

**Kennedy v Barry**

2020 NY Slip Op 35668(U)

September 29, 2020

Supreme Court, Bronx County

Docket Number: Index No. 21417/2018E

Judge: Veronica G. Hummel

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 31

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KENNEDY, KAHSAN

Index No. 0021417/2018E

-against-

Hon. VERONICA G. HUMMEL

YOUSOUF BARRY, MOHAMED

Acting Justice Supreme Court

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The following papers were read on this motion ( Seq. No. 1 ) for summary judgment noticed on October 23, 2019 and submitted September 4, 2020.

Notice of Motion – Affirmation and Exhibits	NYSCEF Doc. # 12-20
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 25-31
Reply Affirmation	NYSCEF Doc. # 32

Upon the foregoing papers, it is ordered that this motion by defendants MOHAMED YOUSOUF BARRY and JAMES A. LEASING, INC. (defendants) [Mot. Seq. 1], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff KAHSAN KENNEDY (plaintiff) has not sustained a “serious injury” as defined by Insurance Law 5102(d) is decided in accordance with the decision and order of even date.

Dated: September 29, 2020

Hon. V.G.H.  
VERONICA G. HUMMEL, A.J.S.C.

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- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
  - 2. MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER
  - 3. CHECK IF APPROPRIATE.....  SETTLE ORDER  SUBMIT ORDER  SCHEDULE APPEARANCE  
 FIDUCIARY APPOINTMENT  REFEREE APPOINTMENT

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, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IAS PART 31**

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KAHSAAN KENNEDY,

Plaintiff,

-against -

**Index No. 21417/2018E  
DECISION/ORDER  
Motion Seq. 1**

MOHAMED YOUSOUF BARRY and JAMES A.  
LEASING, INC.,

Defendants.

-----X  
**VERONICA G. HUMMEL, A.S.C.J.**

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF, in support of and in opposition to the motion by defendants MOHAMED YOUSOUF BARRY and JAMES A. LEASING, INC. (defendants) [Mot. Seq. 1], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff KAHSAAN KENNEDY (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d).

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained as a result of an October 9, 2017, motor vehicle accident that occurred on or about White Plains Road, near its intersection with Westchester Avenue (the Accident). Plaintiff claims that he suffered injuries to the lumbar spine, cervical spine, and left shoulder. Plaintiff argues that that the injuries satisfy one or more of the following Insurance Law 5102(d) threshold categories: permanent consequential limitation, significant limitation, and 90/180 days rule.

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Defendants move for summary judgment dismissing the complaint on the ground that plaintiff's claimed injuries are not "serious," and that any injuries or conditions from which plaintiff suffers are not causally related to the accident. Defendants also assert that plaintiff's testimony that at some point he returned to work as a cab driver post-accident proves that plaintiff cannot satisfy the criteria under the 90/180-day definition of "serious injury". In support of the motion, defendants submit an affirmation of defendants' counsel, the pleadings, plaintiff's deposition transcript, the affirmed medical report of Dr. Steven A. Renzoni (an orthopedist), and the affirmed medical report of Dr. Jessica Berkowitz (the radiologist who reviewed MRIs taken of plaintiff's shoulders).

Renzoni examined plaintiff on August 19, 2019, almost two years after the Accident. The doctor took range-of-motion measurements of the cervical, thoracic, and lumbar aspects of plaintiff's spine. He found that plaintiff had full range of motion of the cervical spine, and the thoracic spine was not tender. The objective tests of the cervical and thoracic spine were negative.

In contrast, as for the lumbar spine, Renzoni found normal flexion but noted an extension of 0 degrees (25 degrees normal), right lateral bending at 10 degrees (25 degrees normal), and left lateral bending at 20 degrees (25 degrees normal). The doctor specified that the heel-toe walk test was negative.

In terms of the shoulders, Renzoni found a full range of motion and all objective testing was negative. As to the bilateral hips, he also found a full range of motion and negative objective tests. Renzoni concluded that the examination revealed evidence of resolved sprains to the cervical and lumbar spines, bilateral shoulders, and right hip. He stated that plaintiff's complaints of pain and limitation of motion were subjective, and entirely in plaintiff's control. Renzoni opined that plaintiff was capable of functional use of the relevant body parts for normal activities of daily living.

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Berkowitz reviewed plaintiff's MRI study of the left shoulder, performed on May 15, 2019. She opines that the study shows a "tiny amount" of fluid in the subacromial/subdeltoid bursa, but this is a nonspecific showing. She found slight degenerative changes of the acromioclavicular joint and a "small amount" of tendinopathy of the distal supraspinatus tendon, related to chronic repetitive microtraumas to the rotator cuff, leading to rotator cuff degeneration. No rotator cuff tear is identified and there is no evidence of acute traumatic injury. Berkowitz found no causal relationship between the findings on the MRI and the Accident.

Plaintiff opposes the motion by submitting: his affidavit; the affidavit of Dr. Amato (chiropractor) (dated 02/24/2020); Amato's medical reports (dated 10/18/2017, 12/07/2017, and 02/03/2020); the affirmation and reports of Dr. Richard Seldes (orthopedist) (dated 11/13/2018 and 06/28/2018); the affirmation of Dr. V. Reddy's (radiologist) (dated 01/10/2020) and his MRI reports for the lumbar and cervical spine (dated 12/5/2017); the affirmation of Dr. Priyesh Patel (radiologist)(dated 01/09/2020) and his MRI reports of the left and right shoulder (dated 12/06/2017).

In sum and substance, Amato conducted examinations finding significant restrictions in cervical and lumbar ranges of motion and his EMG testing showing bilateral lumbar and cervical radiculopathies. He opines that the injuries to the cervical and lumbar spine were caused by the Accident. He also finds that the Accident further aggravated and exacerbated prior minor injuries from 2000 which were dormant.

Reddy states that the MRI reveals cervical bulges at C-3-C-6 and lumbar posterolateral annular bulge with root impingement. Patel opines that the left shoulder MRI shows a left shoulder<sup>1</sup> tear of the anterior labrum and tendinosis of the supraspinatus tendons, and finds

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<sup>11</sup> Of note, plaintiff only addresses the left shoulder in the opposition papers so that any claims based on the right shoulder are deemed abandoned.

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that degenerative conditions were not present. Amato finds that these injuries are all causally related to the Accident.

Applying the principles that govern motions for summary judgment to the record here, the court finds that defendants met their *prima facie* burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) as a result of the subject accident by submitting plaintiff's testimony, the medical records and the opinion of experts (*Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car, Inc.*, 98 NY2d 345 [2002]; *DeJesus v Pauino*, 61 AD3d 605 [1st Dept 2009]). Contrary to plaintiff's contention, defendants' expert was not required to review plaintiff's records (*see Oliveras v New York City Transit Authority*, 179 AD3d 503 [1st Dept 2020]).

In opposition, plaintiff's evidence raises triable issues of fact as to his claims of "serious injury" under the threshold categories of permanent consequential limitation and significant limitation. Plaintiff's evidence demonstrates that he received medical treatment for his claimed injuries shortly after the accident, and that he had substantial limitations in motion at a recent examination (*see Perl v Meher*, 18 NY3d 208 [2011]). The limitations of motion on the lumbar spine were also found by defendants' expert. Furthermore, Amato treated the plaintiff, reviewed the medical records and MRI reports, and found a direct causal relationship between the Accident and his pathological findings of injury to the cervical spine, lumbar spine, and the left shoulder (*see Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Additionally, even assuming the three-month gap in treatment was significant, plaintiff's affidavit raises triable issues of fact as to whether he has a reasonable explanation for his gap in treatment (*see Ramkumar v Grand Style Transportation, Enterprises, Inc.*, 22 NY3d 905 [2013]). Hence, plaintiff generates a question of fact as to whether he suffered a permanent consequential limitation or significant limitation of the cervical spine, lumbar spine, and left shoulder sufficient to constitute a "serious injury" under the Insurance Law.

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As for the 90/180-day category, the verified bill of particulars states that plaintiff was confined to bed for approximately nine months. In his affidavit and at deposition, plaintiff alleges that he was unable to work for seven months as a result of the accident. Amato opined that plaintiff was unable to undertake substantially all of his customary and daily activities for the required 90 of the first 180 days following the Accident. As such, plaintiff generates an issue of fact was to the 90/180 category (*see Engles v Claude*, 39 AD3d 357 [1st Dept 2007]; *De Araujo v Stem Cab Corp.*, 207 AD2d 823 [2d Dept 1994]).

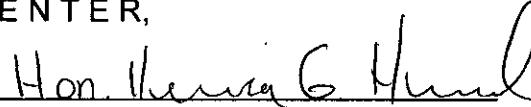
The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion by defendants MOHAMED YOUSOUF BARRY and JAMES A. LEASING, INC., [Mot. Seq. 1], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff KAHSAAN KENNEDY has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied.

The foregoing constitutes the decision and order of the court.

Dated: September 29, 2020

ENTER,

  
Hon. Veronica G. Hummel