

**Tohirov v Syed**

2018 NY Slip Op 31162(U)

June 7, 2018

Supreme Court, Kings County

Docket Number: 511586/16

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

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

\_\_\_\_\_ x

**AKBAR TOHIROV,**

**Plaintiff,**

**-against-**

**ASHRAF SYED and CEBER CAB CORP.,**

**Defendants.**

\_\_\_\_\_ x

**DECISION / ORDER**

**Index No. 511586/16  
Motion Seq. No. 1  
Date Submitted: 4/26/18  
Cal No. 62**

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.*

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>17-31</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>34-38</u>
Reply Affirmation.....	<u>40</u>

**Upon the foregoing cited papers, the Decision/Order on this application is as follows:**

This is a personal injury action arising out of a motor vehicle accident. Defendants Ceber Cab Corp. and Ashraf Syed move (Mot. Seq. 1) for summary judgment dismissing the plaintiff Akbar Tohirov's complaint, pursuant to CPLR 3212, on the ground that Tohirov did not sustain a "serious injury" under Insurance Law § 5102(d).

On February 4, 2016, plaintiff Akbar Tohirov, who was 30 years old at the time, was operating a vehicle as an Uber driver on West 85<sup>th</sup> Street in Manhattan at the intersection with Broadway when he was struck by a vehicle owned by defendant Ceber Cab Corp. and operated by defendant Ashraf Syed, who was traveling southbound on

Broadway. Plaintiff testified that the collision caused his vehicle to spin 180 degrees. He testified that he hit his head on the frame of the car and his right knee hit the center console and he felt pain in his right shoulder and back. Plaintiff was taken by ambulance to St. Luke's Hospital emergency room. A few days later, on February 8, 2016, plaintiff began treatment with Colin Clarke, M.D. For approximately one year he received treatment three times a week, including physical therapy, acupuncture, electrical stimulation, chiropractic care, massages and trigger point injections. In addition, plaintiff underwent arthroscopic surgery to his right shoulder on July 5, 2016. Plaintiff's Bill of Particulars states that plaintiff sustained injuries to his right shoulder, neck, back and right knee. Plaintiff testified at his EBT that he was out of work for approximately a month, and thereafter he worked fewer days and shorter hours while he was receiving physical therapy. He said he worked 3 or 4 days a week, and 4 to 5 hours each day. (Exhibit E Pages 58, 67-68, 73).

Defendants support their motion with an affirmation of counsel, the pleadings, plaintiff's EBT, affirmed IMEs from an orthopedist, a neurologist, an affirmed report of an emergency medical doctor and a radiologist, plaintiff's ambulance call report and emergency room records, and MRI reports for plaintiff's right shoulder, lumbar and cervical spine.

The report for the MRI taken on March 28, 2016 of plaintiff's right shoulder found an intermediate grade partial thickness tear of the articular surface involving the posterior fibers of the supraspinatus tendon and biceps tenosynovitis. The report for the April 12, 2016 MRI of plaintiff's cervical spine found herniations at C4-C5, C6-C7, and the report for an April 20, 2016 MRI of his lumbar spine found a herniation at L5-S1. As defendants provided these studies in their motion, they are not required to be in

admissible form.

Dr. Toriello, an orthopedist, found that plaintiff's injuries from the accident – sprains to plaintiff's cervical spine and lower back, a right shoulder contusion and a right knee contusion – were resolved with no evidence of disability or need for further treatment. Dr. Toriello opines that plaintiff did not sustain an injury to his right shoulder on February 3, 2016 [sic] which required surgical intervention, as he did not complain about his shoulder in the emergency room and the MRI of the right shoulder revealed no evidence of a causally related traumatic injury (*see Meely v 4 G's Truck Renting Co.*, 16 AD3d 26, 30 [2d Dept 2005]). Defendants' examining neurologist, Dr. Carciente, found no objective evidence of a neurological injury or disability, while Dr. Haydock opines that the plaintiff's failure to complain of pain other than a headache in the emergency room is inconsistent with plaintiff's claims of trauma-induced injuries to his neck, back, right knee and right shoulder. Dr. Eisenstadt, who reviewed the MRI films taken after the accident, concluded that they revealed only degenerative changes which were not traumatically induced. She states that there is no evidence on the films of any conditions caused by a traumatic injury. (*see Gouvea v Lesende*, 127 AD3d 811 [2d Dept 2015]).

Further, plaintiff's own deposition testimony that he missed only one month from work is sufficient to make a prima facie showing that plaintiff was not prevented from performing substantially all of his daily activities for 90 out of the first 180 days after the accident (*see Strenk v Rodas*, 111 A.3d 920 [2d Dept 2013] ["plaintiff returned to work on a partial basis during the relevant period of time"]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007] ["The plaintiff testified at trial that he missed only one month of work, that he then returned to work on a part-time basis, and that, after another month,

he had resumed working on a full-time basis”).

The court finds defendants have made a prima facie showing of their entitlement to summary judgment, based upon the affirmed reports of the examining orthopedist Dr. Edward A. Toriello and examining neurologist Dr. Michael J. Carciente, as well as the affirmed reports of Dr. Timothy G. Haydock, and radiologist, Dr. Audrey Eisenstadt (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]).

However, in his papers in opposition, plaintiff has raised issues of fact sufficient to defeat summary judgment. Dr. Harvey Manes, the physician who performed the plaintiff's right shoulder surgery, notes in his affirmation that the post-operative diagnosis is “partial tear of the glenoid labrum, partial tear of the rotator cuff, generalized synovitis, and subacromial impingement.” He states that these conditions are “causally related to the February 4, 2016 accident, and that arthroscopic surgery of plaintiff's right shoulder was medically necessary.” In addition, Dr. Colin Clarke opines in his affirmation that, given the lack of a history of injury or complaints prior to the February 4, 2016 accident, plaintiff's “injuries, physical limitations and complaints of pain are attributable to his February 4, 2016 accident” [Exhibit 4, ¶ 16].

Accordingly, it is

**ORDERED** that the defendants' motion for summary judgment is denied.

This shall constitute the decision and order of the court.

Dated: June 7, 2018

ENTER :



Hon. Debra Silber, J.S.C.

Hon. Debra Silber  
Justice Supreme Court