

Abreu v Bristol

2023 NY Slip Op 32830(U)

August 14, 2023

Supreme Court, Kings County

Docket Number: Index No. 518534/2020

Judge: Debra Silber

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

X

DELVIS B. ROJAS ABREU and WANDY DEL LA ROSA,

DECISION/ORDER

Plaintiffs,

-against-

Index No. 518534/2020

Motion Seq. No. 3

Date Submitted: 6/1/2023

**PHILIP ANTHONY BRISTOL
and STEPHON MCDONALD,**

Defendants.

X

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, Affirmations, Affidavits, and Exhibits Annexed.....	<u>48-57</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>69-80</u>
Reply Affirmation.....	<u>82-84</u>

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

This is a personal injury action arising from an automobile accident that occurred on June 8, 2020 in Queens, New York. At the time of the accident, plaintiff Delvis B. Rojas Abreu was an Uber driver, but he was driving his car for personal use and was not working at the time. Plaintiff testified that as he was exiting from a parking space, his car was rear-ended by a car owned and driven by the defendants. There has not been a determination of liability. The police came to the scene and took a report. The plaintiff left the scene of the accident with his passengers, who are his family members, and went home. He sought medical treatment the next day, at the emergency room at Jamaica Hospital, and subsequently saw other doctors and had physical therapy for some period of time. The other plaintiff is not the subject of this motion, although she too claims she sustained injuries as a

result of the accident. For simplicity, the court will refer to the plaintiff Abreu, the only plaintiff this motion is addressed to, in the singular form, "plaintiff."

In his bill of particulars, provided by plaintiff as defendants provided his supplemental bill of particulars but not the initial one, the plaintiff claims that, as a result of the accident, he sustained injuries to his cervical, thoracic and lumbar spine, to his left knee, left shoulder and left foot. At the time of the accident, the plaintiff was approximately 33 years old.

Defendants contend that they are entitled to summary judgment dismissing the complaint solely with regard to plaintiff Delvis B. Rojas Abreu, 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 an affirmed IME report from an orthopedist.

Dr. Pierce Ferriter, an orthopedist, examined plaintiff on December 19, 2022, on behalf of the defendants. This was two and a half years after the accident. Dr. Ferriter states that he reviewed a list of forty-one of plaintiff's medical records. At the time of the exam, Dr. Ferriter states that "Mr. Rojas states that he has complaints of pain in the neck, mid-back, left shoulder, left knee and right ankle/foot. He reports that his symptoms are the same since the reported date of injury." He 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 or spasm. Dr. Ferriter reports that all related tests were negative.

As regards plaintiff's claimed injuries to his left shoulder, left knee and left foot, Dr. Ferriter tested the range of motion in both of plaintiff's shoulders, both of plaintiff's knees, both of plaintiff's ankles, and both of plaintiff's feet and toes, and reports that plaintiff had normal ranges of motion. Dr. Ferriter also reports that all related tests were negative.

The doctor concludes that plaintiff's cervical spine "sprain/strain," thoracic spine "sprain/strain," lumbar spine "sprain/strain," left shoulder "sprain/strain," left knee "sprain/strain," and left foot "sprain/strain" have all resolved, and states that "Within reasonable degree of a medical certainty, the claimant has fully recovered from the injuries sustained on 06/08/2020."

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 one week from work after the accident [EBT Tr. Doc 53 Page 16], 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 Eyer*, 79 NY2d 955, 956-957 [1992]). On the issue of causation, Dr. Ferriter offers no 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]). Dr. Ferriter has not done so here. In fact, defendants' counsel argues that causation is an issue in this case, as the plaintiff had been in a prior motor vehicle accident, which he testified resulted in injuries to his back, and thus, "As the plaintiff cannot establish causality of same based upon the above, a summary disposition in favor of the defense is just and proper as a matter of law" [Doc 50 ¶27].

In opposition to the motion, the plaintiff submits an affirmation of counsel, a transcript of plaintiff's EUO, and a number of exhibits which the court will now review. Some of them are of poor quality, and very fuzzy. Counsel's scanner needs fine tuning or cleaning.

The first item is at Document 74, and seem to be the emergency room records from Jamaica Hospital for 6/9/20. As this item is not certified, it is not in admissible form and could not be considered.

The next item [Doc 75] starts with a certification of medical records by the medical records custodian for a facility called CitiMed Diagnostics. While hospital records are admissible if certified, other medical providers' records are not. CPLR 4518(c). The court searched for the word "affirm" and found an affirmed medical report which begins at page 168 of this exhibit. This report, as it is affirmed by Dr. Mark L. Goodstein, "Interventional Pain Management Specialist, Diplomate American Board of Anesthesiology and Pain Medicine" is in admissible form. Dr. Goodstein states therein that on 1/29/21, about seven months after the accident, he saw plaintiff for a follow-up exam. Plaintiff told Dr. Goodstein that he was going to physical therapy, which "does alleviate the discomfort somewhat." He notes that plaintiff had been receiving chiropractic and acupuncture treatments for more than six months. He reviewed the MRIs of the cervical, lumbar and thoracic spine as well as the EMG/NCV tests with the plaintiff. He describes plaintiff's complaints as follows: " Patient is complaining of 8/10 (0-10 pain scale) pain in the neck occurring occasionally. The pain is on the bilateral sides. The pain is burning and achy. The pain radiates to the left shoulder. Patient is complaining of 8/10 (0-10 pain scale) pain in the mid/upper back occurring constantly. Patient is complaining of 7/10 (0-10 pain scale) pain in the low back occurring occasionally. The pain is achy in nature. The pain radiates to the left leg." Dr. Goodstein tested the range of motion in plaintiff's cervical and lumbar spine, and reports significant restrictions, as well as spasm and tenderness. He tells plaintiff to continue with physical therapy. He recommends epidural steroid injections for pain in plaintiff's spine. He states, "The patient is currently 50% temporarily impaired."

Following Dr. Goodstein's affirmed report is the doctor's initial exam, conducted on 1/8/21 [Doc 75 Page 173]. It is substantially similar to the exam of 1/29/21 described above.

The next item in this exhibit is an affirmed report from Dr. Steven A. Bernstein, an orthopedist who specializes in foot and ankle surgery. His report is also on CitiMed stationery, and starts at page 178 of the exhibit. He saw plaintiff for an initial consultation on September 23, 2020. He incorrectly states that plaintiff sustained a work-related accident on 6/8/20, and describes his exam "On examination of the left foot, the patient has a moderate hallux valgus deformity with dislocating first metatarsophalangeal joint with a hypertrophic medial eminence and pain along the medial first metatarsal as well radiating into the arch." Dr. Bernstein's diagnostic impression is "dislocating first metatarsophalangeal joint, left foot." Dr. Bernstein saw plaintiff again on 12/2/20, and his affirmed follow up report is at page 182. He states "The patient is doing well. He has no pain or problems with the foot at this time. He feels good. He is back to working. On examination, the hallux valgus is still present. The swelling has gone away and the pain has gone away for now."

Plaintiff next provides, at Document 76, the MRI reports, of MRI studies conducted at CitiMed, which were all read by the same radiologist, Dr. Stephen P. Toder, accompanied by an affirmation from Dr. Toder, which authenticates the MRI reports. On June 29, 2020, plaintiff had MRIs of his left foot, left knee, and left shoulder. The radiologist notes bone bruising and swelling on the knee and shoulder, along with other findings. On September 27, 2020, plaintiff had MRIs of his lumbar and cervical spine. The reports indicate a number of disc bulges, and a herniation at C6-7 "with impingement of nerve roots centrally and on the right and with mild central stenosis."

Document 77 is an affirmation from a physician at CitiMed, Regina Moshe, who states that she has reviewed the films from the MRI of plaintiff's thoracic spine conducted on

September 24, 2020, which as initially interpreted by another doctor, and that she agrees with his findings. The report states that plaintiff has two bulges, which impress on the anterior thecal sac, and “slight thoracic scoliosis is noted convex to the right.”

The next exhibit, document 78, is a follow-up report from Dr. Mark L. Goodstein. He examined plaintiff on 4/4/23, presumably in connection with this motion. He indicates that plaintiff had the cervical epidural steroid injections he recommended, in 2021. Dr. Goodstein states “Patient stopped his treatment at CitiMed 08/23/2021. He still has neck/mid back/and low back pain which is now worse.” He describes plaintiff’s current complaints as follows; “Patient is complaining of 8/10 (0-10 pain scale) pain in the neck occurring occasionally. The pain is sharp and achy. The pain radiates to the left shoulder with numbness in the left shoulder. Patient is complaining of 8/10 (0-10 pain scale) pain in the mid back occurring occasionally. Patient is complaining of 8/10 (0-10 pain scale) pain in the low back occurring occasionally. The pain is sharp and achy. The pain radiates to the left leg with numbness in the left leg.” Dr. Goodstein tested plaintiff’s range of motion, in his cervical and lumbar spine. He reports improved findings, which are still not normal. With regard to the cervical spine, he states, “[t]here is tenderness over the paraspinal and upper trapezius as well as over the bilateral, left more than right, cervical facet distributions and muscle spasms. Foraminal compression/Spurling's sign is positive.” For the lumbar spine, he states “There is diffuse tenderness over the lumbar segments bilaterally associated with muscle spasm. Pain was elicited with lumbar facet loading bilaterally. Straight leg raising test is positive on the right at 60 degrees and positive on the left at 45 degrees.” Dr. Goodstein concludes “It is within a certain degree of medical certainty, that the history presented by the patient, the objective physical findings as well as the diagnosis rendered is causally related to the injury the patient

incurred on the specified date. Prognosis for recovery is guarded. Patient is currently 50% temporarily impaired.”

The final item provided by plaintiff is at Document 79. It is a certification of medical records, signed and notarized in New Jersey, in front of an operative report (with photos) on the stationery of Integrated Specialty ASC, LLC, for procedures performed by Dr. Mark Goodstein on 2/9/21, specifically, a “cervical epidural steroid injection at C7-T1 towards the left with fluoroscopic needle guidance” and “trigger point injections in the upper thoracic paraspinal region bilaterally x6.” Following that is another operative report for a “cervical epidural steroid injection at C7-T1 towards the left with fluoroscopic needle guidance” performed on 9/2/21. It is not in admissible form, but is not necessary, as Dr. Goodstein affirmed in his recent report that he had done these procedures.

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 addition, while the plaintiff did testify that he only missed one week of work, he continued at his deposition to explain that he did not return to work full time after that week, but instead returned to work “for “15 to 20 hours per week” [Doc 53 Page 18] and increased slowly to 35 hours per week, which is still not full time for a taxi driver.

In conclusion, plaintiff’s treating doctor’s affirmed reports 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 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, it is **ORDERED** that the defendants’ motion is denied.

This constitutes the decision and order of the court.

Dated: August 14, 2023

ENTER :



Hon. Debra Silber, J.S.C.