

McDonald v Kochar
2022 NY Slip Op 32180(U)
July 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 504385/2016
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

EDDIE Mc DONALD and STEVE MORANT,

Plaintiffs,

-against-

**SUMIT KOCHAR AND "JOHN DOE" WHO'S TRUE
NAME IS PRESENTLY UNKNOWN,**

Defendants.

DECISION/ORDER

Index No. 504385/2016

Motion Seq. No. 4

Date Submitted: 3/17/2022

X

SUMIT KOCHAR,

Third-Party Plaintiff,

-against-

EDDIE MCDONALD,

Third-Party Defendant.

X

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, Affirmations, Affidavits, and Exhibits Annexed.....	<u>54-77</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>83-93</u>
Reply Affirmation.....	<u>105-107</u>

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

This is a personal injury action arising from an automobile accident that occurred on January 6, 2016, at or near the intersection of Tapscott and Howard Avenues in Brooklyn, New York. At the time of the accident, plaintiff Eddie McDonald was driving his vehicle on Tapscott Avenue. Plaintiff McDonald testified that he never saw the defendant's vehicle before the impact, which was to the "left front side" of his vehicle. He further testified that the other vehicle, which was a black Cadillac Escalade, fled the scene, but that his passenger, plaintiff Steve Morant, was able to get the license plate of

the defendant's vehicle. Plaintiff McDonald did not request an ambulance, and was not treated at a hospital emergency room. Plaintiff McDonald left the scene and went to his job as a glass installer for the New York City Housing Authority. He subsequently sought medical treatment. Plaintiff Morant has settled his claims and discontinued his suit [Doc 44].

In his bill of particulars and supplemental bill of particulars, the plaintiff (McDonald) claims that as a result of the accident, he injured his left shoulder, neck and back. Plaintiff underwent arthroscopic surgery for the injuries to his left shoulder on March 24, 2016. At the time of the accident, the plaintiff was 50 years old. At his deposition, he testified that he missed no time from work as a glass installer for the NYCHA, either after the accident or after the surgery to his left shoulder [Doc 67].

The defendant¹ moves for summary judgment dismissing the complaint. He contends that plaintiff McDonald did not sustain a "serious injury" as defined by Insurance Law § 5102(d). In support of the motion, the defendant submits an attorney's affirmation, copies of the pleadings, the plaintiff's bills of particulars, the plaintiff's deposition transcript, an affirmation from Dr. Elizabeth Ortof, a neurologist, who examined the plaintiff on behalf of the defendant, an affirmation from Dr. Pierce Ferriter, an orthopedic surgeon, who examined the plaintiff on behalf of the defendant, and an affirmation from Dr. Scott Springer, a radiologist, who reviewed the MRIs of the plaintiff's cervical spine and lumbosacral spine, but not the MRI of his left shoulder.²

¹ As only defendant owner has been identified, the court will refer to "defendant," not "defendants" although defendant owner may not have been driving.

² The report is included by plaintiff in Doc 89. There is no dispute that this MRI was performed prior to Dr. Springer's report.

Dr. Ortof (neurologist) examined the plaintiff on March 13, 2018, approximately twenty-six months after the accident. She reviewed none of his medical records. She tested the range of motion in the plaintiff's cervical and lumbar spine, but not his left shoulder, and reported completely normal results. She states that the plaintiff's "[m]otor exam revealed 5/5 strength of the arms and legs, with normal tone and bulk. There was slight pain-limited strength of the left shoulder secondary to pain. No involuntary movements were noted. Reflexes were I+ in the biceps and triceps bilaterally and 1+ in the brachioradialis bilaterally. Reflexes were 1+ in the knees and 1+ in the ankles bilaterally. There was no Babinski reflex. Coordination revealed intact finger-to-nose and intact fine finger movements bilaterally." Her impression was that it was a "[n]ormal neurological exam," and she opines that the plaintiff "is capable of working as a glass installer. He is capable of performing all normal activities of daily living from a neurological perspective. There is no disability or permanency from a neurological perspective. I defer comment on his orthopedic issues to the appropriate specialist."

Dr. Ferriter examined the plaintiff on February 11, 2019, a little more than three years after the accident. He tested the range of motion in the plaintiff's cervical and lumbar spine and reported completely normal results. He also tested the range of motion in the plaintiff's left shoulder. His findings were not completely normal. He noted that plaintiff's internal rotation was 70 degrees, when normal is 80 degrees. Dr. Ferriter reported that the other ranges of motion in the plaintiff's left shoulder were normal. In his report, he states that the only documents he reviewed were the plaintiff's bill of particulars and supplemental bill of particulars. He did not review the plaintiff's operative report from the surgery to plaintiff's left shoulder or any of the plaintiff's medical records. Dr. Ferriter opines that the plaintiff sustained a "[c]ervical spine sprain/strain" and a

“[l]umbar sprain/strain”, both of which are “resolved” and concludes that “[t]he 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 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.”

However, Dr. Ferriter’s report essentially fails to address the plaintiff’s claimed injuries to his left shoulder, instead simply opining that the plaintiff is “[s]tatus post left shoulder surgery on 3/24/2016 – healed by exam.” He fails to mention or opine on the plaintiff’s claims that he sustained a rotator cuff tear and a labrum tear. He also fails to address or explain the deficits that he noted in the plaintiff’s range of motion in his left shoulder, despite his assertion at the end of his report that the plaintiff’s injuries are either “resolved” or “healed” and that “[t]he examinee presents with a normal orthopedic examination on all objective testing.” He also fails to mention, comment, or opine on the plaintiff’s claims of cervical and lumbar disc herniations and bulges, which plaintiff claims were caused by the accident. The court notes that Dr. Ferriter is silent on the issue of whether the plaintiff’s injuries are causally related to the accident.

The defendant’s radiologist, Dr. Springer, did not examine the plaintiff. He only reviewed the MRI films of the plaintiff’s cervical and lumbar spine, but not the MRI of the plaintiff’s left shoulder [Doc 77]. He concluded that the cervical spine MRI demonstrated “mild degenerative changes from C3-4 to C6-7. He noted disc bulges and disc herniations. He describes the findings: “C3-C4 demonstrates a mild disc bulge with mild mass effect on the anterior thecal sac. There is a small right neural foraminal herniation with a disc osteophyte complex. This causes moderate narrowing of the right

neuroforamen with mass effect on the exiting right C3 nerve root. There is mild resultant narrowing of the left neuroforamen without mass effect on the exiting C3 nerve root. There is mild narrowing of the central canal at this level, which is secondary to the herniation. C4-C5 demonstrates a mild left paracentric disc herniation. There is a left-sided disc osteophyte complex. This causes mild mass effect on the anterior thecal sac. There is contact with the ventral surface of the cord and associated deformity. There is no underlying syrinx. There is moderate resultant narrowing of the left neuroforamen with mass effect on the exiting left C4 nerve root. There is mild resultant narrowing of the right neuroforamen without mass effect on the exiting nerve root. C5-C6 demonstrates bilateral neuroforaminal herniations with a disc osteophyte complex. There is moderate mass effect on the bilateral lateral portion of the thecal sac and cord. There is associated deformity. There is no underlying syrinx. There is mild resultant narrowing of the bilateral neuroforamen without mass effect on the exiting nerve roots. Disc osteophyte complexes, as described above, are chronic, bony productive changes. The most common cause for herniations is degenerative disc disease and there is clear evidence of degenerative change, particularly the C3-C4 disc bulging at the same level as a herniation." He then states that "disc bulging, as described above, has no traumatic basis. It is degenerative in origin, related to ligamentous laxity and weakening of the outer ligamentous fibers." The inference is that herniations are caused by trauma. Dr. Springer states that there is disc desiccation, with loss of disc height at multiple levels, which he opines "could not have happened in the one month and 12 day interval between the examination and the incident and is indicative of degenerative disc disease."

In his review of the plaintiff's lumbosacral spine MRI, he noted "mild degenerative changes at the L1-2, L2-3, L3-4, L4-5 and L5-S1 levels. He notes disc desiccation at the T12-L1, L3-4 and L4-5 levels and disc herniations at the T12-L1, L3-4 and L4-5 levels. He concludes his review of the MRIs by stating that there is no fracture or subluxation in either the cervical or lumbar spine, MRI's, and opines that there are "[n]o posttraumatic changes causally related to the 1/6/2016 incident." Inexplicably, Dr. Springer did not review the MRI of the plaintiff's left shoulder. As such, the plaintiff's claims of a rotator cuff tear and a labrum tear in his left shoulder were not addressed by the defendant's radiologist.

With regard to the 90/180-day category of injury, as previously indicated, the plaintiff's bill of particulars and his deposition testimony are clear that he missed no time from his job as a glass installer for the NYCHA. The defendant has made a *prima facie* case with regard to the 90/180 category of injury.

However, the court finds that defendant has not made a *prima facie* showing of his entitlement to summary judgment (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyley*, 79 NY2d 955, 956-957 [1992]). While plaintiff's testimony that he missed no time from 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”]), the defendant has not made a prima facie case with regard to the other applicable categories of injury.

Dr. Ferriter fails to address the plaintiff’s claim that he sustained tears to the rotator cuff and to the labrum in his left shoulder. He finds limitations in plaintiff’s range of motion³ in his left shoulder, but opines that the injury has “healed.” Dr. Ortof did not measure the range of motion in the plaintiff’s left shoulder at all, as neurologist are only concerned about the spine, and Dr. Springer did not review the MRI of the plaintiff’s left shoulder. As such, the court finds that the reports of Dr. Ferriter, Dr. Ortof and Dr. Springer are insufficient to establish that the plaintiff did not sustain a serious injury to his shoulder as defined in Insurance Law § 5102(d).

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]).

³ A finding of 70/80 for internal rotation of a shoulder is a 12.50% reduction from normal in the plaintiff’s range of motion, and raises an issue of fact as to whether the limitation is significant. (see *O’Sullivan v Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1998]; *Parker v Defontaine-Stratton*, 231 AD2d 412 [1st Dept 1996]; *Cesar v Felix*, 181 AD2d 852 [2d Dept 1992].)

Even if the defendant had met his prima facie burden for summary judgment, plaintiff 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. There are issues of fact raised by plaintiff's doctor's affirmations, which create a "battle of the experts" sufficient to overcome the motion. In particular, Dr. Gorum, the plaintiff's treating surgeon [Doc 90] notes that when he last examined the plaintiff in January of 2022, he noted significant loss in plaintiff's range of motion in the left shoulder. He also opines that "the Plaintiff's injuries to his left shoulder are solely related to the accident of January 6, 2016" and that the injuries "were traumatic in nature and not the result of any degenerative changes or conditions that may have existed previously." Finally, Dr. Gorum opines that the plaintiff suffered a significant limitation of use of his left shoulder and has a permanent consequential limitation of his left shoulder, which were solely caused by the accident that is the subject of this lawsuit.

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

This constitutes the decision and order of the court.

Dated: July 7, 2022

ENTER :



Hon. Debra Silber, J.S.C.