

**El-Hassan v Munoz Trucking Inc.**

2022 NY Slip Op 34551(U)

May 23, 2022

Supreme Court, Queens County

Docket Number: Index No. 712672/2017

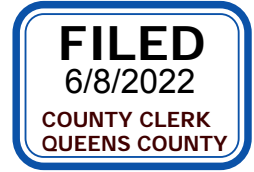
Judge: Mojgan C. Lancman

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This opinion is uncorrected and not selected for official publication.

**Short Form Order**

NEW YORK SUPREME COURT – QUEENS COUNTY



PRESENT: HONORABLE MOJGAN C. LANCMAN

IAS Part 20

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AHMED EL-HASSAN,

Plaintiff,

-against-

MUNOZ TRUCKING INC. and MARIA TERESA  
CORRAL,

Defendants.

Index No.: 712672/2017

Motion Seq. No.: 1

Motion Date: 3.2.2022

Motion Cal. No.: 9

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The e-filed papers bearing NYSCEF document numbers 22-56 and 60-64 were read on the motion of the defendants, Munoz Trucking Inc. (“Munoz Trucking”) and Maria Teresa Corral (“Corral”) (collectively, the “Defendants”), for an Order granting summary judgment dismissing the complaint of the plaintiff, Ahmed El-Hassan (the “Plaintiff”).

The Plaintiff filed this cause seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident (the “Accident”). Presently before the Court is the Defendants’ motion for summary judgment dismissing the complaint on the ground that the Plaintiff’s injuries do not meet the serious injury threshold imposed by Insurance Law § 5102 (d). The motion is opposed by the Plaintiff. For the following reasons, the motion is granted in part and denied in part.

**I. Factual Background and Procedural History**

The Accident occurred on April 25, 2016, at approximately 1:00 p.m., on College Point Boulevard near its intersection with 14th Avenue in Queens County, New York. The Plaintiff was operating one of the two vehicles involved in the accident. The other vehicle was operated by Corral and owned by Munoz Trucking.

**A. The Plaintiff’s Bills of Particulars**

The Plaintiff’s bill of particulars alleges the following injuries: (1) tear of the lateral and medial meniscus with arthroscopy, partial lateral meniscectomy, synovectomy and removal of loose bodies on March 29, 2017; (2) tears in left shoulder with left shoulder arthroscopy, subacromial decompression, acromioplasty, debridement of rotator cuff tear, debridement of

anterior and posterior glenoid labrums, partial synovectomy and biceps tenotomy on March 20, 2017; (3) disc herniation and bulge at C6-C7 with anterior cervical percutaneous discectomy under fluoroscopic guidance on November 2, 2017; (4) disc bulges at L2-L3, L3-L4, L4-L5 and L5-S1 with radiculopathy; (5) right shoulder impingement; (6) internal derangement of the right knee; and (7) post-traumatic headaches and post-concussion syndrome. The left shoulder and the left knee surgical interventions were performed by Dr. Hank Ross.

The Plaintiff's first supplemental bill of particulars alleges that on May 11, 2017, he underwent: (1) discectomy at L4-L5; (2) annuloplasty at L4-L5 and L5-S1; and (3) contrast injection and evaluation of nucleograms at L2- L3, L3-L4, L4-L5 and L5-S1. These procedures were performed by Dr. Tamar Elbaz.

The Plaintiff's second supplemental bill of particulars alleges that he underwent the following procedure on his cervical spine on October 23, 2018: (1) partial excision of C6 vertebral bodies; (2) anterior cervical discectomy C6-C7; (3) intervertebral implant C6-C7; (4) arthrodesis C6-C7; (5) anterior instrumentation C6-C7; and (6) allograft/autograft. Dr. Karen Avanesov performed these procedures.

The Plaintiff's third supplemental verified bill of particulars alleges that he underwent an interlaminar epidural steroid injection on his lumbar spine on June 27, 2019, which was performed by Dr. Elbaz.

### **B. The Defendants' Submissions in Support**

Dr. Jonathan Glassman conducted the orthopedic medical examination of the Plaintiff. Dr. Glassman noted that the Plaintiff's medical history includes a prior lumbar spine injury that he suffered when he was rear-ended in a 2012 motor vehicle accident.

Dr. Glassman arrived at the following diagnoses: status post sprain/strain of the cervical spine; status post sprain/strain of the lumbar spine, status post sprain/strain of the left shoulder, normal orthopedic examination of the right shoulder, status post sprain/strain of the left knee, normal orthopedic examination of the right knee, status post cervical spine procedure C6-C7 anterior cervical percutaneous discectomy under fluoroscopic guidance on November 2, 2017, status post anterior cervical discectomy and fusion at C6-C7 level on October 23, 2018, status post lumbar spine pain management procedure on May 11, 2017, status post left shoulder arthroscopy with subacromial decompression, acromioplasty, debridement of rotator cuff tear, debridement of anterior and posterior glenoid labrums, partial synovectomy and biceps tenotomy on March 20, 2017, status post left knee arthroscopy with partial lateral meniscectomy, synovectomy and removal of loose bodies on March 29, 2017 and pre-existing morbid obesity.

Dr. Glassman concluded that the Plaintiff's history of chronic morbid obesity can explain and be the likely etiology of the reported findings on multiple diagnostic studies and that the Plaintiff suffers from degenerative changes.

Dr. Glassman also concluded that any complaints with regard to the right shoulder and right knee were most likely incidental findings, a function of chronic pre-existing degenerative changes and not causally related to the Accident.

Dr. Daniel Feuer conducted the neurological medical examination of the Plaintiff. The physician concluded that the neurological examination demonstrated evidence of moderate peripheral neuropathy, which is secondary to a systemic disorder and not trauma.

Dr. Feuer's diagnoses were: (1) status post cervical and lumbosacral sprain; and (2) diabetic peripheral neuropathy. The physician also opined that the Plaintiff does not demonstrate any objective neurological disability, and that he is neurologically stable to engage in full active employment, as well as the full activities of daily living without restriction.

In support of their motion, the Defendants also submit the affidavit of Dr. Kevin K. Toosi, a biomechanical engineer.

With regards to the alleged shoulder injuries, Dr. Toosi concluded that same are related to degenerative changes and are not causally related to the Accident.

With respect to the Plaintiff's alleged knee injuries, Dr. Toosi opined that the Plaintiff's bilateral knee pathologies are due to degeneration of his knee joints compatible with his age and increased body habitus, and are not caused by the Accident.

Lastly, Dr. Toosi concluded that the Plaintiff's cervical spine disc bulge/disc herniation, lumbar spine disc bulges, cervical and lumbar radiculopathies, bilateral shoulder pathologies and left knee meniscal tears are not attributable to the Accident.

### **C. The Plaintiff's Opposition**

In opposition, the Plaintiff submits, *inter alia*, the affirmations of Drs. Ross and Elbaz and the affidavit of Dr. James Pugh, Ph.D, P.E., which are summarized below.

The affirmation of Dr. Ross, a treating physician, states as follows with respect to his examination of the Plaintiff on March 25, 2021:

On physical examination of his left knee, I noted joint line tenderness to palpation. I performed range of motion testing using a goniometer, and found the following: flexion 120 degrees (normal 150). On physical examination of his left shoulder, I noted weakness on abduction and rotation. I performed range of motion testing using a goniometer, and found the following: abduction 100 degrees (normal 150); forward elevation 160 degrees (normal 180); external rotation 80 degrees (normal 90); and internal rotation to 70 (normal to 90).

Dr. Ross states that:

It is my opinion within a reasonable degree of medical certainty that due to ongoing symptoms, restrictions in range of motion, the fact that his medical history was non-contributory, MRI findings, and my own clinical examinations, that Mr. Elhassan's injuries represent a significant limitation in the use of his left shoulder and left knee, and a permanent partial disability. Moreover, the fact that I last examined him nearly four years post-accident, and he still suffered from range of motion limitations in his left shoulder and left knee is an indication that the injuries he sustained as a result of the subject accident represents a significant limitation and are permanent in nature.

The Plaintiff also submits the affirmation of Dr. Elbaz, a treating physician, who last examined the Plaintiff on April 16, 2021. Range of motion testing conducted on the subject date revealed the following:

I performed range of motion testing using a goniometer to his cervical spine, and found the following: flexion 38 degrees (normal 60); extension 31 degrees (normal 60); right lateral rotation 47 degrees (normal 80); left lateral rotation 45 degrees (normal 80); right lateral bending 36 degrees (normal 50); left lateral bending 35 degrees (normal 50) ... I performed range of motion testing using a goniometer to his lumbar spine, and found the following: forward flexion 57 degrees (normal 90); extension 15 degrees (normal 25); right lateral flexion 15 degrees (normal 25); left lateral flexion 18 degrees (normal 25); right rotation 15 degrees (normal 30); and left rotation 21 degrees (normal 30). Range of motion testing with the use of a goniometer to his left shoulder revealed the following: forward flexion 92 degrees (normal 170-180); abduction 86 (normal 170-180); adduction 24 degrees (normal 45); extension 22 degrees (normal 40); internal rotation 51 degrees (normal 80-90); and external rotation 43 degrees (normal 60-70). With respect to his left knee, range of motion testing with the use of a goniometer revealed the following: flexion 100 degrees (normal >109) and flexion contracture 4 degrees (normal <5).

The Plaintiff's biomechanical expert, James Pugh, Ph.D, P.E., opines as follows:

Based on the biomechanical accident analysis presented above, within a reasonable degree of accident reconstruction and biomechanical engineering certainty, the loads and mechanisms required to compromise plaintiff's spine, left knee, and left shoulder were present in the subject accident of April 25, 2016, and plaintiff's cervical and lumbar spine disc bulges and herniations, his cervical and lumbar radiculopathies, and his left knee, and left shoulder pathologies and resultant surgeries to same were caused and/or necessitated by the subject accident.

## II. Discussion

The familiar principles applicable to summary judgment motions are set forth below.

“Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law” (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

The “function of summary judgment is issue finding, not issue determination” (*see Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

To be entitled to the “drastic” remedy of summary judgment, the movant “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). However, the failure to make a *prima facie* showing of entitlement to summary judgment requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If no genuine issue of material fact exists, the grant of summary judgment is proper (*see Kornfeld v NRX Technologies, Inc.*, 62 NY2d 686, 688 [1984]).

Insurance Law § 5102 (d) states:

Serious injury means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

The Court now turns to the consideration of each category of serious injury.

### **A. Death, Dismemberment; Significant Disfigurement; A Fracture; Loss of a Fetus**

The record reveals that as the result of the Accident, the Plaintiff did not: die, suffer dismemberment, have significant disfigurement, sustain a fracture or lose a fetus. Accordingly, the Defendants are granted summary judgment with respect to this category of serious injuries.

### **B. Permanent Loss of Use of a Body Organ, Member, Function or System**

With respect to the permanent loss of use category, it is settled law that the permanent loss of use must be total in order to satisfy this serious injury threshold (*see Oberly v Bangs Ambulance*, 96 NY2d 295 [2001]; *Davis v Cottrell*, 101 AD3d 1300 [3d Dept 2012]). As there is no evidence that the Plaintiff suffered a permanent loss of use of a body organ, member, function or system, any claim in this regard is dismissed (*see Oberly v Bangs Ambulance*, 96 NY2d 295).

### **C. The 90/180 Day Claim**

The Plaintiff's 90/180-day claim is dismissed based upon his deposition testimony and the absence of medical evidence to support same. "A claim under this category must be supported by objective medical evidence of an injury or impairment of a nonpermanent nature which would have caused the alleged limitations on [the] plaintiff's daily activities. Further, there must be proof that the injured party was curtailed from performing [his or her] usual activities to a great extent rather than some slight curtailment [internal quotation marks and citations omitted]" (*Sul-Low v Hunter*, 148 AD3d 1326, 1327 [3d Dept 2017]).

The Plaintiff testified that he continued to work after the Accident. Moreover, his deposition testimony did not reveal that he was curtailed from performing his usual activities to a great extent. "In addition, the plaintiff failed to set forth any competent medical evidence sufficient to raise a triable issue of fact as to whether he sustained a medically determined injury of a nonpermanent nature that prevented him from performing his usual and customary activities for 90 of the 180 days following the subject accident [citations omitted]" (*John v Linden*, 124 AD3d 598, 599 [2d Dept 2015]).

### **D. The Permanent Consequential Limitation of Use and Significant Limitation of Use Claims**

"As to ... significant limitation of use and permanent consequential limitation of use, whether a limitation of use or function is significant or consequential . . . relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part [internal quotation marks and citations omitted]" (*Harris v Vogler*, 187 AD3d 1392, 1394 [3rd Dept 2020]).

The Defendants meet their *prima facie* burden of establishing entitlement to summary judgment with respect to the subject categories through: (1) Dr. Glassman's report, which indicates that there is no causal link between the Plaintiff's alleged injuries and the Accident; (2) Dr. Feuer's report, which states that the Plaintiff is status post cervical and lumbosacral sprain, and suffers

from diabetic peripheral neuropathy; and (3) Dr. Toosi's report, which indicates that that the Plaintiff's alleged injuries are not causally related to the Accident (*see Diaz-Montez v JEA Bus Company, Inc.*, 175 AD3d 1384 [2d Dept 2019]).

In opposition, however, the Plaintiff raises triable issues of fact. The reports of Dr. Ross and Dr. Elbaz state that the Plaintiff suffers from losses in range in motion and that his injuries are causally related to the Accident. "This evidence, viewed in a light most favorable to [P]laintiff as the nonmoving party, raise[s] a triable issue of fact as to whether [P]laintiff's [injuries] constitute[] [] serious injur[ies] under the significant limitation of use and permanent consequential limitation of use categories [citations omitted]" (*Harris v Vogler*, 187 AD3d 1392, 1394, 1395). The Defendants' motion for summary disposition with respect to the subject categories is thus denied (*see Ramirez v L-T & L. Enterprise, Inc.*, 189 AD3d 1636 [2d Dept 2020]).

### III. Conclusion

For the reasons stated above, it is hereby:

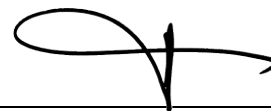
ORDERED, that the Defendants' motion is granted in part and denied in part; and it is further,

ORDERED, that any serious injury claims made by the Plaintiff predicated upon: (1) death, dismemberment, significant disfigurement, fracture and loss of a fetus; (2) permanent loss of use of a body organ, member, function or system; and (3) 90/180 days are dismissed; and it is further,

ORDERED, that the branches of the Defendants' motion for summary judgment with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injuries are denied.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York  
May 23, 2022



MOJGAN C. LANCMAN, J.S.C.

