

Zahn v Tetteh

2020 NY Slip Op 30361(U)

February 4, 2020

Supreme Court, Kings County

Docket Number: 501187/2017

Judge: Debra Silber

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

x

**ROBERT ZAHN, JAMEL ALSTON and MICHAEL
HEXENBAUGH,**

DECISION / ORDER

Plaintiffs,

**Index No. 501187/2017
Motion Seq. No. 2
Date Submitted: 11/14/19
Cal No. 59**

-against-

QUASHIE A. TETTEH and IGAL HACKING CORP.,

Defendants.

x

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

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>29-38</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>89-115</u>
Reply Affirmation.....	<u>120</u>

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

This is a personal injury action arising out of a motor vehicle accident which took place on October 21, 2015. Plaintiffs Jamel Alston and Michael Hexenbaugh were passengers in a vehicle owned by Con Edison and operated by plaintiff Robert Zahn which was stopped for a light on Atlantic Avenue at the intersection with Euclid Avenue in Brooklyn, New York, when it was struck in the rear by a yellow taxi owned by defendant Igal Hacking Corp. and operated by defendant Quashie A. Tetteh. Summary judgment on the issue of liability was granted by the court on March 1, 2017. The court notes that this motion is only brought by defendant Igal Hacking Corp., as defendant driver Tetteh has a different attorney. Further, this motion is only addressed to plaintiff Alston's claims, as

defendant made a separate motion (Seq. # 3) with regard to plaintiff Zahn's claims.

In his Bill of Particulars, plaintiff Alston alleges that as a result of the accident he sustained injuries to his neck and back. He was removed from the scene in an ambulance and brought to the emergency room at Jamaica Medical Center. At the time of the accident, plaintiff was 37 years old. Plaintiff alleges that he sustained a permanent consequential limitation of use and a significant limitation of use, as well as a non-permanent injury which prevented him from performing substantially all of his usual and customary daily activities for 90 of the 180 days following the accident. However, he testified at his EBT that he was only incapacitated from his employment from October 21, 2015 to November 4, 2015. This is confirmed by the Worker's Compensation decision at Exhibit J of plaintiff's opposition.

Defendant contends that plaintiff Alston did not sustain a serious injury as defined by Insurance Law § 5102(d). Defendant argues that, given plaintiff Alston's deposition testimony, he does not satisfy the 90/180 category. Further, defendant contends that plaintiff Alston's completely normal independent neurological examination, combined with defendant's radiologist's review, demonstrate that plaintiff did not sustain a serious injury as a result of the subject accident. Defendant submits the pleadings, plaintiff's EBT transcript, an affirmed IME report from Michael J. Carciente, M.D., who examined plaintiff on August 21, 2018, as well as an affirmed report from Darren Fitzpatrick, M.D., a radiologist, who reviewed the x-rays of Alston's cervical and lumbar spine taken on October 28, 2018, seven days after the subject accident. Dr. Carciente reports a completely normal neurological examination with no objective neurological findings, and "no objective evidence of either a radiculopathy or a spinal cord condition," and "no ongoing neurological injury, disability or permanency." Similarly, Dr. Fitzpatrick states that plaintiff has minimal cervical and lumbar degenerative disc disease, which was not caused

by a traumatic injury.

Plaintiff opposes the motion, contending defendant has failed to establish its entitlement to summary judgment insofar as the defendant's neurologist doesn't indicate that he performed any range of motion testing and he did not review Alston's medical records. In the alternative, plaintiff's counsel argues that in the event the court finds defendant has met its burden, questions of fact exist as to whether Alston has sustained a serious injury. Plaintiff relies upon his medical records, including affirmed reports which are contemporaneous with the date of the accident and a recent report of an examination by Dr. Gautam Khakhar on May 14, 2019 [Exhibit Y]. Dr. Khakhar finds that Alston continues to suffer from quantifiable and decreased ranges of motion in his cervical and lumbar spine and he diagnoses plaintiff with "myofascial derangement of the cervical and lumbar spine" as a result of to the subject accident, which he describes as "significant injuries," resulting in "a partial permanent disability."

Conclusions of Law

Defendant has failed to make a *prima facie* showing that plaintiff Alston did not sustain a permanent consequential limitation of use or a significant limitation of use, as defendant's examining neurologist (Exhibit E) does not specify his quantitative findings of plaintiff's range of motion, or what tests he performed (see *Connors v Flaherty*, 32 AD3d 891, 893 [2d Dept 2006] ["examining physicians failed to specify the degrees of range of motion in the plaintiff's cervical spine"]; see also *McFadden v Barry*, 63 AD3d 1120, 1120–21 [2d Dept 2009] ["defendants' examining neurologist and orthopedist, however, both failed to address whether there were any limitations in the injured plaintiff's range of motion in the rotation of her lumbar spine"]; *Whittaker v Webster Trucking Corp.*, 33 AD3d 613 [2d Dept 2006] ["The affirmed medical reports of the defendants' examining orthopedic surgeon and neurologist merely noted that the plaintiff had a full range of motion in his

cervical spine without setting forth the objective test or tests performed supporting their conclusions”).

As defendant has failed to make a prima facie case with regard to all of plaintiff's 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]).

In any event, had defendant made a prima facie case for dismissal, plaintiff's affirmed medical reports, which are both contemporaneous with the accident and recent, are sufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a serious injury as a result of the accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: February 4, 2020

ENTER :



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court