

<b>Yunanev v McMahon</b>
2020 NY Slip Op 34640(U)
May 1, 2020
Supreme Court, Orange County
Docket Number: Index No. EF011656/2018
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at 285 Main Street, Goshen, New York 10924 on the 1st day of May, 2020.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

EDUARD I. YUNANEV,

PLAINTIFF,

-AGAINST-

JEANETTE M. MCMAHON and DENNIS R.  
MCMAHON IV,

DEFENDANTS.

VAZQUEZ-DOLES, J.S.C.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

**DECISION & ORDER**  
INDEX #EF011656/2018  
Motion date: 2/5/20  
Motion Seq.#1 & 2

The following papers numbered 1 - 9 were read on plaintiff's motion for summary judgment on the issue of liability, and the motion for summary judgment by defendant dismissing the complaint alleging no serious injury:

Notice of Motion( #1 granted)/Affirmation (Sullivan) and Exhibits A - H .....	1 - 3
Notice of Motion(#2 granted in part)/Affirmation (Gaztambide) and Exhibits A - J .....	4 - 6
Affirmation in Opposition (Sokel) and Exhibits A - I .....	7 - 8
Reply Affirmation .....	9

This personal injury action arises out of a crossover motor vehicle accident that took place on July 17, 2018. Plaintiff commenced this action by filing a Summons and Complaint on November 28, 2018. Defendants served a Verified Answer with Affirmative Defenses on January 14, 2019. On or about February 14, 2019, plaintiff served a Verified Bill of Particulars. The Bill of Particulars alleges injury to his right knee, lumbosacral spine, cervical spine, shoulders and right ankle; particularly a horizontal oblique tear of the posterior horn medial meniscus for which plaintiff underwent arthroscopic surgery on October 11, 2018, disc bulging at

L1-L2, L4-L5 and disc herniation at L2-L3, L3-L4, L5-S1 requiring several paraspinal trigger point injections. The Examination Before Trial of plaintiff was held on July 29, 2019. Plaintiff filed his Note of Issue on November 19, 2019.

With respect to plaintiff's motion for partial summary judgment, defendants do not dispute the underlying facts of the subject accident as set forth in the depositions of the parties, nor counsel's explanation of the law generally applicable to crossover collisions. Defendants have effectively admitted negligence and therefore have conceded to liability.

With respect to defendants' motion, they do contend that the medical evidence establishes that plaintiff sustained, at most, minor injuries in the subject accident, injuries that do not fall within any definition of "serious injury" as set forth in Insurance Law § 5102(d) and thus, as applied by the Courts, has not met a condition precedent to bringing a civil action for damages rendering his liability motion moot.

"To recover damages for non-economic loss related to personal injury allegedly sustained in a motor vehicle accident, the plaintiff is required to present non-conclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of Insurance Law § 5102 (d), but also that the injury was causally related to the accident." (*Valentin v Pomilla*, 59 AD3d 184, 186 [1st Dept 2009] [internal quotation marks and citation omitted]).

"To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a serious injury" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011] [internal quotation marks and citations omitted]). Once a defendant meets its initial burden, plaintiff must then demonstrate a triable issue of fact as to whether he sustained a serious injury within the meaning of Insurance Law §5102 [d] (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]). Plaintiff's expert may provide

a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*See Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where defendant has alleged that the injuries are due to a preexisting degenerative condition, plaintiff has "the burden of coming forward with evidence addressing the defendant[s] claimed lack of causation" (*Valentin v Pomilla*, 59 AD3d at 186).

Defendants move for summary judgment on the ground that plaintiff has failed to establish a serious personal injury that is causally related to the accident of July 17, 2018. In support of their motion, defendants offer plaintiff's Bill of Particulars, deposition transcript, and medical records. Defendants also offer a report from their examining physician, Robert C. Hendler, M.D., who examined the plaintiff on September 16, 2019. Dr. Hendler reviewed the reports of plaintiff's numerous MRI studies.

The MRI of the right knee performed on August 8, 2018 showed an oblique horizontal tear of the posterior horn of the medial meniscus. Per his request, Dr. Hendler was provided with plaintiff's intra-operative photographs that were taken at the time of Dr. Khaimov's right knee surgery performed on October 11, 2018. From his review of those images, Dr. Hendler found no posttraumatic tearing of the medial meniscus. The anterior cruciate ligament and patellofemoral joint were normal. Dr. Hendler found that the need for the right knee surgery was due to pre-existing degenerative changes and not causally related to the subject accident.

The MRI of the right ankle performed on July 31, 2018 showed no evidence of post-traumatic findings. The MRIs of the left and right shoulder performed on July 26, 2018 and July 27, 2018 indicated partial tearing of subscapularis tendon with teninosis and tears of glenoid labrum. Dr. Hendler's physical examination of both shoulders was normal indicating no present

disability no permanent findings in either shoulder that would be causally related to the subject accident.

The MRI of the lumbar spine performed on August 24, 2018 showed disc bulging with herniations at L5-S1 and L3-L4. Dr. Hendler found that plaintiff's injury to his lumbar spine was pre-existing degenerative disc disease and that there is no causal relationship between his persistent subjective complaints regarding the lumbar spine and the accident. Physical examination of both his lumbar spine and cervical spine were completely normal. There were no positive objective tests or decreased sensation that would clinically correlate with an ongoing herniated disc in the low back, or a lumbar radiculopathy.

Dr. John Rigney also reviewed the radiographic examinations of plaintiff's MRIs and found that there is no causal relationship between the accident and the findings on the MRI examinations. With respect to plaintiff's shoulders, there is no evidence that the findings on the MRIs are causally related to the subject accident. The tears found are not uncommon nor unexpected in arthritic shoulders and in shoulders with impingement such as was found here. It is his opinion that there were degenerative changes of both menisci with horizontal tearing of both menisci. There was no evidence that the findings are causally related to the subject accident and he found no evidence of acute traumatic injury.

Defendants have established *prima facie* that the alleged injuries to the plaintiff's right knee and lumbar region of his spine does not constitute serious injuries under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law §5102(d) (*see Staff v Yshua*, 59 AD3d 614 [2d Dept 2009]), and that, in any event, the alleged injuries were not caused by the accident (*see Gouvea v Lesende*, 127 AD3d 811 [2d Dept 2015]; *Fontana v Aamaar & Maani Karan Tr. Corp.*, 124 AD3d 579, 580 [2d Dept 2015]). The defendants also demonstrated, *prima facie*, that the plaintiff did not sustain a serious injury under

the 90/180-day category of Insurance Law § 5102 (d) (*see Brun v Farningham*, 149 AD3d 686, 687 [2d Dept 2017]). The reports of Dr. Hendler and Dr. Rigney affirm that plaintiff's MRI films revealed evidence of degeneration and no evidence of post-traumatic injury of the right knee or lumbar spine.

In opposition, plaintiff limits his allegations to two contentions in support of his claim of serious injury; that he sustained a temporary disability under the "90/180 day" category and that the injuries to his right knee and lumbar spine constitute a serious injury under the "permanent consequential limitation of use" and "significant limitation of use" category of Insurance Law §5102(d).

With respect to his first claim, plaintiff's own deposition testimony establishes that he did not sustain a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment as he did not miss a day of work following the accident (*Anderson v Foley*, 162 AD3d 965 [2d Dept 2018]).

With respect to his second claim, plaintiff submits the affirmations of his treating physicians, Dr. Arkadiy Shusterman, Dr. Aleksandr Khaimov and Dr. Leon Reyfman. Contrary to defendants' contentions, plaintiff's experts did address the findings of pre-existing degeneration set forth in the reports by Dr. Hendler and Dr. Rigney. Both Dr. Shusterman and Dr. Reyfman found no pre-existing symptomology present in plaintiff's lumbar spine prior to the accident based upon their own personal procedures and observations. Dr. Khaimov found no pre-existing symptomology present in plaintiff's right knee prior to the accident based upon his visualization of the arthroscopic surgery he performed on plaintiff's right knee on October 11, 2018. In recent examinations, both Dr. Shusterman and Dr. Reyfman found that plaintiff still has

a loss of range of motion in his right knee and lumbar spine.

Based upon the foregoing, it is hereby

**ORDERED** that plaintiff's motion is granted as to the issue of liability; and it is further

**ORDERED** that plaintiff's allegations are limited to injuries to his right knee and lumbar spine which constitute serious injuries under the "90/180 day", the "permanent consequential limitation of use" and "significant limitation of use" categories of Insurance Law §5201(d); and it is further

**ORDERED** that defendants' motion(seq. #2) is granted only with respect to the plaintiff's claim that he suffered a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment; and it is further

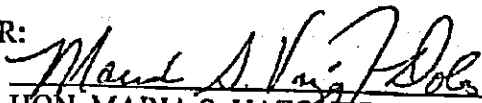
**ORDERED** that the defendants' motion is otherwise denied; and it is further

**ORDERED** that all parties are directed to appear for a SKYPE conference, as previously scheduled, on May 15, 2020.

The foregoing constitutes the decision and Order of the Court.

Dated: May 1, 2020  
Goshen, New York

ENTER:

  
HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Counsel of Record Via NYSCEF