

<b>Henderson v Kuritzky</b>
2020 NY Slip Op 33159(U)
August 10, 2020
Supreme Court, Bronx County
Docket Number: 29412/18E
Judge: Ben R. Barbato
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**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM- PART 14**

**Present:** Honorable Ben R. Barbato

**ROBERT HENDERSON,**

Plaintiff,

-against-

**JAY KURITZKY and SAMMIE CARTER,**

Defendants.

**DECISION/ORDER**

Index No.: 29412/18E

Recitation, as required by CPLR 2219(a) of the papers considered in the review of this motion to dismiss:

<b>Papers</b>	<b>Numbered</b>
<b>Notice of Motion, Affirmation(Kolodny) and Exhibits Annexed</b>	<b>1</b>
<b>Notice of Motion, Affirmation (Casey) and Exhibits Annexed</b>	<b>2</b>
<b>Affirmations in Opposition and Exhibits Annexed</b>	<b>3, 4</b>
<b>Affirmation in Reply (Kolodny)</b>	<b>5</b>

The instant action sounds in personal injury arising from a motor vehicle accident occurring on March 6, 2018, on Southern Boulevard at or near its intersection with 179<sup>th</sup> Street, in the County of Bronx, City and State of New York. Plaintiff, Robert Henderson, at the time of the accident was a passenger in that vehicle operated by the Defendant, Sammie Carter, which vehicle came in contact with that vehicle operated by the Defendant, Jay Kuritzky. Defendants, Sammie Carter and Jay Kuritzky, move this court for an Order pursuant to CPLR §3212 awarding Summary Judgment in favor of Defendants dismissing Plaintiff's Complaint claiming that the Plaintiff cannot meet the serious injury threshold requirement mandated by Insurance Law§5102(d).

The aforementioned motions are hereby consolidated and decided as follow:

Defendant, Jay Kuritzky offers the Affidavit of Dr. Corey A. Stein, a Chiropractor, who

conducted an examination of the Plaintiff on November 7, 2019. Dr. Stein determined that Plaintiff sustained a cervical, thoracic and lumbar sprains and strains which at the time of his examination of the Plaintiff had resolved. Dr. Stein opines that Plaintiff suffers no chiropractic disability and can continue to perform all activities of daily living without limitation. Dr. Stein determines a causal relation between the original complaints and the subject accident.

Defendant, Jay Kuritzky, submits the Affirmed report of Dr. Audrey Eisenstadt, a Radiologist, who reviewed the MRIs of Plaintiff's lumbar and cervical spine and right knee. Dr. Eisenstadt's review of the MRI of the lumbar spine reveals congenital transitional vertebra at the lumbosacral junction, desiccation of the L5/S1 level with degenerative disc disease. Dr. Eisenstadt's review of the Plaintiff's cervical spine reveals desiccation and degeneration at the C2/3, C3/4, C4/5, C5/6 and C6/7 levels and osteophyte formation at the C7/T1 level. She opines that there exists no evidence of a traumatic occurrence noted of the cervical spine. Dr. Eisenstadt's review of the MRI of Plaintiff's right knee reveals degenerative joint disease, no meniscal tear seen and the small joint effusion relates to synovial/overgrowth of the synovial lining related to degenerative joint disease.

Plaintiff submits the report of Dr. Denny X. Rodriguez, who on August 10, 2018, conducted a range of motion test of Plaintiff and found a deficiencies in the cervical spine, thoracic and lumbar spine, as well as the right knee. Dr. Rodriguez, review of the MRIs of Plaintiff's cervical, lumbar spine and right knee states that the results are consistent with recent trauma causally related to the March 6, 2018 motor vehicle accident. Dr. Rodriguez further asserts that he had read the reports and findings of Dr. Eisenstadt and Dr. Stein and disagrees with their findings. Dr. Rodriguez also reviewed an EMG/NCV taken on April 5, 2018 by Dr. Versalles which reveals cervical bilateral C5/6 (4±) radiculopathy. Dr. Rodriguez opines that

Plaintiff has suffered a permanent partial impairment due to posttraumatic right knee, cervical and lumbar spine derangement causally related to the accident of March 6, 2018.

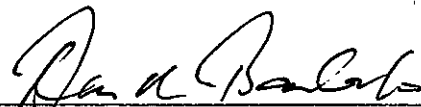
It is settled law that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, their right to judgment. The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial. CPLR §3112(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Singer v. Friedman*, 220 A.D.2d 574(2d Dept 1995). Further, issue finding rather than issue determination is the function of the court on motions for summary judgment. *Esteve v. Abad*, 271 A.D. 725 (1st Dept. 1947); *Stillman v. Twentieth Century Fox F. Corp.*, 3 N.Y.2d 395 (1957); *Clearwater Realty Co. v. Hernandez*, 256 A.D.2d 100 (1st Dept. 1998). Additionally the role of the court is not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811(4<sup>th</sup> Dept. 2000) Since summary judgment is a drastic remedy it should not be granted where there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223(1978) Thus where the existence of an issue of fact is arguable summary judgment should not be granted. *Stone v. Goodson*, 8 N.Y.2d 8 (1960). In the instant case viewing the evidence in the light most favorable to the party opposing the motion for summary judgment, namely the Plaintiffs, there exists a triable issue of material fact for determination by a jury. See: *Bacon v. County of Westchester*, 149 A.D.2d 451 (2<sup>nd</sup> Dept. 1989); *Mutschnik v. Summit Brokerage Corp.*, 148 A.D.2d 427 (2<sup>nd</sup> Dept. 1989) However, with respect to Plaintiff's claim that he was unable to perform his usual and customary activities for 90 out of the 180 days immediately following the accident a reading of Plaintiff's deposition transcript and medical records provided do not support such position. *Hayes v. Gaceur*, 162 A.D.3d 437 (1<sup>st</sup> Dept 2018); *Holloman v. American United Transportation Inc.*, 162 A.D.3d 423 (1<sup>st</sup> Dept 2018).

Therefore it is

**ORDERED**, that the portion of Defendants, Sammie Carter and Jay Kuritzky, motion seeking dismissal of the 90/180 day claim is **granted** it is further

**ORDERED**, that Defendants, Sammie Carter and Jay Kuritzky, motion for an Order pursuant to CPLR §3212 granting summary judgment dismissing the Plaintiff's Complaint for failure to meet the serious injury threshold requirement mandated by Insurance Law §5102(d) is otherwise **denied**.

Dated: August 10, 2020



Hon. Ben R. Barbato, J.S.C.