

Ettienne v Cheng Zhang

2023 NY Slip Op 30651(U)

March 3, 2023

Supreme Court, Kings County

Docket Number: Index No. 510153/2020

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**

_____ X

VAUGHN ETTIENNE,

Plaintiff,

-against-

**CHENG ZHANG and HOME ELEGANCE KITCHEN
CABINET INC.,**

Defendants.

_____ X

DECISION / ORDER

Index No. 510153/2020

Motion Seq. No. 1

Date Submitted: 12/8/22

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.....	<u>13-22</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>25-31</u>
Reply Affirmation.....	<u>32</u>

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 November 29, 2017, on the upper level of the westbound side of the Verrazzano Bridge. Plaintiff testified that his car was completely stopped when it was rear-ended by defendants' vehicle. He was taken from the scene by ambulance to Staten Island University Hospital. At the time of the accident, plaintiff was approximately forty-one years of age. In his Bill of Particulars [Doc 18], plaintiff claims that as a result of the accident, he sustained injuries to his cervical and lumbar spine.

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 affirmed IME reports from an orthopedist and a neurologist.

Dr. Jeffrey Passick, an orthopedist, examined plaintiff on November 1, 2021, on behalf of the defendants, and prepared an affirmed report. This was four years after the accident. He states that he reviewed the emergency room record from the day of the accident, but not any of the plaintiff's other medical records. He reports that plaintiff said "he feels pain in the neck, mid back and bilateral knees." He tested plaintiff's range of motion in his neck, back and both knees with a goniometer and reports that plaintiff had completely normal ranges of motion with no tenderness or spasm. Dr. Passick reports that all related tests were negative. It is noted that there is no claim of any knee injuries in the plaintiff's bill of particulars.

The doctor concludes that plaintiff's cervical and lumbar spine "strain" has resolved, and states that "The claimant's subjective complaints were not correlated by objective findings during today's physical examination. I find no orthopedic disability based on the physical examination. This is also based upon the available medical documentation, which was reviewed. This individual is capable of performing all the tasks of daily living and maintaining full employment without restrictions. All opinions expressed are based upon a reasonable degree of medical certainty."

Dr. Warren E. Cohen, a neurologist, examined plaintiff on December 27, 2021, on behalf of the defendants, and prepared an affirmed report. He reviewed plaintiff's emergency room records but no other medical records. He states that plaintiff described his then-current issues as follows "The examinee reports complaints of occasional neck pain that is localized. He reports numbness of the left shoulder and hand. He also reports complaints of occasional mid-back pain that is localized. He denies radiating pain,

numbness, or tingling of the lower extremities. He also reports complaints of right knee pain and left shoulder pain.” It is noted that the Note of Issue was filed last August, and that plaintiff’s bill of particulars only asserts injuries to plaintiff’s cervical and lumbar spine. Dr. Cohen did not test plaintiff’s range of motion. He palpated the plaintiff’s spine, and reports that his examination of the cervical, thoracic, and lumbar spine revealed no tenderness to palpation, no spasm, and no radicular symptoms. Dr. Cohen’s motor exam was normal, and he states, “there is no evidence of muscle atrophy.” He reports that plaintiff’s gait was normal. Dr. Cohen concludes that plaintiff had a “normal neurologic examination with no objective clinical evidence of radiculopathy” and that plaintiff’s cervical and lumbar “sprain” has resolved. He opines “The exam demonstrates no impairment of neurologic function that would impair the ability of the examinee to participate in activities of daily living and all usual activities. From a neurologic perspective, the examinee is not disabled. The examinee is working and from a neurologic perspective there is no impairment of neurologic function that would impair the ability of the examinee to participate in usual work activities. There is no permanent impairment of neurologic function.”

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 three days from work after the accident [EBT Doc 21, Page 15], and defendants argue that this testimony rules out the plaintiff’s claim with regard to 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]). On

the issue of causation, neither Dr. Passick nor Dr. Cohen offer an opinion, solely stating that plaintiff's "sprains/strains" have 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]). Neither of defendants' doctors have made such a concession.

In opposition to the motion, the plaintiff submits an affirmation of counsel, copies of defendants' IME reports, plaintiff's emergency room records which are not certified, an affirmation from a doctor, and forty pages of medical and chiropractic records [Doc 31] which were not submitted in admissible form and could not be considered. The court notes that they reflect chiropractic treatment solely from December 26, 2017 to the end of January 2018.

The emergency room records [Doc 30] are not certified, and they were not provided in defendants' motion papers. Thus, they are not in admissible form and could not be considered.

Dr. Kenneth Chapman provides an affirmation dated December 1, 2022, which describes his examination of plaintiff on August 18, 2022, which was his first contact with plaintiff, and appears to have been conducted so plaintiff could oppose this motion. To be clear, this is the only evidence in admissible form submitted by plaintiff, and it summarizes an exam which took place four and a half years after the motor vehicle accident at issue. Dr. Chapman states that he is a pain management doctor at the Spine and Pain Institute of New York, located on Staten Island, NY. He tested plaintiff's range of motion and reports restrictions in the range of motion of plaintiff's cervical, thoracic, and lumbar spine, as well as in his left knee. Dr. Chapman states "[a]fter physical examination, my diagnosis were (sic) as follows: radiculopathy – lumbar region; disc displacement – lumbar region; cervical

disc displacement and pain to the thoracic spine.” Dr. Chapman does not say he reviewed any of plaintiff’s medical records related to the accident, which would have been solely the emergency room record, MRI films¹, and records of a month of chiropractic treatment. He concludes that “it is my medical opinion, to a reasonable degree of medical certainty, that there is a causal relation to Mr. Ettienne’s aforementioned injuries and the November 29, 2017 motor vehicle accident, where the vehicle in which he was operating was struck from behind, and that these injuries are permanent.” Dr. Chapman attaches his office report from the August 18, 2022 exam, in which he summarizes the cervical and thoracic MRI reports that plaintiff gave him. Doing so does not turn the radiologist’s findings into admissible evidence. It is hearsay. He did not view the films. He states that plaintiff told him that he missed one week of work and that he works full time. He does not mention that plaintiff is currently a detective employed by the NYPD. He did not ask plaintiff if he had any work-related injuries or any prior or subsequent motor vehicle accidents to report. Thus, Dr. Chapman’s report is unable to establish causation without any medical evidence which is contemporaneous with the accident date.

To summarize, the report of plaintiff's expert physician, who was not a treating doctor, sets forth the results of a recent examination but does not, and cannot, provide the results of any examination conducted within the months after the accident, nor does he explain plaintiff's lack of any treatment for more than four years prior to his exam, thereby rendering his opinion as to the causation of plaintiff's current limitations in range of motion purely speculative (*see Acevedo v Grayline NY Tours, Inc.*, 204 AD3d 597, 598 [1st Dept 2022]) citing *Black v Gordon*, 172 AD3d 580, 581 [1st Dept 2019]; *Vila v Foxglove Taxi Corp*, 159 AD3d 431,431-432 [1st Dept 2018]).

¹ In his notes, as discussed below, he says that he read the MRI reports.

Based upon the foregoing, the court finds that the plaintiff has not raised any triable issues of fact regarding his claims of “a permanent consequential limitation of use of a body organ or member” or “a significant limitation of use of a body function or system” to warrant denial of the defendants’ motion for summary judgment.

Accordingly, the motion is granted, and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: March 3, 2023

ENTER:



Hon. Debra Silber, J.S.C.