

<b>Park v Flynn</b>
2019 NY Slip Op 30619(U)
March 13, 2019
Supreme Court, New York County
Docket Number: 153583/2016
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ADAM SILVERA PART IAS MOTION 22**

*Justice*

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**INDEX NO. 153583/2016**

ALBERT PARK,

**MOTION DATE 01/14/2019**

Plaintiff,

**MOTION SEQ. NO. 002**

- v -

JOHN FLYNN, TARIKV DESTA

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 68, 69, 70, 71, 72, 73, 74, 75, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that defendant Tarik V.K. Desta’s threshold motion for summary judgment dismissing the complaint is decided below. The Court notes that defendant John Flynn cross-moved for summary judgment seeking the same relief as defendant Desta. The Court notes that in a prior motion, mot. seq. 003, defendant Flynn moved for summary judgment on the issue of liability. By Decision/Order dated February 25, 2019, this Court granted defendant Flynn’s prior motion and dismissed this action as to him only. Thus, defendant Flynn’s current cross-motion is deemed moot.

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established it is warranted as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case”. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *See id.* at 853. Additionally, summary judgment motions

should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *See Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility.” *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1<sup>st</sup> Dep’t 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1<sup>st</sup> Dep’t 1990). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979).

Here, defendant Desta argues that plaintiff failed to show that he sustained a serious injury pursuant to Insurance Law §5102(d) in that, based upon the MRI reports, as well as the independent medical examinations by defendant Desta’s doctors, plaintiff’s alleged injuries to his left shoulder are degenerative in nature. Defendant Desta further argues that plaintiff did not suffer any permanent loss of use of a body organ or member, any significant limitation of use of a body function or system, any permanent consequential limitation, and was not prevented from performing substantially all of the material acts constituting his customary daily activities for 90 out of 180 days following the accident. Finally, defendant Desta argues that there are unexplained gaps in plaintiff’s treatment. In support of the motion, defendant Desta proffers, *inter alia*, the independent medical examination report of Dr. Barbara Freeman, dated July 6, 2018, which states plaintiff’s ranges of motion for the cervical spine, right shoulder, left shoulder, lower back, and both knees. Page 3 of Dr. Freeman’s report notes that “at the time of that examination[, on the day of the accident,] the claimant [sic] functional range of motion of his left shoulder”, and that plaintiff’s left shoulder had functional range of motion at an evaluation one month following the accident. Dr. Freeman opines that “[g]iven this information

and the fact that the claimant's MRI is consistent with a preexisting degenerative condition, I cannot causally relate the surgery to the accident of 3/14/16." Notice of Motion, Exh. F, Dr. Freeman Report, p. 3-4. In further support of the motion, defendant Desta points to the report of A. Robert Tantleff, MD, who reviewed, one page of a two page radiology report, CD-ROM images, the verified bill of particulars, and the supplemental verified bill of particulars. Such report states that plaintiff's left shoulder condition is degenerative in nature.

In opposition, plaintiff proffers, *inter alia*, his physician's medical report as well as the medical report from defendant Flynn's independent medical examination. The medical report of plaintiff's physician shows limited ranges of motion. The Court notes that plaintiff's ranges of motion differ on all the medical reports submitted; even defendant Desta and defendant Flynn's physicians have inconsistent findings. Moreover, in direct contradiction to defendant Desta's claims of degeneration, plaintiff's physician Dr. Thomas A. Scilaris, opines "within a reasonable degree of medical certainty, that the symptomologies and injuries to the left shoulder that [plaintiff] presently exhibits are solely caused by the March 14, 2016 accident and not from degenerative condition." Aff. in Opp., Exh. D, Scilaris Aff., ¶23. Furthermore, defendant Flynn's physician also contradicts defendant Desta's physicians as to the causation of plaintiff's injuries. In the report by defendant Flynn's physician, Richard A. Weiss, M.D, dated July 26, 2016, he opines that "[b]ased upon...the history as related by the claimant and my physical examination, there is a causal relationship between the injuries sustained and the accident reported." Aff. in Opp., Exh. F, Dr. Weiss Report, p. 3.

Preliminarily, the Court notes that Dr. Freeman's report is deficient in that she failed to state the objective tests used to measure plaintiff's ranges of motion. On page 2 of Dr. Freeman's report, she merely states in a general manner that "[r]ange of motion testing is done in an active

manner". The Appellate Division, First Department, has consistently held that "[t]he report of the doctor...is deficient because he failed to identify the objective tests he employed to measure plaintiff's range of motion". *Nagbe v Minigreen Hacking Group*, 22 AD3d 326, 327 (1<sup>st</sup> Dep't 2005). Furthermore, plaintiff has sufficiently raised a triable issue of fact. All of the conflicting medical reports as to limitations on plaintiff's range of motion and causation, including two medical reports in direct contradiction regarding the existence of degenerative disease, are issues of fact precluding summary judgment.

As to the alleged gap in treatment, plaintiff's affidavit in opposition clearly states that he treated consistently for over a year until his no-fault benefits were denied and he could not afford further treatment. *See* Aff. in Opp, Exh. E, Park Affidavit, ¶4. Additionally, plaintiff's physician stated that "[p]laintiff's condition is permanent and any medical treatment he receives will be palliative in nature only." Aff. in Opp., Exh. D, Scilaris Aff., ¶4. In *Brown v Dunlap*, the Court of Appeals held that "[a] plaintiff need not incur the additional expense of consultation, treatment or therapy merely to establish the seriousness or causal relation of his injury." *Pommells v Perez*, 4 NY3d 566, 577 (2005). A gap in treatment is explained by a doctor's report stating that "once he determined further medical therapy would only be palliative in nature, he terminated treatment and instructed plaintiff to continue exercises at home." *Id.* Thus, plaintiff has sufficiently explained his cessation of treatment. Thus, defendant Desta's motion for summary judgment on the issue of threshold is denied.


Accordingly, it is

ORDERED that defendant Tarik V.K. Desta's motion for summary judgment on the issue of threshold is denied in its entirety; and it is further

ORDERED that defendant John J. Flynn’s cross-motion for summary judgment on the issue of threshold is denied as moot; and it is further

ORDERED that within 30 days of entry, plaintiff Albert Park shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

<u>3/13/2019</u> DATE		 ADAM SILVERA, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE