

<b>Johnson v QLR Five LLC</b>
2020 NY Slip Op 31237(U)
April 2, 2020
Supreme Court, Kings County
Docket Number: 524216/2017
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

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**GEORGE JOHNSON, JR.,**

**Plaintiff,**

**-against-**

**QLR FIVE LLC AND JADENE D. GARDENER,**

**Defendants.**

\_\_\_\_\_x

**DECISION / ORDER**

**Index No. 524216/2017**

**Motion Seq. No. 1**

**Date Submitted: 2/20/20**

**Cal No. 26**

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

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>13-21</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>23-31</u>
Reply Affirmation.....	<u>33</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 November 1, 2017 in Brooklyn, NY. At the time of the accident, plaintiff was fifty-one years old. He sought medical treatment the next day. Plaintiff alleges that as a result of the accident he sustained injuries to his cervical and lumbar spine, and to his right shoulder. Defendants move for summary judgment dismissing the complaint, and contend that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d).

Defendant submits the pleadings, plaintiff's EBT transcript and affirmed reports from an orthopedist, Pierce J. Ferriter, M.D., and a radiologist, Dr. Darren Fitzpatrick. Dr. Pierce J. Ferriter examined plaintiff on January 9, 2019 and tested his range of

motion and reports that plaintiff had normal range of motion in his cervical and lumbar spine and right shoulder, with otherwise negative test results. He diagnoses plaintiff with “resolved sprains/strains to his cervical spine, lumbar spine and right shoulder.” He states that plaintiff had “a normal orthopedic examination on all objective testing and no findings which would result in orthopedic limitations in use of the body parts examined.” He concludes that plaintiff is “capable of functional use of the examined body parts for normal activities of daily living and usual daily activities.”

Dr. Darren Fitzpatrick reviewed the MRIs of plaintiff’s cervical and lumbar spine taken on 11/27/17. He states that plaintiff has mild cervical degenerative disc disease, without any evidence of a recent traumatic injury, and an unremarkable lumbar spine MRI, with no disc bulges and no indication of a traumatic injury.

With regard to the 90/180-day category of injury, defendants contend that by eliminating the accident as the cause of the conditions alleged, defendants have eliminated all categories of injury in the statute. Further, they maintain that plaintiff cannot establish that he was medically prevented from performing substantially all of his usual and customary activities for the requisite period, as plaintiff was receiving social security disability at the time of the accident and had not been employed in about 20 years. Defendant also argue that while plaintiff claims to have been confined to bed for four months following the accident, there is no evidence of a medical directive to that effect.

Plaintiff opposes the motion and argues that defendants fail to make a prima facie showing with regard to the 90/180-day category of injury, with proof that plaintiff was not restricted from performing substantially all of his usual and customary activities for 90 out of 180 days following the accident. Plaintiff points out that Dr. Ferriter

examined him more than a year after the accident and did not review plaintiff's medical records, and that Dr. Fitzpatrick failed to address plaintiff's shoulder injury despite the availability of records, specifically, the MRI of plaintiff's right shoulder (e-file doc 30). Further, plaintiff maintains that plaintiff's medical records and the affirmed report of Donald I. Goldman, M.D., raise issues of fact which require a trial. Dr. Goldman, who examined plaintiff on October 30, 2019, finds that plaintiff has significant quantified limitations in his range of motion in his cervical and lumbar spine and right shoulder. He finds plaintiff has a rotator cuff tear to the right shoulder, numerous cervical bulging discs with concern of impingement at the C3-C4, C4-C5 and C6 levels due to close proximity of the discs to the spinal cord, as well as multiple bulging discs in the lumbar spine. Dr. Goldman concludes that the injuries to plaintiff's neck, right shoulder and low back are causally related to the accident of November 1, 2017 and are permanent.

#### Conclusions of Law

Defendant has failed to make a prima facie showing that plaintiff was not prevented from performing substantially all of the material acts which constituted his 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]). As defendant has failed to make a prima facie case with regard to all of plaintiff's injuries and all of the applicable categories of injury, it is unnecessary to consider the papers submitted by this plaintiff 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 defendant made a prima facie case for dismissal, Dr. Goldman's affirmed report is sufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a serious injury as a result of the accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

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.