SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9
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MERZIL VALET, JEAN P. MONESTIME, and YVES VOLCY,

Plaintiffs,

-against-

MOHAMMED ALAM and MAXIMILIEN GRIFFON,

Defendants.
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DECISION / ORDER

Index No.: 511312/2018

Motion Seq. No. 2

Submitted: 08/12/2021

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

Papers	**NYSCEF Doc.**
Notices of Motion, Affirmations, and Exhibits Annexed	27-52
Affirmations in Opposition and Exhibits Annexed	55-88
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Upon the foregoing cited papers, the Decision and Order on this motion is as follows:

This is an action for personal injuries arising from a motor vehicle accident that occurred on May 28, 2017, near the intersection of Canal Street and Mulberry Street in New York, NY. The vehicle operated by defendant Alam and owned by defendant Griffon rear-ended the vehicle operated by plaintiff Valet when it was stopped for a red light. Plaintiffs Monestime and Volcy were passengers in Valet's vehicle. Plaintiff Valet alleges that he sustained injuries to his left shoulder, lumbar spine, and cervical spine. Valet was 65 years old at the time of the accident. Plaintiff Monestime claims injuries to his right knee, left knee, cervical spine, and lumbar spine. Monestime was 54 years old at the time of the accident. Plaintiff Volcy claims injuries to his left knee, right knee, left

shoulder, cervical spine, and lumbar spine. Volcy was 50 years old at the time of the accident. The police were not contacted when the accident occurred, but Valet completed an accident report (MV-104 Form) the following day.

Defendants now move, pursuant to CPLR 3212, for summary judgment and an order dismissing the complaint on the grounds that none of the three plaintiffs have sustained a "serious injury" within the meaning of Insurance Law § 5102 (d). Plaintiffs oppose the motion.

Defendants submit the pleadings, transcripts of each plaintiff's EBT, and affirmations from their medical experts Dr. Dana A. Mannor, M.D. (orthopedist) and Dr. Audrey Eisenstadt, M.D. (radiologist) for each of the plaintiffs.

Plaintiff Valet

Valet testified that he first sought medical treatment at Linden West Medical P.C. (hereafter, Linden) in Brooklyn, New York, about seven days after the accident with pain in his neck, lower back, and left shoulder. He received about four months of physical therapy treatment. He testified at his EBT that he was in a prior accident in 2010 in which his vehicle was also struck in the rear (Doc 36 at Page 36).[1] He testified that he was a taxi driver at the time of the accident (though he was not working on the day of the accident). He said that he missed 22 days of work as a result of this accident, but only "because the car was in the shop," and that he did not make any worker's compensation or disability claims (Doc 36 at 36-38). He said that he returned to work after his car was repaired (Doc 36 at 38).

[1] He brought an action, *Valet v Poveda*, et al, 504228/12, and testified that he sustained injuries from that accident to his neck and back (Doc 28 Page 6) and had MRIs of both.

Dr. Mannor examined Valet for defendants on November 19, 2020. She measured the range of motion for, and performed various objective tests to, plaintiff's cervical spine, lumbar spine, and left shoulder (Doc 43). She found all results on these tests to be normal, and her conclusion is that Valet sustained sprains/strains to those body parts, all of which had resolved by the date of her exam. She found no evidence of orthopedic disability, and opines that Valet is capable of working and performing his activities of daily living.

Dr. Eisenstadt reviewed the MRI films of Valet's left shoulder which were taken on July 3, 2017, a little over a month after the accident occurred. She found the left shoulder MRI to reveal a chronic, not traumatic, labral tear and other "changes [that] are compounded by the degenerative joint disease seen at the acromioclavicular joint with hypertrophic bony spurring and capsular expansion seen." She concludes that plaintiff's left shoulder changes are "developmental and degenerative changes involving the acromion and acromioclavicular joint, which have no traumatic etiology or association with the incident." She also reviewed the MRIs of Valet's cervical spine, which were taken on August 22, 2017 (eight weeks after the accident) and only found degenerative changes unrelated to the subject accident. She also reviewed the MRIs of Valet's lumbar spine taken on August 22, 2017, which she states show degenerative changes, including desiccation, herniations, and bulges, which she opines must have predated the accident. She found no traumatic injuries in reviewing plaintiff's MRIs and concludes that Valet did not sustain any injuries as a result of this accident.

The court finds that defendants have established a prima facie case for summary judgment, by establishing Valet did not sustain a "serious injury" under any of the applicable categories of Insurance Law § 5102 (d). Valet's testimony establishes that

he missed only 22 days of work while his car was being repaired, and that he returned to work thereafter, eliminating the "90 out of 180 days" category. Defendants' submissions also eliminate the permanent consequential limitation and significant limitation of use categories, as their radiologist found that all of Valet's left shoulder, lumbar spine, and cervical spine injuries were pre-existing/long-standing or degenerative changes unrelated to the subject accident, as indicated on the MRI films taken shortly after the accident. Defendants' orthopedist noted no reductions or restrictions in Valet's range of motion or any other limitations when she examined him in November of 2020.

However, plaintiffs' submissions raise a triable issue of fact sufficient to defeat the motion as to plaintiff Valet. The affirmation of Dr. Osei-Tutu, Valet's treating physician, raises an issue of fact as to whether Valet sustained a permanent consequential limitation of use or a significant limitation of use of his left shoulder, lumbar spine, and cervical spine.

Valet submits reports from his treating physician, Dr. Bernard Osei-Tutu, which span the time period from June 2017 to August 2017, a more recent [affirmed] report from May 4, 2021, and an affirmation dated July 27, 2021. In his recent affirmation, Dr. Osei-Tutu authenticates his earlier reports "by reference" (Doc 68). Dr. Osei-Tutu did not examine Valet between August 22, 2017 and May 4, 2021. Dr. Osei-Tutu endeavors to explain Valet's gap in treatment, stating that he informed Valet to cease physical therapy and to perform the exercises at home because further physical therapy would have had only a "palliative effect."

Dr. Osei-Tutu ordered MRIs of Valet's left shoulder, cervical spine, and lumbar spine in June and August 2017, which were conducted by Dr. David R. Payne, a

radiologist. Plaintiff submits copies of Dr. Payne's 2017 MRI reports (dated 7/3/17 and 8/22/17), which Dr. Payne subsequently authenticates in March 2021. Dr. Payne concludes in his recent affirmation that the injuries observed in the 2017 MRIs "were caused by the automobile accident of May 28, 2017" (Docs 61-62). Dr. Payne did not examine Valet at any time, of course, and he does not say that he reviewed any of his medical records other than the MRIs themselves.

In his affirmation, Dr. Osei-Tutu states that plaintiff presented with pain and reduced range of motion in his right shoulder, lumbar spine, and cervical spine, at his initial visit one week after the accident, and he continued to have a reduced range of motion in these body parts through September 2017. When Valet was re-examined in May 2021, he still presented with a reduced range of motion in his left shoulder, lumbar spine, and cervical spine, which Dr. Osei-Tutu measured with a goniometer. He concludes:

> "Based upon my interviews with Mr. Valet, . . . Mr. Valet's medical history as he related it, my examinations of Mr. Valet on June 13, 2017, July 18, 2017, August 31, 2017, and May 4, 2021, following 3 months of physical therapy, my review of MRIs of Mr. Valet's cervical spine, lumbar spine and left shoulder, all taken at Southwest Medical Imaging on July 3 and August 22, 2017, I conclude within a reasonable degree of medical certainty that as a result of the automobile accident of May 28, 2017, Merzil Valet sustained . . . . "disc herniations in the lumbar and cervical spine as well as a tear of the supraspinatus tendon which cause permanent and significant decrease in motion to all three areas of the body" (Doc 68 Page 6).

Dr. Osei-Tutu's findings are supported by the radiologist Dr. Payne's affirmation. According to Dr. Payne, the left shoulder MRI indicates that Valet had a "partial tear of central articular sided fibers of the supraspinatus at insertion," "articular sided partial tear of superior and central fibers of subscapularis at their insertion," and a "Type I SLAP lesion" (Doc 61). The cervical spine MRI indicated that Valet had a "broad right

paracentral herniation at C3-4 with impingement upon the cord and right C5 root," a "broad central herniation at C4-5 with thecal sac indentation and impingement upon originating C6 roots. Mild biforaminal bony stenosis secondary to uncovertebral and facet joint hypertrophy," a "right paracentral herniation at C5-6 with thecal sac indentation," "central herniation at C6-7 with thecal sac indentation. Mild biforaminal stenosis," and "right foraminal herniation at C7-T1 with impingement upon the exiting C8 root" (Doc 62). The lumbar spine MRI indicated "herniations at L3-4, L4-5, stenosis, and a herniation at L5-S1, with impingement" (Doc 88). Dr. Payne concludes that "the tear of the supraspinatus tendon and the tear of the subscapularis tendon," the "disc herniations at C3-4, C4-5, C5-6, C6-7 and C7-T1," and the "disc herniations at L3-4, L4-5 and L5-S1" were all caused by the subject accident (Docs 61-62, 88).

Contrary to defendants' contentions, Valet's doctor's failure to explicitly address the radiologist's contention that the injuries are solely degenerative in nature does not render Valet's submissions insufficient. "To the extent that [plaintiff's] reports did not specifically address the findings in the report submitted by the defendants that the abnormalities in the tested areas were degenerative, rather than traumatic, the findings of the plaintiff's doctors that [the] injuries were indeed traumatic and were causally related to the [subject accident] implicitly addressed the defendants' contentions that the injuries were degenerative" (*Fraser-Baptiste v New York City Tr. Auth.*, 81 AD3d 878, 879 [2d Dept 2011]; *see also Harris v Boudart*, 70 AD3d 643, 645 [2d Dept 2010]; *Sinfelt v Helm's Bros., Inc.*, 62 AD3d 983 [2d Dept 2009]). Valet's doctors attribute the plaintiff's injuries to the subject accident, not to any degenerative or pre-existing condition, which has the effect of implicitly addressing the determination of defendants'

radiologist that the injuries indicated on the MRI films are all pre-existing, degenerative, and not causally related to the accident.

Plaintiff Monestime

Monestime testified that he was a rear-seat passenger in the vehicle operated by Valet on the date of the accident (Doc 38). They were driving to New Jersey to help a friend. He said that he lost consciousness when the vehicle was rear-ended, that he was not wearing a seatbelt at the time, and that several parts of his body struck the inside of the vehicle (Doc 38 at 18). He first sought treatment about five days after the accident at Linden, the same facility where Valet was treated. He testified that he received physical therapy treatment for about six months. He was also treated by Dr. Osei-Tutu, who referred him for MRIs of his cervical and lumbar spine and of his right knee, and he subsequently underwent arthroscopic surgery to his right knee (Doc 38 at 23-25). He also testified that he was not working at the time of the accident, he was confined to bed/home rest for a period of time after his surgery, and that he was able to perform his usual activities of daily living and recreational activities after the accident, but with pain (Doc 38 at 31-32).

Dr. Mannor examined Monestime on November 19, 2020. Her conclusion is that plaintiff's "cervical spine sprain/strain, resolved; thoracic spine sprain/strain, resolved; lumbar spine sprain/strain, resolved; left knee sprain/strain, resolved; and right knee post-arthroscopic surgery, healed (Doc 44)." She found Monestime's range of motion to be full and unrestricted for each of these body parts, and she found no evidence of a disability. Dr. Mannor concludes that he is able to work and to perform all activities without restrictions.

Dr. Eisenstadt reviewed the MRIs taken on 8/23/17 of Monestime's cervical spine, lumbar spine, and right knee (Doc 50). She states that "review of the cervical spine MRI examination performed just under three months following the incident reveals degenerative disc disease involving the osseous, ligamentous and intervertebral disc structures with no traumatic etiology." She reports that the lumbar spine MRI also "revealed degenerative changes with no traumatic origin." Dr. Eisenstadt's review of the plaintiff's right knee MRI states that the films show "tricompartmental degenerative joint disease" and other changes which "are well over six months in origin and are typical in appearance and distribution for arthritis." Additionally, she states the "parameniscal cyst could not have occurred in three months' time and indicates that the meniscal tears are longstanding in duration." Defendants' radiologist reviewed Monestime's MRIs but did not examine plaintiff.

Defendants' radiologist's conclusion that the MRI films show only degenerative abnormalities not causally related to the subject accident is "insufficient to establish that plaintiff's pain might be . . . unrelated to the accident" (*see Pommels v Perez*, 4 NY3d 566, 577-579 [2005]; *see also De La Cruz v Hernandez*, 84 AD3d 652 [1st Dept 2011]). Further, while plaintiff testified that he was unemployed at the time of the accident, his testimony regarding the first 180 days after the accident does not eliminate the "90 out of 180 days" category. Monestime testified that he "could not" work after the accident, and that he became "ill," and had a "personal problem," and that after the accident "it was not a time for me to leave my home" (Doc 38 at 31-32). Defendants' counsel never clarified at the EBT whether Monestime was referring to the injuries he allegedly sustained as a result of the accident or something else. Therefore, defendants have not

made a prima facie case for the "90 out of 180 days" category of injury in the Insurance Law with plaintiff's EBT testimony.

Since defendants have failed to meet their burden of proof as to all of plaintiff's claimed injuries and all applicable categories of injury in Insurance Law § 5102 (d), specifically as to the "90 out of 180 days" category, the motion must be denied. 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]).

Even if defendants had established a prima facie case for summary judgment, Monestime's submissions are sufficient to overcome the motion and raise a triable issue of fact. His treating physician, Dr. Osei-Tutu, states in his July 27, 2021 affirmation:

> "Based upon my interviews with Mr. Monestime, my review of the MV-104 dated May 28, 2017, Mr. Monestime's medical history as he relates it, my examinations of Mr. Monestime on June 20, 2017, July 25, 2017, September 19, 2017, November 30, 2017, January 18, 2018, and April 27, 2021 following 7 months of physical therapy, my review of MRIs of Mr. Monestime's cervical spine, lumbar spine and right knee all taken at Southwest Medical Imaging on August 23 and 24 of 2017, I conclude within a reasonable degree of medical certainty that as a result of the automobile accident of May 28, 2017, Jean Philippe Monestime sustained the following injuries to his cervical spine, lumbar spine and right knee:
>
> CERVICAL SPINE: Central disc herniation indenting thecal sac; Left paramedian disc herniation at C4-5 indenting thecal sac; Disc herniation at C5-6 impinging upon the spinal cord; Disc herniation at C7-T1 impinging exiting C8 root.

LUMBAR SPINE: Disc bulge at L4-5; Left paracentral disc herniation at L5-S1 impinging upon the exiting L5 nerve root.

RIGHT KNEE: Tear of the posterior horn of the medial meniscus; Tear of the anterior horn of the lateral meniscus" (Doc 70 at 6).

Dr. Osei-Tutu also states that "Monestime sustained injuries resulting in a permanent consequential limitation of use of a body organ or member as well as a significant limitation of use of a body function or system with regard to the cervical spine, lumbar spine and right knee. Specifically, Mr. Monestime sustained disc herniations in the lumbar and cervical spines as well as meniscal tears of the right knee which cause permanent and significant decrease in motion to all three areas of the body" (*id.*). Dr. Osei-Tutu also explained Monestime's gap in treatment, from February 2018 to the time of his EBT, stating "after Mr. Monestime received physical therapy from June 20, 2017 to January 18, 2018, I determined that any additional therapy would only have a palliative effect. Therefore, I advised him to cease therapy and instead to perform home exercises and use medical supplies which were previously provided."

Additionally, Dr. Ajoy Sinha, Monestime's knee surgeon, found, in his affirmed report dated October 30, 2017 (authenticated July 22, 2021), that Monestime presented with a meniscal tear, he recommended surgery, and stated that Monestime had a "Temporary/Partial (Moderate 50% for bilateral knee) degree of disability" (Doc 75) for some period of time. His operative report is Doc. 76.

Plaintiff Volcy

Volcy also first sought medical treatment at Linden about a week after the accident due to pain he was experiencing in his neck, back, both shoulders, and both knees. He received physical therapy for about four months. He testified that he was in

a prior accident in 2012 and injured his left shoulder in that prior accident. He commenced a lawsuit in connection with that accident, which was settled. Volcy was not asked at his EBT whether he was unable to perform any of his usual and customary daily activities after the accident. Further, while he testified that he was not working at the time of the accident, he said that at the time of the EBT (June 2019) he had been a fulltime taxi driver since March 2018. He was not asked any questions about his employment or his activities in the six months after the accident.

While Dr. Mannor, defendants' orthopedist, found that Volcy's range of motion was normal and opines that Volcy's sprains/strains in his neck, back, shoulders, and knees had all resolved, she did not examine Volcy until November 2020, more than three years after the accident. Defendants' radiologist reviewed the MRI films of the plaintiff's left shoulder, left knee, right knee, cervical spine, and lumbar spine and found "no traumatic origin" for the abnormalities she observed, and she characterizes all of the abnormalities as degenerative in nature and unrelated to the subject accident.

Nonetheless, the court is constrained to conclude that defendants have not made a prima facie case for dismissal. Specifically, defendants' submissions in support of their summary judgment motion do not establish that Volcy did not have an injury that would qualify under the significant limitation of use category, or that he was not prevented from performing substantially all of his daily activities for 90 out of the first 180 days following the accident. Defendants' orthopedist examined Volcy more than three years after the subject accident and defendants' counsel did not ask Volcy at his EBT whether he was prevented from performing his usual daily activities within the applicable 180-day period. Thus, defendants have not eliminated the "90 out of 180 days" category, necessitating denial of the motion with regard to plaintiff Volcy.

When a defendant has failed to make a prima facie case with regard to all of the plaintiff's claimed injuries and all of the 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, even if defendants had met their prima facie burden for summary judgment, Volcy would have been found to have overcome the motion, as there are triable issues of fact raised by his submissions in opposition to the motion. Specifically, there are issues of fact raised by plaintiff's doctor's affirmations, which create a "battle of the experts" sufficient to overcome the motion.

Accordingly, it is **ORDERED** that defendants' motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

Dated: November 30, 2021

ENTER:

Hon. Debra Silber, J.S.C.