

Callender v Foronda

2023 NY Slip Op 34217(U)

December 5, 2023

Supreme Court, Kings County

Docket Number: Index No. 518048/2020

Judge: Debra Silber

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

X

KEEYON CALLENDER,

Plaintiff,

-against-

JAYSON FORONDA and UMAR SHAFIQ,

Defendants.

X

DECISION/ORDER

**Index No. 518048/2020
Motion Seq. No. 3**

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>54-61</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>83-96</u>
Reply Affirmation.....	<u> </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 1, 2020 in Brooklyn, New York. Plaintiff claims he was rear-ended while sitting in a parked car which he had double-parked on East 53rd Street between Avenues M and N with his hazard lights on. He was stopped to wait for his cousin, who was at a nearby laundromat [Doc 61 Page23]. He turned down the offer of an ambulance and subsequently sought medical treatment by driving himself to an urgent care center right after the accident. He then treated at Island Musculoskeletal Care, where he was given an injection in his shoulder and was referred for an MRI. He then had physical therapy for his injuries, which started in the summer of 2020 and he was still having physical therapy three to four times a week at the time of his EBT a year later.

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 left shoulder. At the time of the accident, the plaintiff was approximately 27 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, and an affirmed IME report from an orthopedist.

Dr. Salvatore J. Corso [Doc 60], an orthopedist, examined plaintiff on February 15, 2022, on behalf of the defendants. This was a year and a half after the accident. He states that plaintiff had a work-related accident, but that is not accurate. Plaintiff works at Coney Island Hospital for a company that contracts with the hospital for workers [Doc 61 Page 13]. Dr. Corso also states that "He states that x-rays and CAT scans were taken at the hospital. . . . He states that he was not admitted to the hospital" but that does not seem to be accurate either. Dr. Corso states that "Mr. Keeyon Callender reports that he had a prior motor vehicle accident in September 2019 with no sustained injuries when his vehicle was side swept." But when plaintiff was asked at his EBT if he had ever been in a prior motor vehicle accident "where you were injured", he said "no" [Doc 61 Page 60].

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. Keeyon Callender reports that he is currently experiencing pain in the back."

Dr. Corso examined plaintiff and tested his range of motion in his cervical and lumbar spine and in his left shoulder. 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. Corso reports that plaintiff had normal ranges of motion in his cervical and lumbar spine and in his left shoulder, other than lumbar extension, which was 25 degrees (30 degrees normal), and he states that all related tests were negative. His “impression” is that plaintiff’s sprains/strains have “resolved”. Dr. Corso concludes that “[t]oday’s examination indicates that the injured body parts alleged in the Bill of Particulars have resolved. The claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident on 06/01/2020. There are no objective clinical findings indicative of a present disability, and functional impairment, which prevents the examinee from engaging in ADL, and usual activities including work, school, and hobbies. The claimant is able to return to full duty work without restrictions.”

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 at the time of the accident, and that he missed one day from work after the accident [Doc 61 Page 15]. 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. The plaintiff was asked if he any pain in the month prior to the EBT. He said “just my lower back” [Doc 61 Page 59]. He was then asked, “does your present lower back pain interfere with any physical activities?” and he said “weightlifting” and “sitting down too long” and “that’s about it” [*id.*].

Defendants aver 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 55 ¶17].

Defendants further argue that "defendants' proof rules out the 90/180-day category of the statute" as "this category requires proof that "there was a causally related, medically determined injury, this category requires proof that plaintiff was medically prevented from performing "substantially all" of his usual and customary activities for the requisite period" [Doc 55 ¶24].

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]).

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

The first item is at Document 84, and is an affirmation from Garen Gajian, M.D., who states that he was plaintiff's treating doctor. He first examined plaintiff on June 18, 2020, and he saw him regularly afterwards. Dr. Gajian states that plaintiff "underwent an EMG on 8/5/2020 which was interpreted by me to show a left C6-7 and left L4-5 radiculopathy." He continues, "He also underwent MRI of his lumbar spine which was interpreted by me to show a L4-L5 bulge which correlates with his EMG findings; MRI of his cervical spine which was interpreted by me to show a C3-4 and C6-7 bulge which correlates with his EMG findings

and an MRI of his left shoulder interpreted by me to show subacromial subdeltoid bursitis and a hypertense supraspinatus requiring an ultrasound guided steroid injection on 7/24/2020." Dr. Gajian annexes his chart [Doc 90] for the plaintiff, and states, "It is my opinion that there is a causal relationship between the patient's motor vehicle accident of 06/01/2020 and his complaints, objective findings and restrictions in range of motion as noted within the chart utilizing a handheld goniometer with normal ranges based upon the AMA guidelines of Permanent Impairment 5" Edition." Dr. Gajian concludes that "As of the last examination in December of 2022, range of motion was reduced as follows: cervical flexion 44/50; extension: 44/60; lateral flexion: 31/45; right rotation: 51/80; left rotation: 53/80; with positive cervical compression test, positive left shoulder decompression test and positive Soto Hall test; with positive straight leg on the right of approximately 63 degrees and positive on the left of approximately 61 degrees with positive Kemps test. Mr. Callender's injuries limit him in his daily activities, such as performing household tasks, cleaning, shopping, walking for extended periods of time and achieving a full range of motion in his cervical spine, lumbar spine and left shoulder. In my opinion, to a reasonable degree of medical certainty, Mr. Callender sustained a significant limitation of and a permanent consequential limitation to his cervical spine, lumbar spine and left shoulder as a proximate result of the accident of 6/1/20 and he will continue to experience restriction of motion. It is my opinion to a reasonable degree of medical certainty that the accident of 6/1/20, was the competent producing cause of Mr. Callender's cervical spine, lumbar spine and left shoulder injuries."

Document 85 is an affirmation from Himanshu Patel, M.D, which certifies the authenticity of his MRI report, specifically, the left shoulder MRI performed on June 15, 2018.

The report states “Mild strain of the supraspinatus insertion without tear, Trace subacromial subdeltoid bursitis.”

Document 86 is an affirmation from Laurence Cohen, M.D, which certifies the authenticity of his MRI report, specifically, the lumbar spine MRI performed on June 12, 2018. The report states “At L4-LS, mild diffuse disc bulge which may be physiologic. There is mild spinal canal stenosis with mild ligamentum flavum hypertrophy. Mild bilateral facet joint degeneration with small joint effusions . . . Mild spinal stenosis L4-LS with mild diffuse disc bulge and ligamentous hypertrophy. Mild bilateral facet joint degeneration Suggestion of large left gonadal vein. This may reflect normal variation. Finding may correlate with process such as varicocele. Clinical correlation suggested.”

Document 87 is an affirmation from David Kasow, M.D, which certifies the authenticity of his MRI report, specifically, the cervical spine MRI performed on June 29, 2020. The report states “Small disc bulges C3-4 and C6-7. No overt stenosis.”

Document 88 are plaintiff’s chiropractic records. There are 408 pages. They have the certification of a records custodian, which is not the way to make them admissible. If they were exchanged pursuant to CPLR 3122-a, it does not say so. Nor does counsel say so in the affirmation in support.

Document 89 are plaintiff’s records from Island Musculoskeletal Care, MD, PC.

They have the certification of a records custodian, which is not the way to make them admissible. If they were exchanged pursuant to CPLR 3122-a, it does not say so. Nor does counsel say so in the affirmation in support.

Documents 90 and 91 are plaintiff’s records from Dr. Valentin Avanesov. They have the certification of a records custodian, which is not the way to make them admissible. If

they were exchanged pursuant to CPLR 3122-a, it does not say so. Nor does counsel say so in the affirmation in support.

Plaintiff's recent affirmed report from Dr. Garen Gajian, M.D, along with his records, 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]). His affirmed report indicates that a recent exam found significant, quantified restrictions in plaintiff's range of motion, and his records indicate same, contemporaneously with the accident. Dr. Gajian 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: December 5, 2023

ENTER :



Hon. Debra Silber, J.S.C.