SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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TERRENCE GITTENS,

Plaintiff,

-against-

ISMAEL LIMO INC. and MICHAEL MAUROSE,

Defendants.

---x

DECISION / ORDER

Index No. 507595/2019
Motion Seq. No. 2
Date Submitted: 7/15/21

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.....	24-31
Affirmation in Opposition and Exhibits Annexed.....	47-51
Reply Affirmation.....	54

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action which arises from a motor vehicle accident which took place on June 12, 2018 at the intersection of Eastern Parkway and Buffalo Avenue. Plaintiff testified that his car was hit on the passenger side by defendants' car, as he crossed through the intersection with the right of way. Plaintiff declined medical attention at the scene. He testified that he was in a lot of pain but was only a probationary employee for the City of New York and did not yet have insurance. His car was towed to an auto mechanic and he left the scene in the tow truck. Then, a family member picked him up. He made an appointment to see a doctor as soon as he could. At the time of the accident, plaintiff was approximately thirty-two years of age. In his Bill of Particulars, plaintiff claims that as a result of the accident, he sustained injuries to his cervical and thoracic spine and

his left shoulder.

Defendants contend that they are entitled to summary judgment dismissing the complaint as plaintiff did not sustain serious injuries as a result of the accident, as defined by Insurance Law § 5102 (d). Defendants support their motion with an attorney's affirmation, the pleadings, plaintiff's deposition transcript, and the affirmed IME reports from an orthopedist and a radiologist.

Dr. Gregory Chiaramonte, an orthopedist, examined plaintiff on September 24, 2020 on behalf of the defendants. Plaintiff told him that he treated for six months after the accident. He told him about his prior accident. Plaintiff told him that he still had pain in the neck, mid back, low back, and left shoulder. Dr. Chiaramonte reports that plaintiff had abnormal ranges of motion in his cervical spine, specifically, 5 degrees of right lateral flexion (45 degrees normal) and 10 degrees of left lateral flexion (45 degrees normal), 10 degrees of right and left rotation (80 degrees normal). He explains this by saying "the claimant voluntary restricted ROM, symptom magnification is noted." Dr. Chiaramonte tested the range of motion in plaintiff's thoracic spine and reports that it was normal. He tested the range of motion in plaintiff's lumbar spine, although plaintiff's Bill of Particulars does not say he injured his lumbar spine in this accident. The results were normal. Finally, he examined the plaintiff's left shoulder. The results were abnormal. He states he found "forward flexion at 90 degrees (180 degrees normal), extension at 40 degrees (40 degrees normal), abduction at 90 degrees (180 degrees normal), adduction at 30 degrees (30 degrees normal), internal rotation at 70 degrees (80 degrees normal), and external rotation at 70 degrees (90 degrees normal)." Again, he states that "the claimant voluntary restricted ROM, symptom magnification is noted." The doctor concludes that plaintiff's

sprains and strains have all resolved, and "there is no evidence of an orthopedic disability, permanency or residuals."

Dr. Jessica Berkowitz, a radiologist, reviewed the MRIs of plaintiff's cervical spine and left shoulder. The cervical spine MRI was performed on December 15, 2018, and she states, after reviewing the films, "Disc bulge, C5-6. Disc bulge slightly asymmetric to the right and associated annular fissure, C6-7. Disc bulges and most annular fissures are chronic and degenerative in origin. There is no evidence of acute traumatic injury to the cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma. . . Evaluation of this MRI examination reveals no causal relationship between the claimant's alleged accident and the findings on the MRI examination."

After reviewing the plaintiff's MRI of his left shoulder, Dr. Berkowitz states she observed "Minor degenerative changes of the acromioclavicular joint. Minor tendinopathy and perhaps minimal tearing of the distal supraspinatus tendon. These rotator cuff abnormalities are related to chronic repetitive microtrauma to the rotator cuff. This wear and tear on the rotator cuff leads to rotator cuff degeneration, tendinopathy and tearing. Increased soft tissue in the region of the rotator interval and thickening of the glenohumeral joint capsule in the axillary pouch. These findings may be seen in the setting of adhesive capsulitis. Adhesive capsulitis is an inflammatory condition of unknown etiology. Serpiginous structure that is high signal on fat suppressed long TR images inferior to the humeral head in the region of the axillary pouch. The etiology of this latter finding is unclear on the basis of MRI review alone but the tortuosity of this structure suggests a venous varicosity. A venous varicosity would be developmental. There is no evidence of acute traumatic injury to the shoulder such as fracture, traumatic bone marrow

edema or musculotendinous junction tear. Evaluation of this MRI examination reveals no causal relationship between the claimant's alleged accident and the findings on the MRI examination."

Defendants contend that their medical evidence, combined with plaintiff's testimony at his EBT, eliminate all categories of injuries in the statute. Plaintiff testified at his EBT that he missed only two weeks from work after the accident [EBT Page 12], and defendants argue that this testimony rules out the 90/180-day category of injury.

The court finds that defendants have not made a *prima facie* showing of their entitlement to summary judgment (*see Toure v Avis Rent A Car Sys*., 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). While plaintiff's testimony that he missed only two weeks of work after the accident makes a prima facie showing on the 90/180-day category of injury (*see Dacosta v Gibbs*, 139 AD3d 487, 488 [1st Dept 2016] ["Plaintiff's testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked "light duty" is fatal to her 90/180–day claim"]; *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013] [plaintiff returned to work on a partial basis during the relevant period of time]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007] ["The plaintiff testified at trial that he missed only one month of work, that he then returned to work on a part-time basis, and that, after another month, he had resumed working on a full-time basis"]), defendants have not made a prima facie case for the other categories of injury.

The court finds that the IME report of Dr. Chiaramonte, which finds significant limitations in plaintiff's range of motion in his cervical spine and left shoulder, cannot be interpreted by the court, as he proposes, to mean the plaintiff faked his restrictions. This raises the issue of the doctor's credibility, which cannot be decided by the court.

Credibility issues are for the jury (*see Ocampo v Boiler*, 33 AD3d 332 [1st Dept 2006]; *Bradley v Soundview Healthcenter*, 4 AD3d 194, [1st Dept 2004]). Plaintiff testified that his doctor has recommended that he have arthroscopic surgery to his left shoulder to repair the tear. He testified that he intends to have the surgery. He testified that his activities are restricted, that he cannot exercise, play sports, or clean his home. He now has a desk job with the NYC Department of Education.

As the defendants have failed to meet their 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 defendants made a prima facie case for dismissal, plaintiff's treating doctor's affirmation is 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 doctor, Charles Kaplan, M.D. provides an affirmation (Docs 49 and 51) indicating significant and quantified restrictions in plaintiff's ranges of motion, from tests performed contemporaneously with the accident and during the ten months the plaintiff was treated at his facility, and he opines that plaintiff's injuries were caused by the subject accident. He states "it is my opinion within a reasonable degree of medical certainty that

Mr. Gittens sustained the following permanent injuries as a result of the motor vehicle accident that occurred on June 12, 2018: partial tear of the supraspinatus tendon of the left shoulder; tear of the superior labrum adjacent to the biceps tendon of the left shoulder; and cervical strain with increased symptomatology of prior cervical disc injuries and radiculopathy. Furthermore, I opine that Mr. Gittens' injuries as described above are traumatically induced, permanent in nature and causally related to the accident of June 12, 2018."

Plaintiff also provides an affirmation (Doc 50) from the radiologist who read his MRI films. Dr. John Himmelfarb states that the cervical spine had two herniations and the left shoulder had tears in two places, a partial tear in the supraspinatus tendon and a superior labral tear. Dr. Kaplan's affirmation, particularly on the issue of causality, clearly raises a "battle of the experts," requiring a trial.

Accordingly, the motion is denied.

This constitutes the decision and order of the court.

Dated: July 22, 2021

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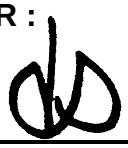

Hon. Debra Silber, J.S.C.