

McKinnon v Barrie
2022 NY Slip Op 35114(U)
July 18, 2022
Supreme Court, Bronx County
Docket Number: Index No. 31592/2018E
Judge: Veronica G. Hummel
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31**

-----X
JEREMIAH MCKINNON,

Plaintiff,

-against -

**Index No. 31592/2018E
DECISION/ORDER
Motion Seq. 2**

UMARU BARRIE

Defendant.

-----X
VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to the motion of defendant UMARU BARRIE (defendant) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff JEREMIAH MCKINNON (plaintiff) has not sustained a “serious injury” as defined by Insurance Law 5102(d).

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained as a result of a motor vehicle accident that occurred on July 1, 2018 (the Accident). Plaintiff testified that he was out of work for three and a half months. In June 2019, plaintiff underwent surgery on his left shoulder.

In the bill of particulars, in relevant part, plaintiff alleges that, as the result of the Accident, plaintiff suffered injuries to the both shoulders, cervical spine, and lumbar spine, that satisfy the following Insurance Law 5102(d) threshold categories of: permanent loss of use; permanent consequential limitation, significant limitation, and 90/180 days. In the opposition, plaintiff does not claim or address the ground of permanent loss of use and the ground is therefore deemed waived (*Burns v Kroening*, 164 AD3d 1640 [4th Dept 2018]). In

any event, as plaintiff does not allege or prove a total loss of a body part, the claim is dismissed (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 29 [2001]).

Defendant seeks summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under Insurance Law 5102(d). Defendant argues that plaintiff’s claimed injuries are not “serious,” and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motion is supported by the pleadings, a statement of material facts, an attorney affirmation, the bill of particulars, plaintiff’s deposition transcript, and the expert affirmations of Dr. Corso (orthopedics) and Dr. Fitzpatrick (radiologist).

Dr. Corso bases his opinion on the details of a physical examination conducted on April 23, 2021, approximately three years post-Accident, the bills of particulars, and the police report. The examination of the cervical spine, lumbar spine, and both shoulders reveals no decreases in range of motion and negative objective tests. In the “impression section”, the expert finds cervical spine, lumbar spine, thoracic spine, and right shoulder sprains are “resolved”. The left shoulder is “arthroscopy resolved”.

In the discussion, the expert finds that the injured body parts alleged in the bill of particulars have fully resolved. Plaintiff did not sustain any significant or permanent injury as a result of the Accident. There are no objective clinical findings indicative of a present disability or functional impairment which prevents plaintiff from engaging in the activities of daily living and usual activities including work, school, and hobbies.

Dr. Fitzpatrick submits his evaluation, dated November 21, 2019, of the MRIs performed on plaintiff’s cervical spine, lumbar spine, and both shoulders. As for the lumbar spine, he finds mild disc bulges and mild to moderate multilevel degenerative disc disease, which occurs over a protracted time of at least six months. The MRI findings are within the spectrum of degenerative disc disease and are not causally related to acute traumatic lumbar spine injury.

In terms of the cervical spine, the expert finds loss of disc height and small broad-based disc osteophytes. The impression is of multilevel degenerative disc disease. The physician finds no traumatic injury, and degenerative changes that require six months to form. The MRI findings are within the spectrum of degenerative disc disease and are not causally related to acute traumatic cervical spine injury.

In terms of the right shoulder, the expert finds severe tendinosis with high-grade partial tearing. There is no traumatic injury and the tendinosis and tear are the result of chronic overuse. The conditions are degenerative in nature.

As for the left shoulder MRI, the expert finds bursitis, tendinosis, and arthrosis. He finds no traumatic injury, and opines that the tendinosis and other conditions are the result of chronic overuse causing degeneration over the course of months to years with no traumatic basis.

Based on the submissions, defendant sets forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body parts under the permanent consequential limitation, and significant limitation categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; see *Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]).

Plaintiff opposes the motion, submitting an attorney affirmation, a statement of material facts, and the affirmations/ reports of Dr. Oshidar (chiropractor), Dr. Cohen (orthopedist), and Dr. Krishna.

Plaintiff's submissions are insufficient to generate an issue of fact as causation concerning the left shoulder because there are no initial measurements of limitation in range of motion provided (*Corporan v Erichsen*, 148 AD3d 549 [1st Dept 2017]). Furthermore, the approximate 12 per cent limitation in the right shoulder noted by Dr. Cohen at the November 29, 2021, examination is insignificant to generate an issue of fact as to the permanent

consequential category, although the submitted evidence does generate an issue of fact as to significant limitation of the right shoulder (*McLoud v Reyes*, 82 AD3d 848 [2d Dept 2011]).

Plaintiff's evidence also raises triable issues of fact as to plaintiff's claims of "serious injury" as to the cervical spine and lumbar spine under permanent consequential and significant limitation categories (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that plaintiff received medical treatment for the claimed injuries after the Accident, and that plaintiff had substantial limitations in motion in the relevant body parts after the Accident, and at the recent examination by plaintiff's expert in 2021 (see *Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's experts find that, as a result of the Accident, and not degeneration, plaintiff, suffered loss of range of motion and bulging discs and herniated discs in the cervical spine and lumbar spine. The experts opine that these injuries are significant and causally related to the Accident and permanent in nature and the Accident was the primary competent cause of the injuries (*Morales v Cabral, supra*; see *Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under threshold categories of permanent consequential limitation and significant limitation as to the cervical spine and lumbar spine.

Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra*; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

In addition, defendant establishes *prima facie* that there was no 90/180 day injury and plaintiff's submissions generate an issue of fact (*Morales v Cabral, supra*).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendant UMARU BARRIE [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff JEREMIAH MCKINNON has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied.

The foregoing constitutes the decision and order of the court.

Dated: July 18, 2022

E N T E R,

s/Hon. Veronica G. Hummel/signed 07/18/2022
Hon. Veronica G. Hummel, A.J.S.C.

1. CHECK ONE.....	CASE DISPOSED IN ITS ENTIRETY	☒ CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED	☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER	☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT	☐ REFEREE APPOINTMENT