

Ali v Muhammad
2020 NY Slip Op 34285(U)
December 24, 2020
Supreme Court, Kings County
Docket Number: 520913/2017
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

KORBAN ALI,

Plaintiff,

-against-

**MAHABUBUL ALAM MUHAMMAD
and MAG TRANSIT INC.,**

Defendants.

DECISION / ORDER

Index No. 520913/2017

Motion Seq. No. 1

Date Submitted: 11/12/20

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>17-26</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>51-58</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 December 10, 2016 at the intersection of Fifth Avenue and 9th Street in Brooklyn, NY. Both drivers were taxi drivers with TLC license plates. Both drivers made left turns from two different lanes, and there was a side-swipe collision. Defendants move for summary judgment, contending that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d).

In his Bill of Particulars, plaintiff, who was 43 years old at the time of the accident, alleges that as a result of the accident, he sustained injuries to his cervical spine, lumbar spine, right shoulder and both knees.

The movants contend that plaintiff did not sustain a “serious injury” as a result of

this accident, and counsel concludes that “In light of the affirmations submitted by defendants' doctors, it is clear that defendants have made a prima facie showing that plaintiff's allegations of injury were either not caused in this accident, and/or have not resulted in impairments which would qualify as serious injury in this accident, such that the action should be dismissed, unless plaintiff can present competent medical evidence sufficient to demonstrate an issue of fact.”

Defendants support their motion with the pleadings, plaintiff's deposition transcript and the affirmed reports of an orthopedist, Pierce J. Ferriter, M.D., who examined plaintiff, and a radiologist, Mark J. Decker, M.D. who examined the MRIs taken, as well as an affirmation from Dr. Rikki Lane, M.D., who is board certified in Emergency Medicine, who did not examine plaintiff but reviewed plaintiff's Bill of Particulars, the police report and the emergency room records from Brooklyn Methodist Hospital.

Dr. Pierce J. Ferriter examined plaintiff on January 13, 2020. This was a little more than three years after the accident at issue here, and a few months after plaintiff's subsequent accident in September, 2019. He tested plaintiff's range of motion and reports normal ranges of motion in plaintiff's cervical and lumbar spine as well as in his right shoulder and in both knees. Dr. Ferriter diagnoses plaintiff with resolved sprains/strains. He states that plaintiff had 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.”

Dr. Lane reviewed the police report, the ambulance call report, the emergency room records and the plaintiff's Bill of Particulars. She reports that “The Bill of Particulars alleges injuries to the cervical spine, thoracic spine, lumbar spine, bilateral shoulders,

right knee, head and face, however patient complained of non-localized, general aches and pains that were 'minimal' in severity. On exam patient was well appearing, in no distress, with normal mood, and affect, and good judgement. The head and face were without external signs of trauma and there were no traumatic findings on exam. The extraocular movements were normal, and the mucosa was moist. The neck was supple, and the back was nontender. Extremities had normal range of motion and patient was neurologically intact. There was no evidence of significant injury to the head, face, cervical, lumbar or thoracic spine, or to any extremity whatsoever. On discharge patient was noted to be stable and improved with no trauma criteria met. Had there been any suggestion of any acute injury to the head, face, neck, spine or extremities, imaging and specialist consultation would have been performed, however, no further investigation or treatment was indicated given there was minor trauma, patient only complained of minimal non-localized pain, had a completely normal physical exam." She concludes "It is my opinion, within a reasonable degree of medical certainty that there were no acute traumatic findings to causally relate the plaintiffs accident and the claimed injuries other than minimal transient, non-localized soreness."

Radiologist Mark J. Decker, M.D. examined the x-ray of plaintiff's lumbar spine and the MRI of his right shoulder. With respect to the x-ray of plaintiff's lumbar spine, taken in April 2017, he says "Diffuse degenerative disease. This is longstanding and not causally related to the date of accident of 12/10/2016. Nonacute posttraumatic deformity of sacrococcygeal junction. This is longstanding and not causally related to the date of accident of 12/10/2017. No evidence to suggest that an acute traumatic injury was sustained." With respect to plaintiff's right shoulder, Dr. Decker reviewed the MRI taken on May 25, 2017 and states that he found "Tear of superior labrum extending below the

posterior equator with 3-mm posterior superior labral cyst. Biceps tendinopathy with no tear at the anchor. This finding is longstanding and not causally related to the date of accident of 12/10/2016. AC joint hypertrophy with rotator cuff tendinopathy and articular fraying of supraspinatus proximal to the insertion. This finding is longstanding and not causally related to the date of accident of 12/10/2016. No evidence to suggest that 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 films are degenerative and not causally related to the accident, combined with Dr. Lake’s report that the injuries alleged in the Bill of Particulars are inconsistent with the emergency room records, undercut all of the applicable categories of serious injury, and that plaintiff’s testimony at his EBT any claim under the 90/180 category.

Plaintiff testified at his EBT that he came to the United States from Bangladesh in 2011. He testified on January 7, 2020 with the assistance of a Bengali interpreter. At the time of the accident, he was working as a taxi driver for Verifone, a “green taxi”. At the time of the deposition, he was working for a different company, also driving a taxi. He drove his own car and had to have it repainted when he switched to a “black car” company. He testified that he called 911 after the accident and was taken from the scene to Brooklyn Methodist Hospital, where he was treated and released. He could not remember what treatment he received, and had great difficulty answering the subsequent questions about his medical care after the accident. He said that “after accident, I have a pain in both knee, back and my right shoulder. But after some time, mainly I have a problem with right shoulder, my lower back and my knee, my right knee.” He testified that one of the doctors he saw, whose name he could not remember, recommended that

he have surgery to his right knee, but he did not have it as he was afraid to have the surgery [EBT Tr. P. 55]. Plaintiff testified that he did not have any prior accidents, but he had another accident in September 2019, which was three years after the accident which is the subject of this lawsuit. He testified that in the subsequent accident, he also injured his lower back, right shoulder and right knee [Tr. P. 59]. He testified that he works approximately 30 hour per week, spread out over six days, and he takes a lot of breaks, "I cannot sit long time in the cab. One hour, one and a half hours. Like approximately one hour, one and a half hours I work, and then I take a break, like hour, and then I start working [again]." Plaintiff was never asked if he missed any work after the accident.

The court finds that the defendants have made a prima facie case for summary judgment. The emergency room gave plaintiff Tylenol and Advil and discharged him, advising that he go to his own doctor in three to five days. They did not do any tests. They noted that it was a minor accident, at a low rate of speed, and "The degree of pain is minimal." At his EBT, plaintiff could not describe his treatment, his diagnosis, or the names of any of his doctors. The burden then shifts to the plaintiff to overcome the motion and raise a triable issue of fact.

Plaintiff counters that there are triable issues of fact as to whether plaintiff suffered a serious injury under Insurance Law § 5102(d). Plaintiff provides an attorney's affirmation and affirmations from Dr. Jacob Peacock and Dr. Scott Weiss of Brooklyn Premier Orthopedic Group, and from several radiologists. Plaintiff also provides his emergency room records, which were also provided by defendants, and a number of other items which were not submitted in admissible form and could not be considered.

Dr. Peacock states that "Mr. Ali first came under the care of my office, Brooklyn Premier Orthopedic Center for Musculoskeletal Disorders, formerly known as Brooklyn

Premier Orthopedic Group, on February 21, 2017. Mr. Ali complained of pain to the lower back, right shoulder and both knees, legs/ankles. Dr. Weiss examined him at this initial visit, and recommended physical therapy and acupuncture, as well as X-rays of both knees, right shoulder, lumbar spine, thoracic spine and tib-fib films.” Plaintiff was referred to Back to Health Physical Therapy, and he went there for treatment. At his May 22, 2017 visit, Dr. Wiess recommended MRIs to the right shoulder and right knee, to start acupuncture and to continue physical therapy. “The MRI of the right shoulder revealed a nondisplaced labral tear and multiple tiny anterior inferior perilabral cysts.

. . . The MRI of the right knee reveals evidence of effusion and a 4 millimeter chondral intra-articular body anterior to the anterior root of the lateral meniscus.” Dr. Peacock reports that “Dr. Weiss reviewed Mr. Ali's MRIs of the right knee and right shoulder. Dr. Wiess recommended continuing physical therapy for the right knee and viscous supplementation. Dr. Weiss wanted to discuss seeing a surgeon with regard to the right shoulder. Dr. Wiess referred Mr. Ali to see Dr. Steven Horowitz for the back and neck pain.” Dr. Peacock describes referrals to Dr. Levine and Dr. Reyfman, two of the providers whose records are not in admissible form. His descriptions of their exams are thus hearsay.

Dr. Peacock states that “on August 9, 2020 Mr. Ali presented to Brooklyn Premier Orthopedic Center for Musculoskeletal Disorders where I examined him. Mr. Ali made complaints of pain in the right knee that was constant and achy. Mr. Ali reported that the knee is constantly swollen which limits his range of motion and that his right knee is aggravated with walking and standing. With regards to Mr. Ali's right shoulder, he reported a constant sharp pain that radiated down the right upper extremity into the elbow. He rated the pain a 9/10 quality. He reported the pain was aggravated with

overhead lifting. Mr. Ali reported the pain in the lumbar spine was sharp in nature which he rated a 9/10 quality. He had been attending physical therapy with minimal relief.” Dr. Peacock performed an exam and range of motion testing. He states “Upon my examination of Mr. Ali's lumbar spine, sensation was intact to light touch throughout the bilateral lower extremities. Mr. Ali had spasm and tenderness over the lumbar paravertebral musculature bilaterally. Mr. Ali had pain with flexion and extension of the lumbar spine. Mr. Ali had a positive slump and straight leg R>L and positive facet loading L>R. Range of motion to Mr. Ali's lumbar spine was forward flexion was 40°/60° where 60° is normal representing a 33.3% loss, extension was 15°/25° where 25° is normal representing 40% loss, lateral bend to the left and right was 15°/25° where 25° is normal representing 40% loss to the left and right. Upon examination of the right shoulder, forward flexion was 150°/180° where 180° is normal representing 16.7% loss, internal rotation was 40°/80° where 80° is normal representing 50 loss and external rotation was 60°/80-90° where normal is 80-90° representing approximately 22-25% loss . Upon my examination of Mr. Ali's right knee, there was tenderness along the medial/lateral joint line, patella/quad tendon. Range of motion was 10-120° where normal is 0-140° representing 14.2% loss. I diagnosed Mr. Ali with right knee internal derangement. right knee iliotibial band friction syndrome, right knee chondral intra-articular loose body, right shoulder labral tear, impingement and subacromial sub- deltoid bursitis, and lumbar spine spondylosis, as well as lumbago. Mr. Ali will require continued orthopedic and pain management follow ups and continued physical therapy for acute exacerbations of symptoms. Mr. Ali will require additional radiographic studies, including x-rays, MRIs, CT scans and EMG's. With regard to the cervical and lumbar spines, he will require more invasive pain management injections. If that fails, he would likely be a candidate of a

radiofrequency procedure. He may also require future visco- supplementation for the right knee and future surgical intervention of the right shoulder with a right shoulder arthroscopy to address impingement and labral tear.” Dr. Peacock concludes “As a result of the motor vehicle accident that occurred 12/10/16 within a reasonable degree of medical certainty. Mr. Ali has sustained permanent, partial, and significant loss of use of function of the right knee, right shoulder and lumbar spine. Based on the history provided, records reviewed, and my medical examination, within a reasonable degree of medical certainty, Mr. Ali injuries, disability. and need for treatment are causally related to the motor vehicle accident on 12/10/16. . . . It is my opinion, within a reasonable degree of medical certainty, that Mr. Ali has sustained serious and significant injuries to his right shoulder, right knee and lumbar spine. The injuries are permanent in nature and are causing a significant loss of the use and function of his affected body parts and systems. and the patient will require future surgery, including arthroscopy to his right shoulder and right knee. He may also require future surgery such as discectomy, laminectomy or fusion to his lumbar spine. His injuries will continue to interfere with his ability to perform his daily functions and activities. It is my opinion, within a reasonable degree of medical certainty. that, as a result of this accident, the injuries Mr. Ali has demonstrated through objective medical evidence and testing, were caused by the trauma Mr. Ali sustained on December 10. 2016 in a motor vehicle accident. The subject accident is the cause to Mr. Ali's injuries as Mr. Ali never experienced any prior injuries symptoms to his right shoulder and cervical spine. Prior to the subject accident. Mr. Ali was in good health.” E-File Doc 55 contains the affirmed reports of Dr. Weiss and Dr. Peacock prepared in connection with plaintiff's initial and follow up visits. Doc 56 contains the x-ray and MRI reports, with affirmations from the radiologists.

Conclusions of Law

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and

competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Here, the court finds that 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 Eyler*, 79 NY2d 955, 956-957 [1992]). Defendants' orthopedist, Dr. Pierce J. Ferriter examined plaintiff and found normal ranges of motion in plaintiff's cervical and lumbar spine, right shoulder and right knee, with otherwise negative test results. He diagnosed plaintiff with resolved strains and sprains and found no orthopedic disability. Dr. Decker examined the films and concludes that all of the abnormalities are unrelated to the accident. The affirmed report of Dr. Lake, combined with the emergency room records, make 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]). He was not asked at his deposition if he missed any time from work after the accident, but he was asked when he was able to drive the car again, which seems to be related to the repairs and not his injuries, but he said a few weeks to a month, which may or not mean he returned to driving the taxi after a few weeks. His attorney should have made sure this question was asked. He was asked if he made a claim for Worker's Compensation, and he responded that he did not know what that is.

In opposition to the motion, plaintiff's treating doctor provides an affirmation that overcomes the motion and raises an 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]). There is not one word in the records about plaintiff's job, nor is there anything about his staying home from work. Thus, even

though there are medical records in admissible form generated in the six months after the accident, they do not discuss plaintiff's activities or his job, but repeatedly complain that he came to his appointments without a translator. Thus, plaintiff's doctors affirmations do not overcome the motion with regard to the 90/180 category of injury. In addition, there is a gap in the plaintiff's medical records for the period from June 12, 2017 to his recent exam, which presumably was set up to oppose the motion, on August 9, 2020. Plaintiff did not tell Dr. Peacock that he had a subsequent accident in September 2019 when he went to see him on August 9, 2020. This would seem to undercut the validity of Dr. Peacock's conclusions. However, Dr. Ferriter also examined plaintiff after the September 2019 accident, and he reports normal range of motion testing, no tenderness, and concludes that plaintiff has fully recovered. This is thus a "battle of the experts."

When a plaintiff overcomes the motion with regard to one or more categories of injury, the court is not permitted to dismiss some of plaintiff's claims and to send others to trial. Further, because Dr. Ferriter does not mention plaintiff's subsequent accident, and plaintiff's doctors do not either, it is possible that the subsequent accident exacerbated plaintiff's injuries but did not cause them. In determining a motion for summary judgment, the court is required to view the evidence provided in the light most favorable to the non-moving party. Here, that is the plaintiff.

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

This constitutes the decision and order of the court.

Dated: December 24, 2020

E N T E R :

Hon. Debra Silber, J.S.C.