

**Eldeeb v McArthur**

2015 NY Slip Op 32393(U)

June 25, 2015

Civil Court, Queens County

Docket Number: 300518QTS2014

Judge: Cheree A. Buggs

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**Civil Court of the City of New York**  
**County of Queens**

Part 32

\_\_\_\_\_  
MUNIR K. ELDEEB and HODA E. ELNAGAR,

Plaintiffs,

against

SAMANTHA McARTHUR, CHARLES MARINO,  
IMPERIAL SANITATION CORP., NEW YORK  
CITY DEPARTMENT OF TRANSPORTATION,  
NEW YORK CITY TRANSIT AUTHORITY,  
MTA BUS COMPANY and METROPOLITAN  
TRANSPORTATION AUTHORITY,

Defendants.

**Index Number 300518QTS2014**

**Motion Cal # 9 Motion Seq. # \_\_\_\_\_**

Submitted to Special Term on 4/28/2015

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Cross-motion and Affidavits	
Annexed.....	1,2
Answering Affidavits.....	3,4
Replying Affidavits.....	5
Exhibits.....	_____
Other.....	_____

Upon the foregoing cited papers, the decision on the defendants' Samantha McArthur and MTA Bus Company and cross-motions of co-defendants' Charles Marino and Imperial Sanitation Corporation's motions for summary judgment upon the ground that the plaintiff Munir K. Eldeeb did not sustain a serious injury as required by New York State Insurance Law is as follows:

The defendants' motion and co-defendants' cross-motion for summary judgment are granted only to the extent that the plaintiff's claims of serious injury under the 90/180 day category are dismissed.

Plaintiff Munir K. Eldeeb ("Eldeeb") and co-defendant Hoda E. Elnagar ("Elnagar") commenced this action to recover damages for injuries Eldeeb allegedly sustained on July 13, 2009 at the intersection of Queens Plaza South and 24<sup>th</sup> Street, Queens County, City and State of New York. They filed a Summons and Complaint on February 9, 2010. Eldeeb claims that he suffered a serious injury as a result of the accident and Elnagar's cause of action is for loss of society and services of her husband Eldeeb. Defendant Samantha McArthur, New York City Department of Transportation, MTA Bus Company and Metropolitan Transportation Authority (collectively "defendants") served an answer with cross-claims on March 10, 2010. Co-defendants Charles Marino and Imperial Sanitation (collectively "co-defendants") filed a verified answer on May 21, 2010. On September 24, 2012 plaintiffs discontinued the matter against New York City Department of Transportation, New York City Transit Authority and Metropolitan Transportation Authority. Plaintiffs filed a Note of Issue on May 5, 2011, which was stricken by

Honorable Martin Ritzholtz on September 22, 2011 due to outstanding discovery, including depositions of the parties and independent medical examinations of Eldeeb. The matter was restored to the active calendar and transferred to the Civil Court of the City of New York, County of Queens on by Honorable Martin Ritholtz on October 21, 2014.

Eldeeb served a verified bill of particulars on August 18, 2010, claiming numerous injuries as a result of the accident. He claimed that he was a passenger on the defendant bus that collided with co-defendants' vehicle. He alleged the following injuries as a result of the accident, which were "caused, aggravated, exacerbated, activated and/or precipitated by the negligence of the defendants": cerebral concussion with post-concussion syndrome; contusion to head; headaches; nausea; vomiting; dizziness; vertigo; brain injury; visual disturbance; insomnia; loss of memory; loss of cerebral functioning; restriction of range of motion of the head; pain in his head on movement; permanent disability; cervical sprain or strain; cervical headaches; neck pain which radiated to his shoulders and numbness in his hands; restriction in range of motion; cervical pain and disability; tear of the meniscus, right knee, right knee internal derangement; contusions; bilateral knee strain; right knee arthroscopy on September 11, 2009; permanent and significant scarring and disfigurement, permanent disability; fracture of the proximal phalanx, first toe, left foot; chronic arthritis at or near the site of the fracture; pain on movement; right elbow strain, effusion; right elbow contusion; contusion to anterior chest wall; inability to breathe; restricted range of motion; bilateral shoulder strain; inability to properly walk. He alleged that he was confined to home for one day then periodically for about four weeks following right knee surgery and then three weeks. He claimed lost earnings in the amount of \$4,056.00. He also claimed future special damages including hospital expenses and loss of earning capacity.

Eldeeb served a verified further supplemental bill of particulars and second further supplemental bill of particulars on August 19, 2011 and further alleged aggravation or exacerbation of the following injuries: hallux rigidus of left foot; hallux limitus, left foot; osteochondral lesions of left foot; tears of lateral and medial collateral ligaments of the left foot; left foot surgery with internal fixation; post-operative infection; scarring and disfigurement. He claimed additional lost earnings in the amount of \$5,070.00. He claimed as a result of the accident, he sustained a serious injury, significant disfigurement of the left foot and left toe and 90/180 day category.

In support of the motion, defendants submitted an attorney affidavit; pleadings; Eldeeb's verified and supplemental bills of particulars; Eldeeb's deposition transcripts dated January 20, 2011 and August 30, 2012; limited stipulation of discontinuance dated September 24, 2012; Note of Issue dated May 3, 2011; So-Ordered Stipulation of Honorable Martin Ritholtz dated September 22, 2011 and September 9, 2014; report of Dr. Toriello

dated October 2, 2012; and December 12, 2012; report of Dr. Feuer dated October 5, 2012; radiology reports of Dr. Tantleff dated September 21, 2010; January 10, 2011.

In support of the cross-motion, co-defendants submitted an attorney affirmation; the pleadings; verified bills of particulars, verified supplemental bills of particulars and verified further bill of particulars; plaintiff's deposition transcripts dated January 20, 2011 and August 30, 2012; Note of Issue dated May 5, 2011; Order of Justice Ritholtz dated October 20, 2014; limited stipulation of discontinuance dated September 24, 2012; plaintiff's records from Advanced Orthopedics; operative report of Dr. Yager dated April 22, 2011; report of Dr. Toriello.

The records of Advanced Orthopedics contain various reports. According to a report of Dr. Russonella dated August 20, 2009, Eldeeb was injured in a bus accident on July 13, 2009. He injured his right elbow and right knee. Range of motion to full extension of the right knee to 120 degrees. The doctor opined that he had tears of the medial and lateral meniscus on the right. On September 3, 2009, Eldeeb returned for an office visit. Dr. Russonella believed he should have arthroscopic surgery of the right knee. MRI of the elbow was negative for a tear but showed teninopathy. MRI of right knee revealed "a tear of the posterior horn of the medial meniscus." He returned on September 29, 2009, three weeks after knee surgery. Range of motion was "-5 degrees of full extension to 110 degrees flexion, passively from full extension to 120 degrees of flexion." Report of October 8, 2009 revealed range of motion of "-3 degrees of full extension to approximately 90 degrees of flexion." Aggressive therapy and anti-inflammatories were recommended, as needed. Eldeeb returned on October 27, 2009 and range of motion of the right knee was decreased, 95 degrees of flexion with pain. He advised the doctor that he had fallen and also hurt his knee at work. He was advised to stay out of work and that he could have a re-injury of his knee. On November 3, 2009, he was seven week post surgery and passive range of motion in his right knee was full extension to 110 degrees. He was advised to stay out of work for 3 weeks and to continue physical therapy. Records of Dr. Berkowitz are included. On December 17, 2009, the report indicated that he could fully extend his knee and flex to about 120 degrees, with tenderness. and on March 2, 2010 and April 8, 2010, he was given injections in his right knee for pain. Reports of Dr. Berkowitz dated May 24, 2010 indicated flexion of the right knee to 120 degrees and he was given pain medication. On July 26, 2010 Dr. Berkowitz indicated Eldeeb felt better by taking the pain medication and he had better range of motion and less tenderness. He was referred to a foot specialist.

Both defendants and co-defendants rely on the report of Dr. Toriello. Dr. Toriello performed an orthopedic examination on October 2, 2012. He reviewed various medical records and MRI reports. Range of motion was tested with a goniometer. The examination had a neurological component. Range of motion of the cervical spine,

thoracic spine, right shoulder, left shoulder, elbows, right wrist and hand, left wrist and hand, bilateral knees, right ankle and foot, left ankle and foot were normal. Range of motion of the lumbosacral spine was normal. Straight leg raising was “bilaterally full and pain free.” In Dr. Toriello’s opinion Eldeeb had “a resolved chest contusion; resolved thoracic sprain; resolved low back strain; resolved cervical strain; resolved knee contusions and resolved right elbow contusion.” Eldeeb had recently had surgery on a fracture of his left toe/foot. In the doctor’s opinion, Eldeeb did not need any physical therapy or orthopedic treatment. He stated that he needed to review additional records to render an opinion on Eldeeb’s left toe surgery.

Dr. Toriello wrote an addendum to his report on December 12, 2012 after reviewing the records related to Eldeeb’s left foot/toe surgery, in his opinion, Eldeeb’s fracture was related to pre-existing diseases of gout and Behschet’s disease “which can cause a non erosive arthritis of the joints of the lower extremities.” In his opinion, the surgery on July 13, 2009 was not related to the accident, and Eldeeb had sustained a left great toe contusion, which had resolved.

Dr. Feuer performed a neurologic examination on October 5, 2012. He reviewed various medical records, including MRI reports. Range of motion was tested with a goniometer. Range of motion of the cervical spine, lumbosacral spine were normal. Straight leg raising was negative. In his opinion Eldeeb’s examination was normal.

Dr. Tantleff reviewed various films and wrote reports on September 21, 2010 and January 10, 2011. On September 21, 2010, Dr. Tantleff reviewed a MRI of Eldeeb’s right elbow and in his opinion Eldeeb had “degenerative changes of the elbow joint as denoted most prominently involving the lateral aspect of the joint, but involving the olecranon, triceps tendon and lateral epicondyle... a small spur at the insertion of the triceps tendon and chronic and reactive change.” In his opinion, this was related to Eldeeb’s age.

On September 21, 2010, Dr. Tantleff reviewed a MRI of Eldeeb’s right knee and in Dr. Tantleff’s opinion Eldeeb had degenerative changes in his right knee related to “wear and tear” unrelated to the accident.

On January 10, 2011, a review of the MRI of the right elbow revealed “regional degenerative changes of the elbow joint as denoted most prominently involving the lateral aspect of the joint, but involving the olecranon, triceps tendon and lateral epicondyle as described. There is a small spur at the insertion of the triceps tendon and chronic reactive change. The findings are the result of chronic repetitive micro-traumatic insult and chronic overuse stress changes consistent with the individual’s age and unrelated to the date of incident as they are not the result of a single traumatic event.”

Defendants and co-defendants both rely on the sworn testimony of Eldeeb taken on January 20, 2011. He

testified that following the accident he had taken one day off. He took about a month and a half off following his surgery. He stated that he still had pain in his right knee and left big toe. He did not sustain any subsequent injuries to his alleged sites of injury. He was taking medication for depression and following the accident the dosage increased. He had been taking physical therapy for about a year. He still had pain in his right knee and left toe.

He testified again on August 30, 2012. Following foot surgery, he was out of work for two months. He stated that he felt depressed because he was unable to run five miles a day anymore and had gained weight. He was seeing a rheumatologist. He had taken injections in his toe for pain. He had been diagnosed with Bechet Disease. He was taking medication for depression and seeing a doctor. He claimed the accident increased his depression.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering admissible evidence to eliminate any material issues of fact from the case. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]).

Defendants and co-defendants established their prima facie cases that Eldeeb did not sustain a serious injury, including under the 90/180 day category (*Anderson v Clark*, 94 AD3d 681 [2012]). Eldeeb was required to offer sufficient evidence to raise a triable issue of fact.

In opposition, Eldeeb raised a triable issue of fact that he has sustained a serious injury, except as to the 90/180 day category (*see generally Himmelburger v Buchris*, 117 AD3d 801 [2014]). He submitted an attorney affirmation; the pleadings; his affidavit; his verified bills of particulars; affirmation of Dr. Steven M. Yager; affirmation of Dr. Dov Berkowitz; affirmation of Dr. Joseph Leadon; various medical records. He presented contemporaneous and recent evidence of range of motion deficits to his alleged sites of injury. Dr. Yager stated in his sworn affirmation that Eldeeb had been a patient since April 11, 2011 and that he had recently seen Eldeeb on March 25, 2015. In his opinion, plaintiff's left toe fracture and subsequent surgery were related to the accident, not Behsches Disease or gout. He believed that Eldeeb would need further physical therapy and walking devices. Eldeeb also submitted the sworn affidavit of Dr. Berkowitz, his orthopedist. He was originally treated on August 20, 2009. Dr. Berkowitz stated that Eldeeb had range of motion deficits in his right knee, right elbow and indicated the range of motion and compared his results to normal range. He was recently seen on March 30, 2015 and April 14, 2015. In his opinion Eldeeb's right knee injury and subsequent knee surgery were related to the accident. Dr. Leadon certified his MRI reports related to Eldeeb's right knee, which, in his opinion revealed a tear in the meniscus. Eldeeb recalled extensively in his affidavit his injuries and treatments following the accident and that he had still treated with physical therapy in 2014. However, neither his sworn testimony or his affidavit rebut

defendants' and/or co-defendants' prima facie case that he did not sustain a serious injury under the 90/180 day category (*see generally McLeod v Reyes*, 82 AD3d 848 [2011]).

Accordingly, the defendants' motion and co-defendants' cross-motion for summary judgment are granted only to the extent that the plaintiff's claims of serious injury under the 90/180 day category are dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: June 25, 2015

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/s/  
**HON. CHEREÉ A. BUGGS**  
**Judge of the Civil Court of the City of New York**  
**County of Queens**