

Williams v Gales

2022 NY Slip Op 31978(U)

June 22, 2022

Supreme Court, Kings County

Docket Number: Index No. 522874/2018

Judge: Debra Silber

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

_____x

RICHARD R. WILLIAMS,

Plaintiff,

DECISION / ORDER

-against-

Index No. 522874/2018

SHARON A. GALES,

Motion Seq. No. 3

Defendant.

Date Submitted: 2/10/22

_____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, Affirmation and Exhibits Annexed.....	<u>34-43</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>44-50</u>
Reply Affirmation.....	<u>51</u>

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

This is a personal injury action arising out of a motor vehicle accident that took place mid-day on June 24, 2017 in Brooklyn, NY. At the time of the accident, plaintiff and the defendant were driving their own vehicles when a collision occurred at the intersection of East 52nd Street and Avenue J. There is a stop sign at the intersection that controls traffic moving on East 52nd Street. There is no traffic control device for vehicles travelling on Avenue J at that intersection. The front left (driver's side) front fender of the plaintiff's vehicle and the front right (passenger side) bumper and the front passenger-side fender of the defendant's vehicle came into contact with each other. The plaintiff did not go to a hospital for medical attention following the accident.

In the portion of the plaintiff's bill of particulars where the injuries that the plaintiff allegedly sustained are listed, this bill of particulars states that the injuries listed are for

someone named “Samuel Bertrand.” In the modern era of computer word processing and attorneys cutting and pasting portions of documents into other documents, this might be a simple typographical error on the part of plaintiff’s counsel, but it’s impossible for the court to know, as no amended bill of particulars was ever filed correcting the error. Assuming that the injuries listed are for the plaintiff in this case, and that only the name is incorrect, the plaintiff alleges that as a result of the accident, he sustained injuries to his cervical and lumbar spine. At the time of the accident, he was fifty-eight years old. He states in his bill of particulars that he was not confined to bed, home, or a hospital, that he was not making a claim for lost earnings, and that he was not incapacitated from his work (as ground crew for JetBlue Airways) after the accident [Doc 37]. Plaintiff also testified that he missed no time from work as a result of the subject accident [Doc 38, p.15].

Defendant moves for summary judgment dismissing the complaint on the issue of liability, and additionally contends that plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102(d).

In support of the motion, defendant submits the pleadings, an attorney’s affirmation, plaintiff’s bill of particulars, plaintiff’s and defendant’s EBT transcripts, an uncertified copy of the police accident report, photos of the damage to the defendant’s vehicle, a notarized report from a chiropractor, Dr. Robert Snitkoff, which is not in affidavit form,¹ and an affirmed report from a radiologist, Dr. Robert Traflet.

¹ Both parties have submitted defective chiropractor’s reports which are notarized but are not affidavits. A chiropractor cannot affirm, per CPLR 2106, and substituting chiropractor for physician in the preamble to an affirmation is insufficient. An affidavit is required. Here, as both parties made the same error, the court has disregarded it and considered both reports as being submitted in admissible form, pursuant to CPLR 2001. For the requirements of an affidavit, see West’s McKinney’s Forms for Civil Practice Law and Rules §5:18 “Supporting Papers:

Initially, the court notes that as the copy of the police accident report offered by the defendant is not certified, it is, therefore, inadmissible. It is, however, evidence of the date, time, and place of the accident, information the officer had a duty to report. The testimony of the parties agree that the plaintiff was traveling on East 52nd Street, which is a one way street. Plaintiff testified that he stopped at the stop sign on East 52nd Street at the intersection of Avenue J, which is a two-way street, and that there is no traffic control device at that intersection for cars travelling on Avenue J. Plaintiff testified that he stopped for approximately ten seconds, inched out to look both ways, saw nothing initially and started to move forward to make a left turn onto Avenue J. The plaintiff claims that as he started to move forward, when he looked left again, he saw the plaintiff for the first time, and he immediately stopped and sounded his horn. Plaintiff testified that he thought that the defendant would either stop or just maneuver around his car, but she struck his left side at the driver's side front fender. The defendant testified that the first indication that she had that she was in an accident was the sound of the impact when it occurred. She testified that she never saw the plaintiff's vehicle at any time prior to the impact occurring, despite the fact that there was no construction or police activity obscuring her view of the intersection.

Based on the plaintiff's testimony that he had stopped at the stop sign and then started slowly to move forward, but when he saw the defendant's vehicle, he stopped again and sounded his horn, a question of fact exists as to whether he properly yielded

Affirmations and Affidavits" [Feb 2022 update]. Note: online treatise. Here, the documents omit, among other items: the caption, the name of the document, the index number, the state, and county where the affidavit is signed and sworn to, and do not open with "[name], being duly sworn, deposes and says."

the right of way to defendant, who was proceeding through the intersection. In addition, although the defendant had the right to assume that vehicles, such as the plaintiff's vehicle, traveling on an intersecting street, would obey the provisions of the Vehicle and Traffic Law, in particular, Section 1142(a), the defendant was still required to use reasonable care and was not permitted to proceed into the intersection in total disregard of a vehicle traveling on an intersecting street which she should have seen. In this case, particularly in light of the fact that the defendant testified that she never saw the plaintiff's vehicle prior to the impact, and that there was nothing obstructing her view, while the plaintiff testified that he had already started to enter the intersection when he first saw defendant's car, a question of fact exists as to whether the plaintiff had already entered the intersection, and if so, if the defendant failed to see what there was to be seen (see *Gardner v Smith*, 63 AD3d 783 (2d Dept, 2009)). Based on the foregoing, the portion of the defendant's motion seeking summary judgment on the issue of liability is denied. The court notes that to demonstrate her entitlement to summary judgment, the defendant must prove that she was completely free of any comparative fault for the happening of the accident.

Turning to the portion of the defendant's motion which seeks summary judgment based on her contention that the plaintiff fails to satisfy the "serious injury" threshold as defined in the Insurance Law, the court notes that Dr. Snitkoff, the defendant's examining chiropractor, examined the plaintiff on September 27, 2017, approximately three months after the accident. The defendant's radiologist did not examine the plaintiff. He reviewed the cervical and lumbar MRI films and concluded that all of the positive findings on the MRIs are degenerative, longstanding and not causally related to the date of the accident.

He also states that the conditions indicated (chronic disc pathology at multiple levels) “would not be consistent with causal relation with respect to one specific prior traumatic event, but rather shows typical chronic degenerative etiology.”

Dr. Snitkoff examined plaintiff and tested the range of motion in plaintiff’s cervical and lumbar spine and reports completely normal results. He concludes that his sprains and strains have all resolved. He concludes that “there is no evidence of disability” and “there is no medical necessity for further chiropractic treatment.”

With regard to the 90/180-day category of injury, as previously indicated, the plaintiff’s bill of particulars and his deposition testimony are clear that he missed no time from his job as a member of the ground crew for JetBlue Airlines. The court additionally notes that the plaintiff’s papers in opposition make no argument to counter the defendant’s contention that the plaintiff’s fails testimony is proof which satisfies the 90/180 category of injury. Based on the foregoing, the court is unable to conclude that the plaintiff was unable to perform substantially all of his usual and customary daily activities for 90 out of 180 days after the accident. Thus, defendant 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.”]).

The court finds that defendant has also made a *prima facie* showing of his entitlement to summary judgment with regard to the other applicable categories injury (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]). The notarized report of chiropractor Robert Snitkoff, D.C. and the affirmation radiologist Robert Traflet, M.D., who examined the plaintiff's MRIs, establish that plaintiff did not sustain a serious injury as a result of the subject accident. The burden of proof then shifts to plaintiff.

Plaintiff counters that the medical evidence he has submitted overcomes the motion and raises a triable issue of fact as to whether he sustained serious injuries as defined by Insurance Law § 5102 (d).

Plaintiff provides an affirmation of counsel, an affidavit from the plaintiff, affirmed reports of his cervical and lumbar MRIs from his radiologist, Dr. Sasan Azar, a notarized report from Peter Tochilovsky, a chiropractor who examined the plaintiff on two occasions, once in June of 2018, approximately one year after the date of the subject accident, and again, more recently, in February of 2021. Plaintiff also offers the records from Dr. Yura Stoly at SH Medical P.C., the physical medicine and rehabilitation doctor who plaintiff saw immediately following the accident and treated with until December of 2017, which were submitted in admissible form, with a certification from the doctor's staff person and record-keeper, which authenticates the records as business records, made in the ordinary course of business (See CPLR 4518; *Irizarry v Lindor*, 110 AD3d 846 [2d Dept 2013]; *Buntin v Rene*, 71 AD3d 938 [2d Dept 2010]; *Komar v Showers*, 227 AD2d 135 [1st Dept 1996] [day to day treatment records not containing reports or interpretations are admissible as business records]).

Dr. Tochilovsky saw plaintiff in June of 2018 and in February of 2021. At the first visit, he reports that plaintiff had significant restrictions in the range of motion in his right shoulder, cervical and lumbar spine. He noted that there was decreased muscle strength as well as spasms in the paraspinal musculature in both the cervical and lumbar spine. At the second visit, he reports that plaintiff's right shoulder range of motion had returned to normal, but that plaintiff continues to have significant restrictions in the range of motion in his cervical and lumbar spine, as well as continued decreased muscle strength and spasms in the paraspinal musculature in the cervical and lumbar spine, all accompanied by pain. He opines in the reports from both visits that the plaintiff's decreased range of motion is "directly related to the trauma on 6/24/2017," and that the subject accident "Is the competent producing cause of Mr. Williams' existing injuries which are listed in my physical examination, and they are permanent."

A review of the medical records from Dr. Stoly² indicate that the plaintiff's decreased range of motion in both his cervical and lumbar spine were noted on his first visit on June 27, 2017, three days after the subject accident.

In his review of the plaintiff's cervical MRI films, Dr. Azar noted disc desiccation at the C3-4 level with a central disc herniation impinging upon the thecal sac, disc desiccation at the C4-5, C5-6 and C6-7 levels with stenosis and impingement of the

² The certification does not make the range of motion testing admissible without an affirmation. However, the court finds that it is the custom and practice of this court, Supreme Court, Kings County, to permit all types of medical records to be submitted with motions and considered admissible in spite of the case law that differentiates between "day to day" records and "interpretations and opinions." (See *Irizarry v Lindor*, 110 AD3d 846 [2d Dept 2013]; *Buntin v Rene*, 71 AD3d 938 [2d Dept 2010]; *Komar v Showers*, 227 AD2d 135 [1st Dept 1996]. In addition, we are still in the midst of the Covid-19 Pandemic. As a result, while the records would not be admissible at trial, the court had considered them as admissible in connection with this motion.

exiting nerve roots at all three levels, and a posterior disc bulge at the C7-T1 level. In his review of the plaintiff's lumbar MRI, he noted disc desiccation at the L1-2 level with a focal left paracentral disc herniation, disc desiccation at the L3-4 level with a focal central disc herniation, disc desiccation at the L4-5 level with a small neural foraminal disc herniation with impingement of the bilateral exiting L4 nerve roots, and disc desiccation at the L5-S1 level with a broad based posterior bulge. Dr. Azar does not differentiate between pre-existing or degenerative findings and finding that might be causally related to the accident.

The court finds that plaintiff has overcome the motion and raised an issue of fact as to whether he sustained a "serious" injury as a result of the subject accident, specifically, a "permanent consequential limitation of use of a body organ or member" or "a significant limitation of use of a body function or system" (*White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]; see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). Dr. Stoly's records and Dr. Tochilovsky's notarized report indicate significant and quantified restrictions in plaintiff's range of motion, both contemporaneously with the accident and recently, and Dr. Tochilovsky opines that plaintiff's injuries were caused by the subject accident and are permanent in nature. He thus raises a "battle of the experts." This is sufficient to raise an issue of fact which requires a trial.

Accordingly, it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: June 22, 2022

ENTER:



Hon. Debra Silber, J.S.C.