as a result of this accident in that he now has stiffness and radiating pain, numbness and tingling.

Expert Records and Reports

Records of Robert Handago documented visits from January 18, 2018 (a follow up from the 2017 work related accident) and January 24, 2019; March 25, 2019 and April 25, 2019 (all relating to the December 2, 2018 accident). Resultant assessment at all visits was disc derangement at the cervical and lumbar levels. The plaintiff was not working in January 2018. However, he was working at the time of all three 2019 visits. Dr. Handago assessed the plaintiff to be 100% disabled in January 2018 and 25%; 75% and 50% in January; March and April 2019, respectively. Physical therapy was prescribed after all visits; surgery was not referenced.

Records documenting examinations completed by Dr. Michael Robinson on May 15 and June 6, 2019 were entered into evidence. MRI dated May 24, 2019 showed disc degeneration at L4-5, L5-S-1. Massage therapy for the entire spine was prescribed together with physical therapy.

Dr. Sathish Modugu reports, labeled “narrative for no-fault”, relate to the December 2018 accident. Giving a “guarded” prognosis for the cervical spine, assessment includes herniation at C4-C5 and exacerbation of a pre-existing lumbar condition. The cervical condition is deemed permanent.

MRI reports dated March 9, 2017; April 2, 2019 and May 24, 2019 were entered into evidence. All showed post cervical fusion and lumbar fusion syndrome. The April report documented mild osteophyte at C4-5 and C6-7. Essentially, but for a small disc herniation noted on the December 2019, no significant changes were found from March 2017 to May 2019.

Cervical range of motion documented by treating physicians showed no significant changes. Dr. Handago, in his January 2019 report, noted “Cervical spine range of motion is nearly normal. There is pain in the evaluation range of motion. Forward flexion 30°. Rotation right 75°. Rotation left 65°. Motor function grossly intact. Patient has hypesthesias dorsal aspect of right hand ulnar mid and radial distributions. Reflexes grade 1-2/6 bilaterally for the biceps, triceps and brachial radialis reflexes.”

Dr. Robinson gave no range of motion measurements.

Dr. Modugu, not a treating physician, in his December 2019 report noted minimal change, “Range of the motion of the cervical and lumbar spine was measured with goniometer. It revealed 65 degrees rotation to the right and 55 degrees rotation to the left. Normal would be 60 to 90 degrees. Lumbar spine range of motion revealed 40 degrees flexion and 5 degrees extension- Normal

would be 60-90 degrees flexion and 20-30 degrees extension. Minimal changes are noted two years later.”

Robert Hendler’s defense medical report was entered into evidence. Formation of disc abnormalities forming at the levels above and below C5-C6, the fusion site, are noted in the 2017 MRI by Dr. Hendler in his report. Dr. Hendler found no significant limitation in either cervical or lumbar ranges of motion during his examination. Largely on those bases, Dr. Hendler opined that there was no significant change in the plaintiff’s cervical or lumbar spine between the two studies.

FINDINGS

Plaintiff alleges that he sustained a serious injury in that he suffered a permanent consequential limitation, significant limitation and was unable to perform his usual and customary daily activities for not less than 90 days out of the 180 days immediately the accident. He has failed to prove, by a preponderance of the evidence, that he has sustained a serious injury.

Plaintiff returned to work, to his original position, within two weeks of the accident. He testified to being able to perform most of his prior routine activities. No medical provider limited his activities.

While assigned partial disability by treating physician, he returned to work on a full time basis. No activity limitations was supported by the documentary evidence.

Similarly, plaintiff has failed to prove a permanent consequential limitation or significant limitation. Range of motion, as documented by Dr. Handago, remained consistent with minimal changes during the period of treatment. No significant or consequential limitations are noted.

On that basis, the Court finds that plaintiff has failed to carry his burden of proving a serious

injury by preponderance of the evidence, and on the issue of damages, finds for defendant.

Submit judgment on notice.

Dated: February 2, 2022
Goshen, New York

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HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*