

<b>Kim v Karnes</b>
2016 NY Slip Op 30258(U)
February 18, 2016
Supreme Court, New York County
Docket Number: 155826/2013
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 22

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Roy Kim,

*Plaintiff,*

-against-

Edward Karnes,

*Defendant.*

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Motion Seq 01  
Index No. 155826/2013

DECISION AND ORDER  
Hon. ARLENE P. BLUTH, JSC

Defendant’s motion for summary judgment dismissing the action on the grounds that plaintiff has not suffered a serious injury is granted only to the extent that the 90/180 day claim is dismissed, and otherwise denied.

Defendant submits, inter alia, the affirmed report of Dr. Rubinshteyn who examined plaintiff on 7/18/14; he stated that plaintiff had full ranges of motion in his cervical and thoracic spine and left shoulder (for comparison to right shoulder only), greater than normal range in his lumbar spine, and that plaintiff refused to perform the right shoulder range of motion test. Dr. Rubinshteyn concluded that plaintiff’s cervical and lumbar spine strains, and right shoulder strain, had all resolved. He noted that plaintiff’s medical records showed that he had been treated for low back pain 3 years before the subject accident.

Defendant also submits the affirmed report of Dr. Cohn, a radiologist, who read plaintiff’s films (which were taken one month after the subject accident and read by Dr. Golkow of Doshi Diagnostic) and stated that plaintiff had (1) normal cervical and right shoulder MRIs, and (2) degenerative changes, but no evidence of trauma, in his lumbar spine at L4-5 and L5-S1. Defendant also annexes the MRI reports from plaintiff’s radiologist, Dr. Golkow, who stated that plaintiff’s cervical MRI was normal, there were two mild herniations in the lumbar spine (with

disc space dessication in both), and there was either a cyst or tear in the right shoulder (but since no edema, more likely a cyst).

Regarding the 90/180-day category, defendant cites to plaintiff's deposition testimony that he returned to college a few days after the accident and did not miss any additional time through December 2012. Thus, defendant set forth a prima facie case for dismissal, and the burden shifts to plaintiff.

In opposition, plaintiff submits a single, affirmed doctor's report; Dr. Mun, who examined plaintiff one day after the 4/9/12 accident, again on several follow-up exams and most recently on 12/10/14, when he measured range of motion restrictions in plaintiff's lumbar and cervical spine and right shoulder. In the last paragraph of his affirmation (para. 14) he opined that plaintiff's cervical and lumbar spine and right shoulder limitations are permanent, and were caused by this accident, not any prior accident or degenerative condition.

In reply, defendant asserts that Dr. Mun's affirmation is conclusory and does not raise an issue of fact. Defendant asserts that Dr. Mun impermissibly relied on the unaffirmed MRI reports of Dr. Golkow and did not personally read the MRI films. Because defendant annexed Dr. Golkow's reports (exh N-P) to his moving papers, and Dr. Rubinshteyn relied on those records, defendant's objection is without merit. See *Pantojas v Lajara Auto Corp.*, 117 AD3d 577, 986 NYS2d 87 (1st Dept 2014). Defendant also claims that Dr. Mun's office records are diametrically opposed to his affirmation. Defendant, however, failed to annex Dr. Mun's records for the 12/10/14 visit, when Dr. Mun affirmed that he found restrictions in plaintiff's cervical spine range of motion, creating an issue of fact.

Dr. Mun did not raise an issue of fact regarding plaintiff's lumbar spine or right shoulder

because he did not address the significance of Dr. Golkow's finding of disc dessication in the lumbar spine (which is evidence of degeneration, not a traumatic injury); and he did not address Dr. Cohn's findings of degenerative changes in the lumbar spine. See *Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509, 999 NYS2d 37 (1<sup>st</sup> Dept 2014), *aff'd* 25 NY3d 1222, 16 NYS3d 515 (2015).

As for the right shoulder, Dr. Mun's statement that "the competent producing cause of the intrasubstance tear (in right shoulder) was the motor vehicle accident of April 9, 2012 and not (sic) degenerative condition" is not supported; there is not even proof that there was a shoulder tear. As stated previously, Dr. Golkow opined that what he saw in the right shoulder MRI was more likely a cyst, not a tear, because there was no edema. Additionally, because plaintiff refused to allow defendants' doctor to perform range of motion testing on his right shoulder, any claims of reduced range of motion cannot be credited.

However, with regard to plaintiff's cervical spine, Dr. Mun noted that at his 12/10/14 exam of plaintiff he measured 10 degree restrictions in 4 planes of plaintiff's cervical range of motion (35 degrees measured/45 normal in two planes and 70 degrees measured/80 normal in two planes) which Dr. Mun states are permanent and caused by the subject accident. Dr. Mun also stated that the Spurling maneuver test was positive. Accordingly, plaintiff has raised an issue of fact regarding plaintiff's cervical spine, and it is up to the jury, not this Court, to decide which doctor(s) to believe.

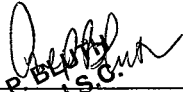
Finally, plaintiff did not raise any issue of fact with respect to his 90/180 day claim.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted only to the extent that the 90/180 day claim is dismissed, and otherwise denied.

This is the Decision and Order of the Court.

Dated: February 11, 2016  
New York, New York

  
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HON. ARLENE P. BUTTH, JSC  
ARLENE P. BUTTH, JSC