

**Sanchez v Rigo Limo-Auto Corp.**

2023 NY Slip Op 33358(U)

September 29, 2023

Supreme Court, Kings County

Docket Number: Index No. 515464/2016

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

**REYNOLDS CONTRERAS SANCHEZ,**

**Plaintiff,**

**-against-**

**RIGO LIMO-AUTO CORP. and JOHN DOE WHOSE  
TRUE NAME IS PRESENTLY UNKNOWN,**

**Defendants.**

**DECISION/ORDER**

**Index No. 515464/2016  
Motion Seq. No. 3  
Date Sub.: 7/20/2023**

X

*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, Affirmations, Affidavits, and Exhibits Annexed.....	<u>37-47</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>50-54</u>
Reply Affirmation.....	<u>55</u>

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

This is a personal injury action arising from an automobile accident that occurred on January 9, 2016 in Brooklyn, New York. Plaintiff was riding an electric bicycle on Halsey Street near the intersection with Wilson Avenue, delivering food for a restaurant when he was hit by defendants' vehicle, a taxi. Plaintiff landed on the roadway. He left the scene in a taxi, and claims he was not offered an ambulance by the police. He went to the emergency room at Wyckoff Heights Medical Center the day after the accident. He subsequently had physical therapy for some period of time. In his bill of particulars dated 6/24/19, the plaintiff claims that, as a result of the accident, he sustained injuries to his left shoulder. He has had arthroscopic surgery for the injuries. At the time of the accident,

the plaintiff was approximately 30 years old. He also avers in his bill of particulars that he was unable to work for six months after the accident [Doc 43 ¶16].

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, an affirmed IME report from an orthopedist, and a report from an independent radiologist.

Dr. Alan Zimmerman, an orthopedist, examined plaintiff on January 14, 2020, on behalf of the defendants. This was four years after the accident. Dr. Zimmerman states that he reviewed plaintiff's medical records, including his operative report. At the time of the exam, Dr. Zimmerman states that "[t]he claimant has no complaints." He tested plaintiff's range of motion with a goniometer, using "normal ranges of motion are as per the American Medical Association 'Guidelines to the Evaluation of Permanent Impairment' Fifth Edition, and reports that plaintiff had normal ranges of motion in his shoulders. Dr. Zimmerman reports that all related tests were negative.

The doctor concludes that plaintiff's "left shoulder allegations, resolved" and "there is no disability. There is no permanency." Dr. Zimmerman then states "The claimant is presently working and may continue to do so without restriction. No further treatment is medically necessary from an orthopedic perspective." Under a heading "causal relationship," Dr. Zimmerman states "This cannot be established. When the claimant arrived at Wyckoff Heights Medical Center his complaints were "whole body ache, not able to move neck". He had no shoulder complaints at that time. If he had an extensive

injury as the surgeon alleges then certainly he would have been symptomatic immediately following the accident.”

Defendants submit an affirmed report from a radiologist, Dr. Michael Setton, who reviewed the MRI of the plaintiff’s left shoulder taken on 9/25/18, more than two years after the accident. He basically concludes that plaintiff has degenerative joint disease in his shoulder. His conclusion is “Review of the left shoulder MRI performed on Reynolds Contreras Sanchez on 9/25/2018, reveals evidence of a chronic Hill-Sachs lesion of the humeral head which is of uncertain etiology with respect to the accident 2 years and 8 months prior. A Hill-Sachs lesion represents a bony impaction type injury sustained at the time of an anteroinferior shoulder dislocation. There is no evidence of any surrounding bone marrow edema to suggest a recent injury, occurring within 3 months of the MRI. There is, however, no way of accurately determining whether this dislocation could have occurred 6 months or even 6 years prior due to the significant amount of time elapsed between the accident and this MRI. There is no other evidence of osseous or soft tissue injury which may have resulted from the accident occurring on 1/19/2016. There is mild supraspinatus tendinopathy, reflecting an early stage of tendon degeneration related to rotator cuff impingement. There is minimal subacromial/subdeltoid bursitis, reflecting a reactive inflammation of the synovial lining of this potential space secondary to impingement. Impingement is a process whereby the rotator cuff tendons and overlying subacromial/subdeltoid bursa get pinched in between the humeral head and acromion process with shoulder abduction. It reflects a chronic repetitive overuse type injury, with no causal relation to trauma. There is no evidence of rotator cuff tear, nor is there evidence of peritendinous or myotendinous soft tissue edema to suggest any acute

traumatic rotator cuff injury. There is no evidence of acute fracture, nor is there evidence of abnormal bone marrow signal to suggest a recent dislocation or any other occult osseous injury. There is no evidence of any capsular or labral injury. There is minimal bicipital tenosynovitis, reflecting a reactive inflammation of the synovial lining of the biceps tendon sheath secondary to a chronic repetitive friction type overuse injury, unrelated to trauma. There is minimal joint fluid present, the quantity of which is within physiologic range to allow for normal lubrication of the articular surfaces. There is no evidence of a significant joint effusion, a finding which strongly mitigates the likelihood of any recent traumatic internal joint derangement. There is mild hypertrophic acromioclavicular joint degeneration, reflecting an extremely common form of degenerative joint disease with bony and capsular hypertrophy, chronic findings which predate and are unrelated to the accident. There is no evidence of any traumatic acromioclavicular joint injury.”

Defendants contend that they make a prima facie case for summary judgment dismissing the plaintiff’s complaint. With regard to the 90/180 day category of injury, counsel states “Plaintiff testified that he did not go back to work at the restaurant after the accident, but that he is currently employed cleaning homes. See pp. 58-60. Plaintiff testified that he was confined to his bed for two (2) months and to his home for (6) months after the accident. See p. 62. These time periods, however, are irrelevant, as defendant has already shown that plaintiff’s alleged injuries are not related to the accident, thus rendering the 90/180 category inapplicable.” [Doc 38 ¶22]. This argument is insufficient to make a prima facie case with regard to the 90/180 day category of injury.

The only item in defendants’ motion papers that can be referred to with regard to this category of injury, that is, information with regard to the six months after the accident, is the

plaintiff's EBT, taken on November 7, 2019. He testified that he did not go back to his job, and that his doctors told him not to go back to work [Page 60]. He went for physical therapy and was told that the length of time he shouldn't work depended on the results of the physical therapy [*id.*]. Plaintiff testified that he went to physical therapy for four to six months, first three times a week for two months, then two times a week. He was then discharged from physical therapy and given home exercises. He then went to an orthopedist, Dr. Berkowitz, who was referred to him by a friend. Dr. Berkowitz sent him for another MRI. That report is not in the motion papers. Plaintiff testified that Dr. Berkowitz told him there was a tear in his tendons and needed surgery. He was told that the surgery would give him back a full range of motion and "my pain would go away" [Page 52]. After the surgery, he said he went for physical therapy again, for more than six months.

Plaintiff testified that he had a subsequent accident in September of 2018 [*id.* Page 58]. He was driving a car and further injured his left shoulder. The MRI of his left shoulder which defendant's doctor reviewed was conducted after the September 2018 accident, and the arthroscopic surgery to his left shoulder was performed in December of 2018. However, plaintiff testified that he had an MRI at Wyckoff Heights Hospital two months after his 2016 accident [Page 48]. He was told he needed surgery. He went to a different doctor. The MRI report is submitted by defendants. It is unclear why Dr. Setton was given the 2018 MRI films to review and not the ones from 2016. The MRI report states that the first was taken on February 11, 2016, and another one was taken at Wyckoff Heights Hospital on July 6, 2016. The report at Pages 2-3 of Doc 46 compares the two, and states that the radiologist sees "mild insertional tendinosis" and "bursitis," neither of which were visible on the first MRI.

The court finds that defendants have not made a *prima facie* showing of their entitlement to summary judgment and have thus not shifted the burden of proof to the plaintiff (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyley*, 79 NY2d 955, 956-957 [1992]).

Nonetheless, even if defendants had made a *prima facie* case, the plaintiff's submissions would have been found to overcome it and raise issues of fact on the issue of "serious injury."

In opposition to the motion, the plaintiff submits an affirmation of counsel and a number of exhibits. The first item is at Document 54, an affirmation from Dr. Dov J. Berkowitz. He states that he first saw plaintiff in August 2018, before the second accident, and that when he examined him, he had restricted range of motion and marked pain. He sent him for an MRI, and thought he would find "likely occult labral versus rotator cuff tear." The report from the "left shoulder MRI report performed on September 25, 2018, was reviewed. This MRI report revealed a partial thickness undersurface tendon insertional tear; mild subacromial bursitis, and glenohumeral joint effusion; and downward sloping acromion process narrowing the subacromial space." Dr. Berkowitz saw plaintiff next on October 15, 2018, after the motor vehicle accident, and states "Mr. Contreras Sanchez was seen for a follow-up visit. He was still complaining of persistent left shoulder pain that had not been improving with physical therapy. He indicated that pain is worse with lifting heavy objects and rotational movements. At that time, I noted restricted range of motion of his left shoulder as follows: forward flexion- 125 out of 180 degrees, abduction - 130 out of 180 degrees, marked rotational pain at about 90 degrees of abduction, positive Hawkin's sign, positive O'Brien's sign and weakness with downward pressure against abduction. My impression

was left shoulder derangement with partial rotator cuff tear. . . I recommended him for a left shoulder arthroscopy.” Dr. Berkowitz does not mention the September 2018 accident in his affirmation. It is also not mentioned in his narrative reports. He performed the surgery, and says “my postoperative diagnosis was left shoulder tearing of the rotator cuff, supraspinatus tendon, tearing of the anterior labrum, chondral lesion of the humeral head, extensive hypertrophic synovitis, multiple adhesions, significant hyperemic bursitis, and thickened CA ligament.” He then describes several follow up visits, all of which resulted in range of motion testing, and none was normal. Then, for oppose this motion, there was an April 17, 2023 visit, and Dr. Berkowitz states “his left should is improved overall. He gets some occasional discomfort with internal rotation of the shoulder. He can forward flexion to 180 degrees (normal 180 degrees). Abduction is 170 degrees out of 180 degrees. Internal rotation is about 60 degrees out of a normal of 70) and external rotation is about 75 degrees out of a normal of 90 degrees. 13. Based upon my examination of the Plaintiff, his age and medical history, his ongoing complaints, the diagnostic tests and the left shoulder arthroscopy that I performed on December 26, 2018, it is my opinion with a reasonable degree of medical certainty that injuries to plaintiff's left shoulder are casually and solely related to the accident of January 19, 2016. . . . it is my further opinion that the left shoulder injuries suffered by the Plaintiff were traumatic in nature, and not the result of any degenerative changes or conditions that may have existed previously. Despite the February 11, 2016 left shoulder MRI report taken at Wyckoff Height Medical Center, that was reported as normal (a clearly inaccurate reading) and what the defense might argue about the lack of a tear on the September 25, 2018 left shoulder MRI REPORT, I justifiably relied on the findings of the September 25, 2018 left shoulder MRI REPORT as well as my examinations of the plaintiff

to make a recommendation for left shoulder surgery following the failure of conservative treatment. The left shoulder arthroscopy performed by me on December 26, 2018 confirmed: a) the accuracy of the left shoulder MRI report taken on September 25, 2018; b) the inaccuracy of the February 11, 2016 MRI report; and c) the traumatically induced injuries that were causing the plaintiff's severe and continuous pain in his left shoulder since the time of the January 19, 2016 accident." Dr. Berkowitz concludes "Based upon my examination of the Plaintiff, his age and medical history, his ongoing complaints, the diagnostic tests and the left shoulder arthroscopy that I performed on December 26, 2018, it is also my opinion to a reasonable degree of medical certainty that the Plaintiff suffered a significant limitation of use of his left shoulder as a result of the January 19, 2016 accident. Based upon my examination of the Plaintiff, his age and medical history, his ongoing complaints, the diagnostic tests and the left shoulder arthroscopy that I performed on December 26, 2018, it is also my opinion to a reasonable degree of medical certainty that the Plaintiff has a permanent consequential limitation of his left shoulder that was caused solely by the January 19, 2016 accident."

The Wyckoff Heights treatment records submitted by plaintiff are not in admissible form and could not be considered.

Based upon the foregoing, the court finds that the plaintiff has overcome the motion and 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", as well as a "medically determined injury or impairment which prevented plaintiff from performing substantially all of his usual and customary daily activities for at least ninety of the first one hundred eighty days immediately following the

accident,” so as to warrant denial of the defendants’ motion for summary judgment. While it is troubling that there is no indication that Dr. Berkowitz was told of the second accident, his first exam in August 2018 was prior to the second accident, and if the September 2018 accident exacerbated plaintiff’s injuries, that doesn’t mean he was not injured in the 2016 accident. These are factual issues for a jury.

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

This constitutes the decision and order of the court.

Dated: September 29, 2023

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Hon. Debra Silber, J.S.C.