

Jian Qing Zheng v Boujlid

2022 NY Slip Op 34337(U)

December 20, 2022

Supreme Court, Kings County

Docket Number: Index No. 527968/2019

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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JIAN QING ZHENG,
Plaintiff,

-against-

HAMID BOUJLID and LAL CHAND DHANDA,
Defendants.

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DECISION / ORDER

Index No.: 527968/2019

Motion Seq. No. 1 & 3

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of defendants' motion for summary judgment and plaintiff's cross-motion to preclude.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, and Exhibits Annexed (MS #1)	<u>13-22</u>
Notice of Cross-Motion, Affirmations, and Exhibits Annexed (MS #3)	<u>49-57</u>
Affirmation in Opposition and Exhibits Annexed (MS #3)	<u>58</u>
Affirmation in Reply and Exhibits Annexed (MS #1)	<u> </u>
Affirmation in Reply and Exhibits Annexed (MS #3)	<u>61</u>

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

This action arises from a motor vehicle accident. Defendants move, in motion sequence #1, for summary judgment and dismissal of plaintiff's action, pursuant to CPLR Rule 3212, contending that plaintiff has failed to sustain a "serious injury," pursuant to Insurance Law § 5102(d). In opposition to the defendants' motion, the plaintiff cross-moves, in motion sequence #3, for an order denying the defendants' motion, as well as for an order granting plaintiff sanctions against defendants for failing to appear for deposition, such as preclusion, striking their answer, and/or sanctions.

The accident in question occurred on the afternoon of February 10, 2019, at the intersection of 25th Avenue and 45th Street in Queens, New York. At the time of the accident, the plaintiff was riding a bicycle and claims defendant's passenger opened the

door to the defendant's taxi "just as he was passing." At the time of the accident, plaintiff was approximately twenty-nine years old. He claims he sustained injuries to his cervical and lumbar spine as a result of the accident. He had surgery to his cervical spine in May 2019, and avers that the surgery was necessitated by the accident.

Dr. Pierce J. Ferriter, an orthopedist, examined plaintiff on May 3, 2021, on behalf of the defendants, which was more than two years after the accident. He did not review any of his medical records. Plaintiff informed him that he still has pain in his neck and back. Dr. Ferriter tested the range of motion in plaintiff's cervical spine and lumbar spine. He reports that plaintiff had normal ranges of motion in all planes, and all other tests were negative. There was no swelling, and no tenderness to palpation.

Dr. Ferriter concludes that plaintiff's sprains and strains to his lumbar spine have resolved. He states that he is "status post alleged cervical spine procedure on 3/15/19 - healed." He states that "The examinee presents with a normal orthopedic examination on all objective testing. The orthopedic examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined. The examinee is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including work duties. There is no disability or permanency."

Dr. Audrey Eisenstadt, a radiologist, reviewed the MRIs of plaintiff's cervical and lumbar spine which were conducted on February 16, 2019, a few days after the accident. Dr. Eisenstadt opines that the films indicate degeneration and desiccation, while acknowledging that there are bulging discs and herniated discs. She states that these "are well over six months in origin." She also reviewed the MRIs of plaintiff's right shoulder, which was conducted on April 17, 2019. She opines that the abnormalities are all degenerative or congenital. Dr. Eisenstadt concludes that "[t]he changes seen are related

to a chronic impingement syndrome with no acute or recent post traumatic abnormalities seen.”

At plaintiff’s EBT, taken on April 8, 2021, he testified that he was not working at the time of the accident. He said he started a new job in April 2020, about fourteen months after the accident, as a sushi chef, and worked at that job part-time for about a year. Plaintiff said that when he got that job, “I told him I cannot work long hours because my physical conditions. I cannot stand very long.” He was then asked, “are you limited in any of your activities?” [Doc 20 Page 53], which question did not specify if it was addressed to the first 180 days after the subject accident, or at the time of the EBT, and he responded that he has pain in his neck, lower back, shoulders and his hand, and stated that “since I feel numb on my hand and I cannot help the household chores and so a lot of household chores has to be done by my wife, like laundry or grocery shopping my wife has to do it . . . in terms of my job I cannot do what I used to do like heavy duty job like a chef, so I only can do some light duties.” The plaintiff was not asked any questions about his activities during the first six months after the date of the subject accident.

Upon review of the papers, the court finds that the defendants have not made a prima facie case with regard to all of plaintiff’s claimed injuries and all applicable categories of injury. Specifically, with regard to the 90/180 category of injury, there is no evidence whatsoever of plaintiff’s condition in the first six months after the accident. Movant’s counsel argues that they have made a prima facie case, as “this category requires proof that there was a causally related, medically determined injury, which we do not believe plaintiffs can establish.” A defendant cannot win a summary judgment motion by stating that the plaintiff cannot prove their case at trial.

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]).

In conclusion, defendants' motion is denied. Plaintiff's cross-motion to preclude the defendants from testifying is denied as academic, in light of the court's (J. Knipel) November 23, 2022 Final Pre-Note Order [Doc 64] which grants plaintiff preclusion as against the defendants, "as per the 12/9/21 order." The branch of plaintiff's cross motion which seeks an award of sanctions is also denied.

This constitutes the decision and order of the court.

Dated: December 20, 2022

ENTER:



Hon. Debra Silber, J.S.C.