Abreu v Crescent Car & Limo

2022 NY Slip Op 32012(U)

June 24, 2022

Supreme Court, Kings County

Docket Number: Index No. 505961/2017

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

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

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CARLOS S. ABREU,

Plaintiff,

-against-

CRESCENT CAR & LIMO and MOHAMMAD IMRUL H. CHOWDHURY,

Defendants.

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DECISION/ORDER

Index No. 505961/2017
Motion Seq. No. 3
Date Submitted: 3/17/2022

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed..........	48-58
Affirmations in Opposition and Exhibits Annexed..................................	61-66
Reply Affirmation..	

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

This is a personal injury action arising from an automobile accident that occurred on November 16, 2016, at or near the intersection of Sutter Avenue and 86th Street in Queens, New York. At the time of the accident the plaintiff was driving his mother's vehicle, traveling on Sutter Avenue, and the defendant was traveling on 86th Street, when the vehicles came into contact with each other. Plaintiff did not request an ambulance and was not treated at a hospital emergency room.

In his bill of particulars, the plaintiff claims that he sustained serious injuries in the subject accident, including a disc bulge at the C3-4 level, cervical and lumbar radiculopathy, cervical and lumbar sprains and strains, a left shoulder contusion, left shoulder sprains and strains, and restricted ranges of motion in his left shoulder, cervical spine, and lumbar spine. At the time of the accident, the plaintiff was nineteen

years old. He further claims in his bill of particulars that he was not incapacitated from employment, and that he is not claiming a loss of earnings. At his deposition, he testified that he only missed "a couple of days" from school and from his job as a counterperson at a pizzeria, and he also testified that he was not confined to his bed or home following the accident [Doc 53]. The defendants move for summary judgment dismissing the complaint and contend that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d).

In support of the motion, the defendants submit an attorney's affirmation, copies of the pleadings, the plaintiff's bill of particulars, the plaintiff's deposition transcript, an affirmation from Dr. Arnold Berman, an orthopedic surgeon, who examined the plaintiff on behalf of the defendants, and an affirmation from Dr. Jessica Berkowitz, a radiologist, who reviewed the MRI of the plaintiff's cervical spine.

Dr. Berman examined the plaintiff on February 25, 2021, almost five years after the accident. Dr. Berman examined the plaintiff and tested the range of motion in both the plaintiff's cervical and lumbar spine and reports completely normal results. He also tested the range of motion in the plaintiff's left shoulder. He notes that the test of plaintiff's forward flexion was 120 degrees when normal is 180 degrees, that the test of plaintiff's abduction was 100 degrees when normal is 180 degrees, that the test of plaintiff's internal rotation was 60 degrees when normal is 80 degrees, and that the test of plaintiff's external rotation was 70 degrees when normal is 90 degrees. He states that "the alleged injury to the left shoulder would not result internal derangement or loss of range of motion. As such, the loss of range in motion is not supported by the alleged injury." [1] He concludes that "the clinical exam of the cervical spine, lumbar spine and left

[1] It appears that he is trying to say that the nature of the accident as he understands it

shoulder are essentially normal" and opines that the plaintiff "did not sustain any permanent injury and has no disability as a result of the accident of 11/16/16." The defendants' radiologist, Dr. Berkowitz, did not examine the plaintiff. She reviewed the cervical MRI films and concluded that it is an "unremarkable MRI of the cervical spine," and notes that there are no disc bulges or herniations present and that there is no evidence of an acute traumatic injury, such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or an epidural hematoma.

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 only a few days of school and from his job at a pizzeria. The defendants have made a prima facie case with regard to the 90/180 category of injury.

However, the court finds that defendants have not made a *prima facie* showing of their entitlement to summary judgment (*see Toure v Avis Rent A Car Sys*., 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). While plaintiff's testimony that he missed only a few days from school and work after the accident 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"]),

could not have caused the injuries and abnormal range of motion, but it is not clear.

defendants have not made a prima facie case with regard to the other applicable categories of injury.

The court finds that the IME report of Dr. Berman, which finds significant limitations in plaintiff's range of motion in his left shoulder, but opines that the "alleged injury to the left shoulder would not result in internal derangement or loss of range of motion" is conclusory in nature and is insufficient to establish that the plaintiff did not sustain a serious injury as contemplated in Insurance Law § 5102(d).

When a defendant has failed to make a prima facie case with regard to all of the plaintiff's claimed injuries and all of the applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Accordingly, it is

ORDERED that the defendants' motion is denied.

This constitutes the decision and order of the court.

Dated: June 24, 2022

ENTER:

Hon. Debra Silber, J.S.C.