

Burns v Yahonton
2018 NY Slip Op 33251(U)
December 13, 2018
Supreme Court, Kings County
Docket Number: 508247/16
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

MARK BURNS,

Plaintiff,

-against-

**VLADMIR YAHONTON, 5 VEHICLE CORP.
and JAMAL AMED,**

Defendants.

DECISION / ORDER

Index No. 508247/16

Motion Seq. No. 3

Date Submitted: 10/25/18

Cal No. 7

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants 5 Vehicle Corp. and Jamal Amed's motion for summary judgment.

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>61-71</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>73-80</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 that occurred on March 28, 2016. Plaintiff was the rear seat passenger in a cab owned by 5 Vehicle Corp. and operated by Jamal Amed. The cab was heading northbound on Sixth Avenue in Manhattan when it collided with a vehicle owned and operated by defendant Vladimir Yahonton, at the intersection of West 45th Street. Defendant Yahonton did not answer the complaint and a default was taken against him by plaintiff on the issue of liability.

In his bill of particulars, plaintiff alleges that as a result of the accident, he sustained two herniated discs, with activation, aggravation and exacerbation of

asymptomatic underlying degenerative changes, including radiculopathy and severe pain. At the time of the accident, plaintiff was 42 years old.

The movants contend that plaintiff did not sustain a "serious injury" as a result of this accident; that plaintiff has no disability and suffers from degenerative disc disease unrelated to the subject accident.

Movants have come forward with sufficient evidence to make a prima facie showing of their entitlement to summary judgment. They submit a report from their examining neurologist, Robert S. April, M.D., their emergency medicine expert, Jay Walshon, M.D., and their radiologist Dr. Eric L. Cantos, who reviewed the MRI taken of plaintiff's spine shortly after the accident (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). Dr. April examined plaintiff on November 15, 2017 and found that the plaintiff had a full range of motion and negative test results. He states that it was a normal neurological examination and opines that the accident did not produce any disability or limitation; that there was no evidence to explain plaintiff's not working that any symptoms he had at the time of his exam were "related to his pre-existent morbid obesity, and are subjective without any objective correlates." In reviewing plaintiff's MRI films, Dr. Cantos found only "mild changes of degenerative disc disease" in the plaintiff's thoracic spine and two bulging discs in the lumbar spine, with no evidence "of an acute fracture or disc herniation that could be attributed to the accident. There are changes of degenerative disc disease in the lower lumbar region."

Dr. Walshon reviewed plaintiff's emergency room records and did not examine the plaintiff. He states that plaintiff did not complain "of lower thoracic or lumbar pain or

injury" in the ambulance or the E.R., but of neck pain, leading him to conclude that "other than neck and upper back muscle soreness, the injuries claimed in the bill of particulars are inconsistent with the initial presentation and the documentation" in the E.R. records. He also states that "had the E.R. personal believed plaintiff sustained a significant injury to the spine, imaging studies would have been ordered, but they were not."

However, plaintiff has come forward with sufficient evidence to raise an issue of fact as to whether he sustained a serious injury as a result of the March 28, 2016 motor vehicle accident. Alan Hartz, M.D., a radiologist, disputes Dr. Cantos's reading of the MRI films. Dr. Hartz maintains that the MRI films show disc herniations at L5-S1 and T9-T10 with foraminal narrowing throughout the lumbar spine and notes that causation cannot be determined from an MRI film alone but must be made based upon "symptomatology following the traumatic event, which was confirmed clinically by an examining medical provider," as here. Similarly, Dr. Joseph Labib, who treated plaintiff and examined him most recently on July 24, 2018, found continuing significant limitations in plaintiff's range of motion in his cervical and lumbar spine and positive test results confirming the claimed cervical and lumbar injuries. Dr. Labib states that after the accident, he advised plaintiff not to return to work or to engage in any lifting or strenuous activities and opines that plaintiff sustained medically determined injuries that prevented him from performing substantially all of his usual and customary daily activities during the 180 days immediately following the date of the accident. In addition, he opines that the plaintiff's continued disability is both significant and permanent. Furthermore, he disputes defendants' experts' conclusions on the issue of causation;

specifically referring to Dr. Cantos' report and Dr. Walshon's report, noting that the clinical findings, based upon objective tests and the patient's complaints, independently and collectively demonstrate a causal relationship between the acute traumatic motor vehicle collision on March 28, 2016 and the documented injuries and related sequelae.

Finally, Fouad Batah, M.D., plaintiff's primary care doctor, attests to doing an annual physical examination of plaintiff approximately three weeks prior to the subject accident, and states that plaintiff had no complaints with regard to his back, neck or spine, and his physical examination of plaintiff's back, neck and spine were normal. After the accident, Dr. Batah treated plaintiff for injuries to his neck, back and spine, and referred him to Dr. Labib and for MRIs, and advised plaintiff not to return to work. Dr. Batah opines that as a result of the March 28, 2016 accident, plaintiff suffered from traumatically induced injuries to his neck, cervical and lumbar spine and resulting limitations of motion that are permanent and significant and which prevented him from performing substantially all of his usual and customary daily activities during the 180 days following the accident. He also expressly disputes Dr. Cantos' conclusion with regard to the issue of causation, based upon his clinical findings.

Accordingly it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: December 13, 2018

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**