

**Infante v Jones**

2022 NY Slip Op 33297(U)

September 27, 2022

Supreme Court, Kings County

Docket Number: Index No. 502427/2018

Judge: Debra Silber

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

X

WILSON QUEVEDO INFANTE,

Plaintiff,

-against-

LUTHER W. JONES,

Defendant.

DECISION/ORDER

Index No. 502427/2018

Motion Seq. No. 1

Date Submitted: 6/9/2022

X

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>16-27</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>30-35; 41-42</u>
Reply Affirmation.....	<u>38; 43-44</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 July 14, 2017 on Delancey Street, at or near the intersection with Essex Street in New York, New York. At the time of the accident, plaintiff was driving his car eastbound on Delancey Street when, while stopped at a red traffic signal, his vehicle was allegedly struck in the rear by the vehicle owned and operated by defendant, Luther Jones. The plaintiff testified that the impact was strong and that after the vehicles came to a stop, he exited his vehicle and observed damage to the rear of his vehicle and damage to the front of the defendant's vehicle. The police came to the scene and took a report. The plaintiff left the scene of the accident driving his vehicle.

Plaintiff testified that he first felt pain on the day following the accident in his neck, back and shoulders. He testified that approximately one week following the accident, he

sought medical treatment at CitiMed on Greene Avenue in Brooklyn. Plaintiff was examined at CitiMed and began a course of physical therapy, going 2-3 times per week. Plaintiff testified that he also received acupuncture and chiropractic care. He had MRIs. The course of his treatment he stated lasted “almost a year.” However, he testified that the therapy, acupuncture and chiropractic treatments only provided temporary relief, and that eventually he was referred to an orthopedic surgeon, Dr. Daly, for the pain in his right shoulder. The plaintiff testified that he had surgery to his right shoulder in January of 2018. Plaintiff testified that the pain in the right shoulder has since improved, but that his activities are limited and that he is unable to lift his daughter, play his guitar, or participate in sports. Plaintiff further testified that his lower back pain has resolved, but that he still has neck pain and pain in his left shoulder. Finally, plaintiff testified that he missed some time from work when he was going to therapy and that he missed three weeks of work following the surgery to his right shoulder, which was more than six months after the accident. At the time of the accident, he was an Uber driver. At the time of the EBT, he was a security guard.

In his bill of particulars, the plaintiff claims that, as a result of the accident, he sustained injuries to both of his shoulders, his cervical spine, and his lumbar spine. At the time of the accident, the plaintiff was approximately 26 years old.

The defendant moves for summary judgment dismissing the complaint [MS #1], contending that the plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102(d). In support of his motion, the defendant submits an attorney’s affirmation, copies of the pleadings, the plaintiff’s bill of particulars, the plaintiff’s deposition transcript, an affirmed report from Dr. Jeffrey Passick, an orthopedist, who examined the plaintiff on behalf of the defendant, and an affirmed report from Dr. Jonathan Lerner, a radiologist,

who reviewed the MRIs of the plaintiff's cervical spine, lumbar spine, thoracic spine, and both shoulders.

Dr. Passick examined the plaintiff on January 3, 2020, two and a half years after the accident [Doc 24]. He tested the strength and range of motion in the plaintiff's cervical spine, thoracic spine, lumbar spine, and both shoulders and reports that plaintiff's muscle strength and range of motion was completely normal. In his report, he states that, in addition to the plaintiff's bill of particulars, he reviewed numerous medical records, including, but not limited to, the record from the plaintiff's initial visit to CitiMed following the accident, the reports from the radiologists who reviewed the MRIs of the plaintiff's cervical, thoracic, and lumbar spine, as well as of the plaintiff's shoulders. Dr. Passick also states that he reviewed plaintiff's physical therapy, chiropractic and acupuncture records, as well as the operative report from the surgery performed on the plaintiff's right shoulder by Dr. Ronald Daly. Dr. Passick states that the plaintiff reported to him that he missed seven months from work as a result of this accident, and returned to work on 2/12/18. However, plaintiff testified that he went back to work the day after the accident, and only missed three weeks from work following the shoulder surgery, as well as some hours while receiving treatment [Doc 22 Page 81]. The court can only conclude that Dr. Passick's report contains a typographical error of sorts, and that he has problems with "cut and paste." The affidavit that plaintiff includes with his opposition papers is silent regarding time he lost from work. The court notes that none of the medical records that Dr. Passick reviewed or refers to in his report are included in the motion.

Dr. Passick's diagnosis is that the plaintiff sustained a cervical spine strain, a thoracic spine strain, a lumbar spine strain and a left shoulder strain, all of which have "resolved." Dr. Passick also notes that the plaintiff sustained a right shoulder strain, from

which he has “recovered.” He opines that “the above-diagnosed strain injuries are causally related to the accident on July 14, 2017,” but also opines that “[t]he right shoulder surgery performed on 1/29/18 is not causally related to the July 14, 2017 accident,” stating that the “[o]perative photos show no injuries. Specifically, no labral tear is noted - the surgery was diagnostic and showed no injuries.” He concludes by opining that “[n]o ongoing physical therapy or orthopedic treatment would be reasonable or necessary for the accident of record,” that he finds “no orthopedic disability,” and that “[t]here is no permanency as a result of the accident of record.”

The defendants’ radiologist, Dr. Jonathan Lerner, did not examine the plaintiff. He reviewed the MRI films of the plaintiff’s cervical, thoracic, and lumbar spine, as well as the MRI films of the plaintiff’s shoulders [Doc 23]. He concludes that the cervical spine MRI shows “mild diffuse disc bulge with effacement of the ventral subarachnoid space” at both the C5-6 and C6-7 levels. He further notes that there was no evidence of central canal spinal stenosis or neural foraminal narrowing and opines that “[t]he above findings are seen in the setting of desiccation of the C5-C6 and C6-C7 intervertebral disc space levels, which is consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event.” Dr. Lerner concludes by opining that there is “no causal relationship between the claimant’s alleged accident and the findings on this [cervical] MRI examination.” Dr. Lerner found that the MRI of the plaintiff’s thoracic spine was normal, and showed “[n]o evidence of fracture, subluxation, or prevertebral soft tissue abnormality.”

In his review of the plaintiff’s lumbar spine MRI, Dr. Lerner notes “bilateral facet osteoarthritis” at the L2-3, L3-4 and L4-5 levels, but states that “[t]here is no evidence of central canal spinal stenosis or neural foraminal narrowing” at those levels. He also notes

that there is a “broad-based central disc protrusion and bilateral facet osteoarthritis” at the L5-S1 level with “mild central canal spinal stenosis and mild bilateral neural foraminal narrowing,” but opines that “[t]he above findings are seen in the setting of desiccation of the L5-S1 intervertebral disc space level, which is consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event.” He further opines that “the presence of bilateral facet osteoarthritis at L5-S1 suggests that the minimal retrolisthesis at this level is degenerative in etiology and further reflects a chronic degenerative process as opposed to an acute traumatic event,” and concludes by opining that there is “no causal relationship between the claimant’s alleged accident and the findings on this MRI examination.”

In his review of the MRI of the plaintiff’s left shoulder, Dr. Lerner notes that there is “[m]ild acromioclavicular joint osteoarthritis with capsular hypertrophy and subchondral irregularity.” He also notes that there is “[n]o evidence of fracture or dislocation” and “[n]o evidence of rotator cuff tendon, bicipital tendon, or labral pathology” and opines that “this MRI examination reveals no causal relationship between the claimant’s alleged accident and the findings on this MRI examination.” In his review of the MRI of the plaintiff’s right shoulder, he notes that there is “[n]o evidence of fracture or dislocation” and “[n]o evidence of rotator cuff tendon, bicipital tendon, or labral pathology. However, he does note that “[t]here is thickening and redundancy within the anterior limb of the inferior glenohumeral ligament, which may reflect adhesive capsulitis.” Dr. Lerner comments that “[a]dhesive capsulitis is also known as ‘frozen shoulder’, which has been described as a localized discomfort of the affected shoulder with restricted glenohumeral elevation and external rotation.” He states that “[t]here are several potential etiologies [for “frozen shoulder”], including systemic processes such as diabetes, autoimmune disease, and inflammatory

processes”, but he acknowledges that “[p]ost surgical, traumatic, and metabolic etiologies have also been described” as causes of adhesive capsulitis.

### Conclusions

With regard to the 90/180-day category of injury, as previously indicated, the plaintiff’s deposition testimony is clear that, aside from occasionally missing some hours of work when he went to therapy, the plaintiff did not miss any time from work as an Uber driver in the six months following the accident [Doc 22, P. 81]. As such, the court finds that the defendant has made a prima facie case with regard to the 90/180 category of injury.

The affirmed reports from Dr. Passick and Dr. Lerner also establish that the plaintiff has not sustained a permanent loss of use of a body organ, member, function or system.

Despite making a prima facie showing on the 90/180 days and the permanent loss of use categories of injury, the court finds that the defendant has not made a *prima facie* showing of his entitlement to summary judgment with regard to the other applicable categories of injury claimed by the plaintiff in his bill of particulars (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyley*, 79 NY2d 955, 956-957 [1992]).

As the court previously noted, none of the records and reports that Dr. Passick reviewed in forming his opinion are annexed for the court to review or consider, not even the report and photos from the surgery that the plaintiff had to his right shoulder, which Dr. Passick concludes was unnecessary. As such, Dr. Passick’s opinion that the surgery revealed no labral tear, was only diagnostic, and was not causally related to the subject accident must be considered to be speculation unsupported by the record. Similarly, Dr. Lerner’s conclusion that the disc bulges and herniation in the plaintiff’s spine are solely degenerative in nature must also be considered speculation. In an attempt to explain how someone in his 20’s with no history of prior injuries, such as the plaintiff, could have

multiple disc bulges and a herniation, disc desiccation and chronic degenerative process, Dr. Lerner states that “disc bulges in the cervical spine will be seen in up to 57% of asymptomatic individuals” and refers to a medical treatise entitled “Radiology” published in 1987, which is a very long time ago in the world of science and seems to be out of print, and fails to annex copies of the pages cited. He then cites a study that found that “among patients in their 20s who are asymptomatic, an MRI will find In any event, this conclusion is irrelevant, as plaintiff is not “asymptomatic.”

In addition, Dr. Lerner’s review of the MRI of the plaintiff’s right shoulder raises questions regarding his diagnosis of adhesive capsulitis and its etiology for plaintiff, which the doctor states can be the result of “systemic processes such as diabetes, autoimmune disease, and inflammatory processes,” but also concedes that “[p]ost surgical, traumatic, and metabolic etiologies”, such as the subject auto accident, are also possible causes.

As such, the court finds that the reports of Dr. Passick and Dr. Lerner are insufficient to establish that the plaintiff did not sustain a “serious injury” to his right shoulder, left shoulder, neck or back, in that they do not establish that plaintiff did not, as a matter of law, sustain a “permanent consequential limitation of use of a body organ or member” or “a significant limitation of use of a body function or system,” the remaining applicable categories of injury 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]).

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. Plaintiff's doctor's affirmation creates a "battle of the experts" sufficient to overcome the motion. In particular, Dr. Ari Lerner, an orthopedist who examined the plaintiff on January 10, 2022, notes in his affirmed report [Doc 31] that, when compared to the "normal", the plaintiff's range of motion in his cervical spine is still significantly reduced. He opines that the plaintiff's injuries are causally related to the accident, are permanent, and that "he will require further and ongoing medical care and likely further surgical treatment to manage his symptoms, pain, and disability for a lifetime duration."

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

This constitutes the decision and order of the court.

Dated: September 27, 2022

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Hon. Debra Silber, J.S.C.