

<b>Phillips v Quedraogo</b>
2020 NY Slip Op 31159(U)
April 2, 2020
Supreme Court, Kings County
Docket Number: 510804/17
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 9**

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**SCHINA PHILLIPS and EDWARD JONES,**

**Plaintiffs,**

**-against-**

**HAMADO QUEDRAOGO, OPEN ROAD FLEET INC.,  
SAMUEL JOSEPH and WILLIAM GILLISON,**

**Defendants.**

\_\_\_\_\_X

**DECISION / ORDER**

**Index No. 510804/17  
Motion Seq. No. 2  
Date Submitted: 2/20/20  
Cal No. 40**

***Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants Quedraogo and Open Road Fleet's motion for summary judgment.***

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>33-42</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>44-51</u>
Reply Affirmation.....	<u>                    </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 which took place on October 24, 2016 at the intersection of Lincoln Place and Buffalo Avenue in Brooklyn, NY. Plaintiffs were passengers in a taxi owned and driven by movants which collided with a vehicle owned by defendant Gillison and driven by defendant Joseph. A default was obtained against defendant Joseph on the issue of liability, but not against defendant Gillison. Thus this action is deemed abandoned as against defendant Gillison.

Defendants Hamado Quedraogo and Open Road Fleet Inc. contend that they are

entitled to summary judgment dismissing the complaint and any cross claims against them as plaintiffs did not sustain serious injuries as defined by Insurance Law § 5102(d). Defendants rely on the pleadings, plaintiffs' depositions and affirmed reports of an orthopedist, Pierce J. Ferriter, M.D., who examined both plaintiffs, and a radiologist, Mark J. Decker, M.D. who examined the MRIs taken of the two plaintiffs.

Plaintiffs counters that defendants have not met their burden of proof for summary judgment because defendants' doctors have failed to consider plaintiffs' medical records or to address the "significant limitation of use" and 90/180 categories of injury, among other deficiencies. In the alternative, plaintiffs contend that the medical evidence submitted by plaintiffs, including the affirmation of plaintiff Schina Phillips' treating doctor Dr. Thomas S. Mathew and the affirmation of Edward Jones' treating doctor Dr. David H. Delman, are sufficient to establish that both plaintiffs sustained serious injuries as defined by the Insurance Law.

#### Schina Phillips

In her Bill of Particulars, plaintiff Schina Phillips alleges that as a result of the accident, she sustained injuries to her cervical and lumbar spine, including disc bulges and herniations, and injuries to her right shoulder, right knee and right hip. Plaintiff had arthroscopic surgery to her right shoulder. At the time of the accident, she was 54 years of age.

Dr. Pierce J. Ferriter, who examined plaintiff Schina Phillips on November 19, 2018, tested plaintiff's range of motion and reports normal ranges of motion in plaintiff's cervical and lumbar spine and her upper extremities, right hip and right knee, except with regard to her right shoulder, which had a 10-degree reduction in her forward flexion which was 170 degrees (normal 180) and abduction which was 170 degrees (180

normal), with otherwise negative test results. Dr. Ferriter diagnoses Phillips with resolved sprains/strains to her cervical and lumbar spine, left shoulder, right hip and knee and “status post right shoulder arthroscopic surgery – healed by exam.” He states that plaintiff has a normal orthopedic examination and no findings of orthopedic limitations, with plaintiff “being capable of functional use of the examined body parts for normal activities of daily living.”

Radiologist Mark J. Decker, M.D. examined the MRIs of Phillips’ cervical spine, lumbar spine taken on November 18, 2016, right hip, taken on January 13, 2017 and right shoulder, taken on December 16, 2016. With respect to Phillips’ cervical spine and lumbar spine, he states that her bulging discs are degenerative, longstanding and not casually related to the 10/24/16 accident. Similarly, with respect to Phillips’ right hip, he observes nothing that suggests an acute traumatic injury and states that the tear of the anterior superior labrum, and other abnormal findings, are all degenerative, longstanding and not causally related to the subject accident. With respect to Phillips’ right shoulder, Dr. Decker states that the rotator cuff tendinopathy and fraying, as well as the other abnormal findings, are all longstanding and not causally related to the subject accident, and that there is no evidence to suggest an acute traumatic injury was sustained.

Defendants contend that Dr. Ferriter’s affirmed report of a normal orthopedic exam and Dr. Decker’s affirmed report which states that all of the abnormal findings on the MRIs are degenerative and not causally related to the accident, undercut all of the applicable categories of serious injury, and that plaintiff Phillips’ testimony that she was on SSI and not working at the time of the accident because of other medical conditions,

and that she was not confined to her home at all after the accident, also undercuts any claim under the 90/180 category.

Plaintiff contends defendants fail to make a *prima facie* showing of entitlement to summary judgment by Dr. Ferriter's failing to review and consider any of Phillips' medical records or to adequately address the significant limitation of use and 90/180 categories of injury. In addition, plaintiff contends that Dr. Decker failed to support his conclusion that plaintiffs' abnormal MRIs indicate injuries which are solely degenerative in origin. Plaintiff contends that she has shown, through Schina Phillips' medical records and the affirmation of Dr. Thomas S. Mathew, Schina Phillips' treating doctor, that Phillips in fact sustained serious injuries as a result of the subject accident.

Dr. Thomas S. Mathew, who last examined Phillips on September 4, 2019, reports that, as a result of the October 25, 2016 accident, Phillips has sustained injuries to her right shoulder, including a high grade partial thickness interstitial tear of the supraspinatus tendon and a partial thickness interstitial tear of the infraspinatus tendon for which she underwent surgery on March 19, 2017. With regards to her spine, he states that she sustained a cervical disc herniation and bulges with radiculopathy, and lumbar disc herniations and bulges, and with regards to her right knee, a partial thickness interstitial tear of the proximal medial collateral ligament, with attendant pain and decreased range of motion.

Further, Dr. Mathew tested plaintiff's range of motion and sets forth significant and quantified limitations in the plaintiff's range of motion in her neck, back, right shoulder and right knee and concludes that, to the extent these restrictions are occurring almost three years after the accident, they constitute a permanent loss of use proximately caused by the accident. In addition, he maintains that to the extent any

degenerative conditions were present, they were asymptomatic prior to the subject accident and exacerbated by the trauma, which he maintains is evident on the MRIs.

Edward Jones

In his Bill of Particulars, plaintiff Edward Jones alleges that as a result of the accident, he sustained injuries to his cervical and lumbar spine, to his right hip, to his right knee, to both shoulders, and to his head, to which he claims he sustained, *inter alia*, a traumatic brain injury.

Dr. Pierce J. Ferriter, M.D. examined plaintiff Edward Jones on November 19, 2018 and reports a normal orthopedic exam. He tested the range of motion in plaintiff's cervical and lumbar spine, right and left shoulders, right hand and wrist, right hip, right and left knees. Dr. Ferriter diagnoses Jones with resolved sprains/strains to his cervical and lumbar spine, right shoulder, right index finger, right hip and right knee. He states that plaintiff "presents with" a normal orthopedic examination on all objective testing" and" no findings which would result in no orthopedic limitations in use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties."

Radiologist Mark J. Decker, M.D., examined the MRIs of Jones' lumbar spine, taken on November 9, 2016, cervical spine, taken on February 27, 2017, right hip, taken on January 25, 2017, right knee, taken on November 9, 2016, and right shoulder, taken on January 16, 2017. With respect to Jones' lumbar spine, he finds bulging discs that he concludes are degenerative, longstanding and not casually related to the 10/24/16 accident and no evidence of a traumatic injury. With respect to Jones' cervical spine, he finds several bulging discs and two herniated discs that he concludes are degenerative in origin, longstanding and not casually related to the 10/24/16 accident and no

evidence of a traumatic injury. Similarly, with respect to Jones' right hip, he observes no evidence to suggest an acute traumatic injury, but only degenerative findings which are longstanding and not causally related to the subject accident. Likewise, with respect to Jones' right knee, Dr. Decker states that the injuries shown on the films, including a horizontal tear of the posterior horn and body of the medial meniscus, are longstanding and not causally related to the subject accident and that there is no evidence to suggest an acute traumatic injury was sustained in the subject accident. Finally, with respect to Jones' right shoulder, Dr. Decker finds rotator cuff tendinopathy and fraying, a tear of the superior labrum, biceps tendinopathy with an interstitial tear of anchor, and capsular thickening, all of which he reports are degenerative, longstanding and not causally related to the 10/4/16 accident, with no evidence to suggest that an acute traumatic injury was sustained in the subject accident.

Defendants contend that Dr. Ferriter's report of a normal orthopedic exam and Dr. Decker's findings of only non-causally related degenerative changes demonstrate a *prima facie* case for dismissal and undercut all the applicable categories of serious injury.

Plaintiff contends that defendants fail to make a *prima facie* showing of their entitlement to summary judgment, as Dr. Ferriter failed to review or consider Jones' medical records, nor did he address the significant limitation of use and 90/180 categories of injury. Plaintiff contends that he has shown, through Edward Jones' medical records and the affirmation of Dr. David H. Delman, Edward Jones' treating doctor, that Jones sustained serious injuries as a result of the subject accident.

Dr. Delman who last examined Edward Jones on May 6, 2019, states that as a result of the October 25, 2016 accident, Jones sustained the claimed injuries, including

a cervical disc herniation as well as an atlantoaxial subluxation/dislocation, multiple disc bulges in the lumbar spine with radiculopathy, a right knee meniscal tear, multiple tears in the right shoulder, and a right hip labral tear, with attendant pain and decreased range of motion, as well as a closed head injury with chronic post-traumatic headaches and post-traumatic vision problems. Further Dr. Delman sets forth significant and quantified reduced ranges of motion, which he states were caused by the accident, and he concludes that, to the extent these reductions in plaintiff's range of motion, pain and headaches are occurring more than 2 ½ years after the accident, they constitute permanent injuries proximately caused by the accident. In addition, he maintains that to the extent any degenerative conditions were present, they were asymptomatic prior to the subject accident and were exacerbated by the trauma, which he maintains is evident on the MRIs.

Further, plaintiffs note that Edward Jones testified at his EBT that he was given several doctor's notes after the accident and was approved for Social Security Disability, in support of the 90/180 category of injury [EBT Tr. Pages 59-66].

#### Conclusions of Law

The court concludes that defendants have failed to make a prima facie showing that plaintiffs were not prevented from performing substantially all of the material acts which constituted their usual and customary daily activities for not less than 90 of the 180 days following the accident (*see Fils-Aime v Colombo*, 152 AD3d 493, 494 [2d Dept 2017] ["defendants' submissions failed to eliminate triable issues of fact as to whether the plaintiff sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d)"]; *Sullivan v Illoge*, 50 AD3d 886 [2d Dept 2008] ["defendants' motion papers did not adequately address the plaintiff's claim . . . that [he] sustained a medically-

determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident]).

Specifically, plaintiff Phillips testified that she was unemployed and receiving SSI at the time of the accident, while Jones testified that he has not worked as a barber since the date of the accident [EBT Pages 11-12] and that he had doctor's notes to restrict his activities and was approved for Social Security Disability after the accident. Defendants do not provide any medical evidence from the first six months after the accident. There is nothing in the pleadings, the bills of particulars or the EBT transcripts that supports defendants' claim that plaintiffs were not prevented from performing substantially all of the material acts which constituted their usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. To be clear, plaintiffs' statements do not support defendants' motion – they are not proof of the facts alleged by them. When the plaintiff does not state that their activities were not restricted, the defendant needs medical evidence with regards to the 90/180-day category of injury.

As the defendants have failed to meet their burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiffs in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 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 any event, had defendants made a prima facie case for dismissal, plaintiffs' treating doctors' affirmations are each sufficient to overcome the motion and raise an issue of fact as to whether each of the two plaintiffs sustained a serious injury as a result of the subject accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). Plaintiffs' doctors provide affirmations indicating significant and quantified restrictions in their patient's ranges of motion, both contemporaneously with the accident and recently, and opine that their patient's injuries were caused by the subject accident. Thus, they each raise a "battle of the experts," requiring a trial.

Accordingly, it is

**ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: April 2, 2020

ENTER:



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Hon. Debra Silber, J.S.C.