

**Veillard v Macaluso**

2020 NY Slip Op 35417(U)

July 22, 2020

Supreme Court, Kings County

Docket Number: Index No. 504636/2018

Judge: Devin P. Cohen

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Supreme Court of the State of New York  
County of Kings

Index Number 504636/2018

Part 91

Seq # 001

**DECISION/ORDER**

BARTHELEMY VEILLARD,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u>   </u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>   </u>
Other .....	<u>   </u>

against

GIUSEPPE MACALUSO,

Defendant.

Upon review of the foregoing documents, defendant's motion (Seq. 001) for summary judgment on damages only is decided as follows:

**Factual Background**

Plaintiff brings this action for damages based on injuries he claims to have sustained during a motor vehicle accident with defendant on August 31, 2016. In his bill of particulars, plaintiff states the accident caused him to suffer, among other things, bulging discs in his cervical and lumbar spine, as well as a left shoulder sprain.

At his deposition, plaintiff testified that he began to seek treatment approximately two weeks after the accident. This treatment included physical therapy and acupuncture, and well as a belt for his lower back. Plaintiff testified that he also received treatment for his left shoulder from Dr. Golali Nejati for several months. Plaintiff testified that, in 2019, he ended his treatment for his injuries related to this accident with Dr. Nejati. Plaintiff also testified that he has not had any surgery or injections as a result of this accident. Lastly, plaintiff testified that he was in a prior motor vehicle accident in approximately 2002 and that, as a result of this prior accident, he injured his neck, left shoulder, and back.

At defendant's request, plaintiff appeared for an examination by Dr. Jay Eneman, an orthopedic surgeon, on June 25, 2019. As explained in his report, Dr. Eneman performed range of motion tests on plaintiff's cervical and lumbar spine, and left shoulder. Dr. Eneman found decreased range of motion in extension, right and left rotation, and right and left lateral flexion in plaintiff's cervical spine. He found decreased range of motion in extension, and right and left lateral bending in plaintiff's lumbar spine. Lastly, he found decreased flexion, abduction, external rotation and internal rotation in plaintiff's left arm. Dr. Eneman states that these results are "not supported by objective findings" and that the decreased range of motion is due to plaintiff's age, which was 66 years old at the time of the examination. Dr. Eneman concludes that the accident caused the injuries, and that the treatment plaintiff received was related to the injuries. However, despite conceding plaintiff's functional limitations, he concludes that plaintiff is not disabled.

Defendant also submits reports from Dr. Sheldon Feit, who examined MRIs of plaintiff's cervical spine, lumbosacral spine, and left shoulder. Dr. Feit states in his reports that there are injuries to these areas, but that all such injuries are degenerative and nontraumatic.

In opposition, plaintiff submits an affirmation from Dr. Alexander Haselkorn, the medical director of Jamaica Wellness Medical, P.C. in Brooklyn, New York. Dr. Haselkorn certifies the medical records from his facility and attaches them to his affirmation. The records are more than 200 pages and show treatment of plaintiff in 2016 and 2017 by various doctors. Dr. Haselkorn summarizes the treatment in his final narrative report, dated September 19, 2017. In his report, Dr. Haselkorn describes a number of range of motion tests, all of which found overall decreases in range of motion in plaintiff's cervical and lumbar spine. He concludes that plaintiff's injuries were caused by the accident, and that plaintiff's physical limitations are permanent.

Plaintiff also submits the reports of Dr. Greenberg, a radiologist, who examined MRIs of plaintiff's cervical spine, lumbar spine and left shoulder. In his reports, Dr. Greenberg opines that plaintiff sustained bulging discs in his cervical and lumbar spine, as well as a tear of the superior glenoid labrum in plaintiff's left shoulder.

In addition, plaintiff submits an affirmation and medical records from Dr. Mark Gladstein. In his affirmation, Dr. Gladstein states that his office treated plaintiff in November 2016. At that time, he was diagnosed with "cervical radiculopathy, lumbar radiculopathy, myalgia due to the injuries", and was recommended to continue physical therapy and undergo electro-diagnostic testing for upper and lower extremities. Plaintiff later returned in August 2017 and was diagnosed with cervical facet syndrome.

Lastly, plaintiff submits the affirmation and records of Dr. Golali Nejati. The records show that plaintiff began treating with Dr. Nejati in June 2018. During that first visit, Dr. Nejati performed range of motion tests on plaintiff and found that plaintiff's movements in his neck, lower back and left shoulder were restricted. Dr. Nejati continued to find similar restrictions on subsequent visits. Plaintiff's most recent documented examination with Dr. Nejati was in October 2019. During that examination, Dr. Nejati found decreased range of motion, when compared to normal values, in plaintiff's cervical and lumbar spine and left shoulder. He opines that plaintiff's injuries were caused by the accident and that plaintiff's physical restrictions are permanent.

### **Analysis**

Defendants move for summary judgment, seeking dismissal on the basis that plaintiff's injuries do not satisfy one or more of the "serious injury" categories set forth in NY Insurance Law § 5102(d) (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]). At the very least,


the medical affirmations submitted by both parties create triable questions of fact regarding the degree of plaintiff's physical restrictions and whether the accident caused those restrictions (*Chul Koo Jeong v Denike*, 137 AD3d 1189, 1190 [2d Dept 2016]; *Kanic Realty Assoc., Inc. v Suffolk County Water Auth.*, 130 AD3d 876, 878 [2d Dept 2015]). Furthermore, although plaintiff acknowledged a prior accident that affected similar areas of his body, none of the examining doctors address any prior injuries. As a result, defendant's examining physicians fail to clearly establish an alternate cause for plaintiff's admitted injuries.

**Conclusion**

For the foregoing reasons, defendant's motion for summary judgment is denied.

This constitutes the decision and order of the court.

July 22, 2020  
**DATE**

  
**DEVIN P. COHEN**  
Justice of the Supreme Court

  
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