

<b>Bukhgalter v Shamy</b>
2020 NY Slip Op 31130(U)
April 2, 2020
Supreme Court, Kings County
Docket Number: 508967/2018
Judge: Debra Silber
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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

\_\_\_\_\_ X

**LEONID BUKHGALTER,**

**Plaintiff,**

**-against-**

**MOHAMED M. SHAMY,**

**Defendant.**

\_\_\_\_\_ X

**DECISION / ORDER**

**Index No. 508967/2018  
Motion Seq. No. 2  
Date Submitted: 2/6/20  
Cal No. 5**

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

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>15-24</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>26-30</u>
Reply Affirmation.....	<u>31</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. It occurred on February 15, 2017 on 47<sup>th</sup> Avenue near the intersection with 27<sup>th</sup> Street in Queens, NY. Defendant moves for summary judgment, contending that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d) as a result of the accident.

In his bill of particulars, plaintiff alleges that he sustained injuries to his right shoulder, including tears to the labrum and rotator cuff, which required arthroscopic surgery, as well as injuries to his neck and back.

The movant contends that plaintiff's neck, back and shoulder injuries are

degenerative in nature and/or pre-existing and/or unrelated to the subject accident. In addition, movant contends that plaintiff testified that he returned to work as a housing inspector and engineer for the City of New York one week after the accident, undercutting any claim under the 90/180 category of injury.

Plaintiff counters that there is ample medical evidence that he sustained injuries to his right shoulder, neck and back as a result of the subject accident, and that he sustained injuries in the categories “a permanent consequential limitation of use” and “a significant limitation of use.” Plaintiff further claims that the affirmation of his treating physician is sufficient to overcome defendant’s motion and raise an issue of fact, thereby defeating summary judgment.

Conclusions of Law

Movant has made a prima facie showing of defendant’s entitlement to summary judgment (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]). Defendant provides an affirmed IME report from Dr. Jeffrey Guttman, who examined plaintiff on December 13, 2018, an affirmed report from a radiologist, Dr. Michael Setton, who reviewed the plaintiff’s MRIs, and an affirmed report from Dr. Ronald A. Paynter, a doctor who is board certified in emergency medicine, who reviewed plaintiff’s emergency room records. These reports make a prime facie showing that plaintiff did not sustain a serious injury from the subject accident.

Dr. Guttman tested the plaintiff’s range of motion and reports that the plaintiff has full range of motion in his spine and right shoulder, with negative test results and a completely normal exam. Dr. Guttman’s impression is “alleged injury to the cervical and lumbar spine, resolved,” and “alleged injury to the right shoulder with arthroscopy surgery, resolved.” He concludes that there is no objective medical evidence which

substantiates that plaintiff incurred a traumatic injury as a result of the subject motor vehicle accident; that there are “no objective clinical findings indicative of a present disability or functional impairment” and “no permanency as a result of the claimed injuries listed in the bill of particulars.”

Dr. Michael Setton, who undertook an independent review of the MRI films of plaintiff’s cervical spine taken on 6/5/17 and 4/22/18 and his thoracic spine taken on 5/14/17 finds chronic degenerative disc disease without any evidence of a traumatic injury. Dr. Setton also reviewed an MRI of plaintiff’s right shoulder taken 4/5/17 and reports evidence of a chronic repetitive overuse type injury unrelated to the accident and degenerative joint disease with no evidence of a traumatic injury. Similarly, Dr. Paynter, who reviewed plaintiff’s emergency room records, found no indication of a serious injury as a result of the motor vehicle accident and notes that “had plaintiff suffered the injuries claimed in the bill of particulars as a result of the accident,” there would have been clinical findings in the emergency room records to support his claim. He concludes that the ambulance and emergency room records are therefore “inconsistent with the injuries alleged in the plaintiff’s bill of particulars and show that the claimed injuries do not have an acute traumatic origin and so could not be causally related to the 2/15/17 accident.”

Plaintiff’s testimony at his EBT that he returned to work one week after the accident makes a prima facie showing 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]).

However, plaintiff has come forward with sufficient evidence to overcome the motion and raise a triable issue of fact as to whether, as a result of the accident, he

sustained a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system (*White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]). The affirmation of Dr. Victor Katz, plaintiff's treating orthopedist, dated January 17, 2020, who last examined plaintiff on October 28, 2019, indicates significant and quantified limitations in plaintiff's range of motion in his right shoulder and his cervical spine, both contemporaneously with the accident and recently. Further, he opines that the injuries to plaintiff's right shoulder and neck are traumatic in origin and causally related to the subject motor vehicle accident, and not related to any pre-existing conditions or intervening medical problems. He states "based on a reasonable degree of medical certainty, Mr. Bukhgalter's impaired range of motion to his right shoulder and neck, pain and tenderness and difficulty in performing daily activities are consistent with the injuries sustained in the accident of 2/15/17." He also opines that, as the arthroscopic surgery he performed was not successful, plaintiff "is a candidate for repeat right shoulder arthroscopy."

Accordingly it is

**ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: April 2, 2020

**ENTER :**

DocuSigned by: 4/27/2020 12:15 pm  
Debra Silber  
B17D01230F44458

**Hon. Debra Silber, J.S.C.**