

Kogan v Ahsan
2021 NY Slip Op 31169(U)
April 8, 2021
Supreme Court, Kings County
Docket Number: 503865/2018
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

**IGOR KOGAN, NAZAR KLOVATYY
and IRENA NIKOLIN,**

Plaintiffs,

-against-

NAHIYAN AHSAN and CHAMONIX TAXI, LLC,

Defendants.

DECISION / ORDER

**Index No. 503865/2018
Motion Seq. No. 2
Date Submitted: 2/11/21
Cal No. 23**

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>20-41, 45-49</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>52-59</u>
Reply Affirmation.....	<u>60</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 that took place on July 23, 2017 on the Brooklyn side of the Hugh Carey Tunnel. Plaintiff Kogan was driving a car and the other two plaintiffs were passengers in his vehicle, which was rear ended by a vehicle owned by defendant Chamonix and operated by defendant Ahsan. Defendants move for summary judgment dismissing the complaint, contending that plaintiff Kogan (as well as the other two plaintiffs) did not sustain a "serious injury" from the accident, as defined by Insurance Law § 5102(d). It seems the co-plaintiffs settled their claims after the motion was filed. The court will disregard the papers which concern them, as plaintiffs' attorney states in his affirmation (Doc 52) that they have

settled, and a stipulation of discontinuance was erroneously mis-filed as an exhibit to the motion (Doc 47).

On the date of the accident, plaintiff Kogan was forty-nine years old. He drove home after the accident and sought medical care a few days later. He states in his bill of particulars that he sustained injuries to his cervical spine, right knee, and left wrist. He subsequently had arthroscopic surgery to his right knee in December 2017 and surgery to his left wrist in February 2018.

Defendants support their motion with an attorney's affirmation, the pleadings, plaintiff's deposition transcript and affirmed reports from an orthopedist, Jeffrey Elfenbein, M.D., who examined plaintiff, and a radiologist, Scott Springer, M.D., who examined the plaintiff's MRIs.

Dr. Elfenbein examined plaintiff on 2/19/19, a year after the accident and two years ago. Plaintiff was still complaining of pain in his neck, left wrist, left hand, and right knee. This was after both surgeries. Dr. Elfenbein did not review any of plaintiff's medical records. He conducted an exam and concludes that all of plaintiff's strains and sprains have resolved. He states "The examinee presents with a normal orthopedic examination on all objective testing. The orthopedic examination is objectively normal and indicates no findings which would result in no orthopedic limitations in use of the body parts examined. The examinee is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties."

Dr. Springer reviewed the MRI films taken of plaintiff's cervical spine, right knee, and left wrist, as well as other MRIs which were taken of plaintiff's cervical and lumbar spine in 2016 in connection with a prior 2016 motor vehicle accident, and of his right

shoulder, which was taken a year after this accident. With regard to the plaintiff's cervical spine, Dr. Springer compared the study from 2016 with the one done in 2017 following this accident. He reports considerable degenerative changes throughout the cervical spine. He states that at C3-C4, the disc bulge seen on the 2016 films has turned into a herniation, with "mild mass effect on the anterior thecal sac." He opines that "The most common cause for disc herniations is degenerative disc disease." He reports disc bulges at C4-C5, C5-C6 and C6-C7. He states, "Disc bulging has no traumatic basis." His conclusion is "With the exception of the small left paracentric disc herniation at C3-C4, the findings are unchanged from the MRI examination of 7/30/2016." With regard to the left wrist, he states that the findings are normal and have no indication of any traumatic injury, except that "There is deformity of the first metacarpal compatible with prior fracture deformity." The court is not a physician and cannot determine if this means that the carpal tunnel release surgery which plaintiff had after the accident was unrelated to the accident as it was a pre-existing condition. With regard to the plaintiff's right knee, Dr. Springer states that "There is an oblique tear in the posterior horn of the medial meniscus. Degenerative changes are a common cause of meniscal tears with the posterior horn of the medial meniscus being the most common location for degenerative tears to occur. If related to recent trauma, this tear would be associated with underlying bone marrow edema and soft tissue swelling, which are not seen on this study." He concludes that there are "No posttraumatic changes causally related to the 7/23/2017 incident."

Turning to the 90/180 category of injury, the court refers to plaintiff's EBT, as defendants have not provided any medical evidence regarding the first six months after the accident. He was deposed on January 10, 2019 [Doc 29]. Plaintiff testified that he

was in a prior motor vehicle accident in 2016. He stopped working after that accident. At the time of the deposition, he was not working. Defendants' attorney proffers the following concerning this category of injury [at Par. 35] "defendants' proof ruled out the 90/180-day category of the statute. Putting aside, for the moment, that this category requires proof that there was a causally related, medically determined injury, which we do not believe plaintiff can establish, the category requires proof that plaintiff was medically prevented from performing "substantially all" of her [sic] usual and customary activities for the requisite period." So, while defendants acknowledge in their affirmation in support at Paragraph 5 that plaintiff made a claim under this category of injury in Insurance Law 5102(d), that is, "a medically-determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 of the 180 days following the accident," defendants aver that they make a prima facie case for dismissal of this claim by stating "we do not believe plaintiff can [prove it]." This is insufficient as a matter of law.

The court finds that the defendants have failed to meet their burdens of proof as to all claimed injuries and all applicable categories of injury and that the motion must be denied. Accordingly, it is unnecessary to consider the papers submitted by the 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 conclusion, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: April 8, 2021

ENTER:



Hon. Debra Silber, J.S.C.