

Williams v Lawson

2024 NY Slip Op 30074(U)

January 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 509241/2019

Judge: Debra Silber

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

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CARVELL WILLIAMS,

Plaintiff,

-against-

**MEZAN LAWSON, MARC M. NOEL,
ZAHRA ROMAINGREY, and "JOHN DOE",
said name being fictitious and unknown, and
intended to designate the person operating
the automobile of said ZAHRA ROMAINGREY,**

Defendants.

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, and Exhibits Annexed	<u>106-113</u>
Affirmation in Opposition and Exhibits Annexed	<u>124-137</u>
Notice of Cross Motion, Affirmations, and Exhibits Annexed	<u>114-121</u>
Affirmation in Opposition and Exhibits Annexed	<u>138-151</u>
Affirmation in Reply	<u>154-155</u>

Upon the foregoing cited papers, the Decision and Order on these motions

is as follows:

This is a personal injury action arising out of a motor vehicle accident that occurred on May 28, 2018. At the time of the accident, the plaintiff was a passenger in a vehicle owned and operated by defendant Mezan Lawson, who claims she was stopped for a red light when her vehicle was hit in the rear by a vehicle owned and driven by co-defendant Marc Noel, which was hit in the rear by a vehicle owned by defendant Romaingrey, whose driver left the scene before the driver could be identified. The accident took place at the intersection of Atlantic and Georgia Avenues in Brooklyn, New York. A separate case was commenced by another passenger in the Lawson vehicle, Alphonse Williams, under Ind.

513030/2019. A third action was commenced by Marc Noel, under Ind. 519434/2018. They were all joined for trial in 2020. Noel settled his case in September of 2023. Alphonse Williams passed away and an estate representative was appointed in January of 2023, Dolores Seebeary (Letters filed as Doc 27 in that action). However, the stay has not been lifted, and the caption has not been amended in that action. On May 23, 2023, the note of issue was filed in this action. The trial will have to wait until the plaintiff in the other action files the note of issue.

In motion sequence number 5, defendant Noel timely moved for summary judgment dismissing the plaintiff's complaint, pursuant to CPLR Rule 3212, on the ground that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102 (d). In motion sequence number 6, co-defendant Lawson untimely cross-moved for summary judgment dismissing the plaintiff's complaint, pursuant to CPLR Rule 3212, on the ground that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102 (d). However, as this motion is a "me too" motion, the court will consider it despite it having been filed late.

Plaintiff's bill of particulars alleges that he sustained injuries to his cervical spine, lumbar spine, and right shoulder as a result of the accident. At the time of the accident, plaintiff was thirty-two years old. Plaintiff testified that he was transported by ambulance from the scene of the accident to the Brookdale Hospital Medical Center emergency room. He subsequently had arthroscopic surgery to his right shoulder.

Defendant Noel provides, in support of his motion, affirmed reports from an orthopedist and a radiologist, the plaintiff's EBT transcript, plaintiff's bill of particulars, and an affirmation of counsel. In support of the cross-motion, defendant Lawson relies on the

same evidence that defendant Noel offers in his motion and only provides an affirmation of counsel. As the defendants' evidence is identical, the motions will be addressed together.

Salvatore Corso, M.D., an orthopedist, examined plaintiff on April 4, 2023, almost five years after the accident. He provides an affirmed IME report [Doc 111] that states that he only reviewed plaintiff's bill of particulars and the police accident report, because no other "legally authenticated medical records were available for review".

In his report, Dr. Corso states that he conducted range of motion tests on the parts of the body that the plaintiff claims were injured in the subject accident. In his examination of the plaintiff's cervical spine, lumbar spine, and right shoulder, he reports that he found that the plaintiff had normal ranges of motion in all planes, when compared to "normals". Dr. Corso's opinion is that plaintiff's "alleged" injuries to his cervical spine and lumbar spine are "resolved," and that plaintiff is "[s]tatus post right shoulder arthroscopy, resolved." He further opines that "[t]he claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident. 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."

Mark J. Decker, M.D., a radiologist, provides an affirmed report [Doc 110] that states that he reviewed the MRIs of the plaintiff's cervical spine, lumbar spine, and right shoulder. In his report, Dr. Decker's impression of the MRI of the plaintiff's cervical spine is "[s]traightening of upper lordosis secondary to degenerative disc disease" and "[a]nterior spurring and bulging at C4-C5 through C6-C7." At the C4-C5 level, Dr. Decker notes that there is a "[b]road bulge asymmetric to the right of midline with no contact of the cord," but opines that "[t]hese findings are longstanding and not causally related to the date of accident of 05/28/2018." At the C5-C6 level he notes that there is a "[c]entral and

asymmetric to left herniation and annular fissure impressing on the thecal sac and anterior cord with mild stenosis,” but similarly opines that “[t]hese findings are longstanding and not causally related to the date of accident of 05/28/2018.” At the C6-C7 level, he notes that there is a “[c]entral herniation and annular fissure contacting the cord,” but opines that “[t]hese findings are of indeterminate age.”

Dr. Decker’s impression of the MRI of the plaintiff’s lumbar spine is “[m]ultilevel bulging and facet hypertrophy with foraminal encroachment.” He opines that “[t]hese findings are longstanding and not causally related to the date of accident of 05/28/2018.” He further opines that there is “[n]o evidence to suggest that an acute traumatic injury was sustained.”

Dr. Decker’s impression of the MRI of the plaintiff’s right shoulder is “AC joint hypertrophy. Rotator cuff tendinopathy with 5-mm cyst proximal to the insertion of supraspinatus. No fracture. Diffuse labral degeneration. Anterior capsular thickening, which can be seen with adhesive capsulitis.” He opines that “[t]hese findings are all longstanding and not causally related to the date of accident of 05/28/2018,” and that there is “[n]o evidence to suggest that an acute traumatic injury was sustained.”

The moving defendants contend that their medical evidence, combined with plaintiff’s testimony at his EBT, eliminates all categories of injury in the statute. The defendants argue that plaintiff cannot satisfy the 90/180 category, contending that “[t]here is no medical evidence in the record that the plaintiff was substantially curtailed in the performance of his usual and customary daily activities during the statutory period as a result of the subject incident.”

Plaintiff testified at his EBT, held on November 17, 2022, that he was working full time as a truck driver on the date of the accident, and that he has never returned to his job

because “I have not been able to work since my accident.” [Doc 109 page 21]. The court notes that, when asked if a doctor had told the plaintiff that he could not go back to work, plaintiff responded that “[t]hey did not tell me that right out.” When asked what had prevented plaintiff from returning to work, he responded that “[t]he job includes a lot of lifting, and I can't lift” [*id.* page 50]. Plaintiff had physical therapy, acupuncture, and chiropractic treatment after the accident. He also had physical therapy after the arthroscopic surgery to his shoulder. He testified that his neck is painful most days, with pain radiating down his right arm to his hand [*id.* Page 46].

The court finds that defendants have not made a *prima facie* showing of their entitlement to summary judgment (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]). While the affirmed report of the orthopedist who examined the plaintiff almost five years after the accident makes a *prima facie* case with regard to several of the categories of injury in the statute, defendants have submitted nothing addressed to the first six months after the accident, and so defendants do not make a *prima facie* case with regard to the 90/180 day category of injury. A defendant cannot obtain a dismissal order solely based on the plaintiff's testimony that, in essence, he does not remember if any of his medical providers he saw had prepared paperwork for his job to explain his absence from work.

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 the defendants made a prima facie case for dismissal, plaintiff has provided enough evidence to overcome it. The plaintiff opposes both motions with an attorney's affirmation, a certified hospital record from Brookdale Hospital Medical Center, medical records from Dr. Alan Beckles, chiropractic records from Demetrios Karakizis, D.C., acupuncture records from Alimor Acupuncture, certified medical records from Dr. Alford Smith and Moshtaq Ahmed, P.A., certified physical therapy records from Energetic Rehabilitation, certified medical records from Mahmoud El Sayed, D.P.T., certified medical records from Dr. Ashley Simela of Advanced Orthopedics, affirmed reports from the radiologist who initially interpreted the plaintiff's MRIs, chiropractic records from Alexander Mazurovsky, D.C., and certified medical records, including a surgical report, from Dr. Stanislav Avshalumov of Advanced Orthopedics and Joint Preservation, the doctor who performed the arthroscopic surgery on the plaintiff's right shoulder. The court did not consider any of the plaintiff's records which were not submitted in admissible form in determining these motions.

At an exam conducted on June 20, 2018, approximately three weeks after the subject accident, Dr. Mahmoud El Sayed, D.P.T., noted reduced ranges of motion in the plaintiff's right shoulder, cervical spine, and lumbar spine [Doc 132 pp 5-6]. Dr. Stanislav Avshalumov, plaintiff's treating orthopedic surgeon, offers his certified medical records and surgical report [Doc 136], as well as an affirmed report from the plaintiff's most recent exam, conducted on August 25, 2023 [Doc 137]. In his surgical report, Dr. Avshalumov's postoperative diagnosis is "1. Right shoulder posttraumatic internal derangement; 2. Right

shoulder posttraumatic partial thickness tear rotator cuff; 3. Right shoulder bursitis and synovitis; 4. Right shoulder adhesive capsulitis; 5. Right shoulder labral pathology.” Dr. Avshalumov opines that “there is a temporary total loss.”

At his most recent exam on August 18, 2023, [Doc 137] Dr. Avshalumov tested the range of motion in the plaintiff’s right shoulder and reports significant restrictions, such as that plaintiff’s active abduction was 140° compared to a normal of 180°, passive abduction was 160° compared to a normal of 180°, active forward flexion was 140° compared to a normal of 180°, passive forward flexion was 160° compared to a normal of 180°. His diagnosis is “[r]ight shoulder post traumatic internal derangement, [r]ight shoulder post traumatic torn rotator cuff, [r]ight shoulder post traumatic torn labrum, [r]ight shoulder post traumatic bursitis, synovitis” and “[r]ight shoulder post traumatic impingement syndrome.”

Dr. Avshalumov’s impression is that “[t]he injury to the right shoulder has caused significant limitations to activities of daily living, which are expected consequences of injuries of this nature. I believe that he is suffering from posttraumatic internal derangement of his right shoulder and has reached the point of maximal medical improvement from treatment. This is due to trauma and will be a continuing source of pain. My impression is that the symptoms will progress with age and are permanent. It is more probable than not that he will need further treatment in the future, including but not limited to additional surgical intervention.” He further opines that “[b]ased on my clinical examinations, medical treatment, and review of objective medical diagnostic tests such as the MRI reports, causality for the patient’s injuries as related to the accident of 5/28/18, with a reasonable degree of medical certainty, has been established.”

In conclusion, Dr. Avshalumov opines that plaintiff has significant, quantified restrictions in the range of motion in his right shoulder, and the affirmed medical records

demonstrate that these restrictions were found both contemporaneously with the accident and recently. Further, Dr. Avshalumov opines as to the permanent nature of plaintiff's injuries and states that plaintiff's injuries were caused by the subject accident. Thus, the parties' doctors raise a "battle of the experts." This is sufficient to raise an issue of fact which requires a trial.

Accordingly, it is **ORDERED** that the motions are both denied.

This constitutes the decision and order of the court.

Dated: January 8, 2024

ENTER:



Hon. Debra Silber, J.S.C.