Sejour v Bekkaoui
2023 NY Slip Op 30647(U)
March 1, 2023
Supreme Court, Kings County
Docket Number: Index No. 501684/2020
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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LOUIS J. SEJOUR,

Plaintiff,

-against-

KHALID D. BEKKAOUI
and RAMZI BENELHAJLAHSEN,

Defendants.

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DECISION / ORDER

Index No. 501684/2020
Motion Seq. No. 4
Date Submitted: 1/5/23

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, Affirmation and Exhibits Annexed....................	59-68
Affirmation in Opposition and Exhibits Annexed..........................	71-80
Reply Affirmation..	81-82

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

This is a personal injury action which arises from a motor vehicle accident which took place on June 5, 2018, at the intersection of Flatbush Avenue and East 34th Street, in Brooklyn, NY. Plaintiff testified that his car was completely stopped when it was rear-ended by defendants' vehicle. He was a self-employed Lyft driver at the time, but he was not working at the time of the accident [EBT Doc 74 Page 22]. He testified that his niece was in the car with him at the time of the accident. Plaintiff declined medical attention at the scene. At the time of the accident, plaintiff was approximately thirty-five years of age. In his Bill of Particulars [Doc 65], plaintiff claims that as a result of the accident, he sustained injuries to his nose, his cervical, thoracic, and lumbar spine and to his left knee.

Defendants contend that they are entitled to summary judgment dismissing the

complaint as plaintiff did not sustain serious injuries as a result of the accident, as defined by Insurance Law § 5102 (d). Defendants support their motion with an attorney's affirmation, the pleadings, plaintiff's deposition transcript, and the affirmed IME reports from an orthopedist and a radiologist.

Dr. Jeffrey Guttman, an orthopedist, examined plaintiff on March 31, 2022, on behalf of the defendants. This was almost four years after the accident. Plaintiff told him that he still had pain in the neck, back, left knee and nose. Dr. Guttman did not review any of the plaintiff's medical records. He tested plaintiff's range of motion with a goniometer and reports that plaintiff had normal ranges of motion in his cervical spine, thoracic spine, and lumbar spine, with no tenderness or spasm. Dr. Guttman reports that all related tests were negative. He also tested the range of motion in plaintiff's left hip/thigh and reports that it was normal, and of his left knee, which was also normal. All related tests were also negative. The doctor concludes that plaintiff's "alleged injuries" have all resolved, and states that "[b]ased on today's examination, there is no evidence of disability or permanent injury. The claimant can perform activities of daily living and work duties without restrictions. All orthopedic testing was negative. There were no muscle spasms or trigger points and reflexes, muscle strength, sensation and muscle tone were all normal. There is no need for any further diagnostic testing, orthopedic or physical therapy treatment."

Dr. Scott A. Springer, a radiologist, reviewed the MRIs of plaintiff's cervical and lumbar spine and of his left knee. The cervical spine MRI was performed on July 19, 2018, and he states, after reviewing the films, that all of the abnormalities are unrelated to the motor vehicle accident. Specifically, he reports that plaintiff has "[m]ild degenerative changes with anterior osteophytes, C3-C4 through C6-C7. Disc desiccation, C2-C3 through C7-T1. Disc space height loss, C4-C5, C5-C6 and C6-C7. Disc bulges, C3-C4, C4-C5, C5-C6, C6-C7 and C7-

T1. Disc herniations, C5-C6. Central canal narrowing, C5-C6. Disc osteophyte complex, C5-C6. Neural foraminal narrowing, C3-C4 and C5-C6. . . . No posttraumatic changes causally related to the 6/5/2018 incident." He analyzes these abnormal findings as follows: "There are mild degenerative changes with anterior osteophytes at C3-C4, C4-C5, C5-C6 and C6-C7. Degenerative changes are a chronic process and osteophytes are a chronic, bony productive change. These findings could not have developed in the time interval between the examination and the incident. There is disc desiccation with normal disc space heights at C2-C3, C3-C4 and C7-T1. There is disc desiccation with mild loss of disc space heights at C4-C5, C5-C6 and C6-C7. Disc desiccation is a drying out and loss of disc substance process. This could not have developed in the one month and 14-day interval between the examination and the incident and is indicative of degenerative disc disease. Given the associated degenerative changes, the disc space height loss is chronic in nature. . . . C3-C4 demonstrates a mild broad-based disc bulge with mild mass effect on the anterior thecal sac. There is mild resultant narrowing of the bilateral neuroforamen without mass effect on the exiting nerve roots. C4-C5 demonstrates a mild disc bulge with a paracentral component. There is mild mass effect on the anterior thecal sac. The neuroforamen are patent. C5-C6 demonstrates a mild disc bulge with superimposed right paracentric and left far lateral disc herniations. Disc osteophyte complexes are noted, which are chronic, bony productive changes. There is mild narrowing of the central canal at this level, which is secondary to the herniation. There is moderate resultant narrowing of the bilateral neuroforamen with mass effect on the exiting bilateral C5 nerve roots. There is mass effect on the traversing right C6 nerve root. The most common cause for disc herniations is degenerative disc disease and there is clear evidence of degenerative change, particularly the C5-C6 disc bulging at the same level as the herniations, which supports the chronicity of

the disc herniations seen. C6-C7 demonstrates a mild disc bulge with mild mass effect on the anterior thecal sac. The neuroforamen are patent. C7-T1 demonstrates a mild disc bulge with mild mass effect on the anterior thecal sac. The neuroforamen are patent. The disc bulging, as described above, has no traumatic basis. It is degenerative in origin, related to ligamentous laxity and weakening of the outer ligamentous fibers."

The lumbar spine MRI was also performed on July 19, 2018, and Dr. Springer states, after reviewing the films, that all of the abnormalities are unrelated to the motor vehicle accident. He describes the study as showing "[s]traightening of the normal lumbar lordosis. Mild degenerative changes, L1-L2. Disc desiccation, L5-S1. Disc space height loss, L5-S1. Disc bulges, L3-L4, L4-L5 and L5-S1. Neural foraminal narrowing, L4-L5. No fracture, subluxation, or disc herniation. No posttraumatic changes causally related to the 6/5/2018 incident." He analyzes these abnormal findings as follows: "There are mild degenerative changes at L1-L2, which are a chronic process and could not have occurred in the short time interval between the incident and the examination. T12-L1, L1-L2, L2-L3, L3-L4 and L4-L5 discs maintain normal heights and signals. L5-S1 disc demonstrates disc desiccation with mild loss of disc space height. Disc desiccation is a drying out and loss of disc substance process. This could not have developed in the one month and 14-day interval between the examination and the incident and is indicative of degenerative disc disease. Given the associated degenerative changes, the disc space height loss is chronic in nature. T12-L1, L1-L2 and L2-L3 discs demonstrate no disc bulge or disc herniation. L3-L4 demonstrates a mild subligamentous disc bulge with mild mass effect on the anterior thecal sac. The neuroforamen are patent. L4-L5 demonstrates a mild broad-based disc bulge with mild mass effect on the anterior thecal sac. There is mild resultant narrowing of the bilateral neuroforamen without mass effect on the exiting nerve roots. L5-S1 demonstrates a mild disc

bulge with mild mass effect on the anterior thecal sac. There is contact with the traversing bilateral S1 nerve roots. The neuroforamen are patent. Disc bulging has no traumatic basis. It is degenerative in origin, related to ligamentous laxity and weakening of the outer ligamentous fibers. The conus medullaris terminates at approximately T12-L1. The cauda equina is unremarkable. The paraspinal musculature is intact."

After reviewing the plaintiff's MRI of his left knee, taken on July 19, 2018, Dr. Springer states he observed "Possible intrasubstance tear with associated tendinosis, distal quadriceps tendon. Pretibial bursitis. Small joint effusion. Degenerative signal, posterior horn of the lateral meniscus and posterior horn of the medial meniscus. No fracture, dislocation or internal derangement of the knee. No posttraumatic changes causally related to the 6/5/2018 incident." He analyzes these abnormal findings as follows: "There is increased signal in the distal quadriceps tendon. This may represent an intrasubstance tear and associated tendinosis. There are no retracted tendon fibers. Tendinosis is a chronic finding related to repetitive motion that could not have occurred in the time interval between the incident and the examination. The tear could result from progression of tendinosis due to weakening of the tendon fibers. In addition, there is no evidence of bone marrow edema or soft tissue swelling as would be expected with an acute tear. The patellar tendon is intact. A small amount of fluid is seen in the pretibial bursa, which is commonly related to chronic overuse and is a transient process that will resolve without permanent sequelae. There is no underlying tendon or bony injury in this region to indicate this finding is recent or traumatic in nature. There is a small joint effusion, which is a nonspecific transient process that will resolve without sequelae. The anterior cruciate and posterior cruciate ligaments are intact. The medial collateral ligament and lateral collateral ligament complexes are intact. There is no bone marrow edema. There is no subchondral defect. There is degenerative signal in the

posterior horn of the lateral meniscus, which is unrelated to trauma. There is no lateral meniscal tear. There is linear degenerative signal in the posterior horn of the medial meniscus, which is unrelated to trauma. There is no medial meniscal tear. There is no soft tissue swelling. The surrounding musculature is intact."

Defendants contend that their medical evidence, combined with plaintiff's testimony at his EBT, eliminate all categories of injuries in the statute. Plaintiff testified at his EBT that he missed only two weeks from work after the accident [EBT Page 29], and defendants argue that this testimony rules out the 90/180-day category of injury.

The court finds that defendants have made a *prima facie* showing of their entitlement to summary judgment and have shifted the burden of proof to the plaintiff (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). To clarify, on the issue of causation, Dr. Springer opines that plaintiff's MRI abnormalities were not caused by the accident, and Dr. Guttman offers no opinion on causation, stating that plaintiff's "alleged injuries" had resolved. If a defendant's expert concedes that the alleged injuries were caused by the accident, the burden of proof does not shift to the plaintiff (see *Novembre v Punnoose*, 211 AD3d 961 [2d Dept 2022]).

In opposition to the motion, the plaintiff submits an affirmation of counsel, another copy of the plaintiff's EBT transcript, another copy of the plaintiff's bill of particulars, an affidavit from the plaintiff, and a number of medical records.

Document 75 is the emergency room record from SUNY Downstate, where plaintiff went on the evening of the accident. He complained of injuries and pain in his nose, neck, back and left knee. Doc 76 is an affirmation from Dr. Nunzio Saulle of NJS Physical Medicine & Rehabilitation. Plaintiff first saw him two weeks after the accident and received physical therapy until the end of April 2019, when he reached maximum medical improvement. Dr. Saulle reports

that he examined the plaintiff for the first time on June 19, 2018, and he began treating him. At his first visit, Dr. Saulle notes that the plaintiff had reduced ranges of motion in his cervical and lumbar spine and in his left knee. He started him on physical therapy five times a week. A few weeks later, he reduced it to three times a week and states that plaintiff "reported ongoing pain in the neck and back. He expressed that the neck pain radiates towards the left shoulder blade, and there was occasional tingling of the left upper extremity. He stated that the lower back pain radiates to the left buttocks and is aggravated by prolonged standing, sitting, or walking." He referred plaintiff for the MRIs and referred him to an ENT for his nose symptoms. Dr. Saulle describes his ongoing treatment, which terminated on April 30, 2019.

Plaintiff went to see Dr. Saulle again on September 12, 2022, presumably to oppose this motion, which was filed in July of 2022. Dr. Saulle examined the plaintiff and measured his range of motion. Dr. Saulle states that "at this examination, Mr. Sejour reported intermittent pain to his neck and lower back. He expressed that the lower back pain sometimes radiates to the left lower extremity and is aggravated with prolonged sitting or standing." He states that his final diagnosis is "posttraumatic cervical disc herniations, and posttraumatic lumbar disc herniations and disc bulge with left L5 radiculopathy." He opines that "It is my opinion, within a reasonable degree of medical certainty, that that in light of the above-restrictions and pain symptoms, which have persisted for over four (4) years post-accident, Mr. Sejour's above-injuries are permanent and his prognosis for a full recovery is poor. . . It is also my opinion, within a reasonable degree of medical certainty that these injuries and the residual sequelae and the limitations of function constitute a permanent, partial disability which preclude the possibility of complete restoration. It is also my opinion that Mr. Sejour has reached maximum medical improvement from formal physical therapy."

Dr. Saulle then refers to the defendants' experts' reports. With regard to Dr. Guttman's affirmed report, he states that "Dr. Guttman did not review any of the patient's medical records, including the MRI studies. Dr. Guttman does not give any opinion regarding causation. In light of this, it is my opinion that Dr. Guttman's findings and opinions are neither credible nor consistent with Mr. Sejour's past medical history, symptomatology and course of treatment." With regard to the defendants' radiologist's report, Dr. Saulle states "I wholly disagree with Dr. Springer's impression regarding the absolute lack of causation or traumatic injury. It is important to point out that Dr. Springer did not examine the patient, review the objective positive EMG findings, any of my office records, or any of the other treatment records . . . Additionally, it is my opinion, within a reasonable degree of medical certainty that the sudden violent and forceful impact caused by this rear-end collision exerted a tremendous pressure to the structural integrity of the spine, causing injury and trauma to the cervical and lumbar spine."

Following Dr. Saulle's fourteen-page affirmation, plaintiff provides a hundred and fifty pages of his medical records, certified by Dr. Saulle, for his treatment at Dr. Saulle's facility, which the court has not read.

Plaintiff next provides certified copies of his MRI reports [Doc 77]. Of note is the fact that Dr. Springer only reports seeing one cervical disc herniation, while the report of the facility which performed the MRI reports four herniations. The radiologist reports finding three lumbar herniations, while Dr. Springer states that there are none, viewing the same MRI films. Plaintiff also provides a certification/affirmation from the radiologist who read his 2006 MRIs after his prior accident, along with the 2006 MRI reports he signed, to demonstrate that plaintiff had no herniated discs in 2006. The probative value of this information is questionable. Finally, plaintiff provides certified records from Multi-Specialty Pain management, for his treatment from November 15, 2018 to spring 2019, which includes EMG studies.

Based upon the foregoing, the court finds that the plaintiff has sufficiently raised triable issues of fact regarding his claims of “a permanent consequential limitation of use of a body organ or member” and ”a significant limitation of use of a body function or system”, so as to warrant denial of the defendants’ motions for summary judgment.

In conclusion, plaintiff’s treating doctor’s affirmed report, combined with the certified records from Multi-Specialty Pain Management, are sufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a “serious” injury” as a result of the subject accident (*see Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). These reports indicate significant, quantified restrictions in plaintiff’s range of motion, both contemporaneously with the accident and more recently, and his doctor opines that plaintiff’s injuries were caused by the subject accident. Thus, he raises a “battle of the experts.” This is sufficient to raise an issue of fact which requires a trial and the denial of the motion.

Accordingly, the motion is denied.

This constitutes the decision and order of the court.

Dated: March 1, 2023

E N T E R :

Hon. Debra Silber, J.S.C.