

Morrison v Rigo Limo-Auto Corp.

2023 NY Slip Op 32197(U)

July 3, 2023

Supreme Court, Kings County

Docket Number: Index No. 513615/2019

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**

_____x

DAVE W. MORRISON,

Plaintiff,

-against-

**RIGO LIMO-AUTO CORP. and MUHAMMAD
SHAMSUNNO JESEL,**

Defendants.

_____x

DECISION / ORDER

**Index No. 513615/2019
Motion Seq. No. 4
Date Submitted: 3/9/23**

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.....	<u>45-55</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>59-63</u>
Reply Affirmation.....	<u> </u>

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

This is a personal injury action arising from a motor vehicle accident which took place on January 22, 2019. The plaintiff claims that, while stopped for a red traffic light on Linden Boulevard, at its intersection with Thomas Boyland Street, in Brooklyn, NY, he was struck in the rear by a vehicle owned by defendant Rigo Limo-Auto Corp. and operated by defendant Muhammad Shamsunno Jesel. Plaintiff testified at his EBT, held on July 23, 2021, that at the time of the accident he was driving from his home to his customer services job for Delta Airlines at JFK airport [Plaintiff Tr at Doc 50, page 23]. Plaintiff testified that he was not feeling any pain immediately after the accident [*id.* page 34], and that he declined an ambulance when the police asked if he needed one [*id.* pages 34-35].

Plaintiff first sought medical attention at the Brookdale Hospital ER on January 24, 2019, where he made complaints about his lower back [*id.* page 38]. Plaintiff testified that he had never injured his back or neck prior to the subject accident [*id.* pages 38-39]. He went to another doctor subsequently and received physical therapy five days per week for approximately four months (*id.* pages 42-43). At the time of the accident, plaintiff was 54 years of age. In his Bill of Particulars [Doc 48], plaintiff claims that as a result of the accident, he sustained disc herniations and bulges in his lumbar spine; sprain/strains to his cervical, thoracic, and lumbar spine; cervical, thoracic and lumbar radiculopathy; and restricted range of motion. The plaintiff further states, in his Bill of Particulars, that his injuries are “of a permanent nature.” In addition, he claims that to “the extent defendant claims that any injuries sustained by the plaintiff were caused by pre-existing conditions, the plaintiff alleges that any so claimed pre-existing conditions were latent, inactive and dormant and were exacerbated and activated by the acts and omissions of the defendant giving rise to the accident and injuries as set forth herein.”

The defendants contend, in their motion (Motion Seq. #4), that they are entitled to summary judgment dismissing the complaint as plaintiff did not sustain a serious injury as a result of the accident, as defined by Insurance Law §5102(d). The defendants support their motion with an attorney’s affirmation, copies of the pleadings, plaintiff’s bill of particulars, plaintiff’s deposition transcript, and affirmed IME reports from an orthopedist, Dr. Hugh Selznick [Doc 53], and a radiologist, Dr. Jessica Berkowitz, [Doc 53].

Dr. Selznick, an orthopedist, examined plaintiff on September 17, 2020, on behalf of the defendants. This was one year and eight months after the accident. Under the

section of his report entitled "Review of Medical Records," he only lists "verified bill of particulars." Plaintiff told him that he injured his neck, mid and lower back. Dr. Selznick tested plaintiff's range of motion with a goniometer and reports that plaintiff had normal ranges of motion in his cervical, thoracic and lumbar spine, with no tenderness, swelling or spasm. Dr. Selznick reports that all related tests were negative.

Dr. Selznick concludes that plaintiff's "alleged injury to the cervical, thoracic and lumbar" spine have all "resolved." He concludes his report by opining that "[t]here is no medical need for further orthopedic treatment, including physical therapy. There is no objective evidence of permanency or of a disability. The claimant can work as well as continue to perform daily living activities without restrictions stemming from the accident."

Dr. Jessica Berkowitz, the defendants' examining radiologist, provides an affirmation describing her review of the MRI of plaintiff's lumbar spine which was taken on April 18, 2019. Dr. Berkowitz notes a "disc bulge at T11-12 with associated spondylosis; disc bulging and [h]ypertrophic changes of the posterior elements" at L1-L2; and a "[d]isc bulge, spondylosis and changes of the posterior elements slightly narrowing the bilateral neural foramina at L5-S1." She also notes that "discogenic and plate change is noted at several levels." She opines that "[d]isc bulges, spondylosis and hypertrophic changes of the facet joints and posterior elements are chronic and degenerative in origin," and that "[t]here is no evidence of acute traumatic injury to the lumbar spine such as vertebral fracture, asymmetry of the disc spaces, ligamentous rupture or epidural hematoma." Dr. Berkowitz concludes her report by stating that "[e]valuation of this MRI examination reveals no causal relationship between the claimant's alleged accident and the findings on the MRI examination."

Defendants contend that “[b]ased on the medical evidence submitted by defendants coupled with plaintiff’s testimony, we submit that plaintiff’s allegations of injury were not the result of this minor accident, that plaintiff did not sustain trauma, and the alleged injuries do not rise to the level of impairment sufficient to qualify under any category of the statute. Specifically, defendants’ showing includes objective evidence establishing an ‘absence of trauma.’ See, *Kester v Sendoya*, 123 AD3d 418 [1st Dept 2014]. Defendants provide radiological evidence confirming that no traumatic injury was sustained. This negates a claim of any causally related serious injury under the statute and is therefore sufficient to meet the defendants’ burden on this motion. See *Ikeda v Hussain*, 81 AD3d 496 [1st Dept 2011]; *Johnson v Singh*, 82 AD3d 565 [1st Dept 2011]; *Arroyo v Morris*, 85 AD3d 679 [1st Dept 2011]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009].”

Plaintiff testified at his EBT that on the date of the accident, he was employed by Delta Airlines at JFK airport in “airport customer service” [Plaintiff tr at Doc 50, page 14]. He stated that he was confined to bed for two days after the accident [*id.* page 46] and that he missed four weeks from work immediately following the subject accident. [*id.* page 46]. Plaintiff further testified that he had no surgeries in connection with this accident [*id.* page 46]; that he is not claiming that he was scarred or disfigured as a result of this accident [*id.* page 45]; and that there is nothing that he can no longer do, or that he is limited in doing, as a result of the subject accident [*id.* page 47].

The court finds that defendants have 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 Eyley*, 79 NY2d 955, 956-957 [1992]). The affirmed reports of the

orthopedist and the radiologist both conclude that he did not sustain a serious injury as a result of the subject accident. Further, plaintiff's testimony that he missed only four weeks from 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"]). The burden of proof then shifts to the plaintiff.

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

Plaintiff provides an affirmation of counsel, an affidavit from plaintiff, an affirmed report of the results of plaintiff's lumbar spine MRI [Doc 61], affirmed reports [Doc 63] from plaintiff's treating physiatrist, Dr. Nunzio Saulle, at NJS Physical Medicine and Rehabilitation, P.C., inadmissible records from NJS Physical Medicine and Rehabilitation, P.C., and an affirmed narrative report and supplemental narrative report from plaintiff's neurologist, Dr. Nicky Bhatia [Doc 62].

Dr. Saulle saw plaintiff for the first time on January 28, 2019, six days after the accident. At the first visit, he noted the plaintiff's medical history and conducted a physical examination. He measured the plaintiff's range of motion in his lumbar spine utilizing a

goniometer, and noted that, when compared to normal, the plaintiff had reduced ranges of motion in flexion and in right and left lateral bending. He further noted that right and left straight leg raising caused pain in the ipsilateral hamstring. He prescribed physical therapy and home exercises, sent the plaintiff for an MRI of his lumbar spine, noted that the plaintiff “remains disabled from returning to work,” and diagnosed the plaintiff with a “lumbar sprain/strain.” He also opined that the “accident which occurred on January 22, 2019, is causally related to the patient's injury.” In his follow-up evaluation on February 25, 2019, Dr. Saulle again measured the plaintiff's range of motion in his lumbar spine utilizing a goniometer and noted the plaintiff still had reduced ranges of motion in both flexion and in right and left lateral bending, when compared to normal. He instructed the plaintiff to continue physical therapy and home exercises. He also noted that he gave the plaintiff “a note stating that he may return to work February 27, 2019, with no restrictions.” In the last follow-up evaluation offered, dated April 1, 2019, Dr. Saulle measured the plaintiff's range of motion in his lumbar spine again and noted that the plaintiff continued to have a loss of range of motion in flexion and right and left lateral bending. At that visit, he also recommended that the plaintiff have an MRI of his lumbar spine.

The MRI report offered by the plaintiff is affirmed by Dr. Robert Diamond, who interpreted the plaintiff's lumbar MRI taken on April 18, 2019. In his report, Dr. Diamond notes that the plaintiff had a “broad-based, central disc herniation impressing the thecal sac with peripheral extension into the left, greater than right, foramen” and “[a]butment of the exiting left L1 root” at the L1-2 level; a “posterior central disc bulge with increased bulging peripherally into the anteroinferior foramina” at the L2-3 level, a “posterior disc bulge broad-based centrally with peripheral bulging into the bilateral foramina” with “[r]ight

facet hypertrophic change” at the L3-4 level; a “posterior, broad-based, central and peripheral disc bulging with foraminal narrowing” and “[f]acet hypertrophic change” at the L4-5 level; “Grade I retrolisthesis with facet hypertrophic change, [p]osterior disc herniation broad-based centrally as well as extending into the bilateral foramina and [i]mpression on the bilateral exiting L4 roots” at the L5-S1 level; and a “posterior disc herniation centrally and right, greater than left, paracentrally, with possible cord impression at this level. Peripheral extension of a lesser degree intraforaminally” and “[l]eft facet hypertrophic change” at the T11-12 level. Dr. Diamond also noted that “[e]valuation of the lower thoracic region is currently incomplete and may be further assessed by examination tailored for this area, if felt warranted.” The court notes that Dr. Diamond neither saw nor examined the plaintiff and does not offer any opinion on permanency or causation.

Dr. Bhatia, a neurologist, saw plaintiff for the first time on January 26, 2023. He states that he reviewed the plaintiff’s medical records from NJS Physical Medicine & Rehabilitation PC, and the report from Stand-Up MRI. In his examination of the plaintiff, he notes that there was no tenderness or rigidity in the plaintiff’s lumbosacral spine and that the straight leg raise maneuver was negative, but when Dr. Bhatia measured plaintiff’s range of motion in his lumbosacral spine using a goniometer, he found that, for flexion, the plaintiff had a reduced range of motion when compared to normal. Dr. Bhatia diagnosed the plaintiff with “[l]umbar disc herniation L1/2, L4/5, L5/S1, T11/12; disc bulging L2/3, L3/4 with chronic lumbar pain.” In his conclusion, he opines that “[b]ased on the proximity of the symptoms to the traumatic injury and lack of prior such symptoms, and further based on the mechanism of injury and site and nature of pathology involved,

I believe to a reasonable degree of medical certainty that the above conditions and associated impairments are causally related to the traumatic injury sustained on 1/22/19.” Dr. Bhatia further opines that “[t]he patient has been symptomatic and has to date received adequate physical therapy and medical treatment. I believe the patient has at this point reached essentially maximal medical improvement and prognosis is poor for further recovery.” Finally, Dr. Bhatia concludes that “[w]ith a reasonable degree of medical certainty the patient's condition is permanent in nature. He has a permanent partial disability reflecting the consequential limitation of use of the lumbar spine. He will periodically require physical therapy, systemic or intramuscular pain management and possibly interventional procedures to help alleviate pain for the short-term.”

Dr. Bhatia also annexes an additional medical report regarding his review of the plaintiff's MRI films in the case, wherein he takes issue with the findings of the defendants' radiologist, Dr. Berkowitz. Specifically, Dr. Bhatia states that “I disagree with the findings of Dr. Berkowitz that the positive findings within Mr. Morrison's lumbar spine are due to degeneration. In my opinion, to a reasonable degree of medical certainty, these films show multifocal disc displacement and disc herniations at L1-2, L4-L5, L5-S1, T11-12 to the lumbar spine that are causally related to her [sic] motor vehicle accident of 1/22/19 and not due to a pre-existing condition or degeneration”.

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. Saulle's and Dr. Bhatia's affirmed reports indicate significant and quantified restrictions in plaintiff's range of motion, both contemporaneously with the accident and recently, and both opine that his injuries were caused by the subject accident. Dr. Bhatia further opines that the plaintiff's injuries are not due to a pre-existing condition or degeneration, and that they are permanent. Plaintiff 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 defendants' motion is denied.

This constitutes the decision and order of the court.

Dated: July 3, 2023

ENTER:



Hon. Debra Silber, J.S.C.