

**Spencer v Suriel**

2019 NY Slip Op 30149(U)

January 16, 2019

Supreme Court, Kings County

Docket Number: 508297/15

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16<sup>th</sup> day of January, 2019

PRESENT:

HON. DEBRA SILBER

Justice.

\_\_\_\_\_ X

CARSEL SPENCER,

Plaintiff,

-against-

BRAULIO JIMENEZ SURIEL,

Defendant.

\_\_\_\_\_ X

DECISION / ORDER

Index No. 508297/15  
Mot. Seq. # 2  
Cal. # 53  
Submitted: 11/29/18

Papers read on this motion:

NYSCEF Numbered:

Notice of Motion/Order to Show Cause/Exhibits \_\_\_\_\_

20-27 \_\_\_\_\_

Affirmation in Opposition/Exhibits \_\_\_\_\_

29-36 \_\_\_\_\_

Reply Affirmation/Exhibits \_\_\_\_\_

37-38 \_\_\_\_\_

Defendant moves for summary judgment and dismissal of plaintiff's action, pursuant to CPLR Rule 3212, claiming that plaintiff has failed to sustain a "serious injury," pursuant to Insurance Law § 5102(d). Movant has not made a *prima facie* case with objective medical findings with regard to all of the applicable categories of injury. Thus, the motion must be denied.

This motor vehicle accident occurred on March 24, 2015. Plaintiff was driving a

vehicle that came into contact with defendant's vehicle on Jamaica Avenue in Brooklyn, at the intersection with Euclid Avenue. Plaintiff testified that his airbags deployed, his windshield shattered, and his car was totaled [EBT Page 29].

In his supplemental bill of particulars annexed as Exhibit E, plaintiff alleges that he sustained injuries to his cervical and lumbar spine, including herniated discs, and an injury to his head. At the time of the accident, plaintiff was 58 years old.

Defendant supports his motion with an attorney's affirmation, the pleadings, the bill of particulars, the note of issue, a copy of a discovery order and an affirmed IME report from Dr. Jeffrey Passick following an exam of plaintiff conducted on May 30, 2018. The discovery order was issued by a JHO in April of 2018 in response to a motion (seq. #1) brought by defendant in March of 2018 for an order compelling plaintiff to appear for an IME and extending defendant's time to move for summary judgment. The order provides, *inter alia*, that defendant is granted an extension of time to August 30, 2018 to move for summary judgment, and that the branch of the motion to compel plaintiff to appear for an IME was moot as the IME was already scheduled. This order was presumably included so the court would be aware that the motion was timely made.

The "wrinkle" with this motion is that defendant's counsel argues in his affirmation specific statements made in plaintiff's EBT, which he avers is annexed as Exhibit G. However, said exhibit was not included in the motion at all, but was included in the defendant's reply papers. Nonetheless, as it is the plaintiff's EBT, the court finds there was no prejudice to plaintiff as plaintiff had a copy, and thus has considered the EBT transcript as if it was included in the motion papers as contemplated.

The defendant has failed to meet his prima facie burden of demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. See, *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyley*, 79 NY2d 955, 956-957 [1992].

With regard to the category of injury "a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident," defendant has not made a prima facie case for dismissal. There are no medical records in the motion papers which were prepared in the first six months after the accident. Plaintiff testified at his EBT, taken on March 14, 2018, that he was employed by a property management company. He stated that he paints and repairs apartments. He works part-time and is paid hourly. Plaintiff was not asked when he started working for this company. He was not working for this company on the date of the accident. At that time, March 24, 2015, he was unemployed [Pages 12-14]. He testified that he went for treatment four times a week for eleven months after the accident, and that he had acupuncture, chiropractic treatment and physical therapy at these visits [Page 56].

Defendant's counsel's affirmation claims that, [¶¶35-37] in this case, plaintiff's deposition transcript, where plaintiff stated that he was not confined to his bed after the accident, and that he did not leave his home except for medical appointments for a month after the accident, except that he would take a short walk each day that he was otherwise at home, make it "clear that the plaintiff has not suffered a 'serious injury.'" This is not the conclusion the court must draw from this statement by the plaintiff.

Plaintiff also testified, as noted above, that he went for physical therapy four times a week for eleven months. The plaintiff was not asked when he started his current job, what he did in the six months after the accident, if the doctor at the physical therapy facility told him not to return to work for any period of time, or any questions which would be probative with regard to this category of injury.

While the defendant's IME exam concludes that plaintiff's sprains and strains had resolved and he had a completely normal orthopedic exam on May 30, 2018, that was three years after the accident.

As the defendant has not sustained his prima facie burden as to all of the applicable categories of injury in Insurance Law §5102(d), it is unnecessary to determine whether the papers submitted by the plaintiff in opposition to the motion are sufficient to raise a triable issue of fact. (See, *Yampolskiy v Baron*, 150 AD3d 795, 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140, 1140 [2d Dept 2017]; *Koutsoumbis v Pacciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011].

In conclusion, the defendant's motion is denied.

This shall constitute the decision and order of the court.

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber  
Justice Supreme Court