

Davis v FR Limo Inc.

2023 NY Slip Op 32337(U)

July 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 518955/2019

Judge: Debra Silber

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

_____x

KEVIN DAVIS,

Plaintiff,

-against-

FR LIMO INC. and MOHAMMED AHMED,

Defendants.

_____x

DECISION / ORDER

Index No. 518955/2019

Motion Seq. No. 4

Date Submitted: 3/17/23

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>67-75</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>76-83</u>
Reply Affirmation.....	_____

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 February 10, 2019. The plaintiff claims that, while driving his vehicle on Warwick Street in Brooklyn, NY, as he was moving through the intersection with Arlington Avenue, his vehicle came into contact with the vehicle owned and operated by the defendants, which was traveling on Arlington Avenue. At the time of the accident, the plaintiff was driving home, and his wife and children were passengers. [Plaintiff Tr at Doc 72, page 16]¹. The plaintiff testified that, as a result of the impact, his left knee came into contact with the dashboard or steering wheel and his left shoulder twisted [*id.* pages 34-35]. The

¹ His wife's action was brought separately, *Michelle Davis v FR Limo et al*, 524293/2019.

police were called. Plaintiff declined medical attention and drove his car home from the scene [*id.* Pages 40-41].

Plaintiff first sought medical attention at Wyckoff Hospital the following day, where he made complaints about his neck, back and left knee [*id.* page 54]. Plaintiff testified that one to two days after his hospital visit, he went to a doctor with complaints of pain in his neck, back, left knee and left shoulder [*id.* Pages 40-41]. Plaintiff testified that he treated at a physical therapy facility 2-3 times per week, from February to September of 2019, and that he stopped treatment after he had the first surgery because he was feeling better and because he felt that the physical therapy treatments were not helping him anymore [*id.* Page 60]. Plaintiff had MRIs of his cervical and lumbar spine, left knee, and left shoulder and consulted with an orthopedic surgeon [*id.* Page 61]. Plaintiff testified that he had arthroscopic surgery performed on his left shoulder and his left knee. Plaintiff was confined to his home for approximately one week after each of the surgeries [*id.* Page 73]. At his deposition, which was held in July of 2021, plaintiff testified that the last time that he received any treatment for the injuries he sustained in the subject accident was in 2019 [*id.* Page 68]. Plaintiff also testified that he did not miss any time from work as a result of the subject accident because he was already out of work on a Worker's Compensation claim for post-traumatic stress disorder, and that he had been out of work for two years prior to the accident [*id.* Pages 73-74].

At the time of the accident, plaintiff was 31 years of age. In his bill of particulars [Doc 70], plaintiff claims that as a result of the accident, he sustained tears of the rotator cuff and the anterior and inferior glenoid labrum in the left shoulder, and had a surgical repair on August 12, 2019; tears of the lateral meniscus, medial meniscus, and anterior cruciate ligament in his left knee, and he had surgical repairs on September 6, 2019; a

disc herniation and a disc bulge in his lumbar spine; a disc herniation in his cervical spine; and restricted range of motion. The plaintiff further states, in his bill of particulars, that he has scarring at the incision sites where the arthroscopic surgeries were performed and that the injuries are permanent. Finally, in his bill of particulars, plaintiff contends that he satisfies the threshold for “serious injury” as defined in Insurance Law §5102[d] in that he sustained permanent scarring and disfigurement; permanent loss of use of body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent nature, which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for 90 days during the 180 days following the accident.

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. Pierce Ferriter [Doc 73], and a radiologist, Dr. Scott Springer [Doc 74].

Dr. Ferriter, an orthopedist, examined plaintiff on October 10, 2021, on behalf of the defendants. This was two years and eight months after the accident. Under the section of his report entitled “Review of Medical Records,” he only lists “verified bill of particulars,” and “police accident report.” Plaintiff told him that he injured his left knee, left shoulder, neck and lower back and told the doctor that he had surgeries on his left knee and left shoulder. Dr. Ferriter tested plaintiff’s range of motion with a goniometer and reports that plaintiff had normal ranges of motion in his cervical and lumbar spine, his left shoulder,

and his left knee, with no tenderness, swelling or spasm. In his exam of the plaintiff's left knee and left shoulder, Dr. Ferriter noted "well healed surgical scars." Dr. Ferriter reports that all related tests were negative.

Dr. Ferriter concludes that plaintiff sustained sprains and strains to his cervical, thoracic, and lumbar spine, all of which are "resolved." His impression of both the left shoulder and left knee are "status post-surgery-healed by my today's examination." Dr. Ferriter opines that the exam was "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. Currently, the claimant is working. There is no functional disability, and the claimant may continue working as he currently does. The claimant is able to perform normal activities of daily living without limitations. There is no permanency or disability."

Dr. Scott Springer, the defendants' expert radiologist, provides an affirmation describing his review of the MRI of plaintiff's left knee, which was taken on April 19, 2019. In his report, Dr. Springer notes that "[t]here is no fracture or dislocation. The quadriceps and patellar tendons are intact. 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 a physiologic amount of joint fluid, which is normal. There are mild tricompartmental degenerative changes and narrowing, which are chronic processes. The medial and lateral menisci are intact. There is no soft tissue swelling. There is no popliteal cyst. The surrounding musculature is intact." Dr. Springer's final impression is that the MRI of the plaintiff's left knee shows "[p]hysiologic amount of joint fluid; [m]ild tricompartmental degenerative

changes and narrowing,” and “[n]o fracture, dislocation or internal derangement of the knee.” Lastly, Dr. Springer finds “[n]o posttraumatic changes causally related to the 2/10/2019 incident.” For reasons that are not explained, the defendants did not obtain any radiological reviews of the MRIs of the plaintiff’s cervical spine, lumbar spine, or left shoulder.

Defendants contend that “[b]ased on the medical evidence submitted by defendants coupled with plaintiffs’ testimony, we submit that plaintiffs’ allegations of injury were not the result of this minor accident that plaintiffs 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 the New York City Transit Authority as a bus operator [Plaintiff tr at Doc 50, page 14], and that he did not miss any time from work as a result of this accident [*id.* Page 16]. He was already out of work on a Worker’s Compensation claim, as mentioned above. He had returned to his job by the time of his EBT in July of 2021. The court notes that the plaintiff testified that he was confined to his home for one week after the surgery to his knee on September 6, 2019, which was approximately seven months after the subject accident

[*id.* Pages 72-73]. Although plaintiff claims in his bill of particulars that he has scars from both surgeries, no one asked him about his claim of scarring at his deposition. However, arthroscopic surgery scars, marks from three small portal holes, do not qualify as a “serious injury” as this category of injury in Insurance Law 5102(d) has been interpreted.

As defendants have not provided any medical records which were generated during the first six months after the accident, the court must turn to plaintiff’s EBT transcript to determine whether the defendants have submitted any admissible evidence with regard to the 90/180-day category of injury. Defendants’ attorney argues (Aff. Doc 68 ¶31) “defendant’s proof rules out the 90/180-day category of the statute. Putting aside that this category requires proof that there was a causally related, medically determined injury, which we do not believe plaintiffs can establish, the 90/180 category requires proof that plaintiffs were medically prevented from performing ‘substantially all’ of his usual and customary activities for the requisite period.” The only “proof” that counsel could be referring to would be the plaintiff’s EBT [Doc 72].

Plaintiff testified at his EBT, which was held more than two years after the subject accident, that at the time of the accident, he was still employed as a bus operator, but was out from work on a Worker’s Compensation claim that was unrelated to the subject accident. Plaintiff testified that he returned to his job as a bus operator in January of 2020 [Doc 72 Page 74]. Plaintiff further testified that at the time of his EBT in July of 2021, there were no activities that he did before the accident but could no longer do. He did say that he had difficulty using his left foot to activate the turn signal in his bus, that he has trouble doing push-ups, and that he now favors his right arm when lifting things [*id.* Pages 69-70].

Although plaintiff was asked about activities that he used to do before the accident, but could no longer do, or that he had difficulty doing at the time that the deposition was held, plaintiff was not asked at his EBT if there were any activities that he could not perform in the months immediately following the accident, and in particular, the first six months. The court finds that plaintiff's testimony does not make a prima facie case for defendants with regard to the 90/180-day category of injury, as he wasn't asked any questions about whether his usual and customary activities had been curtailed in the first six months after the accident.

There is thus nothing in the pleadings, the bill of particulars or the plaintiff's EBT transcript that supports defendants' claim that plaintiff's usual and customary daily activities were not curtailed during the 90 days immediately following the accident.

As the defendants have failed to meet their burden of proof as to all claimed injuries and all 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 any event, had defendants made a prima facie case for dismissal, plaintiff's treating doctors' affirmations, and in particular, the affirmation of Dr. Diwan, who performed the surgeries on the plaintiff's left shoulder and left knee, is sufficient to overcome the motion and raise a triable issue of fact 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]).

Plaintiff opposes the motion with an affirmation of counsel, affirmed medical records from Dr. Conrad Cean, the managing physician of New York PM Associates, Inc. [Doc 60], an affirmed report from Dr. David Kolb, the radiologist who interpreted the plaintiff's left shoulder MRI, an affirmed report from Dr. Brijesh Reddy, the radiologist who interpreted the plaintiff's left knee MRI, an affirmed report from Dr. Norman Pennington, the radiologist who interpreted the plaintiff's cervical and lumbar spine MRIs [Doc 61], and an affirmation and affirmed records from Dr. Laxmidhar Diwan, the orthopedist who performed the surgeries on plaintiff's left knee and left shoulder [Doc 62].

Plaintiff sought treatment at New York PM Associates, Inc. for the first time on February 14, 2019, four days after the accident. At the first visit, he was seen by Dr. Ifran David, who noted the plaintiff's medical history and conducted a physical examination. He measured the plaintiff's range of motion in his cervical and lumbar spine and noted that, when compared to normal, the plaintiff had reduced ranges of motion in flexion, extension, and rotation. He prescribed physical therapy and home exercises and sent the plaintiff for MRIs of his cervical spine, lumbar spine, left shoulder and left knee. In the most recent report provided by Dr. David, dated August 29, 2019, he states that "[i]t is my opinion, based on the history of the patients [sic] symptoms, diagnosis and examination that the above noted injury was sustained or aggravated in the recent Motor Vehicle Accident that occurred. The disability resulting from the accident maybe [sic] of a temporary or a permanent nature."

Plaintiff offers the affirmed reports following his MRIs of his cervical and lumbar spine, his left shoulder, and his left knee. The reports for plaintiff's cervical and lumbar

spine are affirmed by Dr. Norman Pennington, who interpreted the plaintiff's original studies taken on March 20, 2019. In his affirmation, Dr. Pennington notes that the plaintiff has a "C5-C6 2.2 mm disc herniation which indents the anterior subarachnoid space. No annular disc tear. Central canal and neural foramina are patent," and that "[t]here is no indication of degeneration at C5-C6" in the cervical spine. Dr. Pennington's affirmation also notes that plaintiff had an "L4-L5 shallow central disc herniation" and an "L5-S1 disc herniation with no high-grade central canal or foraminal narrowing," and that "[t]here is no indication of degeneration at L4-L5 and L5-S1." The report for plaintiff's left shoulder MRI is affirmed by Dr. Thomas Kolb, who interpreted the MRI study taken on March 23, 2019. In his affirmation, Dr. Kolb notes that the plaintiff had a "[p]artial rotator cuff tear at the articular aspect of the infraspinatus tendon," a "[l]ow-grade tear of the anterior superior labrum," and "[j]oint and bursal effusion." He further states that "[t]he conditions are status post trauma" and that "[t]he tears do not have signs of degeneration." Finally, Dr. Kolb opines that "[g]iven appropriate clinical correlation, it is my opinion to a reasonable degree of medical certainty that the aforementioned left shoulder tears are caused by the trauma of the motor vehicle accident of 2/10/2019." The report for plaintiff's left knee MRI is affirmed by Dr. Brijesh Reddy, who initially interpreted the left knee study taken on April 19, 2019. In his affirmation, Dr. Reddy states that the plaintiff has a "[h]orizontal tear of the posterior horn of the lateral and medial menisci," and an "[i]nterstitial tear of ACL," as well as "[l]ow-grade tricompartmental chondrosis, joint narrowing, marginal osteophytes" and "[m]ild joint effusion."

Dr. Diwan, an orthopedic surgeon, saw plaintiff for the first time on June 11, 2019. He states that he reviewed the plaintiff's medical records from New York PM Associates, Inc., physical therapy records from Summer PT PC and Averroes Physical Therapy, PC,

treatment records from Body Works Chiropractic PC, and the acupuncture records of ZQZ Acupuncture, PC.

In his most recent examination of the plaintiff on March 15, 2022, he examined the plaintiff's left shoulder and noted both a positive impingement test as well as a positive supraspinatus isolation test. He also measured plaintiff's range of motion in his left shoulder using a goniometer, and found that plaintiff had reduced ranges of motion, when compared to normal, across all planes. In his examination of the plaintiff's left knee, he noted minimal effusion, a positive patellofemoral grind test, and that plaintiff was positive for weakness of quadriceps and positive for wasting of quadriceps. He also measured plaintiff's range of motion in his left knee using a goniometer and found that plaintiff had a reduced range of motion, when compared to normal, in flexion. In his examination of the plaintiff's cervical spine, he noted that plaintiff had a positive distraction test, compression test and Jackson's test, and that when he measured plaintiff's range of motion in his cervical spine using a goniometer, he found that plaintiff had reduced ranges of motion, when compared to normal, across all planes. In his examination of the plaintiff's lumbar spine, he noted that plaintiff had a positive straight leg raising test, a positive Faber's test, a positive Ely's test, and a positive Kemp's test. When Dr. Diwan measured plaintiff's range of motion in his lumbar spine using a goniometer, he found that plaintiff had reduced ranges of motion, when compared to normal, across all planes.

Dr. Diwan annexes the surgical reports from the surgeries that he performed on the plaintiff's left shoulder and left knee. His postoperative diagnosis of the plaintiff's left shoulder was a "[p]artial tear of rotator cuff of 25%, traumatic in nature," a "[p]artial tear of the anterior and inferior glenoid labrum of 30%, traumatic in nature," as well as "[s]ynovitis and bursitis," "[a]dhesions," and "[i]mpingement syndrome." His postoperative

diagnosis of the plaintiff's left knee was a "[p]artial tear of the medial meniscus of posterior horn," a "[p]artial tear of the lateral meniscus of the body and posterior horn," a "[p]artial tear of the anterior cruciate ligament of 15%," as well as "[c]hondromalacia of the patella, grade 1 to 3," and "[s]ynovitis." In his prognosis, Dr. Diwan opines that the plaintiff "[h]as reached maximum medical benefit with significant, permanent, partial disability to the left knee, left shoulder, cervical spine, and lumbar spine. The patient underwent conservative treatment that included physical therapy, acupuncture, and chiropractic treatment, but said treatment failed to improve his condition. He came to me for more drastic treatment and underwent arthroscopic surgery of the left shoulder and left knee. Following the surgery, the patient underwent further physical therapy on the left shoulder and left knee. However, the left shoulder and left knee remain symptomatic and restricted until this day. Similarly, the cervical spine and lumbar spine reached maximum medical benefit. It has been more than three (3) years since the accident of 2/10/2019, and his condition remains symptomatic and restricted." Dr. Diwan concludes by opining that "[t]hese restrictions will continue to interfere with his ability to engage in daily life activities to which he was accustomed prior to the accident of 2/10/2019, including activities that require him to sit, stand or walk for prolonged periods, perform tasks above shoulder level, take the stairs, bending to pick up objects, sleeping, and cleaning. Therefore, it is determined to a reasonable degree of medical certainty that as a result of the accident on 2/10/2019 the patient has sustained a permanent, partial, and significant loss of use of function of the left knee, left shoulder, lumbar spine and cervical spine as determined above which will continue to greatly affect his day-to-day activities."

The court finds that plaintiff has overcome the motion and raised a triable issue of fact whether he sustained a "serious injury" as a result of the subject accident (*White v*

Dangelo Corp., 147 AD3d 882 [2d Dept 2017]; see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). Dr. Cean and Dr. Diwan'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. Kolb, the radiologist who interpreted the plaintiff's left knee MRI further opines that the tears in the plaintiff's left knee "do not have signs of degeneration." 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 7, 2023

ENTER:



Hon. Debra Silber, J.S.C.