

**Malpeli v Singh**

2014 NY Slip Op 31314(U)

May 19, 2014

Supreme Court, New York County

Docket Number: 101885/2011

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH  
Justice

PART 22

Index Number : 101885/2011  
MALPELI, DANIELE  
vs  
SINGH, BALVIR  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 2, were read on this motion to/for motion for SJ - serious injury

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

FILED

MAY 22 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/14/14

[Signature], J.S.C.  
HON. ARLENE P. BLUTH

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NY  
COUNTY OF NEW YORK: PART 22

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Index No.: 101885/2011  
Motion Seq: 001

DANIELE MALPELLI,

*Plaintiff,*

*-against-*

BALVIR SINGH and JASWIDER SINGH,

*Defendants.*

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**DECISION/ORDER**

HON. ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing this action on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) is granted, and the action is dismissed.

In this action, plaintiff alleges that he sustained personal injuries while riding a bicycle on May 7, 2008 on Third Avenue in Manhattan when he was struck by defendants' taxi.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396, 397 [1<sup>st</sup> Dept 1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1<sup>st</sup> Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84 [2<sup>nd</sup> Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that the plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1<sup>st</sup> Dept 2010], citing *Ornelas v Perez*, 4 NY3d 566 [2005]).

**FILED**

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Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (see *Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares the plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to the plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (see *Valentin v Pomilla*, 59 AD3d 184 [1<sup>st</sup> Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1<sup>st</sup> Dept 2006]).

In his verified bill of particulars, plaintiff alleges injuries to both knees and his right shoulder, lumbar and cervical herniations, cervical disc bulge and cervical radiculopathy. It is unclear whether plaintiff alleges a 90/180 claim inasmuch as he claims to have been "totally disabled for a period several months" but does not claim that it was immediately after the accident (#14 in bill). He states that he was "confined to bed for several weeks following the accident" but does not state how many weeks. (#13 in bill). There is no claim set forth of exacerbation/aggravation of any pre-existing condition.

In support of their motion, defendants submit the affirmed reports of Dr. Tantleff, a radiologist; he reviewed MRIs taken less than two months after the accident of plaintiff's knees, shoulders, cervical and lumbar spine. With regard to the lumbar and cervical MRIs of plaintiff's spine, he affirmed that all the problems were due to longstanding degenerative disc disease, compounded by obesity, and that there was no evidence of acute or recent injury to the cervical or lumbar spine. In his review of the MRIs of both shoulders, Dr. Tantleff found evidence of

prior surgery to the right shoulder; otherwise, he affirmed that all the problems were due to longstanding degeneration, compounded by obesity, and that there was no evidence of acute or recent injury to either shoulder. Likewise, with regard to the MRIs of both knees, Dr. Tantleff affirmed that all the problems were due to longstanding degeneration, compounded by obesity, and that there was no evidence of acute or recent injury to either knee; he even stated that “the symmetric findings of the right and left knee are consistent of wear-and-tear degenerative change and not posttraumatic abnormality.”

Defendants also submit the affirmed report of Dr. Montalbano, an orthopedic surgeon, who examined plaintiff and found reduced ranges of motion but attributed that reduction to age-related degeneration and his weight (noting this 60 year old plaintiff was 5 feet tall and weighed 210 lbs.). Dr. Montalbano specifically stated that plaintiff healed from the accident, and all his restrictions are due to the aforementioned conditions, and are not related to the accident. Thus, defendants have made their prima facie case that plaintiff did not sustain a serious injury in the accident, and the burden shifts to plaintiff to oppose.

In opposition, plaintiff submits the affirmed July 22, 2013 medical report of Dr. Capiola and the affirmed preliminary report of Dr. Liebowitz (dated May 12, 2008 but affirmed more than 5 years later on September 4, 2013), his treating orthopedists. However, neither Dr. Capiola nor Dr. Liebowitz addresses defendants’ doctors’ findings of degenerative changes compounded by obesity in every area that plaintiff claims he injured in the subject accident (exh B).

Additionally, plaintiff submits the affirmed reports of Dr. Lichy, a radiologist, who read MRIs of plaintiff’s knees taken shortly after the accident and stated those films showed degenerative osteoarthritic changes. Dr. Lichy also noted cervical and lumbar bulges and herniations, and two right shoulder tears, but did not opine as to causation regarding any of these

conditions (exh C). In Dr. Kolb's affirmed report (also part of exh C), he noted tears in plaintiff's left shoulder but did not opine as to causation. Dr. Ioffe's submission (exh D) was not affirmed and thus not considered by the Court.

Thus, because neither of plaintiff's treating doctors, Dr. Capiola or Dr. Liebowitz, said one word to address or challenge defendants' doctors' findings of degenerative and pre-existing changes in plaintiff's knees, cervical and lumbar spine and shoulders, their opinions that plaintiff's conditions are causally related to the subject accident are conclusory and did not raise a triable issue of fact. *See Kendig v Kendig*, 115 AD3d 438, 981 NYS2d 411 (1st Dept 2014). Additionally, although plaintiff's own radiologist, Dr. Lichy, noted degenerative conditions in his MRI report of plaintiff's knees, plaintiff failed to explain why this was not the cause of plaintiff's reduced range of motion. *See Paduani v Rodriguez*, 101 AD3d 470, 471, 955 NYS2d 48 (1st Dept 2012).

Finally, plaintiff did not oppose the branch of defendant's motions seeking dismissal of his 90/180-day claim. Thus, plaintiff failed to submit any evidence that raises a triable issue of fact sufficient to defeat summary judgment.

Accordingly, it is

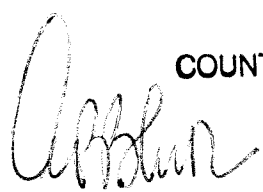
ORDERED that defendants' motion for summary judgment dismissing this action on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) is granted, and the action is dismissed.

**FILED**

MAY 22 2014

This is the Decision and Order of the Court.

COUNTY CLERK'S OFFICE  
NEW YORK



Dated: May 19, 2014  
New York, New York

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HON. ARLENE P. BLUTH, JSC