

**Avraham v Jewish Community Council of Greater
Coney Is.**

2023 NY Slip Op 30072(U)

January 3, 2023

Supreme Court, Kings County

Docket Number: Index No. 513251/2018

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of January 2023

HONORABLE FRANCOIS A. RIVERA

-----X
ELIEZER AVRAHAM,

Plaintiff,

- against -

DECISION & ORDER

Index No.: 513251/2018

JEWISH COMMUNITY COUNCIL OF GREATER
CONEY ISLAND and DARYL STEPHEN,

Defendants.
-----X

Recitation in accordance with CPLR 2219 of the papers considered on the notice of motion filed by plaintiff Eliezer Avraham on May 13, 2022, under motion sequence number five, for an order pursuant to CPLR 3212 and Insurance Law 5102(d) granting the plaintiff partial summary judgment on the issue of serious injury threshold and directing an inquest on damages. Defendants Jewish Community Council of Greater Coney Island (hereinafter JCC) and Daryl Stephen (hereinafter Stephen) (hereinafter collectively as "the defendants") opposed the motion.

- Notice of Motion
- Affirmation in Support
- Exhibits A-E
- Reuben S. Ingber, M.D. Affirmation in Support
- Plaintiff's Affidavit in Support
- Affirmation in Opposition
- Exhibits A-N
- Affirmation in Reply

BACKGROUND

On June 27, 2018, plaintiff commenced the instant action for damages for personal injuries by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). On August 8, 20218, the defendants filed a joint verified answer with the KCCO.

By notice of motion filed on October 15, 2019, under motion sequence number two, plaintiff moved for an order pursuant to CPLR §3212, granting plaintiff summary judgment on the issue of liability against the defendants and dismissing the defendants' second affirmative defense of culpable conduct.

The plaintiff's affidavit and other evidentiary submissions established the following facts. On October 26, 2017, at approximately 2:14 p.m., plaintiff was involved in a three-vehicle accident. On said date and time, plaintiff was the driver of a motor vehicle traveling on Ocean Avenue at or near its intersection with Bay Avenue in Brooklyn, New York. Due to traffic conditions, the plaintiff's vehicle had come to a complete stop, at which time plaintiff was struck in the rear by a motor vehicle owned by defendant JCC and operated by defendant Stephen (hereinafter the subject accident). As a result of this heavy impact, plaintiff's vehicle was pushed into a vehicle in front of the plaintiff.

By decision and order issued on January 6, 2022, plaintiff's motion was granted. The defendants were found to be the sole proximate cause of the subject motor vehicle accident and their affirmative defense of culpable conduct was struck.

LAW AND APPLICATION

The plaintiff now seeks summary judgment on the issue of whether plaintiff sustained a serious injury as defined in Insurance Law 5102(d). Insurance Law § 5102(d) defines serious injury as:

“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 plaintiff's bill of particulars alleged, inter alia, cervical disc herniation and bulges and injury to the right shoulder. In support of the motion, the plaintiff submitted an unaffirmed report by Dr. Reuben S. Ingber (hereinafter Dr. Ingber) dated April 23, 2021, an affirmed medical report of Dr. Jeffrey Passick (hereinafter Dr. Passick) dated February 14, 2022, and an affirmation of Dr. Ingber affirming his April 23, 2021, narrative report.

Dr. Passick diagnosed the plaintiff as having an exacerbation of cervical degenerative disc disease and lumbar degenerative disc disease, superimposed upon prior surgery as well as a resolved right shoulder strain.

Dr. Ingber described the plaintiff's complaints of pain through various range of motion tests. Dr. Ingber performed certain range of motion testing and state the findings.

Dr. Ingber, however, did not state how the test were performed, nor did he compare his findings to what is normal (*see Shirman v Lawal*, 69 AD3d 838, 839 [2nd Dept 2010]). Dr. Ingber also stated that the plaintiff had been well-known to the Doctor's office since he started treatment in 2012 for bilateral sciatic neuritis and lumbar post-laminectomy syndrome. The plaintiff was treated with a series of lumbar trigger point injections, lumbar therapeutic exercises and pain medications including naproxen 200-400 mg BID-TID PRN pain and oxycodone 30 mg Q4H PRN pain. Over the years, he did have some episodes of some cervical pain but no persisting pain, and nothing that required any regular treatments. In April 2016, the plaintiff had a flare-up of left cervicobrachialgia and a cervical spine MRI scan was obtained in anticipation of a possible referral to an anesthesiologist for cervical epidural corticosteroid injections. Dr Ingber also stated that the plaintiff was involved in a subsequent motor vehicle accident on or about June 4, 2019, in which his vehicle was rear-ended.

The plaintiff's evidentiary submissions raised questions of fact and did not eliminate all material issues of fact as to whether plaintiff's claimed spinal injuries were pre-existing, or caused, or aggravated, by the subject motor vehicle accident. It is therefore unnecessary to determine whether the papers submitted by the defendants in opposition to the motion were sufficient to raise a triable issue of fact (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

CONCLUSION

The motion by plaintiff Eliezer Avraham for an order pursuant to CPLR 3212 and Insurance Law 5102(d) granting the plaintiff partial summary judgment on the issue of whether plaintiff sustained a serious injury and directing an inquest on damages is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

Francois A. Rivera

J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.