

**Jeune-Pierre v Crosswell**

2023 NY Slip Op 32832(U)

August 11, 2023

Supreme Court, Kings County

Docket Number: Index No. 523081/2020

Judge: Debra Silber

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

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**EDWIDG JEUNE-PIERRE,**

**Plaintiff,**

**DECISION / ORDER**

**-against-**

**Index No. 523081/2020**

**MITCHELL P. CROSSWELL,**

**Motion Seq. No. 4**

**Defendant.**

**Date Submitted: 5/25/23**

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

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>48-57</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>59-69</u>
Reply Affirmation.....	<u>70</u>

**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 February 20, 2018, at JFK airport. The plaintiff claims that, defendant, who was driving a vehicle, hit him while he was walking in a parking lot at the airport, causing him to fall to the ground. The police were called. Plaintiff was taken from the scene of the accident in an ambulance, and was brought to Jamaica Hospital, where he was treated and released. At the time of the accident, plaintiff was approximately 68 years old. In his bill of particulars [Doc 61], plaintiff claims that as a result of the accident, he sustained injuries to his cervical and lumbar spine, to his right knee and to his right shoulder.

The defendant contends in his motion (Motion Seq. #4) that he is 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 defendant

supports his motion with an attorney's affirmation, copies of the pleadings, plaintiff's bill of particulars, plaintiff's deposition transcript, and an affirmed IME report from an orthopedist, Dr. Dana Mannor [Doc 55].

Dr. Mannor, an orthopedist, examined plaintiff on May 20, 2022, on behalf of the defendant. This was four years and three months after the accident. Under the section of his report entitled "Review of Submitted Medical Records," he only lists "verified bill of particulars," and "police accident report." Plaintiff told him that he injured his right knee, right shoulder, neck, and lower back and told the doctor that he still had complaints of pain in all four parts of his body at the time of the exam. Plaintiff told Dr. Mannor that he uses a neck brace, a back brace, a neck collar, and a cane as assistive devices.

Dr. Mannor tested plaintiff's range of motion with a goniometer and reports that plaintiff had normal ranges of motion in his cervical and lumbar spine, in both of his shoulders, and in both of his knees, with no tenderness, swelling or spasm. Dr. Mannor reports that all related tests were negative.

Dr. Mannor concludes that plaintiff sustained sprains and strains to his cervical and lumbar spine, to his right shoulder and to his right knee, all of which have "resolved." Dr. Mannor concludes that "The claimant can perform activities of daily living without limitations. Today's examination indicates that the injured body parts alleged in the Bill of Particulars have resolved. The claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident on 02/20/2018. There are no objective clinical findings indicative of a present disability, and functional impairment, which prevents the examinee from engaging in ADL, and usual activities including work, school, and hobbies. The claimant is able to return to full duty work without restrictions."

As defendant have not provided any medical records which were generated during the first six months after the accident, the court must turn to plaintiff's EBT transcript to determine whether the defendant have submitted any admissible evidence with regard to the 90/180-day category of injury. Defendant's attorney argues (Aff. Doc 49 ¶28) "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." The only "proof" that counsel could be referring to would be the plaintiff's EBT [Doc 53].

Plaintiff testified at his EBT, which was held on October 12, 2021, four years after the subject accident, that on the date of the accident, he was employed as a taxi driver [Plaintiff tr at Doc 53, page 12], and that since then, he has acquired his own medallion and works for himself. He testified that he missed about three months of work and did not go out of his home except to go for doctor's appointments and physical therapy [*id.* Page 46]. He does not work as many hours as he used to, because of the accident. He said he works five to eight hours a day instead of ten or eleven [*id.* Pages 12-13]. He was working at the time of the accident and had parked his car to go to the restroom. Plaintiff testified that he applied for Worker's Compensation benefits and was approved and received payments [*id.* Page 16].

At the deposition, plaintiff was asked "[a]re there any things that you are limited or restricted in doing due to the injuries you're alleging from this accident?" This question is solely addressed to the time of the deposition, in 2021. He responded "I used to bicycle; I can't do that no more. I can't stand up a long time, sit down a long time because my job

as a taxi driver, right, after two hours I have to stop, I can't drive too long" [*id.* Page 45]. Although plaintiff was asked about activities that he used to do before the accident, but could no longer do, or that he had difficulty doing at the time that the deposition was held, plaintiff was not asked at his EBT if there were any activities that he could not perform in the months immediately following the accident, and in particular, the first six months. The court finds that plaintiff's testimony does not make a prima facie case for defendant with regard to the 90/180-day category of injury, as he wasn't asked any specific questions about whether his usual and customary activities had been curtailed in the first six months after the accident, and he had testified that he didn't leave his home for three months except for medical appointments or physical therapy.

There is thus nothing in the pleadings, the bill of particulars or the plaintiff's EBT transcript that supports defendant's claim that plaintiff's usual and customary daily activities were not curtailed during the 90 days immediately following the accident.

Defendant contends that "[b]ased on the medical evidence submitted by defendants coupled with plaintiffs' testimony, we submit that plaintiffs' allegations of injury were not the result of this minor accident that plaintiffs 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, defendant's showing includes objective evidence establishing an 'absence of trauma.' See, *Kester v Sendoya*, 123 AD3d 418 [1st Dept 2014]. Defendant 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 defendant's 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].” The court notes that there is no “radiological evidence” submitted in support of this motion.

As the defendant has failed to meet his burden of proof as to all claimed injuries and all 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]).

In addition, while plaintiff wasn’t asked how long he received Workers’ Compensation payments, when a plaintiff testifies that he did not return to work for three months after a motor vehicle accident and receives Workers’ Compensation benefits for his loss of earnings, the court must conclude that he in fact had a medically determined injury which prevented him from returning to work (See *Peplow v Murat*, 304 AD2d 633 [2d Dept 2003]).

Accordingly, it is **ORDERED** that the defendant’s motion is denied, and it is further **ORDERED** that the caption is amended to reflect that plaintiff’s name is **PIERRE EDWIDG JEUNE**, in place of “Edwidg Jeune-Pierre.”

This constitutes the decision and order of the court.

Dated: August 11, 2023

ENTER :



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Hon. Debra Silber, J.S.C.