

Reed v Shrestha

2023 NY Slip Op 32867(U)

August 17, 2023

Supreme Court, Kings County

Docket Number: Index No. 518131/2020

Judge: Debra Silber

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

_____X

ENOCH J. REED,

Plaintiff,

-against-

RAJU SHRESTHA,

Defendant.

DECISION/ORDER

Index No. 518131/2020

Motion Seq. No. 2

Date Submitted: 6/22/2023

_____X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion for summary judgment.

Papers	NYSCEF Doc
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>23-31</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>34-52</u>
Reply Affirmation.....	_____

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 December 14, 2017 on Apollo Street, near the intersection of Nassau Avenue, in Brooklyn, New York. Plaintiff was a pedestrian, and defendant was driving a car that he owned, which had livery plates. Plaintiff fell to the ground upon contact with the car. The police came to the scene and took a report. The plaintiff left the scene of the accident in an ambulance, and was taken to the emergency room at Wyckoff Heights Hospital. In his bill of particulars [Doc 26], the plaintiff claims that, as a result of the accident, he sustained injuries to his cervical and lumbar spine. At the time of the accident, the plaintiff was 29 years old.

The defendant moves for summary judgment dismissing the complaint [MS #2], contending that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d). In support of his motion, the defendant submits an attorney's affirmation,

copies of the pleadings, the plaintiff's bill of particulars, the plaintiff's deposition transcript, and an affirmed report from Dr. Salvatore Corso, an orthopedist, who examined the plaintiff on behalf of the defendant.

Dr. Corso examined the plaintiff on April 19, 2022, four years after the accident [Doc 30]. Dr. Corso reports that plaintiff "complains of pain to his neck, right hip, right knee and back. He states he has numbness and tingling radiating down the arms and legs. He states the treatments only provide temporary relief." Dr. Corso did not review any of the plaintiff's medical records. He states they were not available for review. Dr. Corso used a hand-held goniometer and tested the range of motion in the plaintiff's cervical and lumbar spine. He reports normal range of motion in all planes. In describing the exam of the cervical spine, he states that "Examination of the cervical spine demonstrates right paracervical tenderness, no swelling or effusion. There is no muscle spasm elicited upon palpation." This seems to say there was "tenderness". In describing the exam of the lumbar spine, he states that "[e]xamination of the lumbosacral spine reveals right paralumbar gluteal tenderness, muscle spasms or trigger points elicited upon palpation." This seems to say there was tenderness and spasms. Or perhaps not. In a subsequent paragraph, he concludes that there were no muscle spasms. Dr. Corso reports that plaintiff's "alleged injuries to the cervical and lumbar spine have resolved." He 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."

Plaintiff testified at his EBT, held on December 8, 2021, that he injured his cervical and lumbar spine in the accident [Doc 28 Page 41]. Plaintiff also claimed that he injured his hip and knee and received physical therapy to his neck, back, hip and knee, but these claims are not in his bill of particulars [Doc 28 Page 44]. He testified that he missed six months from work after the accident. He had physical therapy for eight months, until his no-fault benefits were stopped [Doc 28 Pages 47-48]. Plaintiff has not had any treatment for his injuries since then, which would be sometime in 2018. Plaintiff testified that at the time of the accident he was working for a company delivering cases of wine and liquor, and that when he returned to work, he took a job delivering packages for Amazon, and testified that the work is “lighter” as the packages are lighter than boxes of liquor [*id.* Page 16].

With regard to the 90/180 category of injury, the only evidence in the motion papers is plaintiff’s EBT testimony. He testified that he missed six months of work after the accident, and when he was asked “[a]re you claiming that there’s any activities you cannot go now that you used to do before the accident?”, he responded at Page 53, “Sitting, standing, walking, running, exercise, sports, sleeping, work. Going upstairs, going downstairs.” Plaintiff was then asked what sports he did before the accident that he can no longer do, and he responded “handball, football, basketball. Sports in general” [*id.* Page 53].

Defendant argues that “the 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” [Doc 24

¶26]. This is not an accurate characterization of the defendant's burden of proof on this motion. A party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]).

The court finds that defendant fails to make a prima facie case with regard to the 90/180-day category of injury. When a defendant has failed to make a prima facie case with regard to all of the plaintiff's claimed injuries and all of the 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]).

Even if the defendant had met his prima facie burden for summary judgment, plaintiff would have been found to have overcome the motion, as there are triable issues of fact raised by his submissions in opposition to the motion. Plaintiff first provides an expert doctor's affirmation, from Dr. Irving Friedman, [Doc 42]. He examined plaintiff on March 20, 2023, and states that plaintiff (who was then 35 years old) has "Unrelenting low back pain. He requires a cane to ambulate. He says, 'It travels from side-to-side.' He

also complains of occipital headaches and neck pain.” Dr. Friedman opines that “Mr. Reed remains with a significant and painful disability at both the cervical and lumbar spine. He requires a cane to ambulate. He has persistent spasm, restricted range of motion and radicular symptoms of the upper and lower extremities. The above multiple deficits are directly and causally related to the injuries sustained on December 14, 2017, i.e., Mr. Reed became acutely symptomatic and has been persistently so. Prognosis for any further functional improvement, short of invasive pain management and/or surgical intervention, is extremely poor in view of the chronicity of his symptoms and his multiple above clinical, radiographic and electro-physiologic abnormalities. The above post-traumatic neuro-spinal deficits are to be considered permanent in nature and causally related.” Dr. Friedman recommended pain medications, injections, and other treatments at the exam.

Documents 44 to 51 are described as “affirmed medical records”. Doc 44 are Dr. Yana Abayev’s records, of Smart Choice Medical, P.C., with her affirmation certifying them as accurate copies. She first saw plaintiff on December 21, 2017, a few days after the accident. Document 45 is not in admissible form, as a physical therapist cannot “affirm under penalties of perjury” pursuant to CPLR 2106. Therefore, medical records which are not hospital records cannot be authenticated by a certification unless the certification is from the physician who created the records and is in affirmation form. Document 47 is an affirmation from Dr. Chi Yong, a neurologist, at Northern Medical Care, P.C. authenticating his initial consultation report on February 13, 2018. His report includes range of motion testing performed at that visit, which indicates significant restrictions in the range of motion in plaintiff’s neck and back. It is followed by an affirmation and report from Dr. Delys Eva St. Hill at the same facility, which describes an exam on March 27,

2018. Document 49 is an affirmation and initial consultation report from Dr. Alford A. Smith, a pain management doctor. Document 51 is an affirmation from Ralph Dauito, MD, the radiologist who reviewed plaintiff's cervical and lumbar MRIs, with copies of his reports. Dr. Dauito found three disc herniations in plaintiff's cervical spine, all impinging on the thecal sack and two disc bulges, also impinging on the thecal sac. Dr. Dauito found three disc herniations in plaintiff's lumbar spine, two impinging on the nerve root and the third, at L5-S1, with an annular tear and impinging on the anterior thecal sac.

In conclusion, plaintiff's medical records, combined with the recent affirmed report from Dr. Irving Friedman is 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 doctors opine 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 defendant's motion is denied.

This constitutes the decision and order of the court.

Dated: August 17, 2023

ENTER :



Hon. Debra Silber, J.S.C.