

**Cao v Makarov**

2022 NY Slip Op 30006(U)

January 3, 2022

Supreme Court, Kings County

Docket Number: Index No. 506932/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

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

X

JIMMY G. CAO,

Plaintiff,

DECISION/ORDER

-against-

Index No. 506932/2019  
Motion Seq. No. 4 & 5

OLEG MAKAROV, PHILLIP ITINGEN  
and ALEXANDER ITINGEN,

Defendants.

X

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>78-89</u>
Notice of Cross Motion, Affirmations, Affidavits, and Exhibits Annexed...	<u>90-102</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>106-111, 118, 123</u>
	<u>112-116,124</u>
Reply Affirmation.....	<u>120, 126</u>

**Upon the foregoing cited papers, the Decision/Order on these motions is as follows:**

In this personal injury action arising from a motor vehicle accident, defendants move and cross-move, for summary judgment and an order dismissing plaintiff's complaint, pursuant to CPLR 3212, based upon their contention that the plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d).

The accident in question occurred on January 5, 2019, on Shore Parkway near its intersection with Guider Avenue, in Brooklyn, New York. At the time of the accident, the plaintiff was, he claims, at a complete stop when he was hit in the rear by the Itingen's vehicle, which was hit in the rear by defendant Makarov's vehicle. Plaintiff claims (in his Bills of Particulars) that he sustained injuries to his cervical, thoracic, and lumbar spine, to

his left shoulder, right wrist, left knee, and that, as a result of the accident, he needed surgery to repair his left inguinal hernia. Plaintiff drove his car home after the accident, and a few hours later, he went to the emergency room at Coney Island Hospital due to pain. He was approximately thirty-one years old on the date of the accident.

The defendants' motion and cross motion rely upon the same proof and arguments. In support of the motions, the defendants offer the pleadings, the plaintiff's bills of particulars, plaintiff's EBT, and affirmed reports from two IME doctors.

Plaintiff testified at his EBT that he missed a few days from work after the accident, [Doc 86, Page 92] so, with regard to the "90/180" category of injury, defendants have established that plaintiff did not have an injury that meets the requirements.

The first report is from Dr. Howard Levy, an orthopedist. He examined plaintiff on March 10, 2020, a little over a year after the accident. He tested the range of motion in plaintiff's spine, and reports that all tests had normal results. There was no spasm or tenderness, he reports. He also tested the range of motion in plaintiff's left shoulder, and also found normal results, no tenderness or swelling, and no crepitus. Plaintiff complained of pain to his neck, low back, and left shoulder, without any radiating pain, and he complained of headaches. He concludes that, from the accident, plaintiff sustained sprains to his cervical and lumbar spine and to his left shoulder, which had resolved by the date of his exam.

Dr. Stuart Stauber, an internist, examined plaintiff on March 17, 2020, a few days after Dr. Levy' exam. He indicates that plaintiff complained of pain in his neck and back, and that he had "difficulty bending and lifting with his left arm." Dr. Stauber tested the range of motion in plaintiff's spine and obtained abnormal results for left and right lateral flexion of the cervical spine, and for all of the measurements of the plaintiff's lumbar spine.

He concludes “after reviewing the claimant’s medical file, taking a complete history and performing a physical examination, there appears to be a cause and effect relationship between the injuries sustained and the motor vehicle accident.” He then states that the plaintiff’s diagnosis is “cervical and lumbar sprain and strain.” Dr. Stauber did not examine the plaintiff’s left shoulder. He then states that plaintiff does not need any further physical therapy but says “comment is deferred to the appropriate specialist with respect to the claimant’s continued symptomatology pertaining to his neck and back (i.e., pain management and an orthopedist).”

“Contradictory findings raise triable issues of fact” (see *Martinez v Pioneer Transp. Corp.*, 48 AD3d 306 [1st Dept 2008]). That court, faced with this issue, said “[w]here conflicting medical evidence is offered [by defendant] on the issue of whether a plaintiff’s injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury. Since defendants never sustained their initial burden of establishing that each of the Martinez plaintiffs had not suffered a serious injury causally related to the accident, the burden of proof never shifted to them” citing *Whittaker v Webster Trucking Corp.*, 33 AD3d 613 [1st Dept 2006] [internal citations omitted].

The court finds that the defendants have not made a *prima facie* showing of their entitlement to summary judgment with the affirmed IME reports of Dr. Levy and Dr. Stauber, written after examinations of the plaintiff performed only a week apart, which contradict each other.

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 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]). Here, the contradictory reports of defendants' two doctors prevent the court from concluding that defendants have established their entitlement to dismissal of the plaintiff's complaint.

Accordingly, it is **ORDERED** that defendants' motions for summary judgment are both denied.

This constitutes the decision and order of the court.

Dated: January 3, 2022

ENTER:



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Hon. Debra Silber, J.S.C.