

**Ali v Pastuizaca**

2023 NY Slip Op 30654(U)

March 2, 2023

Supreme Court, Kings County

Docket Number: Index No. 511584/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

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

\_\_\_\_\_X

**AMANAT ALI,**

**Plaintiff,**

**-against-**

**JOSE PASTUIZACA, and "JOHN DOE", being the  
operator of the vehicle,**

**Defendants.**

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**DECISION / ORDER**

**Index No. 511584/2019  
Motion Seq. No. 2  
Date Submitted: 1/5/23**

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

| <b>Papers</b>   | <b>NYSCEF Doc.</b> |
|---|--------------------|
| Notice of Motion, Affirmation and Exhibits Annexed..... | <u>27-35</u>       |
| Affirmation in Opposition and Exhibits Annexed.....     | <u>36-41</u>       |
| Reply Affirmation.....                                  | <u>          </u>  |

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

This is a personal injury action which arises from a motor vehicle accident which took place on July 11, 2016, at the intersection of Fort Hamilton Parkway and East 5<sup>th</sup> Street, in Brooklyn, NY. Plaintiff testified that his car was completely stopped when it was rear-ended by defendants' vehicle. Defendants have failed to provide discovery and have been precluded from testifying. Plaintiff was a self-employed yellow cab driver, but he was not working at the time of the accident and was on his way home [EBT Doc 35 Page 14]. At the time of the accident, plaintiff was approximately forty-nine years of age. In his Bill of Particulars [Doc 33], plaintiff claims that as a result of the accident, he sustained injuries to his cervical spine and to his left shoulder.

Defendants contend that they are entitled to summary judgment dismissing the

complaint as plaintiff did not sustain serious injuries as a result of the accident, as defined by Insurance Law § 5102 (d). Defendants support their motion with an attorney's affirmation, the pleadings, plaintiff's deposition transcript, and an affirmed IME report from an orthopedist.

Dr. Gregory Chiaramonte, an orthopedist, examined plaintiff on October 13, 2021, on behalf of the defendants. This was five years after the accident. He did not review any of the plaintiff's medical records. He tested plaintiff's range of motion with a goniometer and reports that plaintiff had normal ranges of motion in his cervical spine and left shoulder, with no tenderness or spasm. Dr. Chiaramonte reports that all related tests were negative.

The doctor concludes that plaintiff's cervical spine and left shoulder "sprain/strain" have resolved, and states that "[t]he claimant is able to perform normal activities of daily living as he was doing prior to this accident . . . There is no orthopedic residuals, disability, or permanency."

Defendants contend that their medical evidence, combined with plaintiff's testimony at his EBT, eliminate all categories of injuries in the statute. Plaintiff testified at his EBT that he missed only two weeks from work after the accident [EBT Page 34], and defendants argue that this testimony rules out the plaintiff's claim with regard to the 90/180-day category of injury.

The court finds that defendants have made a *prima facie* showing of their entitlement to summary judgment and have shifted the burden of proof to the plaintiff (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). On the issue of causation, Dr. Chiaramonte offers no opinion, solely stating that plaintiff's "sprains/strains" have resolved. If a defendant's expert concedes that the alleged injuries were caused by the accident, the burden of proof does not shift to the plaintiff (see *Novembre v Punnoose*, 211 AD3d 961 [2d Dept 2022]). Dr. Chiaramonte has not done so here.

In opposition to the motion, the plaintiff submits an affirmation of counsel, an affidavit from the plaintiff, an affirmation of his treating physician, and allegedly affirmed copies of his MRI reports.

Dr. Dmitriy Grinshpun provides an affirmation (twenty-three pages long) dated December 15, 2022, which describes his treatment of plaintiff from the first visit, which was five days after the accident, up until April 20, 2017, when he states he “discharged the patient from treatment since the treatment failed to provide any further long standing beneficial results. . . . Mr. Ali had reached the maximum medical benefit from conservative management after treating consistently for approximately nine months following the accident.”

Plaintiff went back to see Dr. Grinshpun in order to get an updated report to oppose this motion. The doctor states “I recently conducted a physical examination of Amanat Ali on September 1, 2022, over 6 years after his accident. Prior to examination, the patient explained that overall, the physical therapy he received, along with the nerve block injections and medications, partially alleviated his pain symptoms. He has been consistently performing his home exercises and stretches since his discharge up to the present time. However, Mr. Ali still complained of moderate neck pain and moderate left shoulder pain, in association with numbness and weakness in his left arm causing impairment with his activities of daily living.” Dr. Grinshpun performed range of motion testing of plaintiff’s cervical spine and left shoulder, and states that “[t]he following positive findings indicate muscular injury and resultant nerve root involvement: Range of motion testing of the cervical spine revealed impairment as follows: flexion to 30 degrees (normal 45 degrees); extension to 30 degrees (normal 40 degrees); left rotation to 25 degrees (normal 40 degrees); right rotation to 35 degrees (normal 40 degrees); left lateral flexion to 30 degrees (normal 40 degrees); right lateral flexion to 35 degrees (normal 40 degrees). All movements elicited pain upon extremes of motion. Range of motion testing of

the left shoulder revealed the following impairments: left flexion to 130 degrees (normal 150 degrees); left abduction to 105 degrees (normal 150 degrees); left adduction to 20 degrees (normal 30 degrees); left internal rotation to 20 degrees (normal 40 degrees); and left external rotation to 70 degrees (normal 90 degrees). All movements elicited pain at extremes of motion. Orthopedic Tests: Drop Arm Test was positive on the left; Foraminal Compression test was positive on the left; Positive painful impingement sign on the left; Positive Tinel and Phalen signs on the left; [and] Barani maneuver was still positive bilaterally. I confirmed my final diagnoses of Amanat Ali's injuries, as follows: Post-traumatic left shoulder tear of the subscapularis tendon in combination with tendinosis/tendinopathy (by MRI); Post-traumatic left shoulder impingement of the rotator cuff (by MRI); Left shoulder contusion with internal derangement; Post-traumatic C5-C6 disc herniation with compression of the anterior thecal sac, effacement of the anterior subarachnoid space and impingement of the neural foramina and exiting nerve root (by MRI); Post-traumatic C4-C5 and C6-C7 disc bulges with compression of the anterior thecal sac and effacement of the anterior subarachnoid space (by MRI); Post-traumatic left Carpal Tunnel Syndrome (by EMG); Post-traumatic left sided acute C5-C6 cervical radiculopathy (by EMG); and Myoligamentous injuries to the cervical spine. It is my opinion, within a reasonable degree of medical certainty, that the traumatic MRI findings, including the impingement and tendon tears to the patient's left shoulder as well as the disc injuries to the patient's cervical spine, are traumatic and causally related to the patient's July 11, 2016 accident. . . . It is my expert medical opinion that the accident of July 11, 2016, was the primary competent producing cause of these injuries sustained by Amanat Ali, and that with reasonable degree of medical certainty, his conditions are chronic and disabling in nature, and in view of the length of time they have persisted, represent a permanent condition. I therefore conclude that Amanat Ali is permanently partially disabled."

Plaintiff also provides allegedly affirmed copies of his MRI reports [Doc 40]. However, it appears more likely that the 2016 reports had the affirmation language typed in recently above his 2016 signature, and that the doctor did not actually sign the affirmation. Counsel should never do this again. There is nothing in these reports which is probative, in any event.

Based upon the foregoing, the court finds that the plaintiff has sufficiently raised triable issues of fact regarding his claims of “a permanent consequential limitation of use of a body organ or member” and “a significant limitation of use of a body function or system”, so as to warrant denial of the defendants’ motions for summary judgment.

In conclusion, plaintiff’s treating doctor’s affirmed report is sufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a “serious” injury” as a result of the subject accident (*see Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). These reports indicate significant, quantified restrictions in plaintiff’s range of motion, both contemporaneously with the accident and more recently, and his doctor opines that plaintiff’s injuries were caused by the subject accident. Thus, he raises a “battle of the experts.” This is sufficient to raise an issue of fact which requires a trial and the denial of the motion.

Accordingly, the motion is denied.

This constitutes the decision and order of the court.

Dated: March 2, 2023

ENTER:



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Hon. Debra Silber, J.S.C.