

<b>Norfleet v Yousuf</b>
2018 NY Slip Op 30254(U)
February 14, 2018
Supreme Court, Kings County
Docket Number: 500824/15
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14<sup>th</sup> day of February, 2018

P R E S E N T :

HON. DEBRA SILBER,

Justice.

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RICHARD NORFLEET JR. and NUBIA T.  
NORFLEET,

Plaintiffs,

-against-

MOHAMMAD YOUSUF,

Defendant.

**DECISION / ORDER**

Index No. 500824/15  
Mot. Seq. # 3  
Cal. # 40  
Submitted: 2/8/18

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Papers numbered 1 to 19 were read on this motion:

Papers Numbered:

Notice of Motion/Order to Show Cause/Exhibits \_\_\_\_\_

1-12 \_\_\_\_\_

Affirmation in Opposition/Exhibits \_\_\_\_\_

13-18 \_\_\_\_\_

Reply Affirmation/Exhibits \_\_\_\_\_

19 \_\_\_\_\_

Defendant Mohammad Yousuf moves for summary judgment and dismissal of plaintiffs' complaint under CPLR § 3212, on the grounds that plaintiff Richard Norfleet Jr. (Nubia Norfleet's claims are purely derivative) failed to sustain a "serious injury," as defined in Insurance Law § 5102(d).

The subject auto accident took place on August 7, 2014, at or near the intersection of South Conduit Avenue and 79<sup>th</sup> Street in Queens County. At the time of the accident, plaintiff allegedly had to brake suddenly when he came upon a number of mattresses on the road in front of him, and plaintiff was then hit in the rear by defendant's vehicle, a livery cab. Plaintiff claims he sustained injuries from the accident to, *inter alia*, his neck, back, hips and right shoulder.

Movant has made a *prima facie* case with objective medical findings with regard to the following categories of injury:

- a permanent consequential limitation of use of a body organ or member
- a significant limitation of use of a body function or system
- a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident

As regards plaintiff's claim, set forth in his bill of particulars, that he sustained "a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident," defendant submits the transcript of plaintiff's EBT where he testified that he is a self-employed barber and is not claiming a loss of earnings as a

result fo the accident. He further testified that he missed some days of work in the four weeks after the accident. As plaintiff resumed his normal daily activities less than 90 days after the accident, defendant makes a *prima facie* case for dismissal of this claim. See *Nesci v Romanelli*, 74 AD3d 765 [2d Dept 2010]; *Kreimerman v Stunis*, 74 AD3d 753 [2d Dept 2010]; *Camacho v Dwelle*, 54 AD3d 706 [2d Dept 2008]. Plaintiff testified (EBT Page 11) he missed some days of work in the first month after the accident, and then he missed two months of work after his shoulder surgery, which was performed on December 10, 2014, four months after the accident. His missed work thus adds up to less than 90 days. His testimony supports defendant's claim that he did not sustain an injury in this category. In addition, movant provides an affirmation from Dr. Rikki Lane, who is board certified in emergency medicine, which supports defendant's claim as to this category. See *Candi v Omega Cab*, 6 AD3d 641 [2<sup>nd</sup> Dept 2004].

However, as movant has not made a *prima facie* showing with regard to "a permanent consequential limitation of use of a body organ or member" or "a significant limitation of use of a body function or system," the motion must be denied. Defendant's Independent Medication Examination by Dr. Barbara Freeman, an orthopedist, held on June 21, 2016, indicates that plaintiff's range of motion in his shoulder was not normal. She acknowledges this, stating "range of motion is down." For the spine, Dr. Freeman doesn't provide "normals" for reference, and states that "range of motion testing of the spine . . . has been found in multiple studies . . . not to be a reliable indicator of disability." The affirmed IME by Dr. Michael Carciete, a neurologist, states that plaintiff "has no objective neurological findings." He did not conduct any range of motion testing. These IME reports, taken together, do not make out a *prima facie* case for

dismissal.

The defendant has failed to meet his burden of proof, that is, to show that the plaintiff Richard Norfleet, Jr. did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. See, *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]. Since the defendant failed to meet his burden of proof as to all applicable categories of injury, the motion must be denied. It is unnecessary to consider the papers submitted by the 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].

The court notes that, had defendant made a *prima facie* case with regard to all of the applicable categories of injury, the court would have nonetheless concluded that plaintiff overcame it and raised a triable issue of fact, also resulting in the court's denial of the motion. His numerous doctor's affirmations, both contemporaneous with the accident and recent, indicate significant restrictions in plaintiff's range of motion in his neck, back, right shoulder and both hips. Further, his doctors state that his injuries are causally related to the accident. The most recent exam, January 19, 2018, by Dr. Gabriel Dassa, states that plaintiff's right shoulder is swollen and dysfunctional, as he now has adhesive capsulitis. Dr. Dassa states that plaintiff's injuries are permanent,

and that "it is my professional opinion, with a reasonable degree of medical certainty, that today's evaluation and findings represent objective evidence of persistent impairment to the patient's neck, back, right shoulder, both hips, and left thumb. It is also my opinion that . . . [if the] history in the medical record is true and accurate, that the accident of August 7, 2014 is the competent cause of the patient's injuries and orthopedic impairments."

Therefore, defendant's motion for summary judgment is denied.

This constitutes the decision and order of the court.

E N T E R :

  
Hon. Debra Silber, J.S.C.

Hon. Debra Silber  
Justice Supreme Court