

**Ali v Ibrahim**

2023 NY Slip Op 32277(U)

July 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 519235/2018

Judge: Debra Silber

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

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**MOHAMED A. ALI,**

**Plaintiff,**

**-against-**

**EMAD ELDIN IBRAHIM and BRONX MERCHANT  
FUNDING SERVICES LLC,**

**Defendants.**

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**DECISION / ORDER**

**Index No. 519235/2018**

**Motion Seq. No. 4**

**Date Submitted: 4/27/23**

*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>64-73</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>77-80</u>
Reply Affirmation.....	_____

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

This is a personal injury action arising from a motor vehicle accident which took place on December 21, 2017, at the intersection of Bath Avenue and 20<sup>th</sup> Avenue. Plaintiff was driving his own vehicle, taking his two children to school, when he was in an accident with a vehicle owned and operated by defendants. He testified at his EBT that he was stopped for a red light when he was rear-ended by defendant. An ambulance arrived and checked him and his sons. He then took them to school and went home. Later that day, plaintiff was in pain and went on his own to Maimonides Medical Center, where he was given x-rays, and was treated and released. At the time of the accident, plaintiff was 40 years of age. In his Bill of Particulars [Doc 67], plaintiff claims that as a result of the accident, he sustained injuries to both knees, his right shoulder, his right hip, and his

cervical and lumbar spine. He had physical therapy, chiropractic care, acupuncture and massage therapy for an extended period of time, perhaps for a year. Plaintiff had arthroscopic surgery to his left knee in April of 2018. He had injections for pain to his back, neck, left knee, right shoulder and right hip.

The defendants contend, in their motion (Motion Seq. #4), that they are entitled to summary judgment dismissing the complaint as plaintiff did not sustain a serious injury as a result of the accident, as defined by Insurance Law §5102(d). The defendants support their motion with an attorney's affirmation, copies of the pleadings, plaintiff's bill of particulars, plaintiff's deposition transcript, an affirmed IME reports from an orthopedist, Dr. Alan J. Zimmerman [Doc 71], and a radiologist, Dr. Audrey Eisenstadt, [Doc 72].

Dr. Zimmerman, an orthopedist, examined plaintiff on August 14, 2019, on behalf of the defendants. This was one year and eight months after the accident. Plaintiff reported that he had a prior injury to his left knee in 2008, and he had an ACL reconstruction surgery at that time. Plaintiff told Dr. Zimmerman that "He has pain in the right hip, cannot lift heavy bags because of left shoulder complaints. Pain from the neck to the back to the right hip. Right hand shakes all the time. Pain in the left side of his neck." Dr. Zimmerman notes that plaintiff's left knee and ankle were swollen. He tested plaintiff's range of motion with a goniometer and reports that plaintiff had normal ranges of motion in his cervical, thoracic and lumbar spine, with no tenderness, swelling or spasm. Plaintiff had normal ranges of motion in his shoulders, hips, and knees, except for the left knee, where plaintiff could only bend it to 140 degrees, with 150 being normal. Dr. Zimmerman reports that all related tests were negative and muscle strength was normal.

Dr. Zimmerman concludes that “The claimant presents an essentially normal orthopedic examination on all objective testing; subjective complaints do not correlate with negative clinical test results. The orthopedic examination is objectively normal, and indicates no findings which would result in orthopedic limitations in use of the body parts examined. The claimant is capable of functional use of the examined body parts, for normal activities of daily living, as well as all usual daily activities including regular work duties. The claimant demonstrates symptom magnification and attempts to manipulate the examination. All of the MRI findings of the left knee relate to the prior surgery. The surgery was carried out for preexisting, degenerative and not causally related conditions.”

Dr. Audrey Eisenstadt, the defendants’ examining radiologist, provides three affirmations describing her review of the MRIs of plaintiff’s right shoulder, right knee and left knee, which were taken in January of 2018 (shoulder) and March of 2018 (knees).

Dr. Eisenstadt concludes, after reviewing the right shoulder MRI, that “[r]eview of the MRI scan of the right shoulder performed twenty six days following the incident reveals no acute or recent posttraumatic osseous, tendinous, ligamentous or labral pathology seen. Developmental changes with a downsloping acromion are noted at the acromioclavicular joint, resulting in effacement of the subacromial fat pad and impression on the structures passing through the subacromial region. This is compounded by the hypertrophic bony spurring seen at the acromioclavicular joint with capsular expansion noted. These arthritic changes further narrow the subacromial space and deform the superior aspect of the rotator cuff musculature, indicative of an impingement syndrome or a pinching action on the structures passing through the subacromial region. These structures include the rotator cuff musculature, glenoid labrum and biceps tendon. No

rotator cuff tear is seen. No labral tear is noted. Tenosynovitis surrounding the biceps tendon is seen. This is fluid surrounding an intact tendon, which has no traumatic basis and is related to the origin of the biceps tendon from within the hypertrophied acromioclavicular joint. It is a transient process with no permanent sequela or posttraumatic etiology.”

Dr. Eisenstadt concludes, after reviewing the right knee MRI, that “Review of the MRI scan of the right knee performed three months following the incident reveals degenerative joint disease at the femoropatellar joint space with hypertrophic bony spurring, lateral subluxation of the patella in relation to a shallow intertrochanteric groove in the anterior distal femur and cartilaginous thinning. A shallow intertrochanteric groove of the femur is a congenital abnormality present since birth, which allows the patella to slip laterally when the leg is firmly extended. It has no traumatic etiology but does predispose to premature degenerative joint disease at the femoropatellar joint space with hypertrophic bony spurring, joint space narrowing, and cartilaginous thinning seen on this study, arthritic changes over six months in development. No ligamentous, tendinous or periarticular abnormality is seen. Hypoplasia of the posterior horns of the medial and lateral menisci is also noted, another manifestation of degenerative joint disease, which has no traumatic etiology and could not have occurred in three months' time. No osseous contusion, significant joint effusion or meniscal tears are seen.”

Dr. Eisenstadt concludes, after reviewing the left knee MRI, that “Review of the MRI scan of the left knee performed two-and-a-half months following the incident reveals this patient has had pre-incident surgery on a previously torn anterior cruciate ligament. Multiple screws with susceptibility artifacts are seen in the distal femur, inferior to the

patella, and along the anterior and posterior tibial bone. These changes limit the visualization of the structures due to susceptibility artifacts from the hardware inserted, but indicate that the abnormalities were present prior to the incident of 12/21/17. Degenerative joint disease is seen at the femoropatellar joint space with hypertrophic bony spurring, joint space narrowing, and cartilaginous thinning noted. These changes have no traumatic etiology or association with the incident. They are over six months in development and have no traumatic etiology. No traumatic ligamentous or tendinous disruption is seen. Hypoplasia or loss of substance is seen in the anterior and posterior horns of the medial meniscus and posterior horn of the lateral meniscus, another manifestation of degenerative joint disease predating the incident. Hypoplasia is a wear-and-tear breakdown of meniscal tissue. No bony contusion, meniscal tear or disruption of the prior surgery of the anterior cruciate ligament is noted. The small joint effusion seen is likely related to the arthritic disease identified in the femoropatellar joint space and menisci, as well as the prior surgery seen involving the anterior cruciate ligament.”

Defendants first note that plaintiff testified that he was in a prior motor vehicle accident on April 23, 2016 [Doc 69 Page 65] in which he injured his left knee and lower back. He said he went for physical therapy for a year afterwards, brought a lawsuit and settled it prior to the deposition [id. Page 70]. Counsel contends that “[b]ased on the medical evidence submitted by defendants coupled with plaintiff’s testimony, we submit that plaintiff’s allegations of injury were not the result of this minor accident, that plaintiff did not sustain trauma, and the alleged injuries do not rise to the level of impairment sufficient to qualify under any category of the statute. Specifically, defendants’ showing includes objective evidence establishing an ‘absence of trauma.’ See, *Kester v Sendoya*,

123 AD3d 418 [1st Dept 2014]. Defendants provide radiological evidence confirming that no traumatic injury was sustained. This negates a claim of any causally related serious injury under the statute and is therefore sufficient to meet the defendants' burden on this motion. See *Ikeda v Hussain*, 81 AD3d 496 [1st Dept 2011]; *Johnson v Singh*, 82 AD3d 565 [1st Dept 2011]; *Arroyo v Morris*, 85 AD3d 679 [1st Dept 2011]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009].” Defendants’ counsel concludes that “by eliminating the accident as a cause of the alleged conditions, defendants eliminate all categories of the statute.”

Addressing the 90/180-day category in the statute, defendants’ counsel avers that “the defendant’s proof rules out the 90/180-day category of the statute. Putting aside that this category requires proof that there was a causally related, medically determined injury, which we do not believe plaintiffs can establish, the 90/180 category requires proof that plaintiffs were medically prevented from performing ‘substantially all’ of his usual and customary activities for the requisite period.”

Plaintiff testified at his EBT, held on May 9, 2019, that on the date of the accident, he was employed as an Uber driver. He was working twelve hours a day. He stated that he was confined to bed for two days after the accident, and that he missed four weeks from work immediately following the subject accident [Doc 69 page 70]. He testified that, after that month, he has had too much pain to return to his prior work schedule, and so he has instead worked part-time, six and a half hours per day [id. Page 71] and has been earnings almost half of his prior earnings. Plaintiff further testified that he had arthroscopic surgery to his left knee in connection with this accident [id. Page 54] within the six months after the accident. When asked about his activities and how they have been affected by

the accident, plaintiff testified that he was unable to work out at the gym anymore, could not play soccer with his friends any longer, could not jog which he used to do regularly, cannot walk for more than a few blocks, and has gained thirty pounds. He said “I can't carry heavy stuff with my right hand. I used to lay down like to pray five times a day, because I'm Muslim, and I used to go up and down, but sometimes I have to be sitting in a seat, because when I'm bending or going down I can't do it. And like my [right] hand keeps shaking. . . My hand starts to be shaky. And the nerve over here in my shoulder hurts me so much. There's always pain in my shoulder here. . . with my neck when I'm sitting I can't look straight, because I have to have my neck moving to the left all the time, so I can't look straight. And sometimes I get dizziness, because I'm taking a lot of pain medication” [id. Pages 74-75].

The court finds that defendants have not made a *prima facie* showing of their entitlement to summary judgment (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]). While defendants' IME exam and radiology review make a *prima facie* showing on the other applicable categories of injury, defendants do not make a *prima facie* showing with regard to the 90/180-day category of injury. The only thing submitted on this point which is in admissible form is plaintiff's testimony, which does not support defendants' claim that he did not sustain an injury in this category. Counsel's argument that plaintiff cannot prove that he had an injury in this category is unavailing.

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 defendants had met their 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. Specifically, there are issues of fact raised by plaintiff's doctor's affirmation, which creates a "battle of the experts" sufficient to overcome the motion. For example, Dr. Berkowitz [Doc 79], plaintiff's treating orthopedist, provides range of motion testing data for a date two months after the accident, which indicates that his range of motion in his right shoulder and both knees were significantly limited. Plaintiff was examined again a month later, and little had changed. He recommended, and then performed the arthroscopic surgery to plaintiff's left knee. He tested the plaintiff's range of motion again on July 2, 2018, and reports that plaintiff was complaining of significant pain in his right shoulder, and his range of motion in these three body parts was still limited.

Dr. Berkowitz did a recent exam on March 6, 2023. He states that "Presently, the patient states that although he improved postoperatively in his left knee, he remains with intermittent pain and swelling. The patient states that a lot of his pain in his shoulders and lower back generate from his cervical and lumbar spine due to disc herniations, and the

patient is under the care of a spine surgeon for this condition. The patient is no longer doing physical therapy. On physical examination to the right shoulder conducted in my office, the patient was able to forward flex to 160 degrees (normal 180 degrees) and abduct to 160 degrees (normal 180 degrees). Internal rotation was to 60 degrees (normal 70 degrees) and external rotation to 80 degrees (normal 90 degrees). There was mild rotational discomfort observed. Impingement signs were negative. On physical examination to bilateral knees using a goniometer, the patient was able to fully extend and flex to 125 degrees (normal 140 degrees).”

Dr. Berkowitz concludes that “In summary, the patient was involved in a motor vehicle accident on December 21, 2017, injuring his knees and right shoulder. Following the accident, the patient underwent a course of conservative treatment. However, he continued to have significant pain and difficulties specifically in his left knee. The patient underwent an arthroscopic procedure to his left knee on April 13, 2018, and was found to have significant findings including torn meniscus. Postoperatively, the patient underwent a rehabilitation program to his left knee. Presently, although the patient improved overall in his left knee, he remains with intermittent pain and loss of motion and effusion. I explained to the patient that it was not unusual to experience symptomatology in his left knee after the type of the injury sustained. The patient will benefit from physical therapy to his left knee on a maintenance type of basis. As the years go by, the patient has a high likelihood of developing degenerative joint disease in her left knee secondary the loss of the cartilage tissue. Regarding the right shoulder, the patient remains with having pain which he believes is radiating from his cervical spine. Regarding the left knee, the patient continues to have decreased motion and if his symptomatology worsens, he should

reinstate physical therapy to his left knee. It is my opinion within a reasonable degree of medical certainty that, based on the history which has been provided to me by the patient, physical examination findings and radiological findings, the injuries in question are directly casually related to the accident in which the patient was involved on 12/21/17. It is also my opinion within a reasonable degree of medical certainty, that the patient has sustained has a permanent injury to his left knee.”

Accordingly, it is **ORDERED** that the defendants’ motion is denied.

This constitutes the decision and order of the court.

Dated: July 7, 2023

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Hon. Debra Silber, J.S.C.