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

X

LEONARD L. LEWIS,

Plaintiff,

-against-

VELEZ G. MATIAS AND CLL QUEENS INC.,

Defendants.

X

DECISION/ORDER

Index No. 502974/2021
Motion Seq. No. 2

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……	29-37
Affirmation in Opposition and Exhibits Annexed.....	39-44
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 February 7, 2018 in New York County. Plaintiff was driving on Canal Street. He testified at his EBT that he had stopped for a red light at the intersection with Broadway when his vehicle was hit by defendants' vehicle from behind and pushed into the car ahead of him. The plaintiff declined an ambulance at the scene and instead drove to his girlfriend's house. He subsequently sought medical treatment. He had physical therapy, acupuncture, and chiropractic treatments for "seven to nine months" [EBT Doc 37 Page 35].

In his bill of particulars, the plaintiff claims that, as a result of the accident, he sustained injuries to his cervical and lumbar spine and to his right knee. At the time of the accident, the plaintiff was approximately 37 years old.

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, an affirmed IME report from an orthopedist and a film review by a radiologist.

Dr. Howard A. Kiernan [Doc 35], an orthopedist, examined plaintiff on August 16, 2022, on behalf of the defendants. This was four years and six months after the accident. Under the section of his report entitled "Review of Available Records," he only lists plaintiff's bill of particulars. He states, "At the time of this examination, Mr. Lewis reports that he has complaints of pain in the neck, lower back and right knee."

Dr. Kiernan examined plaintiff and tested his range of motion in his cervical and lumbar spine and in his right knee. He states that he used a hand-held goniometer and used the "Guidelines to the Evaluation of Permanent Impairment" 5th edition, published by the American Medical Association. Dr. Kiernan reports that plaintiff had normal ranges of motion in his cervical and lumbar spine and in his right knee, and states that all related tests were negative. His "impression" is that plaintiff's sprains/strains have "resolved". Dr. Kiernan then, under a heading "disability" says "[b]ased on today's exam and within reasonable degree of a medical certainty, there is no orthopedic residual, disability or permanency."

Dr. Jessica F. Berkowitz, a radiologist, reviewed the MRIs of plaintiff's lumbar spine for defendants [Doc 36]. One was taken on March 17, 2018, and another on February 22, 2019. She opines that on the more recent exam, "Slight disc desiccation and disc bulging

are identified at L4-5. . . These findings are degenerative. No new findings [in her comparison with the earlier MRI]. There 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. Evaluation of this MRI examination reveals no causal relationship between the claimant's alleged accident and the findings on the MRI examination."

Defendants contend that their medical evidence, combined with plaintiff's testimony at his EBT, eliminate all categories of injury in the statute. Plaintiff testified at his EBT that he was employed full time as a delivery person at the time of the accident, and that he missed about four days from work after the accident. When he returned, he worked the same number of hours, but was given less "of a delivery load, just so I wouldn't be overwhelmed" [Doc 37 Page 58]. He worked for this employer until the Covid-19 Pandemic started in 2020. Plaintiff was in a subsequent accident in December of 2018. He was a pedestrian and was hit by a car. He injured his hip [*id.* Page 73]. After that accident "the pain to my right knee has stayed the same. My wrist and my back, the pain increased" [Doc 37 Page 53]. He brought a lawsuit for his injuries from the December 2018 accident. Plaintiff testified that after the February 2018 accident, he could not do laundry or grocery shopping, as he couldn't "take the cart down, lift it back up" on the stair in front of his home [*id.* Page 54]. He was not asked about his activities or whether they were curtailed for any time period other than after this February 2018 accident and before the December 2018 accident. He was not asked if he had been told by a doctor that he "shouldn't do certain things." He was not asked if there was anything that he used to do before the accident that he can no longer do, or that he still does, but less frequently.

Defendants argue that "defendants' proof rules out the 90/180-day category of the statute" as "this category requires proof that plaintiff was medically prevented from

performing 'substantially all' of his usual and customary activities for the requisite period. As stated earlier, plaintiff returned to work just three to four days following the accident, and when plaintiff returned, he kept the same hours. Plaintiff also admitted he was never confined to his bed or home following the accident. Clearly plaintiff did not meet the 90/180 category of the statute." For the other categories of injury, counsel argues that "Based on the medical evidence submitted, defendant submits that plaintiff's allegations of injury were not caused in this minor accident, that no trauma was sustained, and/or 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), including radiological evidence confirming that no traumatic injury was sustained, which negates a claim of any causally related serious injury under the statute, and is sufficient to meet defendants' burden on this motion" [Doc 30 ¶21].

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, Dr. Kiernan offers no opinion, solely stating that plaintiff's "sprains/strains" have resolved. It is noted that 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]).

In opposition to the motion, the plaintiff submits an affirmation of counsel and a number of exhibits which the court will now review.

The first item is at Document 41, and is an affirmation from Dr. Ari B. Lerner, who states he is a pain management specialist. He examined the plaintiff on May 15, 2023, five

years after the subject accident, for the first time. Plaintiff did not tell him about his subsequent pedestrian knock-down accident in December of 2018. Dr. Lerner tested the range of motion in plaintiff's spine and reports significant restrictions. His diagnosis is: "Cervical intervertebral disc disorder. Lumbar intervertebral disc disorder. Sprain/strain of joints/ligaments/fascia/tendon of thoracic and lumbar region. Traumatic arthropathy, right knee." Dr. Lerner states, in his "discussion" section, "At this time, the prognosis for this patient is guarded. The patient has chronic cervical and lumbar radicular pain. He additionally has myofascial pain to the midback, lower back, and surrounding areas. Ongoing orthopedic concerns are noted for the right knee. He does have lumbar and cervical intervertebral disc disorder, as demonstrated by symptoms, exam, and MRI scanning. Intervertebral disc disorders such as the above can have periods of quiescence whether with treatment or due to spontaneous remission. There also may be periods of exacerbation where even normal neck or lower back movements or a cough or sneeze can cause severe radiating pain with paresthesia and localized tenderness. Symptomatic intervertebral disc disorders can affect the patient's quality of life on an ongoing basis both immediately following the insult and well into the future. For the reasons mentioned above and based on the chronicity of his condition, the patient's intervertebral disc disorders are permanent. Mr. Lewis has suffered a trauma on February 7th, 2018 with resultant injury to his cervical, thoracic, and lumbar spine and right knee. He has undergone extensive conservative care modalities including physical therapy, chiropractic adjustments, acupuncture, injections, and massage therapy. He has undergone injection procedures with mild to moderate and temporary relief of pain. He continues to have pain throughout his cervical, thoracic, and lumbar spine with neuropathic and myofascial symptoms and exam findings. He continues with right knee arthropathy. Due to his condition and as a result of injuries sustained in the

February 7th, 2018 accident, he will require further and ongoing medical care and likely surgical treatment to manage his symptoms, pain, and disability. Comments regarding surgical treatment to the right knee are deferred to the specialty of orthopedic surgery." Dr. Lerner's conclusion is "It is my opinion, based on the patient's history and my clinical evaluation, to within a reasonable degree of medical certainty, that the patient's accident dated February 7th, 2018 was the competent producing cause of the patient's permanent physical injuries and resultant impairment and disability."

Document 42 comprises 66 pages of physical therapy records, from Adaptation Physical Therapy, with an affirmed certification from Dr. Vladimir Onefater that they are true, accurate and complete. They are not scanned in chronological order. They appear to start on February 15, 2018, a week after the accident, and end in July of 2018.

Document 43 is an affirmation from Dr. Ronald Wagner, which certifies the authenticity of his MRI reports, specifically, the lumbar spine MRI performed on March 17, 2018, and the cervical MRI performed on March 17, 2018. The cervical spine MRI report finds that plaintiff had a bulge at C3/4 and herniations at C4/5 and C5/6. The report states:

> "At C3/4, a posterior annular disc bulge abuts the ventral surface of the cord. At C4/5, a posterior subligamentous disc herniation favoring the left abuts the ventral surface of the cord and extends peripherally approaching the left neural foramina. There is bilateral foraminal narrowing, ventral spurs and ventral extension of the disc. At C5/6, a posterior central disc herniation abuts the ventral surface of the cord and extends peripherally approaching the left neural foramina and there is bilateral foraminal narrowing and mild central stenosis. Adjacent uncinate process and facet hypertrophic changes contribute to foraminal narrowing and central stenosis. Diminished disc space height, ventral spurs and ventral extension of the disc also noted."
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> The report for the 3/17/18 lumbar MRI finds three disc bulges. The doctor states "L3/4 posterior annular disc bulge flattens the ventral thecal sac. L4/5 posterior annular disc bulge deforms the ventral thecal sac and extends peripherally with proximal left foraminal extension approaching the exiting left L4 nerve root and bilateral foraminal narrowing. L5/S1 posterior subligamentous disc bulge deforms the

ventral epidural space. Mild facet hypertrophic changes also noted at L4/5 and L5/S1."

Based upon the foregoing, the court finds that the plaintiff has not overcome the motion and sufficiently raised triable issues of fact regarding his claims of a serious injury resulting from the accident on February 7, 2018. The defendants make a prima facie case, as stated above, which shifts the burden of proof to the plaintiff. Plaintiff has not satisfactorily explained the gap in his treatment. The physical therapy records stop in July of 2018, and the next record is a description of a recent exam (May 2023) by an expert, not a treating doctor, who was not told about plaintiff's subsequent pedestrian knock-down accident. That is a five-year gap. In the lawsuit from the subsequent accident, filed in Kings County also, Ind. 532307/2021, the complaint states that plaintiff was a pedestrian and was hit by that defendant's car on December 20, 2018, causing serious injuries. That action was settled on or about December 2, 2022, and a stipulation of discontinuance was filed.

The seminal case on this topic is *Pommells v Perez*, 4 NY3d 566 [2005]. The court there is clear that when there are factors which "interrupt the chain of causation" between the accident and the claimed injuries, summary judgment dismissing the complaint may be appropriate. The court notes [at 574] that "Plaintiff ended his physical therapy six months after the accident and sought no other treatment until years later, when he visited Dr. Rose in connection with this case. While a cessation of treatment is not dispositive--the law surely does not require a record of needless treatment in order to survive summary judgment--a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so. Here, plaintiff provided no explanation whatever as to why he failed to pursue any treatment for his injuries after the initial six-month period, nor did his doctors."

In a subsequent case, the Court of Appeals further explains, stating "[t]he record raises a triable issue of fact as to whether plaintiff has offered 'some reasonable explanation' for the cessation of physical therapy treatment for his injury (*Pommells v Perez*, 4 NY3d 566, 574, 830 NE2d 278, 797 NYS2d 380 [2005]). Plaintiff was asked at his deposition when he was last treated, and he replied that 'they cut me off like five months.' The Appellate Division held that a 'bare assertion that insurance coverage for medically required treatment was exhausted is unavailing without any documentary evidence of such or, at least, an indication as to whether an injured claimant can afford to pay for the treatment out of his or her own funds.'" The court reversed, concluding that "the Appellate Division's requirement that plaintiff either offer documentary evidence to support his sworn statement that his no-fault benefits were cut off, or indicate that he could not afford to pay for his own treatment, is an unwarranted expansion of *Pommells*." (*Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 906 [2013]). The court continues "while it would have been preferable for plaintiff to submit an affidavit in opposition to summary judgment explaining why the no-fault insurer terminated his benefits and that he did not have medical insurance to pay for further treatment, plaintiff has come forward with the bare minimum required to raise an issue regarding "some reasonable explanation" for the cessation of physical therapy" (*Id.).*

Here, plaintiff was asked at his EBT held on May 10, 2022 [Doc 37 Pages 35-36] "why did you stop going?" and he replied "I think they told me to stop. I am not exactly sure. I am not sure if they said the insurance or something. There was a reason why. I am not exactly sure." He was then asked, "Once you stopped treating at this facility up until today, have you treated anywhere else for this accident?" and plaintiff responded "no, but I need to" [*id.*]. This testimony does not "explain the cessation of treatment and preclude reliance

on the lack of continued treatment to establish an absence of permanent injury" (*Nelson v Tamara Taxi Inc.*, 112 AD3d 547 [1st Dept 2013]).

Accordingly, it is **ORDERED** that the defendants' motion is granted, and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: November 21, 2023

ENTER:

Hon. Debra Silber, J.S.C.