

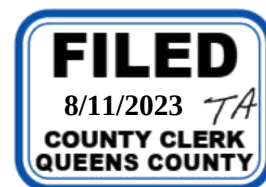
Baker v Irimescu
2023 NY Slip Op 35240(U)
August 10, 2023
Supreme Court, Queens County
Docket Number: Index No. 712286/17
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
EDWARD BAKER,

Plaintiff,

-against-

Index No.: 712286/17

Mot. Date: 6/13/23

Mot. Seq. 2

VIVIAN IRIMESCU and EFFICIENCY
ENTERPRISES, INC.,Defendants.
-----X

The following papers were read on this motion by defendants for an order granting summary judgment, pursuant to CPLR 3212, on the grounds that plaintiff has not sustained a “serious injury” as defined in Insurance Law §5102(d).

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 37-55
Answering Affidavits-Exhibits.....	EF 56-65
Replying Affidavit.....	EF 66

Upon the foregoing papers, it is ordered that the motion by defendants is granted.

As an initial matter, the court file reflects that the plaintiff executed a stipulation of discontinuance with prejudice against defendant Efficiency Enterprises, Inc. on February 16, 2021 (*see* NYSCEF Doc. No. 28).

This action arises out of a motor vehicle accident, that occurred on December 1, 2016. In his Verified Bill of Particulars and Supplemental Verified Bill of Particulars, the plaintiff, who was approximately forty years old at the time of the accident, with a past medical history, alleges, *inter alia*, herniated discs in the cervical spine and lumbar spine, as well as “bilateral knee pain”. The Court notes that pain is not an injury, it is a subjective complaint. Plaintiff alleges that he underwent surgery to his cervical spine, in August of 2020, as a result of his injuries from the accident. He further alleges that he

was confined to the hospital for one day after the accident and to bed and home for one month after the accident.

Defendant moves for an order granting summary judgment, pursuant to CPLR 3212, on the grounds that plaintiff has not sustained a “serious injury” as defined in Insurance Law § 5102(d).

As a general proposition, the proponent of a summary judgment motion of this type must make a *prima facie* showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (see *Licari v Elliot*, 57 NY 2d 230 [1982]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY 2d 557 [1980]).

The defendant’s motion papers must demonstrate, that the plaintiff did not sustain either a permanent consequential limitation of use of a body organ or member, a significant limitation of use of body function or system, or a medically determined injury or impairment of a non-permanent nature that prevented the plaintiff from performing substantially all of the material acts which constituted his or her usual customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Choi v Guerrero*, 82 AD3d 1080 [2d Dept. 2011]; *Jilani v Palmer*, 83 AD3d 786 [2d Dept 2011]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Reed v Righton Limo, Inc.*, 82 AD3d 1070 [2d Dept. 2011]; *Joris v UMF Car & Limo Service*, 82 AD3d 1050 [2d Dept. 2011]; *Keenum v Atkins*, 82 AD3d 843 [2d Dept. 2011]; *Pero v Transservice Logistics*, 83 AD3d 681 [2d Dept. 2011]). However, if the defendant meets this burden, the burden shifts to the plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she/he sustained a “serious injury” (see *Pommels v Perez*, 4 NY3d 566 [2005]; *Gaddy v Eyler, supra*).

Here, the defendant met its burden by submitting, *inter alia*, the affirmed medical reports of Eial Faierman, a board certified orthopedic surgeon, who examined the plaintiff on October 15, 2021. Dr. Faierman performed range of motion testing to the cervical and lumbar spine with the use of a goniometer finding completely full, normal

ranges of motion at all levels. He concluded that there were no objective findings of any traumatic pathology on the examination of the cervical spine and lumbar spine and that the plaintiff does not require any further treatment as it relates to the accident of December 2, 2016. Dr. Faierman also reviewed various medical records, including a CT scan of the head and cervical spine, dated April 15, 2014, which revealed mild multi-level degenerative changes most severe at C7-T1.

According to Dr. Faierman, the plaintiff gave a history of injuring his neck when he was 18 years old and had been experiencing chronic neck pains ever since. Contrary to the plaintiff's claims in his Verified Bill of Particulars, the plaintiff denied injuring his lower back in the December 2, 2016 accident. Plaintiff had a past medical history of lower back pains from a weightlifting injury and did sustain lower back injury in a fall in the shower, in December 2018. Plaintiff advised Dr. Faierman that he had chronic neck pains, for approximately 20 years prior to the current accident, and that the surgery of August, 2020, resolved his radicular symptoms and markedly improved his neck pains.

Dr. Faierman submitted an addendum, dated January 5, 2022, where he affirmed that he reviewed, *inter alia*, MRI films of the cervical spine and lumbar spine, from December 20, 2016, and CT scan films, with cervical spine from April 15, 2014. He opined that the CT scan and MRI films revealed multi-level degenerative changes. The CT scan films revealed multilevel posterior osteophytes. There were some bridging osteophytes anteriorly, consistent with moderate pre-existing multilevel degenerative changes unrelated to the current accident. A review of the MRI films revealed disc osteophyte complexes at multiple levels. He found no traumatic pathology on the cervical spine MRI films related to the accident of December 2, 2016. He opined that while the plaintiff may have temporarily aggravated his neck pains, there were no objective findings of new traumatic pathology in the cervical spine related to the accident of December 2, 2016.

In regards to the lumbar spine, Dr. Faierman states that his review of the lumbar spine MRI reveals degenerative findings, at the L5/S1 level with disc desiccation, endplate sclerosis, endplate irregularity, and a posterior discosteophyte complex. These findings are consistent with preexisting degenerative changes unrelated to the accident of

December 2, 2016. Dr. Faierman did not see any traumatic pathology on the MRI films related to the accident of December 2, 2016.

In another addendum, dated April 20, 2022, Dr. Faierman reviewed a cervical spine MRI, dated January 30, 2020. Dr. Faierman opined that this review revealed the same degenerative findings noted on the previous MRI and CT scan films. There are multilevel degenerative findings with the most severe spondylosis at the C4/5 and C5/6 levels. These were the same anterior osteophytes and posterior disc osteophyte complexes that were seen in the previous studies remain unchanged. He saw no traumatic pathology on the cervical spine films of January 30, 2020 related to the accident of December 2, 2016.

His review of the lumbar spine MRI, from January 30, 2020, revealed the same L5/S1 degenerative findings noted in the previous MRIs. There were no traumatic herniated discs, ligamentous pathology, fractures, subluxations or dislocations on this MRI. Dr. Faierman did not see any traumatic pathology in the lumbar spine related to the accident of December 2, 2016.

Finally, Dr. Faierman reviewed CT scans of the cervical spine, from February 7, 2018. He affirmed that the CT scan revealed unchanged moderate-severe multilevel degenerative changes from C2 through C6, with disc space narrowing, anterior bridging osteophytes and end plate sclerosis.

Defendants also submit multiple radiological reviews from Dr. Marc J. Katzman, a board certified radiologist. In an affirmed report, dated January 26, 2022, Dr. Katzman reviewed a CT of the cervical spine, on April 15, 2014, and concluded that it revealed mild chronic multilevel degenerative spondylosis that predated the subject accident. His review of the cervical spine, on December 20, 2016, revealed mild chronic multilevel degenerative disc disease without evidence of recent post-traumatic injury. The disc bulges at C3-4, C4-5, C5-6, and C6-7, were, according to the doctor, all by definition degenerative and non-traumatic. All aforementioned degenerative changes of the cervical spine are clearly chronic, pre-existing, and unrelated to the accident. There was no recent appearing traumatic disc herniation, extrusion or annular tear. There is no evidence of recent post-traumatic injury to the cervical spine on the basis of this MRI exam.

Dr. Katzman also reviewed the December 20, 2016 lumbar MRI and opined that it revealed mild chronic multilevel degenerative disc disease of the lumbar spine without evidence of recent post-traumatic injury.

Defendants also submit plaintiff's examination before trial (EBT) transcript, where he testified that he had been released from prison in 2014 and, approximately one month after the accident, he was sent back to jail. He testified that he had long standing sharp pain in his back and, in 2015, he was told he had arthritis in his lower back. He testified that he had several x-rays done while he was incarcerated before the subject accident and could not remember the parts of the body that had been treated. He testified to slipping in the shower in jail, in early 2019, where he hit his head on the shower floor and after hitting his head he felt pain in his back and neck and saw the prison doctor.

Defendant met its burden on the "90/180" category of the Insurance Law by submitting plaintiff's deposition transcript and Verified Bill of Particulars and Supplemental Verified Bill of Particulars, where he alleged that he was confined to home for thirty days after the accident (*see Strenk v Rodas*, 111 AD3d 920 [2d Dept. 2013]; *Bucci v Kempinski*, 273 AD2d 333 [2d Dept. 2000]).

In opposition, the plaintiff fails to raise an issue of fact. Plaintiff submits the affirmation of Dr. David Payne, a radiologist, who affirms that he reviewed the MRI films of the cervical spine, that was taken on December 20, 2016, and that he "stand[s] by" his prior MRI review of December 21, 2016, which found herniated and bulging discs in the cervical spine. However, he did not review the prior CT scan of the cervical spine, that were taken on April 15, 2014, and, other than to state in a conclusory manner that "CT scans are less accurate for depiction of spine pathology than are MRIs", he does not address the opinions of Dr. Faierman and of Dr. Katzman regarding their reviews of the CT scan films from 2014. Dr. Payne affirms that "[h]ad the herniations and bulges, that were present on the MRI occurred prior to the date of accident - December 1, 2016, there would have appeared degeneration and/or osteophytes on the MRI scans". However, significantly, he does not comment on the fact that Dr. Faierman did find osteophytes when he reviewed the MRI films.

Thus, Dr. Payne's affirmation is insufficient to raise a triable issue of fact as he does not adequately address the findings of the defendants' radiologists that the alleged

injuries to the cervical spine were degenerative in nature (*see Barnes v Paukar*, 215 AD3d 615 [2d Dept. 2023]; *Amirova v. JND Trans, Inc.*; 206 AD3d 601 [2d Dept. 2021]; *Mnatcakanova v Elliot*, 174 AD3d 798 [2d Dept. 2019]; *Zavala v Zizzo*, 172 AD3d 793 [2d Dept. 2019]; *Cavitolo v Broser*, 163 AD3d 913 [2d Dept. 2018]).

The affirmation of Dr. Scott Katzman is also insufficient. To demonstrate a "serious injury", the plaintiff must submit competent objective medical evidence based on both a contemporaneous physical examination and a recent physical examination. (*see Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345 [2002]). Here, Dr. Katzman did not examine the plaintiff until July 20, 2020.

Furthermore, Dr. Katzman's failure to address plaintiff's past medical history renders his affirmation speculative (*see Rivera v Fernandez*, 25 NY3d 1222 [2015]; *Shmerkovich v. Sitar Corp.*, 61 AD3d 843 [2d Dept. 2009]; *Ferebee v. Sheika*, 58 AD3d 675 [2d Dept. 2009]; *Carrillo v DiPaola*, 56 AD3d 712 [2d Dept. 2008]; *Felix v Wildred*, 54 AD3d 891 [2d Dept. 2008]; *Rabolt v Park*, 50 AD3d 995 [2d Dept. 2008]; *O'Shea v Johnson*, 49 AD3d 614 [2d Dept. 2008]; *Magarin v Kropf*, 24 AD3d 733 [2d Dept. 2005], *Resek v Morreale*, 74 AD3d 1043 [2d Dept. 2010]; *Moore v Sarwar*, 29 AD3d 752, 753 [2d Dept. 2006] *Tudisco v James*, 28 AD3d 536, 537 [2d Dept. 2006]; *Bennett v Genas*, 27 AD3d 601, 602 [2d Dept. 2006]; *Moore v Sarwar*, 29 AD3d 752 [2d Dept. 2006]).

Finally, the plaintiff's argument that his surgical scar constitutes a "significant disfigurement" is unavailing as the plaintiff did not allege in his Verified Bill of Particulars that his injuries qualified under that category of Insurance Law §5102(d).

Accordingly, it is

ORDERED that the defendants' motion for summary judgment on the issue of "serious injury" is granted; and it is further

ORDERED that the plaintiff's complaint is dismissed.

Dated: August 10, 2023



TIMOTHY J. DUFFICY, J.S.C.

