

<b>Jose v Berns</b>
2021 NY Slip Op 30367(U)
February 8, 2021
Supreme Court, Kings County
Docket Number: 510181/2018
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 9**

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**STEVEN JOSE,**

**Plaintiff,**

**DECISION / ORDER**

**-against**

**DARIUS BERNS and AWAIS ANWER,**

**Defendants.**

**Index No. 510181/2018  
Motion Seq. No. 3  
Date Submitted: 12/3/20  
Cal No. 24**

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

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>34-41</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>54-58</u>
Reply Affirmation.....	<u>59</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 August 28, 2016 in Brooklyn, NY. Plaintiff was a passenger in defendant Anwer's taxi. The taxi came into contact with defendant Bern's vehicle at an intersection. Defendant Berns has not answered the complaint. Plaintiff sought and obtained a default order against defendant Berns, dated October 30, 2018, which provides that the inquest against defendant Berns shall abide the trial.

Defendant Anwer moves for summary judgment dismissing the complaint, contending that plaintiff did not sustain a "serious injury" as a result of the accident, as defined by Insurance Law § 5102(d).

In his Bill of Particulars, plaintiff alleges that he sustained injuries to his neck and back and to his right knee. At the time of the accident, he was 23 years old.

The movant contends that plaintiff did not sustain a “serious injury” as a result of this accident, and claims plaintiff has no injury to his spine other than a strain or sprain which has resolved, and that his knee injuries were pre-existing and are unrelated to the subject accident. In addition, movant contends that since plaintiff testified that he did not miss any days of work after the accident, he has no claim under the 90/180 category of injury. Plaintiff testified at his EBT that he did not miss any time from his job as a security guard following the accident (Tr. P. 65).

Defendant supports his motion with an attorney’s affirmation, the pleadings, plaintiff’s EBT, the affirmed IME report of an orthopedist, Raymond A. Shebairo, M.D., and a report from a radiologist, Jessica F. Berkowitz, M.D.

Dr. Shebairo examined plaintiff in 2019, three years after the accident. He reports that plaintiff did not go to the emergency room after the accident, and that he had completed a course of physical therapy. Plaintiff has not had any surgery for any of his claimed injuries. He states he was not given any of plaintiff’s medical records, and he only reviewed plaintiff’s bill of particulars. The doctor conducted an examination and reports that plaintiff’s cervical spine range of motion was normal, except his extension was 45 degrees, when 60 degrees is normal. For plaintiff’s lumbar spine, he states “Range of motion reveals flexion to 50 degrees (60 degrees normal), extension to 30 degrees (25 degrees normal), right lateral bending to 35 degrees (25 degrees normal) and left lateral bending to 35 degrees (25 degrees normal).” These are all abnormal findings. For plaintiff’s right knee, he states “Range of motion reveals flexion to 135 degrees (150 degrees normal) and extension to 0 degrees (0 degrees normal). The range of motion is functional.”

Dr. Shebairo concludes that plaintiff has sustained “1. Cervical spine sprain/strain - resolved. 2. Lumbar spine sprain/strain - resolved. 3. Right knee sprain/strain - resolved. Note: The decreased ranges of motion noted on the examination carry no medical significance and are functional.”

Dr. Berkowitz provides an affirmation describing her review of the MRIs of plaintiff’s lumbar spine and right knee. She states, with regard to his spine, “Unremarkable MRI of the lumbar spine. No disc bulges or herniations are present. There is no evidence of acute traumatic injury to the lumbar spine.” The MRI of his right knee shows, she states, “Patella Alta and slight lateral patellar subluxation. These are developmental. There is no evidence of acute traumatic injury to the knee such as fracture, traumatic bone marrow edema, meniscal or ligamentous tear.”

#### Conclusions of Law

The court finds that the defendant has not made out a prima facie case for dismissal of the complaint by establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. See, *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002].

The one and only IME report, by Dr. Shebairo, reports significantly abnormal results. He doesn’t adequately explain and substantiate, with competent medical evidence, his belief that the reported limitations “carry no medical significance and are functional” (see *McGee v Bronner*, \_\_\_AD3d\_\_\_, 2020 NY Slip Op 06772 [2020]; *Singleton v F & R Royal, Inc.*, 166 AD3d 837, 838; *Mondesir v Ahmed*, 175 AD3d 1291, 1291; *Rivas v Hill*, 162 AD3d 809, 810-811).

As the defendant has failed to meet his burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

In any event, had defendant made a prima facie case for dismissal, plaintiff's doctor's affirmation and his certified MRI report are sufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a serious injury as a result of the subject accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Plaintiff's MRI states that he has a disc bulge and a disc herniation in his lumbar spine. His doctor, Nicky Bhatia, MD, a neurologist, provides an affirmation dated May 13, 2020, which indicates quantified restrictions in plaintiff's range of motion in his lumbar spine on the date of the exam, and opine that plaintiff's injuries were caused by the subject accident. He also states that he reviewed the MRI films and agrees with the radiologist's report that the lumbar spine has a bulge and a herniation. He states "Based on the proximity of the symptoms to the traumatic injury and lack of prior such symptoms, and further based on the mechanism of injury and site and nature of pathology involved, I believe to a reasonable degree of medical certainty that the above

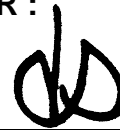
conditions and associated impairments are causally related to the traumatic injury sustained on 8/28/16.” This raises a “battle of the experts,” requiring a trial.

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

This constitutes the decision and order of the court.

Dated: February 8, 2021

ENTER:



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Hon. Debra Silber, J.S.C.