

**Firoj v Beal**

2023 NY Slip Op 33390(U)

September 29, 2023

Supreme Court, Kings County

Docket Number: Index No. 501044/2021

Judge: Debra Silber

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

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**MOHAMAD FIROJ,**

**Plaintiff,**

**-against-**

**NAZIRAH BEAL,**

**Defendant.**

**DECISION / ORDER**

**Index No. 501044/2021  
Motion Seq. No. 3**

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

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>52 - 61</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>97 - 106</u>
Reply Affirmation.....	<u>107 - 109</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 October 6, 2020. The plaintiff claims that, while stopped for a red traffic light on Atlantic Avenue at its intersection with 92<sup>nd</sup> Street, in Queens, NY, he was struck in the rear by a vehicle owned by former defendant Hertz a/k/a Hertz System, Inc. a/k/a The Hertz Corporation and operated by defendant Nazirah Beal.<sup>1</sup> Plaintiff testified at his EBT, held on March 30, 2022, that at the time of the accident, he was driving home [Tr at Doc 58, pages 23-24]. Plaintiff testified that as a result of the impact, his left leg and left knee hit the dashboard [*id.* page 41], that an ambulance came to the scene [*id.* page 46], that

<sup>1</sup> Hertz was granted summary judgment on May 12, 2023, Mot. Seq. # 5, based on the Graves Amendment (49USC 30106) and removed from the caption. To the extent the complaint refers to "Nazirah Beal and/or John Doe," it is ordered that "John Doe" be removed from the caption as well.

he did not complain about pain to the police [*id.* page 48], that he declined the ambulance and left with a friend who helped tow his car to his home [*id.* page 47], and then, after arriving at his home, he took a taxi to Brookdale Hospital because he was experiencing pain [*id.* page 48].

When plaintiff went to the Brookdale Hospital ER on the day of the accident, he made complaints about pain in his neck, left shoulder, left knee and lower back [*id.* page 48]. Plaintiff testified that he had never experienced pain in his left shoulder, neck, left knee or lower back prior to the subject accident [*id.* pages 70-71]. After the accident, he saw his primary care physician, as well as an osteopath, an orthopedic surgeon, a pain management doctor, and he received physical therapy three to four days per week from approximately November of 2020 to September or October of 2021 [*id.* pages 52, 55-57]. Plaintiff testified that surgery was recommended for his left shoulder, but that he declined to have it [*id.* pages 59-61]. At the time of the accident, plaintiff was 42 years of age. In his bill of particulars [Doc 55], plaintiff claims that as a result of the accident, he sustained an intra-meniscal tear in the posterior horn of the medial meniscus in the left knee, a tear in the distal subscapularis tendon in the left shoulder, a sprain of the proximal medial collateral ligament in the left knee, rotator cuff impingement in the left shoulder, cervical paraspinal spasm, cervical sprain/strain, left shoulder sprain/strain, lumbosacral sprain/strain and left knee internal derangement.

In motion sequence #3, defendant Nazirah Beal contends 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 affirmed IME reports from an orthopedist, Dr. Pierce Ferriter [Doc 56], and a radiologist, Dr. Melissa Sapan Cohn [Doc 57].

Dr. Ferriter, an orthopedist, examined plaintiff on May 12, 2022, on behalf of the defendant. This was one year and seven months after the accident. Dr. Ferriter states that plaintiff complained of pain in his neck, lower back, left shoulder, left elbow and left knee. He tested plaintiff's range of motion with a goniometer and reports that plaintiff had normal ranges of motion in his cervical spine, lumbar spine, left shoulder, left elbow and left knee, with no tenderness, swelling or spasm. Dr. Ferriter further reports that all related tests were negative or normal.

Dr. Ferriter concludes his report by simply stating that the plaintiff's "cervical spine sprain/strain," "lumbar sprain/strain," "left shoulder sprain/strain," "left elbow sprain/strain," and "left knee sprain/strain" are all "resolved." Dr. Ferriter's report is silent on the issues of causation and permanency but, despite the findings in his report, he unexpectedly opines that "there is objective evidence of an orthopedic disability." The court can only surmise that it was the doctor's intention to write that "there is *no* objective evidence of an orthopedic disability," and that this is either a typographical error or is the product of poor proofreading.

Dr. Melissa Sapan Cohn, the defendant's radiologist, provides affirmed reports describing her review of the plaintiff's x-rays and MRIs. In her review of the plaintiff's cervical x-ray, taken on November 13, 2020, she notes "straightening of the normal cervical lordosis" and "multilevel degenerative changes." In her review of the x-ray of the

plaintiff's lumbar spine, also taken on November 13, 2020, she finds that it was a "normal lumbosacral spine x-ray."

Dr. Sapan Cohn also reviewed the plaintiff's MRIs. Her review of the MRI of the plaintiff's cervical spine, taken on February 16, 2021, states that "[t]here is disc desiccation at C2-3 through C6-7," which she opines "is the commencement of degenerative disc disease." She finds that there are "osteophyte and/or uncovertebral joint hypertrophy at C3-4 through C5-6," and opines that this is "consistent with chronic and long-standing disease." Dr. Sapan Cohn also notes that "[t]here is disc bulging at C4-5 through C6-7," opining that "[d]isc bulging is unrelated to trauma," and that it "is within the spectrum of degenerative disc disease." Finally, she notes that "[t]here is mild disc space narrowing at C3-4 and C4-5," which she also finds "is within the spectrum of degenerative disc disease." She states that "[t]here is no evidence for disc herniation or acute traumatic related injury."

In her review of the plaintiff's lumbar MRI, taken on February 24, 2021, Dr. Sapan Cohn finds that "[t]here is disc desiccation at L3-4," which she opines "is the commencement of degenerative disc disease." She also finds that "[t]here is mild disc bulging at L3-4," and opines that "[t]his is within the spectrum of degenerative disc disease and is not related to trauma." She further states that "[t]here is no evidence for disc herniation or acute traumatic related injury."

Dr. Sapan Cohn's review of the MRI of the plaintiff's left shoulder, which was taken on December 23, 2020, finds that "[t]here are acromioclavicular joint hypertrophic degenerative changes," and opines that "[t]his represents arthritis of the shoulder and is chronic in nature." She also notes that the plaintiff has "a type III, hooked acromion

process,” which she states, “represents an anatomic variant which predisposes to underlying rotator cuff pathology.” Dr. Sapan Cohn further notes that “[t]here are cystic degenerative changes of the humeral head,” which she states, “represent traction cysts” and opines that they “are associated with long-standing rotator cuff pathology.” She also notes that “[t]here is an incidental ganglion cyst,” which she opines “is unrelated to trauma.” Dr. Sapan Cohn concludes her report by opining that “there are degenerative changes of the acromioclavicular joint and anatomic variation in the configuration of the acromion process which have led to underlying degeneration and tearing of the rotator cuff. There are no findings to indicate an acute traumatic related injury on the submitted examination.”

Lastly, Dr. Sapan Cohn reviewed the MRI of the plaintiff’s left knee, which was taken on December 10, 2020, and finds that the “anterior and posterior cruciate ligaments are intact,” and that “[t]here is mild sprain of the proximal medial collateral ligament.” She also states that “[t]he lateral collateral ligament and extensor mechanism are normal. No meniscal tear is identified.” She finds that “[t]here is intra-meniscal mucoid degeneration of the posterior horn of the medial meniscus,” and that “[n]o joint effusion is present.” Her impression is that the plaintiff has “Intra-meniscal mucoid degeneration of the posterior horn of the medial meniscus,” and a “Grade I sprain of the medial collateral ligament.” Dr. Sapan Cohn opines that the intra-meniscal mucoid degeneration of the posterior horn of the medial meniscus “represents degeneration of the meniscus and is due to chronic wear and tear. This does not represent a meniscal tear or a traumatic injury.” Finally, she opines that the “mild” sprain of the medial collateral ligament “is of indeterminate age and not

associated with any findings to indicate an acute traumatic related injury. No joint effusion, hemarthrosis, bone contusion or soft tissue swelling is identified.”

The defendant contends that “[t]he competent medical evidence suggests that any injuries allegedly sustained by the plaintiff were pre-existing/degenerative, and/or resolved. Therefore, said injuries can and should be deemed insignificant within the meaning of the statute.” The movant further contends that “there is no objective and credible evidence that the plaintiff sustained (A) any causally related permanent loss of use; (B) any causally related permanent consequential limitation; or (C) any causally related significant limitation of use of a body function or system.”

Defendant also argues that the plaintiff “did not suffer from medically determined injuries or impairments of a non-permanent nature that substantially curtailed his usual and customary activities for 90 days during the first 180 days following the incident,” contending that “the plaintiff testified that he was not working when the incident occurred due to the ongoing COVID pandemic,” that “per the Bill of Particulars, bed confinement was noted as just 2 weeks,” and that “the plaintiff was not a student and there is no claim for lost wages.” The defendant contends that “[i]n order to establish a claim under the 90/180 category, proof must exist that the plaintiff’s usual and customary activities were impaired in some significant way for 90 days of the first 180 days post-accident. *Cruz v Calabiza*, 641 NYS2d 255 (1st Dept 1996). No such proof exists before the Court.” [Doc 59 Page 7]. This is not sufficient. A party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of the opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004];

*Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]).

With regard to the 90/180 category of injury, the only evidence in the motion papers is plaintiff's EBT testimony. Plaintiff testified at his EBT that on the date of the accident, in October of 2020, he was not working as a result of the pandemic [plaintiff tr at Doc 58, page 13]. He testified that he was confined to bed for seven days after the accident [*id.* page 73] and that he was confined to his home for "nine months after the accident, I only go to therapy. I didn't go anywhere else" [*id.* page 74]. Plaintiff further testified that his doctors recommended surgery to his left shoulder, but that he declined to have it [*id.* pages 59-60]. When he was asked "[w]ere there any activities before this accident that you did on a regular basis that you are unable to do at the present time at all?", he responded that, as a result of the accident, he has difficulty doing laundry, he cannot lift more than eight or nine pounds [*id.* page 75] and cannot pull "heavy weight" anymore [*id.* page 76]. He also testified that he has difficulty driving, and can no longer do "heavy work, heavy job I used to do before the accident, I cannot do it now. I used to drive seven, eight hours at a stretch before accident. I am not able to do even three hours of driving" [*id.* page 71]. He also testified that he "used to work in the restaurant. I used to do serving with plates and I couldn't do it now. I used to do some construction job. I cannot do it now" [*id.* page 71].

The court finds that the defendant fails to make a prima facie case with regard to the 90/180-day category of injury. 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 the defendant had met his 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. Plaintiff provides an affirmation from his treating osteopath, Dr. Arkadiy Shusterman, dated March 7, 2023 [Doc 99], and an affirmed report from his treating orthopedist, Dr. Randall Ehrlich [Doc 100]. Dr. Shusterman first examined plaintiff on November 4, 2020, less than one month after the subject accident, and notes that, when compared to “normals,” plaintiff had significant restrictions in his range of motion in his cervical spine, lumbar spine, left shoulder, left elbow, and left knee. He also noted cervical and lumbar “paraspinal spasm with multiple trigger points.” Dr. Shusterman reports that he reviewed the results of the MRIs of the plaintiff’s cervical spine, which showed disc narrowing and osteophyte formation; of the plaintiff’s left knee, which revealed an intra-meniscal tear in the posterior horn of the medial meniscus, and a Grade 1 sprain of the proximal medial collateral ligament; and of the left shoulder, which showed, among other things, thickening of the distal subscapularis tendon, “consistent with a partial tear in combination with tendinosis/tendinopathy of left shoulder.” Dr. Shusterman examined the plaintiff most

recently in December of 2022, and he found that plaintiff still had limited ranges of motion in his cervical spine, lumbar spine, left shoulder, left elbow and left knee. Dr. Shusterman opines that “[c]onsidering the patient’s symptoms, the results of diagnostic tests and statistical data from medical literature with regards to similar cases, it is medically reasonable to predict with medical certainty that his injuries are permanent in nature and that this patient suffers from a permanent moderate partial disability with permanent limitations.” Finally, Dr. Shusterman causally relates the plaintiff’s injuries to the subject auto accident.

In his affirmed report [Doc 100], Dr. Ehrlich reports that he first saw the plaintiff in June of 2021 regarding plaintiff’s continuing left shoulder and left knee pain arising from the subject motor vehicle accident. Upon examination, utilizing a goniometer, he found reduced ranges of motion in all planes in both the plaintiff’s left shoulder and left knee. He reviewed the MRIs of plaintiff’s left shoulder and left knee. His impression is that plaintiff sustained “[s]ymptomatic traumatic left knee and left shoulder internal derangement resulting from motor vehicle accident.” Dr. Ehrlich’s instructions to the plaintiff were “Activity as tolerated, Limit stairs, Avoid driving, No heavy lifting, Avoid frequent bending/pulling/pushing.” Dr. Ehrlich also opines that “without left shoulder and left knee surgical intervention, there will be persistent pain and dysfunction that will increase as time increases. In addition, in time, this may cause overuse of the opposite extremity, triggering an onset of pain and dysfunction.”

Finally, plaintiff submits an affirmed report from Dr. Bo Headlam, a physical medicine and rehabilitation doctor, who examined the plaintiff on May 13, 2021 for an Independent Medical Exam. In his report, Dr. Headlam reports that the plaintiff had

reduced ranges of motion in his cervical spine, left shoulder, left elbow and left knee. He opines that “[a]fter review of the claimant’s file, taking a history and performing a physical examination, it appears that the above-diagnosed injuries are causally related to the accident on October 6, 2020” and finds that “[b]ased on the examination at this time, there is evidence of a mild disability.” The court must note that when a defendant’s IME doctor 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]).

In conclusion, had defendant made a prima facie case for dismissal, plaintiff’s submissions in opposition would be considered 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 doctors opine 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, it is **ORDERED** that the defendant’s motion is denied.

This constitutes the decision and order of the court.

Dated: September 29, 2023

ENTER :



Hon. Debra Silber, J.S.C.