

<b>Tabacaru v Demma</b>
2020 NY Slip Op 31271(U)
April 20, 2020
Supreme Court, Kings County
Docket Number: 525357/2018
Judge: Debra Silber
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

\_\_\_\_\_  
**ANATOLIE TABACARU,**

**Plaintiff,**

**-against-**

**CHRISTOPHER A. DEMMA and ZEITUNA K. EBBA,**

**Defendants.**  
\_\_\_\_\_x

**DECISION / ORDER**

**Index No. 525357/2018**

**Motion Seq. No. 1**

**Date Submitted: 2/27/20**

**Cal No. 47**

*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>9-19</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>20-31</u>
Reply Affirmation.....	<u>32</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 April 24, 2018 on the Van Wyck Expressway near Northern Boulevard.

Plaintiff was working as an Uber driver and driving his vehicle when he claims he was hit in the rear by a vehicle owned by defendant Zeituna K. Ebba and operated by Christopher A. Demma. Defendants move for summary judgment dismissing the complaint, contending that plaintiff did not sustain a "serious" injury as a result of the accident, as defined by Insurance Law § 5102(d).

In his Bill of Particulars, plaintiff, who was 45 years old at the time of the accident, alleges that he sustained injuries to his neck, back, left shoulder and left knee

in the accident. Plaintiff had arthroscopic surgery to his left shoulder on September 23, 2018.

The movants contend that plaintiff did not sustain a “serious injury” as a result of this accident; that plaintiff’s complaints predate the subject motor vehicle accident and were not caused by it, which render his claims legally insufficient. Further, they contend that the record fails to show that plaintiff’s activities in the six months following the accident were curtailed to a substantial extent for the requisite period of time, or that such curtailment was caused by a medically determined injury. Defendants support their motion with an attorney’s affirmation, the pleadings, plaintiff’s EBT, and the affirmed IME reports of orthopedist Dana A. Mannor, M.D. and radiologist Jeffrey Warhit, M.D.

Plaintiff counters that he sustained a significant limitation of use and a permanent consequential limitation of use of his neck, lower back, left shoulder, left knee and left foot. In addition, plaintiff maintains that his injuries prevented him from performing substantially all of the material acts which constituted his usual and customary activities for not less than 90 days during the 180 days immediately following the accident. Plaintiff supports his opposition with certified medical records and affirmations from Viviane Etienne, M.D., Richard Pearl, M.D., Paul Ackerman, M.D., Oded Greenberg, M.D. and Leonid Reyfman, M.D. In addition, plaintiff contends that defendants have failed to meet their prima facie burden for summary judgment insofar as Dr. Mannor first examined plaintiff on August 8, 2019 and could give no opinion as to plaintiff’s condition during the 180-day period following the accident. Plaintiff also claims that defendants have failed to consider plaintiff’s deposition testimony, and that Dr. Warhit’s opinion that plaintiff’s “injuries” are merely degenerative changes is not

sufficiently unequivocal to eliminate it as a question for the jury, particularly in light of the contrary opinions from plaintiff's treating doctors.

#### Conclusions of Law

Defendants have made a *prima facie* showing of their 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]). The affirmed reports from defendants' orthopedist, Dr. Dana A. Mannor, M.D., who examined plaintiff, and defendants' radiologist, Dr. Jeffrey Warhit, who reviewed the plaintiff's MRIs, make a *prima facie* case that plaintiff did not sustain a "serious" injury from the subject accident.

Dr. Mannor reviewed plaintiff's medical records and examined plaintiff on August 8, 2019. He reports that the range of motion in plaintiff's cervical and lumbar spine, shoulders and knees was normal, and that all tests performed were negative. Dr. Mannor concludes that plaintiff had "resolved cervical, lumbar and left knee sprain/strain" and "status post left shoulder arthroscopic surgery-healed," with no evidence of an orthopedic disability, permanency or residuals. Dr. Mannor states that the MRI reports indicate that plaintiff has pre-existing arthritis in his left shoulder and disc desiccation in his spine.

Dr. Jeffrey Warhit, MD, a radiologist, undertook an independent review of the MRIs of plaintiff's cervical spine taken on 5/20/18, his left knee, taken on 6/13/18, his left shoulder, taken on 5/21/18, and his lumbar spine taken on 6/6/18. With respect to the lumbar and cervical spine, he states that the MRIs indicate degenerative changes with no evidence of a traumatic injury. With respect to the plaintiff's left knee, he finds no fractures, ligamentous, tendinous, muscular or meniscal tears or quadriceps tendinosis, nor any "evidence of a traumatic etiology". He finds no evidence of any

traumatic injury to the left knee. With respect to the plaintiff's left shoulder, he states that there is supraspinatus and infraspinatus tendinosis," which appears secondary to an impingement syndrome" and "tearing of the anterior glenoid labrum without evidence of a traumatic etiology." He finds no evidence of a traumatic injury to the plaintiff's left shoulder.

In addition, plaintiff's EBT testimony that he went back to work, albeit at a different job, two or two-and-a-half months after the accident (EBT at 36, 37), demonstrates 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 Dacosta v Gibbs*, 139 AD3d 487, 488 [1<sup>st</sup> Dept 2016] ["Plaintiff's testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked "light duty" is fatal to her 90/180-day claim"]; *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013] [plaintiff returned to work on a partial basis during the relevant period of time ]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007] ["The plaintiff testified at trial that he missed only one month of work, that he then returned to work on a part-time basis, and that, after another month, he had resumed working on a full-time basis"]).

Plaintiff has come forward with sufficient evidence to overcome the motion and raise a triable issue of fact as to whether 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, as a result of the subject accident (*White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]). Viviane M Etienne, M.D., provides an affirmation and incorporates therein plaintiff's treatment records at her facility, opines that plaintiff's injuries were causally related to the April 24, 2018 accident. The records include range of motion testing which indicate significant restrictions in plaintiff's range of motion.

Richard Pearl, M.D., an orthopedist who recommended that plaintiff have shoulder surgery, provides an affirmation and diagnoses plaintiff with, *inter alia*, a labral tear of the left shoulder, chondromalacia, traumatic synovitis of the left shoulder, a rotator cuff tear of the left shoulder, and traumatic bursitis. He states that these injuries were caused by the accident. Leonid Reyfman, M.D. performed a neurological evaluation of plaintiff, and provides an affirmation which diagnoses plaintiff with, *inter alia*, cervical disc displacement, lumbar disc displacement, impingement syndrome of the left shoulder and bursitis of the left knee. Dr. Reyfman administered epidural steroid injections to plaintiff on four occasions and states that plaintiff's symptoms and injuries were directly caused by the April 24, 2018 accident. Paul Ackerman, M.D. performed the arthroscopic surgery on plaintiff's left shoulder, and diagnoses plaintiff with a "left shoulder labral tear and rotator cuff tendinitis causally related to the April 24, 2018 accident." Further, he annexes and certifies his medical records for plaintiff, which include range of motion testing which found significant, quantified reductions in the plaintiff's range of motion in his lumbar spine at a recent (November 2, 2019) examination.

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

This constitutes the decision and order of the court.

Dated: April 20, 2020

ENTER :



---

Hon. Debra Silber, J.S.C.