

**McGee v Bronner**

2018 NY Slip Op 34103(U)

October 31, 2018

Supreme Court, Orange County

Docket Number: Index No.EF002796-2017

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

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**FREDERICK L. MCGEE, JR.,**

Plaintiff,

-against-

**JOSEPH BRONNER,**

Defendant.  
-----X

**DECISION AND ORDER**

**INDEX NO.: EF002796-2017**

**Motion Date: 08/29/2018**

**Sequence No. 1**

The following papers numbered 1 to 20 were read on this motion by defendant for an order granting summary judgment dismissing the complaint:

PAPERS

NUMBERED

Notice of Motion / Affirmation (Shuter) / Exhibits A - K  
Affirmation in Opposition (Cole-Hatchard) / Exhibits 1 - 3  
Reply Affirmation (Shuter) / Exhibits A - B

1 - 13  
14 - 17  
18 - 20

Upon the foregoing papers, the motion is granted, and the complaint is dismissed.

This matter arises out of a motor vehicle accident which occurred on July 12, 2016 in Pomona, New York. Plaintiff commenced this action by filing a Summons and Verified Complaint on April 13, 2017. Defendant served an Answer dated May 17, 2017. Plaintiff thereafter served a Verified Bill of Particulars dated June 5, 2017. Note of Issue was filed on March 14, 2018. At a conference before the Court on April 4, 2018, defendant's time to move for summary judgment was

extended to June 29, 2018.<sup>1</sup>

### Motion for Summary Judgment

By Notice of Motion timely filed on June 28, 2018, defendant seeks summary judgment dismissing the complaint, asserting that there are no triable issues of fact. Defendant contends that plaintiff did not suffer a serious injury as defined in Insurance Law § 5102, in the subject accident.

Defendant submits the affirmed report of Dr. Harvey L. Siegel, who examined plaintiff on January 12, 2018 (Exh. K). Dr. Siegel noted that, at the time of his examination, plaintiff no longer had any lower back pain and complained only of intermittent pain in the left shoulder. On physical examination, Dr. Siegel noted “voluntarily diminished” ranges of motion of the thoracolumbar spine and left shoulder.

Dr. Siegel noted that an MRI of plaintiff’s left shoulder taken on October 19, 2016 did not reveal any traumatic injury, and that a surgery performed on that shoulder only cleaned up a prior degenerative condition. Dr. Siegel concluded that plaintiff suffered a lumbosacral sprain/strain and an unspecified left shoulder injury, both resolved. Dr. Siegel opined that plaintiff’s examination revealed “significant symptom magnification” as ranges of motion in his left shoulder were much less than previously measured by plaintiff’s own doctor. Defendant thus concludes that the motion should be granted and the complaint should be dismissed.

In opposition, plaintiff asserts that defendant has failed to make a *prima facie* showing of his entitlement to judgment. Plaintiff contends that defendant’s failure to address his claim for

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<sup>1</sup>Plaintiff counsel in opposition to the instant motion asserts that no such extension was granted, and that defense counsel has misrepresented the Court’s words and actions (Cole-Hatchard Aff. at ¶ 4). However, at the April 4, 2018 conference, the Court unequivocally set June 29, 2018 as defendant’s deadline to file a motion for summary judgment.

economic loss in excess of basic economic loss requires denial of the motion. Further, plaintiff contends that issues of fact remain relating to plaintiff's claims of serious injuries to his left shoulder and lumbar spine under the permanent consequential limitation and significant limitation categories.

Plaintiff submits the affirmed report of Dr. Charles Episalla who examined plaintiff on June 14, 2018 (Exh. 3). Dr. Episalla previously treated plaintiff and performed the surgery on plaintiff's left shoulder on March 2, 2017. Dr. Episalla noted a slight limitation in range of motion in the left shoulder of 160 degrees (180 degrees normal) with residual tenderness to deep palpation and mild weakness of external rotation. Dr. Episalla further noted range of motion limitations of the lumbar spine as great as 44 percent (forward flexion, 50 degrees, normal 90 degrees). Dr. Episalla's assessment indicated a lumbar spine sprain/strain and left shoulder traumatic impingement syndrome. Plaintiff thus concludes that the motion should be denied.

In reply, defendant submits that plaintiff's Bill of Particulars claims only \$7,009.65 for physician services in support of his economic loss claim, and plaintiff testified at his deposition that his only other expense was a prescription co-pay of approximately \$45. Defendant thus concludes that plaintiff has failed to raise a triable issue of fact as to his economic loss claim.

Further, defendant asserts that plaintiff's expert found no significant limitations in plaintiff's shoulder and diagnosed only sprains and strains to the lumbar spine. None of these findings are sufficient to raise a triable issue of fact. Defendant further asserts that the x-ray of plaintiff's lumbar spine revealed only degenerative conditions. There is no evidence of any causally-related injury. Defendant concludes that the motion should be granted.

The Court has fully considered the submissions of the parties.

### Discussion

As an initial matter, plaintiff's opposition addresses only his injury claims relating to the permanent consequential limitation and significant limitation categories, and economic loss claims. Plaintiff indicates that he is not pursuing his other serious injury claims. Therefore, all remaining claims contained in plaintiff's Bill of Particulars thus are dismissed.

With regard to plaintiff's claims of permanent consequential limitation and significant limitation, defendants have met their *prima facie* burden by submission of, *inter alia*, the report of Dr. Siegel whose examination revealed only mild or slight injuries to the left shoulder and lumbar spine, all of which have resolved. Defendant additionally submitted the operative report generated in connection with Dr. Episalla's surgery on plaintiff's left shoulder (Exh. F) which noted only degenerative changes. The only imaging study of plaintiff's lumbar spine (Exh. D) also indicated only degenerative changes.

In opposition, plaintiff failed to raise a triable issue of fact on his claims of serious injury. Although and. Episalla, in his June 14, 2018 report, causally links plaintiff's claimed symptoms to the subject accident. However, the report is insufficient as a matter of law to raise a triable issue of fact. As an initial matter, the limitation in range of motion Dr. Episalla noted in plaintiff's left shoulder (160 of a normal 180 degrees) is insufficient to establish a serious injury. "A minor, mild or slight limitation of use is classified as insignificant within the meaning of the no-fault statute" (*Gaddy v. Eyster*, 79 NY2d 955, 957 [1992], quoting *Licari v. Elliott*, 57 NY2d 230, 236 [1982]).

Further, Dr. Episalla previously reported that plaintiff's left shoulder showed only degenerative changes and the only imaging study of plaintiff's lumbar spine revealed only degenerative conditions. Dr. Episalla's failure to explain in his June 14, 2018 report "why he ruled

out degenerative changes as the cause of plaintiff's ... injuries renders his opinion that they were caused by the accident speculative." (*Riviello v. Kambasi*, 82 AD3d 543 [1st Dept 2011])

Plaintiff's reference to Dr. Episalla's initial examination report (Exh. I), dated October 16, 2016, is unavailing. In that report, Dr. Episalla noted that plaintiff reported that the onset of pain in his shoulders was sudden after the subject accident. This statement is based solely on plaintiff's subjective complaints of pain and thus is insufficient to raise a triable issue of fact (*see e.g. Cennamo v. Themistokleous*, 22 AD3d 700 [2d Dept 2005]). In short, plaintiff suffers at most a slight limitation in his left shoulder, and no objective medical evidence links plaintiff's claimed injuries to the subject accident. Plaintiff's serious injury claims thus must be dismissed.

Turning to plaintiff's economic loss claim, the Court notes that defendant's moving papers do not address any specific argument to this claim. The motion does, however, seek dismissal of the complaint in its entirety. Defendants' submission of plaintiff's Bill of Particulars and deposition transcript is sufficient to make a *prima facie* showing that plaintiff did not suffer economic loss in excess of basic economic loss as a result of the subject accident.

Plaintiff's Bill of Particulars claims \$7,009.65 for physician services. His deposition testimony indicates that his only additional loss was a small prescription co-pay. Plaintiff submitted no further evidence of economic loss in opposition to the motion. It thus is clear that plaintiff falls far short of the \$50,000 threshold for such a claim (*see* Insurance Law § 5102[a]).

Plaintiff's reference *Jones v. Marshall*, 147 AD3d 1279 [3d Dept 2017], a case holding that a defendant's failure to address an economic loss claim requires denial of a summary judgment motion. The claim is unavailing as the cited case is not analogous to the matter at bar. In *Jones*, the plaintiff, in opposition to a motion for summary judgment, submitted evidence in support of his


economic loss claim. Defendants in their reply failed to refute the substance of plaintiff's evidence. No such evidence is presented here. Further, even if defendant's moving papers did not contain evidence sufficient to make a *prima facie* showing, plaintiff's advancement of the claim in opposition to the motion permits the Court to exercise its discretion and search the record to determine if a genuine issue of fact exists (*Oleg Barshay, DC, P.C. v. State Farm Ins. Co.*, 14 Misc3d 74 [App Term 2006]). In the absence of any additional evidence of economic loss, plaintiff's claim cannot stand.

In light of the above, it is hereby ORDERED that defendant's motion is granted, and the complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 31, 2018  
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

TO: Counsel of Record

VIA NYSCEF