

Isayev v Maragh-Bleus
2019 NY Slip Op 30708(U)
March 20, 2019
Supreme Court, Kings County
Docket Number: 517509/16
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

x

TOMER ISAYEV,

Plaintiff,

-against-

**SOOKMIN MARAGH-BLEUS
and FRANCOIS BLEUS, JR.,**

Defendants.

x

DECISION / ORDER

Index No. 517509/16

Motion Seq. No. 3

Date Submitted: 2/28/19

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>51-56</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>80-90</u>
Reply Affirmation.....	<u>93</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 May 14, 2016 at around 4:30 P.M. on Flatbush Avenue near the intersection with Aviation Road in Brooklyn, NY. Plaintiff was removed from the scene in an ambulance and taken to the Kings County Hospital emergency room. At the time of the accident, plaintiff was 18 years old.

In his bill of particulars, plaintiff alleges that as a result of the accident, he sustained injuries to his left elbow, his cervical and lumbar spine and to both of his knees. He was a high school student at the time of the accident. Plaintiff claims that defendant hit the front of his car in the course of performing an illegal U-turn, and that his car was declared a total loss after the accident.

The movants contend that plaintiff did not sustain a "serious injury" as a result of this accident; that plaintiff only had cervical and lumbar sprains and strains as a result of the subject accident, which have resolved with no continuing disability.

Movants support their motion with an affirmation of counsel, the pleadings, plaintiff's bill of particulars, plaintiff's EBT transcript and an affirmed IME report from their examining orthopedist, Willie E. Thompson M.D. (exam June 1, 2018).

Dr. Thompson, an orthopedist, examined plaintiff two years after the accident. He also reviewed many of plaintiff's medical records. Plaintiff told him that he was still experiencing pain on a regular basis in his neck, lower back, left elbow and both knees. Dr. Thompson's range of motion testing of plaintiff's neck, back and knees produced completely normal results, with no spasm or swelling. He also tested plaintiff's shoulders and his left elbow. The results were also completely normal. He concludes that plaintiff's sprains and strains have all resolved and his prognosis is good. He states that "in my opinion, with a reasonable degree of medical certainty, there were no objective findings to support the claimant's subjective complaints."

Plaintiff testified at an EBT taken on April 17, 2018. He said he did not miss any school after the accident, which took place on a Saturday. [Page 52, line 20]. He went to physical therapy for seven months and stopped when no-fault would not pay any longer. Thus, the court must conclude 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 AD3d 920 [2d Dept 2013]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007]).

The court finds that the defendants have made out a prima facie case for dismissal of the complaint by establishing that 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].

Plaintiff opposes the motion with an affirmation from counsel, an affirmation from Aron Rovner, M.D., an orthopedic surgeon, accompanied by some of his office records, certified MRI reports, an affidavit of plaintiff, and several items which are not relevant, such as photos of plaintiff's car and the EBT of defendant driver Sookmin Maragh-Bleus.

To the extent that plaintiff claims that defendants are "precluded from making this motion" because defendant Francois Bleus, Jr., the owner of the vehicle, did not appear for his EBT, plaintiff is not correct. First, a defendant's "preclusion" in a motor vehicle accident is solely limited to the issue of liability. This motion is addressed to the issue of damages. Second, in this matter, his wife, the co-defendant, was the driver, and did appear for an EBT, so she is not precluded from testifying at trial.

Dr. Rovner's affirmation, dated September 17, 2018, states that he is an orthopedic surgeon, and first saw plaintiff on December 19, 2016 for the injuries he claimed to have sustained in this accident, which took place seven months earlier. On this initial exam, he found significant restrictions in plaintiff's range of motion in his lumbar spine and left knee. Plaintiff complained of "persistent lower back pain with numbness, paresthesia and weakness and tingling to the left lower leg and left knee pain with instability, clicking, locking and buckling." He reviewed the MRI films of plaintiff's lumbar MRI taken July 5, 2016, and states that he observed a herniation at L4/L5 and L5/S1, both with impingement, and a bulging disc at L3/L4. At this first visit, he diagnosed plaintiff as "being 90% disabled." He recommended continued physical therapy, chiropractic treatments and acupuncture. He reviewed the films of the MRI of plaintiff's left knee taken December 13, 2016 and concurred with the radiologist's finding

of a torn posterior horn of the medial meniscus. He recommended arthroscopic surgery of the left knee and lumbar epidural injections. Plaintiff declined and said he would discuss it with his mother. On May 4, 2018, Dr. Rovner examined plaintiff again and reports that there was no improvement. His range of motion testing resulted in his conclusion that plaintiff had "a loss of range of motion in his lumbar spine of approximately 50% loss in flexion . . . and a 67% loss in extension, and a 23% loss in flexion of his left knee." Dr. Rovner states that, within a reasonable degree of medical certainty, that the injuries to plaintiff's left knee and lumbar spine were directly causally related to the accident on May 14, 2016, and that plaintiff sustained a permanent and partial disability as a result. He further states that even if plaintiff has the arthroscopic knee surgery, he will have permanent stiffness and loss of his range of motion in the knee, and that plaintiff possibly needs lumbar fusion surgery, but if he has it, plaintiff will still have "permanent pain, stiffness and loss of range of motion."

The court finds that plaintiff has overcome the motion and raised a triable issue of fact as to whether plaintiff has sustained a "serious injury" as a result of the accident. Plaintiff has raised a "battle of the experts" sufficient to overcome the motion. (See *Burke v I Om Atif Hacking Corp.*, 146 AD3d 747 [2d Dept 2017]; *Hamdan v Taggart*, 154 AD3d 743 [2d Dept 2017].)

Accordingly it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: March 20, 2019

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court