Lexis® Context Report

Michael Christopher Gerling M.D.

Orthopedic Surgery, Spinal Surgery

User Name:

Jasen Abrahamsen

Date and Time:

Monday, March 31, 2025 8:02:00 AM EDT

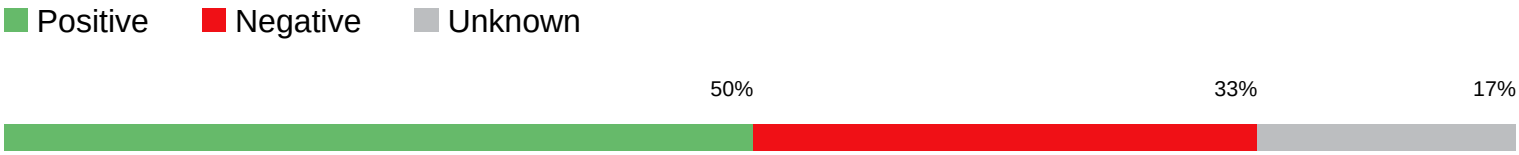
Job Number:

249115644

About LexisNexis | Privacy Policy | Terms and Conditions | Copyright © 2025 LexisNexis.

Michael Christopher Gerling M.D.
Orthopedic Surgery, Spinal Surgery

Overall Challenges Outcome Analysis(12)



Trial Level Challenges

Cases	Methodology	Qualification	Relevance	Procedural	Outcome
Guzman v. Miles	●				✗
Callum v. Price					✗
Voltaire v City of New York	●				✓
Martinez v. Midtown Moving & Storage, Inc.					?
Nilia Alicea, Plaintiff v. Breen Bros Towing Inc. and Robert Santiago, Defendants.					✓
Reyes v. New York City Tr. Auth.					✗
Thompson v. Silva					✓
Brailyn Osvaldo Duran Adames And Damian Armando Regalado Adames v. Nocona Transp., Daniel Wayne Robinson, City Bronx Leasing Two, And Arcenio Contreras, Defendants	●				✓
Casuso v. Mercy Care Transp., Inc.	●				✗
Lopez v. Szerdai					✓
Perez v. Oliveira					?

Appellate Level Challenges

Cases	Methodology	Qualification	Relevance	Procedural	Outcome
Goldwire v New York City Tr. Auth.					✓

No *Shepard's* Signal™
As of: March 31, 2025 12:02 PM Z

Guzman v. Miles

Supreme Court of New York, Bronx County

October 26, 2023, Decided; October 26, 2023, Filed

Index No. 301735-2016E

Reporter
2023 N.Y. Misc. LEXIS 26678 *

FELIX GUZMAN and STATE FARM AUTOMOBILE INSURANCE COMPANY, AS SUBROGEE OF FELIX GUZMAN, Plaintiffs, v. DARRIN D. MILES, BANK OF AMERICA LSNG, AT&T CORP., AT&T DATACOMM, LLC, AT&T NETWORK LLC, Defendants.

Core Terms

spine, cervical, injuries, lumbar, range of motion, subject accident, right knee, surgery, left knee, changes, opines, affirmation, tear, causal relationship, degenerative, inter alia, preexisting, deposition, orthopedic, meniscus, chronic, testing, knees, pain, post-surgical, herniation, permanent, flexion, scan

Judges: **[*1]** BEN R. BARBATO, J.S.C., Judge.

Opinion by: BEN R. BARBATO

Opinion

Justice Supreme Court

The following papers numbered 1 to_were read on this motion **(Mot. Seq. No. 7)** for **SUMMARY JUDGMENT THRESHOLD** submitted on June 23. 2023.

Go to table1

Upon the foregoing papers, it is ordered that this motion by defendants DARRIN D. MILES. AT&T MOBILITY SERVICES LLC. and AT&T SERVICES. INC. (collectively "Movants") seeking summary judgment and dismissing plaintiff FELIX GUZMAN's ("Guzman") complaint on the grounds that Guzman has not sustained a "serious injury" pursuant to the provisions of *Insurance Law §§ 5102 (d)* and 5102 (a), is **GRANTED in part** upon review of the moving papers together with opposition submitted thereto.

Guzman alleges that, as a result of a motor vehicle accident which occurred on February 4, 2016, he sustained injuries to his cervical spine, lumbar spine, right knee, and left knee. Guzman alleges that he sustained a "serious injury" under the "permanent consequential limitation," "significant limitation of use." and/or "90/180-day" categories of the Insurance Law.

In support **[*2]** of the motion. Movants submit, inter alia, counsel's affirmation in support; Plaintiff's bills of particulars; Plaintiff's deposition transcript; defendant Darrin D. Miles" deposition transcript; the affirmed report of orthopedic surgeon Andrew Bazos M.D.; the affirmed report of neurologist Adam Bender. M.D.; the affirmed report of Jonathan Garay. D.O.; the affirmed radiological reports of Marc Katzman. M.D.; and the report of professional engineer Kristopher Seluga, M.S., P.E., and applied physiology, accident reconstruction, biomechanics and safety expert Ricky Mehta-Desaid. Ph.D.

Dr. Bazos conducted an orthopedic evaluation of Guzman on September 3, 2020, finding normal range of motion in the cervical spine, thoracolumbar spine, right knee, and left knee, with negative orthopedic testing. Dr. Bazos found that there is no objective evidence of any ongoing pathology, and opines that Guzman sustained minor, self-limited, soft tissue strain and contusion injuries to the cervical spine, lumbar spine, and bilateral knees as a result of the subject accident. Dr. Bazos found that Plaintiff has no limitations in performing his normal daily activities.

Dr. Bender conducted a neurological evaluation **[*3]** of Guzman on August 5, 2020, which was objectively normal and revealed no neurological problem causally related to the subject accident. Dr. Bender found that, given Guzman's medical records and his examination, the relationship between the subject accident and the need for his lumbar laminectomy and fusion is questionable, and any ongoing subjective complaints are associated with his long-standing and pre-existing

conditions.

Dr. Garay performed an evaluation on August 12, 2020, at which time range of motion testing was performed. With respect to the cervical spine, range of motion loss was revealed upon flexion to 40 degrees (45 degrees normal), extension to 30 degrees (50 degrees normal), left and right side bending to 30 degrees (45 degrees normal), and left and right rotation to 55 degrees (80 degrees normal). With respect to the thoracolumbar spine, range of motion loss was revealed upon flexion to 50 degrees (60 degrees normal), extension to 5 degrees (30 degrees normal), left side bending to 25 degrees (30 degrees normal), right side bending to 20 degrees (30 degrees normal), and positive supine straight leg raise on the right side at 50 degrees. With respect to the lower extremities, **[*4]** neurological and orthopedic tests were negative, and range of motion was normal in both knees. Dr. Garay opines that Guzman's range of motion restrictions are consistent with his prior surgery and preexisting disc and spine disease and scoliosis.

Dr. Garay opines that, based upon his evaluation and review of records, Guzman had a preexisting severe cervical spine condition since 2001, there is no causally related cervical spine impairment, and Guzman's current complaints, examination findings, future medical needs, and activity restrictions are related to his preexisting conditions and prior surgery and are unrelated to the underlying accident. Dr. Garay opines that Guzman at most sustained a lumbar strain/sprain that was superimposed upon a prior injury, and. inter alia, upon preexisting degenerated and protruding discs and arthritic changes, and is not causally related to the subject accident.

Dr. Katzman reviewed a November 6, 2017 lumbar spine CT scan which revealed, inter alia, postsurgical changes at L5-S1 without evidence of surgical hardware complication, and moderate chronic multilevel degenerative disc disease. Review of a September 13, 2018 lumbar spine CT scan revealed no **[*5]** appreciable interval change when compared to a prior November 6, 2017 CT scan. Review of a February 23, 2021 x-ray revealed chronic postsurgical changes at L5-S1 without evidence of surgical hardware complications or pseudarthrosis, and degenerative changes.

Dr. Katzman reviewed a May 25, 2016 cervical spine CT scan which revealed no evidence of recent cervical vertebral fracture or traumatic subluxation, but showed a combination of post-surgical changes and chronic multilevel degenerative conditions. Dr. Katzman opines that the disc bulge at C5-C6. among other things. is degenerative and non-traumatic, there is no recent-appearing traumatic disc herniation or extrusion, and there is no evidence of recent posttraumatic injury to the cervical spine that is causally related to the subject accident. Review of a September 13, 2018 cervical spine CT scan revealed no appreciable interval changes since the last CT exam dated May 25, 2016. Review of an August 30, 2019 x-ray of the cervical spine revealed post-surgical changes related to prior decompressive laminotomies/laminoplasties at C3 through C6 levels without evidence of surgical hardware complication, and moderate chronic multilevel **[*6]** degenerative changes. Review of a September 23, 2019 MR1 of the cervical spine revealed, inter alia, chronic post-surgical and degenerative changes. Review of a February 23, 2021 x-ray of the cervical spine revealed no interval change from the prior September 26, 2019 x-ray.

Dr. Katzman reviewed a May 26, 2016 right knee MR] which revealed recent post-traumatic injuries limited to mild superficial prepatellar and pretibial soft tissue swelling, mild prepatellar bursitis, and trace joint effusion. Dr. Katzman notes that there is mild pre-existing chronic intrasubstance degeneration of the posterior horn of the medial meniscus without surface tear. Review of a May 26, 2016 left knee MRI revealed recent posttraumatic injuries limited to mild superficial prepatellar and pretibial soft tissue swelling, a subacute osteochondral injury of the midline trochlea, and a trace joint effusion.

Kristopher Seluga, P.E., and Ricky Mehta-Desai, Ph.D. conducted an investigation and performed an analysis as to the causal connectivity of Guzman's alleged injuries. Seluga opines that the forces imparted to Guzman during the subject impact were trivial and inconsistent with the permanent injuries claimed. **[*7]**

As an initial matter, Movants" submissions fail to establish, *prima facie,* that Guzman did not sustain a "significant" or "permanent consequential limitation" of his cervical spine and lumbar spine, as Movants" own expert. Dr. Garay, found significant range of motion restrictions in these areas at his August 12, 2020, evaluation (*see Susino v Panzer, 127 AD3d 523, 524 [1st Dept 2015]*). However, Movants" submission of Dr. Garay's report establish *prima facie* that Guzman did not sustain a "significant" or "permanent consequential limitation" of his right knee and left knee (*Velazquez v City of New York, 200 AD3d 547, 548 [1st Dept 2021]*).

Notwithstanding the foregoing. Movants' submissions

establish, *prima facie,* that any injury to the cervical spine and lumbar spine was degenerative and not caused by the accident by submitting the reports of Movants' experts, shifting the burden of proof on the issue of causation as to these body parts (*see* *Blake v Sanchez, 198 AD3d 527 [1st Dept 2021]*; *Feliz v Fragosa, 85 AD3d 417 [1st Dept 2011]*). Movants also submit Guzman's own deposition testimony wherein he admitted that he injured his right leg and hack in a prior accident in 2001 (Felix Guzman deposition tr at 18), had surgery for a prior neck problem in 2007 (*id.* at 142) and was involved in a subsequent motor vehicle accident in September 2018. in which he injured his back and head (*id.* at **[*8]** 34, 210). This shifts the burden to Guzman to address how his alleged neck. back, and right knee injuries are causally related to the subject accident (*see Pines v Lopez. 88 AD3d 545 [1st Dept 2011]*; *Rose v Citywide Auto Leasing, Inc., 60 AD3d 520, 520 [1st Dept 2009]*).

In opposition, Guzman submits, inter alia, counsel's affirmation; treatment records; the affirmation of Kenneth McCulloch, M.D., Guzman's treating orthopedic surgeon; the affirmation of Michael Gerling, M.D.; Guzman's deposition transcript; and the affidavit of James Pugh, Ph.D., P.E.

Dr. McCulloch first examined Guzman on May 3, 2016, at which time he presented with low back pain, neck pain, and bilateral knee pain. Range of motion testing was performed, which revealed range of motion loss of the right knee upon flexion to 130 degrees (150 degrees normal), and of the left knee upon flexion to 140 degrees (150 degrees normal), with positive orthopedic testing. Range of motion loss of the knees was also observed upon examination on July 19, 2016. at which time Dr. McCulloch also reviewed MRI films which revealed medial meniscus tears. On July 26, 2016, Dr. McCulloch performed a right knee surgery, during which he visualized a medial meniscus tear, lateral meniscus tear, and synovitis. Range of motion loss of both knees continued **[*9]** to be observed upon subsequent visits. On March 23, 2017, Dr. McCulloch performed Guzman's left knee surgery, during which he visualized a medial meniscus tear, lateral meniscus tear, and synovitis. Dr. McCulloch most recently examined Guzman on April 14, 2023, at which time range of motion loss was revealed in both knees. Dr. McCulloch opines that the Guzman's tears, synovitis, and resulting surgeries performed on July 26, 2016, and March 23, 2017. were necessary, causally related to the subject accident, and correspond to the traumatic and acute nature of the tears as a result of the accident.

Dr. Gerling first examined Guzman on May 4, 2016. at which time he presented with, inter alia, severe low back pain with radiation into his bilateral lower extremities, and pain in both legs and thighs. Dr. Gerling examined Guzman again on June 2, 2016. August 18, 2016. and September 14, 2016. On September 14, 2016, Dr. Gerling reviewed Guzman's September 1, 2016 MRI. and observed a disc herniation with spondylolisthesis at L5-S1. On October 11, 2016. Dr. Gerling performed a lumbar spine surgery, during which he visualized a disc herniation as well as spondylolisthesis. On December 12, 2017. **[*10]** significant range of motion loss of the lumbar spine was observed upon flexion to 60 degrees (110 degrees normal). Range of motion loss of the lumbar spine continued to be observed at numerous follow-up examinations, including most recently on April 11, 2023.

Dr. Gerling acknowledges that Guzman has a history of spinal injuries and contends that he last treated for his low back in 2008 and was asymptomatic for eight years prior to the subject incident. With respect to his subsequent September 2018 accident, in which he re-injured his lower back. Dr. Gerling contends that Guzman was treating conservatively with therapy and injections for approximately six months and had returned to his base level of pain that he was experiencing prior to the subsequent accident as well as the baseline restrictions he already had as a result from the lumbar surgery. Dr. Gerling opines that Guzman suffered a traumatic exacerbation of the 1.5-S1 disc herniation which correlated to the sudden onset of symptomology, which necessitated the need for L5-S1 fusion surgery which he performed as a result of the subject accident.

Dr. Pugh's report indicates that he reviewed "the submitted medical image films." visited **[*11]** and inspected the site of the accident, tested the coefficient of friction at the site of the accident, and reviewed photographs. Based on the biomechanical analysis performed. Dr. Pugh opines that the loads and mechanisms required to compromise Guzman's spine, left knee, and right knee were present in the subject accident, and Guzman's lumbal herniations, lumbar radiculopathies, left knee, and right knee pathologies and resultant surgeries to same were caused and/or necessitated by the subject accident.

Guzman's submissions are sufficient to raise an issue of fact as to whether he sustained causally related "significant" and "permanent consequential limitations" of his lumbar spine, right knee, and left knee by

submitting expert reports and affirmations of his treating physicians which documented Guzman's limitations after the accident and upon recent examinations over seven years later (*Holloman v Am. United Transportation Inc., 162 AD3d 423. 424 [1st Dept 2018]*). Further. Guzman's treating physicians adequately address his prior injuries (*Ortiz v Boamah, 169 AD3d 486, 488 [1st Dept 2019]*), rebut Movants' expert's findings of degeneration (*see Faulting v City Car & Limousine Services. Inc., 155 AD3d 481, 481 [1st Dept 2017]*; *Ocean v Hossain, 127 AD3d 402, 402-403 [1st Dept 2015]*), and address the subsequent motor vehicle accident in which Guzman claimed to have suffered back injuries (*cf. Antepara v Garcia, 194 AD3d 513 [1st Dept 2021]*; *Garcia v Leon, 70 AD3d 566 [1st Dept 2010]*). "Any questions about the credibility of the **[*12]** conflicting doctors' opinions are for the jury to resolve" (*Ocean, 127 AD3d at 403*, citing *Perl v Meher, 18 NY3d 208. 218-219 [2011]*).

However. Guzman does not offer a fact-based medical opinion ruling out prior or subsequent injuries as a cause of the alleged cervical spine injuries and has therefore failed to raise a triable issue as to causation of these claimed injuries (*see Pines. 88 AD3d at 546*; *Rose, 60 AD3d at 520*). Since Guzman failed to raise an issue of fact as to whether his cervical spine injury was caused by the accident, he cannot recover for such injuries (*see Rosario v Cablevision Sys., 160 AD3d 545, 546 [1st Dept 2018]*).

With respect to Guzman's claim under the "90/180-day" category of injury, this claim must be dismissed. As an initial matter. Guzman's bill of particulars indicates that he was confined to his bed and home "for the most part" after the accident (bill of particulars ¶ 66) and was "substantially disabled" during the relevant period (*id.* at 69-70), and therefore does not allege that he was disabled for the minimum duration necessary to state such a claim (*see Tejada v LKQ Hunts Point Parts, 166 AD3d 436, 437-438 [1st Dept 2018]*; *Abreu v NYLL Mgt. Ltd., 107 AD3d 512. 513 [1st Dept 2013]*; *Arenas v Guaman, 98 AD3d 461 [1st Dept 2012]*). Furthermore, Guzman's deposition testimony demonstrates that he was, at most, somewhat restricted in his activities of daily living, which is fatal to a 90/180-day injury claim (*see Anderson v Pena, 122 AD3d 484 [1st Dept 2014]*; *Pakeman v Karekezia, 98 AD3d 840 [1st Dept 2012]*; *Onishi v N& B Taxi Inc., 51 AD3d 594 [1st Dept 2008]*).

The Court has considered the additional contentions of the parties **[*13]** not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

ACCORDINGLY

The motion by defendants DARRIN D. MILES, AT&T MOBILITY SERVICES LLC, and AT&T SERVICES, INC. for an Order granting summary judgment and dismissing Plaintiff FELIX GUZMAN's complaint on the grounds that Plaintiff has not sustained a "serious injury" as defined by *Insurance Law § 5102 (d)* is **GRANTED to the extent** that Plaintiff's claims relating to his cervical spine and claims under the "90/180-day" category of injury are dismissed, and the motion is otherwise **DENIED**.

This decision constitutes the Order of the Court.

Dated: OCTOBER 23 2023

/s/ Ben R. Barbato

BEN R. BARBATO, J.S.C.

Table1 (*Return to related document text*)

Notice of Motion -	
Affirmation and Exhibits	Nyscef No(s). 5-27
Affirmation in Opposition and Exhibits	Nyscef No(s). 30 - 38
Affirmation in Reply and Exhibits	Nyscef No(s). 39-42

Table1 (*Return to related document text*)

Neutral
As of: March 31, 2025 12:02 PM Z

Callum v. Price

Supreme Court of New York, Bronx County

October 2, 2023, Decided

Index No. 23748/2019E

Reporter
2023 N.Y. Misc. LEXIS 22679 *; 2023 NY Slip Op 34112(U) **

[1]** FATIMA CALLUM, Plaintiff(s), -against- NAMIE GLENDEL PRICE, OAKLEY TRANSPORT INC., MD A BASIT and UBER TECHNOLOGIES, INC., Defendant(s).

Prior History: *Callum v. Price, 2020 N.Y. Misc. LEXIS 27645 (N.Y. Sup. Ct., Sept. 25, 2020)*

Core Terms

spine, summary judgment, serious injury, shoulders, cervical, lumbar, permanent, injuries, causal relationship, issue of fact, consequential, threshold, records, opine, significant limitation, triable issue of fact, plaintiff's claim, medical evidence, range of motion, permanent loss, fail to raise, no objective, body part, left knee, limitations, persisting, instruct, attach

Judges: **[*1]** BIANKA PEREZ, J.S.C.

Opinion by: BIANKA PEREZ

Opinion

The following were read on this motion (Mot. Seq No. 6) for SUMMARY JUDGMENT submitted on May 26, 2023.

Upon the foregoing papers, defendant MD A BASIT moves for summary judgment, dismissing plaintiff's complaint for his alleged failure to satisfy the "serious injury" threshold as defined by *New York Insurance Law §5102(d)*. Plaintiff opposes.

When a defendant seeks summary judgment alleging that plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Palmieri, 1 N.Y.3d 536, 807 N.E.2d 282, 775 N.Y.S.2d 232, [2003]*). "Such evidence includes 'affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim'" (*Spencer v. Golden Eagle, Inc., 82 A.D.3d 589, 590, 920 N.Y.S.2d 24 [1st Dept. 2011]*[internal quotations omitted]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (see *Farrington v. Go On Time Car Service, 76 A.D.3d 818, 907 N.Y.S.2d 479 [1st Dept. 2010]*, citing *Pommells v. Perez, 4 N.Y.3d 566, 572, 830 N.E.2d 278, 797 N.Y.S.2d 380, [2005]*). Once this initial threshold is met, the burden shifts to the plaintiff to **[**2]** raise a material issue of fact using objective, admissible medical proof (see *Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002]*).

In this case, defendant established that **[*2]** plaintiff's alleged injuries were not permanent or significant in nature. Defendant accomplished this by submitting a sworn report from Dr. John H. Buckner, M.D. While Dr. Buckner did not compare plaintiff's ranges of motion values to normal values, he nevertheless examined plaintiff and opined after administering diagnostic tests resulting in negative findings, that there is no objective evidence of cervical spine injury, thoracic spine injury, lumbar spine injury, bilateral shoulder injuries, and left knee injury. (*Rodriguez v. Konate, 161 A.D.3d 565, 566, 76 N.Y.S.3d 553 [1st Dept 2018]*).

In opposition to the motion, plaintiff raised a triable issue of fact as to whether she sustained a "permanent consequential" or "significant" limitation of use of both her shoulders, lumbar spine and cervical spine. Plaintiff submitted affirmed/certified treatment records showing that she complained of pain and had significant range-of-motion limitations in both her shoulders, lumbar spine and cervical spine shortly after the accident and

recently. Dr. Michael C. Gerling reports persisting significant limitations in the plaintiff's lumbar spine and cervical spine and concludes, with a reasonable degree of medical certainty, that plaintiff's injuries are causally related **[*3]** to the accident. Dr. Gerling, opines, that plaintiff's impairments remain to be significant and permanent. Plaintiff also attaches the report of Dr. Richard M. Seldes, M.D. who found persisting significant range of motion limitations in both Plaintiff's shoulders. As to Plaintiff's left knee injury, Plaintiff failed to attach records from a recent examination or provide a basis from which an expert can opine that no change in the condition going into the future is likely (see *Caliendo v. Ellington, 104 A.D.3d 635, 960 N.Y.S.2d 471 [2d Dept. 2013]*). The above submissions are sufficient to raise fact issues as to whether plaintiff sustained a "permanent consequential" or "significant" limitation of use of both her shoulder, her lumbar spine and cervical spine as a result of this accident (*Encarnacion v. Castillo, 146 A.D.3d 600, 601, 44 N.Y.S.3d 744 [1st Dept. 2017]*).

The Court accordingly finds that there remain issues of fact as to whether plaintiff sustained a serious injury under either the permanent consequential limitation of use or significant limitation of use categories of the *Insurance Law § 5102(d)* as to her left and right shoulders, and lumbar and cervical spine. Since plaintiff has established a serious injury to one or more body parts, she may **[**3]** recover for all injuries causally related to the accident (see, e.g., *Bonilla v. Vargas-Nunez, 147 A.D.3d 461, 462, 46 N.Y.S.3d 594 [1st Dept. 2017]*).

As to defendant's branch **[*4]** of the motion, which argues that the proof rules out a serious injury based on the 90/180-day claim, the Court finds that defendant established his entitlement to summary judgment by annexing plaintiff's deposition transcript where she states she felt better before three months had passed after the accident (Exhibit L pg. 94) (see *Williams v. Perez, 92 A.D.3d 528, 938 N.Y.S.2d 536 [1st Dept. 2012]*). The effect of the admission in establishing no serious injury under the 90/180-day category renders unnecessary any medical proof (see *Sanchez v. Oxcin, 157 A.D.3d 561, 69 N.Y.S.3d 623 [1st Dept. 2018]*). In opposition plaintiff failed to raise a triable issue of fact. Plaintiff's medical records have no instructions to remain in her bed/home for the requisite time needed to satisfy a 90/180 claim. Additionally, Plaintiff's disability notes only instruct Plaintiff to avoid strenuous exercise activity.[1] Absent objective medical evidence that the plaintiff was prevented from performing substantially all of the material acts which constitute their usual and customary daily activities, plaintiff has failed to raise an issue of fact (see *Correa v. Saifuddin, 95 A.D.3d 407, 943 N.Y.S.2d 86 [1st Dept. 2012]*; *Blake v Portexit Corp., 69 A.D.3d 426, 893 N.Y.S.2d 28 [1st Dept. 2010]*).

Finally, there is no evidence on this record that plaintiff sustained a "permanent loss of use" of any body part - which requires a "total" loss of use (*Swift v. New York City Transit Authority, 115 A.D.3d 507, 509, 981 N.Y.S.2d 706 [1st Dept. 2014]*).

The Court finds the parties remaining **[*5]** arguments unavailing.

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted only to the extent of dismissing plaintiff's claims as to the "permanent loss of use" claim and the "90/180" claim, and it is further,

ORDERED, that defendant's motion for summary judgment is otherwise denied. This constitutes the Decision and Order of this Court.

Dated: October 2, 2023

Hon. /s/ Bianka Perez

BIANKA PEREZ, J.S.C.

End of Document

[1] Plaintiff annexes the disability certificates (NYSCEF Doc. #124) from Dr. Manish Patel for 90 days following the accident but the certificates fail to provide whether Plaintiff should be confined to home or bed and why.

No *Shepard's* Signal™
As of: March 31, 2025 12:02 PM Z

Voltaire v City of New York

Supreme Court of New York, Queens County

September 26, 2023, Decided; September 27, 2023, Entered

Index No.: 704048/18

Reporter
2023 N.Y. Misc. LEXIS 39584 *; 2023 NY Slip Op 34683(U) **

[1]** DOMINIQUE VOLTAIRE, Plaintiff, -against- THE CITY OF NEW YORK, PORT AUTHORITY OF NEW YORK AND NEW JERSEY and DELTA AIRLINES, Defendants,

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

jury selection, further order

Judges: **[*1]** PRESENT: HON. TIMOTHY J. DUFFICY, J.S.C.

Opinion by: TIMOTHY J. DUFFICY

Opinion

INTERIM ORDER

In an Order, dated August 23, 2023 Justice Catapano-Fox, issued an order directing that jury selection on this matter commence on September 18, 2023 (*see* NYSCEF Doc. No. 256). On September 18, 2023, this matter was assigned by the Trial Scheduling Part to Part 35 for jury selection and trial.

A review of the court file reflects that in the interim, counsel for defendant Delta Airlines (movant) had submitted three (3) proposed Orders To Show Cause (OTSC). Each OTSC sought, in sum and substance, to stay or adjourn the trial date of September 18, 2023 so that counsel for Delta and its experts could review allegedly untimely medical and expert witness exchanges by the plaintiff, in the alternative to vacate the Note of Issue, or, in the alternative, to preclude the plaintiff from presenting certain evidence at trial.

The court file further reflects that the proposed OTSC, submitted under Motion Sequence No. 16, was denied by Justice Catapano-Fox on September 13, 2023 (*see* NYSCEF Doc. No. 266), on the grounds that "movant failed to demonstrate good cause and the parties stipulated to the 9/18/2023 trial date" (*see* NYSCEF **[*2]** Doc. No. 266). Movant then submitted another OTSC, on September 13, 2023, under Motion Sequence No. 17, seeking similar relief, which was largely identical to the previous OTSC, except that it also refers to the plaintiff's liability expert exchange of Vincent Ettari, P.E., dated September 13, 2023. On September 14, 2023, Justice Joseph Risi denied that OTSC "with leave to renew before the assigned trial judge" (*see* NYSCEF Doc. No. 274). On *Saturday*, September 17, 2023, yet another OTSC (Motion Sequence No. 18) was submitted, making virtually the same arguments and seeking the same relief. Justice McKetney-Butler declined to sign that OTSC since Justice Risi had ordered that it be decided by the trial judge.

[2]** On September 18, 2023, this matter was conferenced before the court's principal law clerk, and the Court directed that each side submit papers with the defendant focusing on why the Court should preclude the plaintiff from offering the proposed testimony and the plaintiff focusing on why the testimony should not be precluded.

The Court reviewed the papers and the matter was again conferenced before this Court on September 20, 2023. After unsuccessful attempts were made to settle **[*3]** the case, for the reasons stated on the record, on September 20, 2023, this Court denied the defendant's application to preclude the plaintiff's medical witnesses: Dr. Michael Gerling and Dr Joseph Pyun. The Court reserved decision on the motion to preclude the plaintiff's liability expert Vincent Ettari P.E, but also stated it was considering allowing the defendant time to obtain its own liability expert rather than precluding the

plaintiff's liability expert. The case was adjourned to September 22, 2023 and then to September 25, 2023. On that date, another settlement conference was held and then arguments took place on the record. Defendant's papers were marked as Court Exhibit "A", thje plaintiff's papers were marked as Exhibit "B" and the "supplemental notice of liability expert exchange" of Mr. Ettari was marked as Exhibit "C".

As stated on the record, on September 20, 2023, in regards to Dr. Gerling and Dr. Pyun, the Court denies the application to preclude. Both Dr. Gerling and Dr. Pyun are treating physicians and reports and authorizations for these doctors have been previously provided. The Court does not agree that the defendant will be prejudiced by the fact that in their **[*4]** reports, dated August 25, 2023, the doctors discuss the plaintiff's need for future surgery. This is a valid medical opinion, as to a possible complication of the plaintiff's alleged injuries, and the defendant cannot claim surprise in view of the fact that the need for future surgery has been in the bill of particulars and in supplemental bills of particulars (*see* *Hammond v Welsh, 29 AD3d 518, 815 N.Y.S.2d 147 [2d Dept 2006]*; *Holshek v Stokes, 122 AD2d 777, 505 N.Y.S.2d 664 [2d Dept 1986]*); *Banks v City of New York, 92 AD3d 591, 939 N.Y.S.2d 39 [1st Dept 2012]*; *Han Soo Lee v Riverhead Bay Motors, 57 AD3d 283, 868 N.Y.S.2d 666 [1st Dept 2008]*. Accordingly, defendant's application to preclude the testimony of Dr. Michael Gerling and Dr Joseph Pyun is denied.

As to Vincent Ettari P.E., the plaintiff's liability expert, for the reasons stated on the record, on September 25, 2023, the Court reaches a different conclusion. The record reflects that Mr. Ettari was first disclosed as an expert witness on September 24, 2021. The expert exchange of that date states, in sum and substance, that the defendants were negligent in violating the New York City Building Code "and other relevant statutes".

However, on September 13, 2023, only five (5) days before trial, the plaintiff served a much more detailed "supplemental notice of liability expert exchange", including a 41 page affidavit from Mr. Ettari in which he alleges that the defendants not **[**3]** only violated the New **[*5]** York City Building Code, but also violated, *inter alia*, numerous OSHA code sections and New York State Building Code sections. It is undisputed that OSHA and the New York State Building Code were not mentioned in the prior expert exchange or in any bill of particulars.

The Court finds that this late disclosure of the plaintiff's expert causation theory five days before trial is prejudicial to the defendant's ability to prepare for trial as they have not had adequate time to consult or retain their own expert (*see* *Rocco v Ahmed, 146 AD3d 836, 45 N.Y.S.3d 161 [2d Dept 2017]*; *Durant v Shuren, 33 AD3d 843, 844, 827 N.Y.S.2d 65 [2d Dept 2006]*; *Desert Storm Constr. Corp. v SSSS Ltd. Corp., 18 AD3d 421, 422, 794 N.Y.S.2d 442 [2d Dept 2005]*). Therefore, as stated on the record, on September 25, 2023, jury selection is adjourned to October 16, 2023 so that the defendants can have the opportunity to consult or retain their own liability expert.

Finally, the court record indicates that the instant action was dismissed as against defendants The City of New York and the Port Authority of New York and New Jersey by the Order of Justice Joseph J. Esposito, entered on August 25, 2020 (*see* NYSCEF Doc. No. 144), and subsequently affirmed by Appellate Division, Second Department, on June 7, 2023 (*see* NYSCEF Doc No. 238).

Accordingly, it is

ORDERED that defendants The City of New York and the Port Authority of New York **[*6]** and New Jersey shall be stricken from the caption, as this matter has been dismissed as against them; and it is further

ORDERED that the caption shall be amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF QUEENS

DOMINIQUE VOLTAIRE, Plaintiff, -against- DELTA AIRLINES, Defendant.

Index No.: 704048/2018

[4]** ORDERED** that the Clerk of Queens County is directed, upon receipt of this Order, to amend the caption, as set forth above; and it is further

ORDERED defendant's motion to preclude the testimony of Dr. Michael Gerling and Dr Joseph Pyun is **denied**; and it is further

ORDERED defendant's motion to preclude the testimony of Vincent Ettari P.E. is **granted solely to the extent** that jury selection is adjourned to October 16, 2023, and is **otherwise denied**; and it is further

ORDERED that no motions or Orders to Show Cause

are to be brought by either side without permission of this Court; and it is further

ORDERED that the parties are to report for Jury Selection, at 89-17 Sutphin Boulevard, on **October 16, 2023 at 9:30 a.m.** As stated on the record on September 25, 2023, this is the FINAL DATE for jury selection.

Dated: September 26, 2023

/s/ Timothy J. Dufficy

TIMOTHY J. DUFFICY, [*7] J.S.C.

End of Document

No *Shepard's* Signal™
As of: March 31, 2025 12:02 PM Z

Martinez v. Midtown Moving & Storage, Inc.

Supreme Court of New York, Bronx County

April 3, 2023, Decided; April 3, 2023, Filed

Index No. 24782/2019E

Reporter
2023 N.Y. Misc. LEXIS 16824 *

MAYDELI LORA MARTINEZ, Plaintiff, v. MIDTOWN MOVING & STORAGE, INC. AND JUAN REYES, Defendants.

Core Terms

significant limitation, serious injury, spine, summary judgment, body part, defendants', permanent, cervical, lumbar, causal relationship, issue of fact, injury claim, Affirmation, threshold, injuries, papers, summary judgment motion, insufficient to meet, prima facie burden, plaintiff's claim, medical evidence, subject accident, permanent loss, fail to meet, no objective, consequential, Annexed, Notice

Judges: [*1] Hon. BIANKA PEREZ, Judge.

Opinion by: BIANKA PEREZ

Opinion

[EDITOR'S NOTE: THE ORIGINAL SOURCE CONTAINED ILLEGIBLE WORDS AND/OR MISSING TEXT. THE LEXIS SERVICE WILL PLACE THE CORRECTED VERSION ON-LINE UPON RECEIPT.]

The following papers were read on this motion (Seq. No. #**001**) for **SUMMARY JUDGMENT** noticed on **February 09, 2023**.

Go to table1

Upon the foregoing papers, the defendants move for summary judgment, dismissing the complaint of the plaintiff for her alleged failure to satisfy the "serious injury" threshold as defined by *New York Insurance Law §5102(d)*. Plaintiff opposes.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Plameri, 1 N.Y.3d 536 [2003]*). "Such evidence includes 'affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim'" (*Spencer v. Golden Eagle, Inc., 82 A.D.3d 589, 590 [1st Dept. 2011]*[internal quotations omitted]). A defendant may also meet his or her summary judgment **[*2]** burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (*see Farrington v. Go On Time Car Service, 76 A.D.3d 818 [1st Dept. 2010]*, citing *Pommels v. Perez, 4 N.Y.3d 566, 572 [2005]*). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345, 350 [2002]*).

The defendants failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of *Insurance Law § 5102(d)* as a result of the subject accident (*see Toure, 98 NY2d at 345*; *Gaddy v Eyler, 79 NY2d 955, 956-957 [1992]*). The defendants failed to submit competent medical evidence establishing, prima facie, that the plaintiff did not sustain a serious injury under either the permanent consequential limitation of use or significant limitation of use categories of *Insurance Law § 5102(d)*, as their expert, Dr. Paul Kuflik M.D. found significant limitations in the range of motion of the plaintiff's cervical and lumbar spines (*see Singleton v F & R Royal, Inc., 166 AD3d 837, 838 [2d Dept 2018]*; *Nunez v Teel, 162 AD3d 1058, 1059 [2d Dept 2018]*; *Mercado v Mendoza, 133 AD3d 833, 834 [2d Dept 2015]*; *Miller v Bratsilova, 118 AD3d 761 [2d Dept 2013]*).

Although Dr. Kulflik's report opined that the plaintiff had "an unremarkable examination of the cervical spine", and that there "was no objective evidence the minimal pathology noted on the lumbar spine MRI was causally

related to the alleged injury", he still reported significant limitations of motion in the plaintiff's **[*3]** injured body parts after the subject accident. Further, despite finding significant limitations to the plaintiff's injured body parts, Dr. Kulflik failed to explain the basis for his conclusion that the plaintiff's injuries were not causally related to the accident. Thus, the defendants' medical proof is insufficient to meet their burden, (*see* *Virk v. Gutt 186 A.D.3d 994 [4th Dept 2020]*). Since Dr. Kuflik found significant limitations, the defendants' medical proof is insufficient to meet their burden, (see *Virk v. Gutt 186 A.D.3d 994 [4th Dep't 2020]*).

Since the defendants failed to meet their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (see *Johnson v Salaj, 130 A.D.3d 502, 503 [1st Dept 2015]*; *Che Hong Kim v Kossoff, 90 AD3d 969 [2nd Dept 2012]*). In any event, plaintiff submitted evidence that she sought medical treatment for her back on the date of the accident and that she received MRI testing on the cervical and lumbar spine shortly after the accident, which are sufficient to show contemporaneous treatment. (*See* *Bonilla v. Vargas-Nunez, 147 A.D.3d 461, 462 [2d Dept 2017]*). Further, plaintiff annexed an affirmed report by Doctor Michael C. Gerling, MD, who reported that plaintiff complained of pain and had significant range-of-motion limitations in the injured body parts shortly after the accident and at more **[*4]** recent independent examinations. Accordingly, defendant failed to eliminate all issues of fact as to whether plaintiff sustained a permanent or significant limitation to her cervical or lumbar spine as a result of the accident. (*See*, *Karounos v. Doulalas, 153 A.D.3d 1166 [1st Dept. 2017]*; *Pineda v. Moore, 111 A.D.3d 577 [1st Dept. 2013]*). Lastly, plaintiff's doctor concluded that, based on his examination, treatment conducted on plaintiff and review of prior medical records, her injuries were permanent, significant and caused by the accident, creating questions of fact (*see* *Windham v New York City Tr. Auth., 115 AD3d 597, 598 [1st Dept 2014]*).

Defendants, however, established their entitlement to dismissal of plaintiff's "90/180 day" injury claim. Plaintiff testified at her deposition that she was only of out of work for two to three weeks immediately after the accident, which is fatal to her "90/180 day" injury claim (*see* *Williams v. Perez, 92 A.D.3d 528 [1st Dept. 2012]*). Finally, there is no evidence on this record that plaintiff sustained a "permanent loss of use" of any body part - which requires a "total" loss of use (*Swift v. New York City Transit Authority, 115 A.D.3d 507, 509 [1st Dept. 2014]*).

The Court accordingly finds that there remain issues of fact as to whether plaintiff sustained a serious injury under either the permanent consequential limitation of use or significant limitation of use categories of the *Insurance Law § 5102(d)*.

ORDERED, that defendants' motion for summary judgment **[*5]** is granted only to the extent of dismissing plaintiff's claims that she sustained a "permanent loss of use" and a "90/180 day" injury claim, and it is further,

ORDERED, that defendants' motion for summary judgment are otherwise denied.

This constitutes the Decision and Order of this Court.

Dated: March 27, 2023

/s/ Bianka Perez

BIANKA PEREZ, J.S.C.

Table1 (*Return to related document text*)

Notice of Motion - Affirmation in Support - Exhibits Annexed	No(s). 18-30
Affirmation in Opposition and Exhibits	No(s). 35-44
Replying Affidavit and Exhibits	No(s). 47

Table1 (*Return to related document text*)

No *Shepard's* Signal™
As of: March 31, 2025 12:02 PM Z

Nilia Alicea, Plaintiff v. Breen Bros Towing Inc. and Robert Santiago, Defendants.

Supreme Court of New York, Richmond County

March 23, 2023, Decided; March 23, 2023, Filed

Index No. 152572/2018

Reporter
2023 N.Y. Misc. LEXIS 5061 *

NILIA ALICEA, Plaintiff v. BREEN BROS TOWING INC. and ROBERT SANTIAGO, Defendants.

Core Terms

injuries, spine, exacerbation, conditions, aggravation, preexisting, shoulder, surgery, medical record, neck, serious injury, cervical, alleges, summary judgment, lumbar, films

Opinion

[*1] DECISION AND ORDER

Recitation as required by *CPLR 2219(a)* of the papers considered in the review of Motion Sequence Number 003

Go to table1

Upon the foregoing cited papers, the Decision and Order is as follows:

Procedural History

Defendants, Breen Bros. Towing Inc., and Robert Santiago, move by Notice of Motion (Seq. No. 003) for an order granting them summary judgment dismissing Plaintiff's case on the ground that Plaintiff, Nilia Alicea, did not sustain a threshold "serious injury" as defined by *Section 5102(d) of the Insurance Law*. Plaintiff has filed written opposition to the motion in its entirety. Oral argument was held on September 28, 2022. Defendant's motion was submitted for Decision upon receipt of the transcript of oral argument.

Factual Background

The present motion relates to a motor vehicle accident which occurred on May 2, 2016. At the time of the accident Defendant Robert Santiago was operating a tow truck owned by Defendant Breen Bros. Towing Inc., and Plaintiff was operating a sedan. Plaintiff alleges that she was struck in the rear by the tow truck as she waited for a red light. **[*2]** In her Verified Bill of Particulars dated June 28, 2019, Plaintiff alleges injuries to her bilateral shoulders, neck (cervical spine), and back (lumbar spine). Immediately following the accident Plaintiff did not seek medical treatment at the scene, nor did she go to the hospital. Plaintiff returned to work two days after the accident. Plaintiff first sought medical care at the "Spine Pain Institute of New York" approximately seven days after the accident, however it is unclear from her medical records if this treatment was related to the present accident or pre-existing neck and back conditions. It is undisputed that Plaintiff had been to this same medical provider in the past. She last sought treatment at the Spine Pain Institute three weeks before the accident for similar complaints of neck and back pain. The medical records from Plaintiff's first post-accident visit to the Spine Pain Institute contain no indication that she informed her doctor that she had recently been in a motor vehicle accident.

After a program of conservative treatment with several providers Plaintiff underwent two surgeries. On September 11, 2018, Plaintiff underwent arthroscopic surgery on her left shoulder **[*3]** performed by Dr. Thomas Scilaris M.D., and on November 7, 2019, Plaintiff underwent an anterior discectomy and fusion surgery at the C5-C6 level of her neck performed by Dr. Michael C. Gerling, M.D. Both Dr. Scilaris and Dr. Gerling have provided affirmations in opposition to the present motion. Plaintiff's medical records indicate considerable gaps in treatment between the date of the accident and the surgeries in 2018 and 2019.

This is not Plaintiff's first allegation of traumatic injury to her neck, back and shoulders. In support of their motion Defendants allege that Plaintiff sustained at least 11 prior injures extending as far back as 2009. Most of these injuries took place during Plaintiff's employment at a psychiatric hospital. Plaintiff does not deny that she had pre-existing conditions. However, she claims that her current injuries are either "new" or were aggravated by the 2016 accident. Plaintiff's Bill of Particulars specifically alleges "to the extent defendants claim that any injuries sustained by plaintiff were caused by pre-existing and/or degenerative conditions, plaintiff alleges that any so claimed… conditions… were exacerbated, activated, and/or aggravated" by the **[*4]** Defendants. It is well settled law that a preexisting injury or condition that is exacerbated or aggravated by a motor vehicle accident may be sufficient to satisfy the serious injury threshold. **See *Ambroselli v. Team Massapequa, Inc., 88 A.D.3d 927 (2d Dept. 2011)*.**

Plaintiff commenced the present suit on September 27, 2018. After an exchange of document discovery, including authorizations for medical records relating to both her prior injuries and treatment related to the present accident, Plaintiff was seen for two Independent Medical Examinations (IME's). Plaintiff was examined by Dr. Frances Cuomo, M.D., on June 30, 2021. Dr. Cuomo is a board-certified Orthopedic Surgeon. Prior to her examination, Dr. Cuomo conducted a thorough review of the medical records relating to Plaintiff's treatment for her prior injuries.

After her medical record review, Dr. Cuomo admits that Plaintiff's MRI films "possibly indicate a small partial tear of the supraspinatus." As part of her physical examination of Plaintiff Dr. Cuomo conducted range of motion testing. She opines that Plaintiff has normal range of motion in her right shoulder but indicates limitations in her left shoulder with mildly positive impingement signs. She notes that Plaintiff's pre-operative MRI **[*5]** and post-operative MRI show the same small partial thickness shoulder tear, although noting that the images are of poor quality. In conclusion, Dr. Cuomo opines, without explanation, that the findings on the MRI are chronic and preexisting and do not evidence an acute injury. Dr. Cuomo does not address Plaintiff's exacerbation and aggravation claims.

In addition to being examined by Dr. Cuomo, Plaintiff also underwent an independent medical evaluation by Dr, Yong H. Kim M.D., a board-certified orthopedic surgeon who specializes in conditions of the spine. Like Dr, Cuomo, Dr. Kim lists the voluminous legal and medical documentation that he reviewed before conducting his examination. As part of his medical record review, Dr. Kim reviewed several MRI films ranging from 2010 to 2020. Dr. Kim admits that the later films indicate the presence of herniations and bulges in Plaintiff's cervical and lumbar Spine. Upon physical examination, Dr. Kim notes that Plaintiff exhibited range of motion deficits, however he attributes those limitations, in part, to suboptimal effort. After his record review and examination, Dr. Kim concludes that the conditions present in Plaintiff's neck and back are **[*6]** pre-existing and were caused by a mixture of prior trauma and age-related degeneration. Regarding the cervical discectomy and fusion surgery performed by Dr. Gerling, Dr. Kim opines that the surgery was "arbitrarily done" with no objective correlation to ongoing symptoms. Finally, Dr. Kim addresses the issue of exacerbation and aggravation by stating that Plaintiff's "ongoing complaints with respect to her *lumbar spine* existed prior to the subject accident of May 2, 2016, with no evidence of any acute exacerbation immediately following the subject accident." Notably missing from this conclusion is any reference to the aggravation and exacerbation claims relating to the Plaintiff's *cervical spine,* the location of her surgery.

Applicable Law

The proponent of a summary judgment motion has the initial burden of making a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. **See *Otty Cab Corp. v. Nazir, 72 N.Y.S.3d 517 (2d Dept. 2017).*** A movant's burden can be satisfied by the submission of sworn affirmations (from physicians), affidavits, or deposition testimony in proper evidentiary form. **See *Charlie Fox, Inc. v. Diallo, 48 N.Y.S.3d 264 (2d Dept. 2016).*** When seeking summary judgment pursuant to *Insurance Law §5102(d)* the moving **[*7]** defendant must conclusively establish that the plaintiff did not suffer any of the enumerated "serious injuries" set forth in that statute. **See *Cortez v. Bray, 192 A.D.3d 451 (1st Dept. 2021).*** Once a prima facie showing of entitlement to summary judgment has been established, the burden shifts to the non-moving party to raise a material issue of fact sufficient to warrant a trial. **See *Ubillus-Tambini v. Ischakov, 36 N.Y.S.3d 410 (2d Dept. 2016).*** A plaintiff opposing a "threshold" motion bears the burden of offering objective evidence of a serious injury. ***See Stevens v. Homiak Transp., Inc., 21 A.D.3d 300 (1st Dept. 2005)***. When relying upon the "significant limitation" category, a

plaintiff must also offer objective evidence of a significant loss of use, normally measured by range of motion testing. **See** ***Toure v. Avis Rent a Car Sys., 98 N.Y.2d 343 (2002)*****.** When facing a claim that the conditions predate the accident at issue, are degenerative in nature, or were caused by a prior injury, it becomes the Plaintiff's burden, if and when the burden shifts, to distinguish prior injuries from present ones. **See** ***Pommells v. Perez, 4 N.Y.3d 566 (2005)*****.** If it is claimed that the current accident made preexisting injuries or conditions worse, it becomes a plaintiff's burden to explain "in a specific and nonconclusory manner" how the accident aggravated or exacerbated their preexisting conditions. **See** ***Sanchez v. Steele, 149 A.D.3d 458 (1st Dept. 2017)*****.**

Decision

It is undisputed **[*8]** that there is objective medical evidence in the form of MRI films, that indicate the presence of soft tissue conditions in Plaintiff's neck, back, and left shoulder. It is also undisputed that upon examination by her treating physician, and the IME physicians, that Plaintiff exhibited significant range of motion deficits as compared to what is normal in all three areas. These undisputed facts are sufficient to satisfy two out of the three prongs of a serious injury claim under the "significant limitation of use of a body function or system" category relied upon by Plaintiff. To the extent that Plaintiff alleges that her "injuries" are permanent, the same analysis applies to the "permanent consequential limitation" category. The issue raised by Defendant's motion is one of causation. Defendant alleges that all the conditions claimed by Plaintiff as injuries related to the 2016 accident were actually caused by Plaintiff's prior long history of work-related incidents together with age-related degeneration. Thus, it is Defendant's initial burden to establish, through admissible evidence, that the injuries claimed by Plaintiff were not related to the 2016 accident, but instead were preexisting. **[*9] See** ***Cavitolo v. Broser, 163 A.D.3d 913 (2d Dept. 2018)*****; see also** ***Cineltt v. Greyhound Lines, Inc., 211 A.D.3d 517 (1st Dept. 2022)*****.**

Defendants have not met their initial burden on this summary judgment motion. Dr. Cuomo's report, while detailed, does not adequately establish how the shoulder injury claimed by Plaintiff was caused by the prior incidents and not the present accident. Dr. Cuomo's conclusory opinion that the MRI films "suggested chronicity" is insufficient to support summary judgment. **See** ***Williams v. Maleachern, 186 A.D.3d 1462 (2d Dept. 2020)*****.**

While Dr. Kim's report does adequately distinguish Plaintiff's cervical and **lumbar** spine injuries, supporting a conclusion that they predated the 2016 accident, it is also insufficient to satisfy Defendant's burden on this motion. Both Dr. Cuomo and Dr. Kim fail to adequately address Plaintiff's exacerbation and aggravation claims. **See** ***Pero v. Transervice Logistics, Inc., 83 A.D.3d 681 (2d Dept. 2011)*****; see also** ***Pfeiffer v. New York Cent. Mut. Fire Ins. Co., 71 A.D.3d 971 (2d Dept. 2010)*****;** ***Edouazin v. Champlain, 89 A.D.3d 892 (2d Dept. 2011)*****.** Dr. Cuomo's report fails to even address the issue of exacerbation. While Dr. Kim's report does make the necessary findings in relation to Plaintiff's lumbar spine, he fails to make the same finding in relation to her cervical spine, which is arguably the more serious of her claimed spinal injuries, and the location of her discectomy and fusion surgery. As Defendant's experts fail to adequately address the issue of exacerbation and **[*10]** aggravation, Defendants have failed to satisfy their initial burden on the motion. **See** ***Menjivar v. Capers,*** **2023 N.Y. Slip Op 01083 (2d Dept. 2023); see** ***also*** ***Little v. Ajah, 97 A.D.3d 801 (2d Dept. 2012)*****;** ***Keenum v. Atkins, 82 A.D.3d 843 (2d Dept. 2011)*****.** Accordingly, the motion must be denied without consideration of the Plaintiff's opposition papers. **See** ***Cervantes v. McDermott, 159 A.D.3d 669 (2d Dept. 2018)*****; see also** ***Rabinowitz v. Kahl, 78 A.D.3d 678 (2d Dept. 2010)*****.**

For the detailed reasons set forth above, Defendants' motion for summary judgment dismissing Plaintiff's Complaint on the ground that she did not suffer a serious injury is hereby denied. This constitutes the Decision and Order of the Court in relation to Motion Sequence Number 003. As this case is already certified for trial counsel for both parties are hereby directed to appear for a post certification telephone conference on **April 19,** 2023, at 10:30 AM to discuss next steps.

Dated: March 23, 2023

Hon. Catherioe M. DiDomenico

Table1 (*Return to related document text*)

	Numbered
Notice of Motion by Defendant (003),	1
Affirmation in Opposition by Plaintiff	2
Reply Affirmation by Defendant	3
Transcript of Oral Argument dated 9/28/22	4

Table1 (*Return to related document text*)

Neutral
As of: March 31, 2025 12:02 PM Z

Reyes v. New York City Tr. Auth.

Supreme Court of New York, New York County

March 11, 2022, Decided

INDEX NO. 153721/12

Reporter
2022 N.Y. Misc. LEXIS 1275 *; 2022 NY Slip Op 30818(U) **

[1]** Raul C. Reyes -v- New York City Transit Authority, et al

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Prior History: *Reyes v. New York City Tr. Auth., 2016 N.Y. Misc. LEXIS 3218 (N.Y. Sup. Ct., Sept. 6, 2016)*

Core Terms

leaking, argues, station, staircase, disability, records, sequence, Street, adjacent, repaired, subway station, shoulders, injuries, medical expert, photographs, conditions, contends, inspection, offering, introduce, intrusion, agrees, stairs, introduce evidence, transit authority, right knee, infiltration, testifying, exchanged, hearsay

Judges: **[*1]** HON. LYNN R. KOTLER, J.S.C.

Opinion by: LYNN R. KOTLER

Opinion

By order dated November 24, 2021, the Honorable Deborah Kaplan assigned this action for trial on January 13, 2022 before this Court. At a pre-trial conference on December 7, 2021, the court directed the parties to file any motions in limine on or before December 21, 2021. On January 4, 2022, the court heard oral argument on the four (4) motions and adjourned the trial, in agreement with counsel, to March 15, 2022 due to a spike in covid cases.

In motion sequence 10, plaintiff seeks an order allowing him to introduce records of leaking water in the areas adjacent to and above the location of the accident as proof of knowledge of leaks in these portions of the station by defendant New York City Transit Authority ("NYCTA" or "Transit"), that there was an obligation to examine other portions of the station for water leaks arising from the same source, and to determine what was ascertainable with the exercise of reasonable care.

In motion sequence 11, plaintiff seeks an order precluding Defendant New York City Transit Authority ("NYCTA") and Third-Party Defendant The City of New York (the "City") from mentioning disability regarding Plaintiff's prior **[*2]** back and left leg conditions on the grounds that it is irrelevant hearsay and, to the extent it is a collateral source pursuant to *CPLR §4545*, that it should properly be assessed post-trial.

In motion sequence 12, plaintiff moves pursuant to *CPLR §3101(d)(1)(i)* for an order precluding Defendant NYCTA from belatedly substituting its proposed additional orthopedic medical expert with Dr. Yong H. Kim and proposed additional radiologic medical expert with Jonathan S. Luchs, M.D. and/or preclude these experts from testifying in the trial of this matter.

Dated: 3-11-22

/s/ Lynn R. Kotler

HON. LYNN R. KOTLER, J.S.C.

[2]** Finally, in motion sequence 13, defendant NYCTA moves for an order to preclude plaintiff from presenting records following the date of the alleged incident, December 13, 2011, to preclude the opinion of Andrew Yarmus based upon hearsay and an inspection that took place over three years after the alleged incident; to preclude the opinion of Stanley Fein, to preclude the opinions of both Dr. Ali Guy and Michael Gerling, and to preclude plaintiff from offering evidence of the rules and regulations of the Transit Authority.

Plaintiff opposes NYCTA motion sequence 13 and

NYCTA opposes plaintiff's motions in sequences **[*3]** 10, 11 and 12, respectively. The City submits partial opposition and partial support of NYCTA's motion in limine motion, sequence 13. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order.

MOTION SEQUENCE 10

Plaintiff argues that he should be permitted to introduce records of leaking water in areas adjacent to and above the area of the accident as knowledge of these leaks in the station imposed an obligation on NYCTA to examine other areas of the station for leaks from the same source. Plaintiff also seeks to introduce NYCTA's business records that were exchanged during discovery to demonstrate persistent and intrusive water leaks in areas of the station, above and adjacent to ML-2A months leading up to the accident. Plaintiff further contends that "NYCTA's knowledge of the dangerous condition of leaking water in not only one portion of the station, but in multiple portions above and adjacent to the ML-2A staircase, thus imposed upon NYCTA an "obligation to examine" other portions of the station, including the ML-2A staircase for leaking water arising from the same source of the water that was entering the station from the numerous **[*4]** surrounding areas.

NYCTA opposes the motion and argues that from the beginning, plaintiff has "claimed that water was leaking from above the ML-2A staircase onto the stairs of that same staircase", that plaintiff will have to establish that there was a leak above the ML-2A staircase and that since plaintiff cannot prove his case, plaintiff now seeks to "utilize inuendo" in order to meet his burden and "discuss unrelated water infiltration at an adjacent location and other locations within the Canal Street subway station". NYCTA further argues that the deposition testimony of William Burgos, NYCTA's leak inspector, relates to a leak adjacent to the stairs and not over them and that in the Supervisory Log Inspection reports, there is one reference to a potential overhead leak at the ML-2A staircase. Finally, defendant contends that Norman Marcus's affidavit does not reveal any water infiltration in the area above the ML-2A staircase, but rather states that the leak issue affected the stairway, passage and EDR/EFR rooms. Defendant also argues that plaintiff needs to prove notice of the condition above the stairs and that there actually was a condition above the stairs. Finally, defendant **[*5]** contends that it would be inflammatory and prejudicial to allow evidence of water infiltration "in the massive structure that is the Canal Street Station".

In Reply, plaintiff argues that counsel's statements are completely contrary to the evidence in the case which clearly demonstrates that the EDR is above the ML-2A staircase, that the EFR is adjacent to the ML-2A staircase, and that the source of the water on the ML-2A staircase which caused Plaintiff's accident was the same source of water infiltrating the station in the EDR (electrical distribution room) and EFR (employees facilities room).

First, plaintiff's request to introduce evidence of leaking water adjacent to and above the accident location the ML-2A staircase is granted. It is undisputed that Transit maintained and controlled the Canal Street Subway station and that it had a duty to maintain the station. Plaintiff has the burden to show that Transit breached its duty to plaintiff because there was water on the stair where he slipped and fell and that NYCTA knew or should have known about this condition. It is of no moment that the water came from a pipe or a crack in the wall or a pothole on the street. Moreover, the court **[*6]** disagrees with **[**3]** NYCTA that it would be prejudicial to allow evidence of water infiltration for the entire Canal Street subway station. Plaintiff has never made such a request but seeks to introduce evidence for the area and adjacent surroundings of the ML-2A staircase. Plaintiff points to Burgos' deposition and defendant's own expert Mr. Marcus who acknowledged that "...the leaks affecting the stairway, passage, and EDR/EFR originated from the same source based upon his opinion that the leaks first reported on October 4, 2021 affected all of those areas." Marcus further opined within a reasonable degree of engineering certainty that "subway roof is generally 6 to more than 8 inches below the street surface, such that the mere fact of street water entering from a pothole into the subway is, in my opinion within a reasonable degree of engineering certainty, clear evidence of a faulted substructure below the asphalt paved roadway."

The court agrees that plaintiff is allowed to introduce NYCTA's business records that were exchanged during discovery which show persistent water leaking in the area above and adjacent to the ML-2A staircase where the accident occurred. Moreover, the court found **[*7]** in an order by the Hon. Michael Stallman dated September 6, 2016 that "The 'Service Call and Production Form' is reasonably calculated to lead to admissible evidence as corroborating the existence of the reported leaks and as to whether those leaks were recurring conditions." Plaintiff is entitled to present to the jury NYCTA's

records evidencing persistent water leaks in the area around the ML-2A staircase so that the jury may determine whether NYCTA had notice of the specific condition which caused plaintiff's accident. In turn, NYCTA is free to argue that these records do not demonstrate notice of the dangerous condition at issue in this case.

The court next considers plaintiff's argument that NYCTA's attorney's statement in open court (NYSCEF No. 279) that the EDR was above the stairway constitutes a formal judicial admission. Statements made by an attorney in the context of a judicial proceeding may constitute judicial admissions which can be formal or informal concessions of fact (*see* *In Matter of Liquidation of Union Indemnity Ins. Co., 89 NY2d 94, 103, 674 N.E.2d 313, 651 N.Y.S.2d 383 [1996]*). A formal judicial admission takes the place of evidence and is conclusive of the facts admitted whereas an informal judicial admission is a declaration made by a party in the course of a judicial **[*8]** proceeding which is inconsistent with the position that party now assumes (*People v. Brown, 98 NY2d 226, n2, 774 N.E.2d 186, 746 N.Y.S.2d 422 [2002]*). Attorney Chang stated in open court, based upon Burgos' deposition, that the EDR is above the staircase. Statements made in a deposition are informal judicial admissions (*see* *GJF Constr., Inc. v Sirius Am. Ins. Co., 89 AD3d 622, 934 NYS2d 697 [1st Dept 2011]* Richter, J., concurring, at pgs. *626-627*]). Attorney Chang's reliance on a statement made during a deposition testimony does not transform an informal judicial admission into a formal one. Thus, this branch of plaintiff's motion is denied.

Based on the forgoing, plaintiff's motion is granted to the extent that 1) plaintiff is permitted to introduce evidence of leaking water adjacent to and above the accident location the ML-2A staircase; 2) plaintiff is allowed to introduce Transit's business records that were exchanged during discovery which show persistent water leaking in the area above and adjacent to the ML-2A staircase; and 3) the balance of the motion is denied.

MOTION SEQUENCE 11

Plaintiff argues that he is moving to preclude defendants from offering a medical conclusion or opinion as to plaintiff's disability because it is hearsay, but that it is acceptable for defendants to ask about plaintiff's "functional status". Plaintiff **[*9]** further argues that without any records in evidence or any of those records reviewed by defendants' medical experts, they should be precluded from offering the opinion at trial that his prior back injury or disability "affected the injury he sustained in this accident". The court and plaintiff's counsel had the following exchange:

> **[**4]** THE COURT: So, is your client denying he's in fact on disability?
> MR. MARC SUBIN: No, your Honor.
> THE COURT: Could he testify that he is disabled because of his back and leg?
> MR. MARC SUBIN: I don't really see the relevance there, your Honor, without someone to explain. What the disability was. I think it would be confusing.

However, plaintiff's counsel concedes that he is not moving to preclude the reference to plaintiff's prior back injury. Finally, plaintiff argues that to the extent plaintiff's disability is considered a collateral source pursuant to *CPLR §4545*, it is not proper to introduce evidence of a collateral source during the trial, but rather such evidence may be admitted post-trial during a collateral source hearing.

NYCTA opposes the motion and argues that plaintiff's disability argument based on hearsay should be rejected. NYCTA further argues that plaintiff **[*10]** admitted he was on disability, that there was testimony regarding what plaintiff could and couldn't do before his accident from which this action arises, any limitations he experiences and if he's collecting disability because of the leg and back injury. Therefore, NYCTA maintains that it should be able to explore that line of questioning of plaintiff. Counsel further contends that if the plaintiff has a disability regarding both his foot or his leg and his back, that he's receiving disability before, how he ambulates, how he walks up and downstairs is an issue that needs to be in front of the jury. Defense counsel stated that while he will not introduce evidence of collateral sources of payment at trial, he should be allowed to ask about plaintiff's disability because plaintiff himself affirmatively claimed it.

Plaintiff's motion to preclude is denied to the extent that plaintiff's physical condition pre- and postaccident is relevant as it goes to the issue of damages. By plaintiff's own admission in his deposition dated April 9, 2013, he admits that he had a medical issue with his left leg since birth, that he injured his lower back at work and that he is receiving money for those **[*11]** injuries he suffered to his lower back. Plaintiff further testified that he hasn't worked since 1996 due to his injuries as well as the

activities he was able to do pre- and post-accident.

Plaintiff's notice of claim indicates that he suffered "[m]ultiple injuries to head, neck, arms, body, back and legs." On this record, the court finds that it would be improper to preclude defendants from asking plaintiff about those injuries, and his activities of daily living before and after his December 13, 2011 accident. However, the court reserves decision on plaintiff's request to preclude defendants' medical experts from offering their opinion at trial as to plaintiff's prior back injury or disability until the conclusion of plaintiff's testimony. Finally, plaintiff's motion is granted to the extent that defendants are precluded from asking plaintiff the monetary amounts received for disability as that testimony is more appropriate for a collateral source hearing post-verdict.

MOTION SEQUENCE 12

Plaintiff moves to preclude NYCTA from substituting and/or adding to its medical experts Drs. Mann and Katzman, who were disclosed more than five years ago, with medical experts Dr. Kim and Dr. Luchs **[*12]** without proffering a legitimate reason/excuse. Plaintiff further argues that he has spent years preparing for cross-examination of both Drs. Mann and Katzman and that the additional medical experts' testimony would be cumulative. Plaintiff further contends that Dr. Kim sets forth a new defense theory without good cause that would severely prejudice plaintiff.

Defendant opposes the motion and argues that Dr Mann, if called to testify, would testify about knees and shoulders and that Dr. Kim, a spine specialist, will testify as to the spine, that their respective testimony would in no way be cumulative and that Dr. Kim will testify about plaintiff's condition before this incident and his findings go toward the weight to which the jury should give plaintiff's testimony. **[**5]** As to Drs. Katzman and Luchs, defendant argues that they are under no obligation to call Dr. Katzman, a radiologist, that Katzman never examined plaintiff, that defendant only exchanged Katzman because "they had a done a radiological review and it was exchanged previously" and they are under no obligation to call a radiologist. And finally, counsel argues that the fact that they exchanged another radiological expert which **[*13]** parrots several opinions that were provided by Katzman does not change the situation.

This case has been on the trial calendar since December 2016. The court conducted a pre-trial conference on December 7, 2021 and set a trial date for January 13, 2022. At no time did defendant disclose that it planned to call new medical experts. Clearly, defendant knew the existence of both Drs. Luchs and Kim when the court conducted its pre-trial conference on December 7, 2021. Dr. Kim's medical report is dated November 25, 2021 and the 3101d is dated December 13, 2021 and Dr. Luchs report is dated December 11, 2021 and the 3101d is dated December 13, 2021. Plaintiff relied on NYCTA's expert exchange that it would be calling Mann and Katzman for years. This fact alone demonstrates prejudice to plaintiff. Further, and more importantly, defendant has failed to provide any reason for the substitution of experts to show good cause at this juncture. *Lissak v. Cerabona, 10 AD3d 308, 781 N.Y.S.2d 337* Rather defendant incorrectly shifts the burden to plaintiff. Defendant's argument that Drs. Mann and Kim would testify about different body parts and therefore the testimony would not be cumulative does not warrant a different result.

The court also agrees **[*14]** with plaintiff that Dr. Kim offers a new theory. Specifically, plaintiff contends that Dr. Mann found positive findings and evidence of disability from an orthopedic standpoint and Dr. Mann did not opine that the surgeries were related to any degenerative conditions whereas Dr. Kim opines that the injuries to the cervical spine "were done to address preexisting degenerative/developmental conditions and were not causally-related to the subject accident. Here, plaintiff relied on Dr. Mann's finding of orthopedic disability for more than 4 years. The court agrees with plaintiff that this is a new theory advanced by defendant. Clearly, the prejudice to plaintiff lies not only with the disclosure on the eve of trial but also with Dr. Kim's conclusion/findings regarding plaintiff's spine, which the court finds is a new theory advanced by defendant. Thus, the court precludes NYCTA from calling Dr. Kim.

While the court agrees with defense counsel that he is under no obligation to call Dr. Katzman, defendant failed to offer any explanation why, on the eve of trial, he intends to call a different radiologist. It is of no moment that he may or may not call Katzman. It is however prejudicial to **[*15]** the plaintiff who has relied on defendant's expert disclosure for years to prepare for a different radiologist. Defendant offers no reason for the substitution such as unavailability or death of its expert to justify calling a different medical expert.

Based on the foregoing, plaintiff's motion to preclude NYCTA from calling Drs. Kim and Katzman is granted.

MOTION SEQUENCE 13

First, at oral argument on the motion, plaintiff indicated that he would not be calling Stanley Fein as an expert at the trial, therefore this portion of defendant's motion is moot.

NYCTA moves to preclude plaintiff from introducing any records or testimony related to the Canal Street subway station that post-date the date of the accident because evidence of subsequent alterations of remedial measures are not admissible unless there's an issue of maintenance or control, which is not the case here.

[6]** The City opposes the part of NYCTA's motion which seeks to preclude all evidence of pervasive leaks/water incursion through the Canal Street station and contends that there is an issue of "control" over the water incursion/intrusion condition in question and that photographs, NYCTA maintenance and repair records, and expert **[*16]** observation during the 2015 inspection make clear that the Canal Street station is and has been effectively plagued by recurring water incursion problems throughout the structure and to allow NYCTA to only focus on a singular water dripping/water condition that's allegedly connected to the alleged street surface condition would be an improper curtailment of the "relevant" evidence that the jury must consider in contemplation of the NYCTA's theory of liability against the City.

Next, NYC opposes NYCTA argument that appears to be a blanket preclusion of all post-incident evidence as the City does intend to use photos of the station interior solely for the purposes of establishing the general layout of the station, stairs, chambers, passages, etc. which are at issue in this case, or to demonstrate the hollow nature of the NYCTA's arguments concerning the role of the City in this action.

Plaintiff opposes the motion and argues that he should be permitted to introduce records that postdate the accident as they demonstrate that repairs were feasible prior to the accident and that the condition was not repaired on the date of the accident as claimed by NYCTA.

In Reply to the City's argument, **[*17]** NYCTA contends that it will continue to object to the introduction of any photos to discuss any alleged remedies about the leaks in the station and that neither plaintiff nor the City have shown that leaks in other areas of the station are relevant to the leak above the staircase and therefore, evidence of other water intrusion within the subway station should be precluded.

In Reply to the plaintiff, NYCTA argues that plaintiff has failed to provide a basis for allowing postaccident records, more specifically, the insertion of a drain at the bottom of a staircase, as it is irrelevant to the happening of the alleged incident.

It is well established that evidence of subsequent alterations or remedial measures is not admissible in a negligence action unless there is an issue of maintenance or control (*Niemann v. Lucca, 214 A.D.2d 658, 625 N.Y.S.2d 267 [1995]*; *see also, DeRoche v. Methodist Hospital, 249 A.D.2d 438, 671 N.Y.S.2d 319 [1998]*; *Klatz v. Armor Elevator Co., Inc., 93 A.D.2d 633, 462 N.Y.S.2d 677 [1983]*). Evidence of post-accident repairs and alterations with respect to the structure or instrumentality claimed to have caused the injury, has been deemed admissible, in limited circumstances, to demonstrate the condition at the time of the accident, to identify the cause of the injury, for rebuttal or impeachment, or to show the feasibility of precautionary measures (*Caprara v. Chrysler, 52 N.Y2d 114, 122-123, 417 N.E.2d 545, 436 N.Y.S.2d 251 [1981]*; *DePasquale v. Morbark Inductris, Inc., 221 AD2d 409, 410, 633 N.Y.S.2d 543[1995]*; *see also, **[*18]** Yates v. City of New York, 37 A.D.3d 458, 831 N.Y.S.2d 186 [2007]*).

The court disagrees with defendant NYCTA. Plaintiff's expert, Andrew Yarmus, in his report found "The extensive water intrusion staining, damage, and deterioration noted along the walls, ceilings, and floors of the subway station certainly should have brought the issue of intrusion to the attention of the New York City Transit Authority, and the "above grade" pothole, settlement and ponding conditions noted and known to the Transit Authority Leaking Detection Unit are further indicative of the substantial subsurface water flow conditions which exist at this area. New York City Transit Authority's installation of some drains and drainage channels at the subject subway station further indicates that they were aware of these intrusion conditions." Based on NYCTA third-party complaint against the City, it alleges that the City maintained and controlled the streets, curb, sidewalk areas at the intersection of Lafayette and Canal Streets. Plaintiff correctly argues that post-accident repairs may be admissible on the issue of feasibility of precautionary measures and to be permitted to introduce these records after the date of the incident to both impeach NYCTA's witness regarding when **[*19]** the repair of the subject leaks was completed as well as to show that the

repair of the leak was in fact feasible prior to the subject accident. Here, the Service Call Ticket received on October 4, 2011 shows a complaint of water leaks at "SW M-2 SW **[**7]** ML2A, S/W ML 1 Various SB Areas" and Completed: 12/9/2011 and under Status: Repaired. However, NYCTA's Service Call Forms dated in 2012 show that the leak in the staircase was not repaired as per the 12/9/2011 Service Call Ticket, which indicated "Repaired" on the ticket. Based on the foregoing, plaintiff may be permitted to introduce evidence on subsequent remedial measures based.

Next, defendant argues that the photographs taken in 2014 and 2015 by plaintiff's experts should be precluded given the length of time that has passed since the inspection and the date the photos were taken, the changes that may have happened to the station as a result of time and that the photos need to be authenticated prior to being admitted into evidence.

The City agrees with defendant NYCTA that the photos depicting the streets and sidewalks in 2015 should be excluded as they cannot be reasonably said to depict the location as it existed in 2011. The City **[*20]** further agrees with NYCTA that the 2015 incident photographs cannot be admitted to evidence for the street and station conditions on the day of plaintiff's accident and/or allowed to be a predicate for expert testimony by any party.

Plaintiff disagrees and argues that that the photographs taken by Andrew Yarmus should be admissible to show the jury that the EFR and EDR are not accessible to customers and plaintiff and to illustrate the location of these rooms to properly explain his opinions.

First, the subject photographs were not annexed to the motion papers and therefore, the court reserves decision on the admissibility of the photographs. However, the court rejects plaintiff's argument that the photos should come into evidence because the plaintiff and the public do not have access to the EFR and EDR. Because the public does not have access to these areas is not only irrelevant but also does not meet the criteria for the admissibility of photographs. The criteria for the use of photographs to show a defect, that they be taken reasonably close to the time of the accident and that the condition at the time of the accident be substantially as shown in the photographs. (*compare,* *Davis v. County of Nassau, 166 AD2d 498, 560 N.Y.S.2d 696*; *Karten v. City of New York, 109 AD2d 126, 490 N.Y.S.2d 503*). **[*21]** Based on the foregoing, the court reserves decision on this portion of defendant NYCTA's motion.

Next, NYCTA argues that the opinion of plaintiff's expert Andrew Yarmus should be precluded from testifying at trial because his opinion is not only based on hearsay, but also, he inspected the subway station more than three years after the accident.

The City argues that it would be prejudicial and improper to allow Mr. Yarmus to testify before the jury in this matter and provide his clearly improper opinion because he failed to offer any opinion as to how events like time and Hurricane Sandy could have impacted the condition of the Canal Street station and contributed to the staining conditions observed and photographed during the 2015 inspection.

Finally, NYC argues that TA employees who met with Mr. Yarmus on the date of his inspection were present, not merely to provide access, but to initially steer and immediately direct Mr. Yarmus's attention to the presence of a defective street condition, existing in 2015, which the TA now improperly seeks to connect to the 2011 station stairwell water leak/intrusion and that these statements of TA employees concerning "water service valve located **[*22]** over the staircase" at issue, the apparent fact of "routine water intrusion" at the station, and the "presence of underground streams in the subway station area that...contribute to the [water] conditions" in the station, all constitute admissions by the TA of facts at odds with the allegations constituting TAs third-party action, and, as such, should be admissible at trial.

Plaintiff opposes Transit's motion and argues that Yarmus should be allowed to testify and offer his opinion at the time of trial.

[8]** The court rejects NYCTA and the City's argument that because Yarmus failed to reference Hurricane Sandy in 2012 in his report and that because of the storm completely changed the condition of the subway is a red herring and is rejected by the court. This accident happened over 10 years ago in a very busy subway station and of course one would expect changes to occur to a subway station over a period. To expect otherwise would be insulting to any New Yorker in this City. However, the court agrees with NYCTA and the City that Yarmus cannot base his expert opinion about the alleged underground streams in the area that contribute to water infiltration into the subway based on the discussions **[*23]** with transit authority personnel on the date of his inspection as those statements constitute hearsay. Assuming Mr. Yarmus formulated his opinion

on other facts in the record and/or observations, he would be allowed to offer his opinion.

NYCTA next argues that plaintiff should be precluded from calling both Drs. Michael Gerling and Ali Guy, regarding the alleged injuries to plaintiff's knees, shoulders, pelvis, and deep vein thrombosis as neither doctor treated plaintiff for these alleged injuries.

Plaintiff opposes the motion and argues that that Dr. Guy should be able to testify as to plaintiff's injuries to his right knee, shoulders, pelvis, and deep vein thrombosis as Dr. Guy is plaintiff's treating physician.

In Reply to the plaintiff, NYCTA argues that Dr. Guy did not treat plaintiff for injuries to his right knee, shoulders, pelvis, or deep vein thrombosis and cannot offer any testimony related to same. NYCTA contends that it is not disputing that "Dr. Guy has treated plaintiff for his neck and back and such is not being disputed and, as a result, Dr. Guy should be allowed to testify as to the care and treatment with regard to same. However, about the Plaintiff's other alleged **[*24]** ailments, as described above, under prevailing case law, which is Dr. Guy is limited in such testimony to his examination."

First, plaintiff's argument that Dr. Guy, as plaintiff's treating physician, diagnosed plaintiff with deep vein thrombosis on September 30, 2018 and therefore can testify on this issue is outright rejected. As NYCTA correctly its out, plaintiff went to the emergency room in August 2019 and that Dr. Guy made a notation in his medical notes about DVT on September 28, 2019. Plaintiff's argument is not only misleading but a complete untruth. In plaintiff's opposition, he refers to his Exhibit F, pg. 2. Other than a notation that plaintiff is taking Xarelto, nowhere in any of Dr. Guy's medical records does he diagnosis or treat plaintiff for DVT. There is nothing in the medical records/notes to show any treatment by Dr. Guy for DVT. Based on the foregoing, Dr. Guy is not permitted to testify as to his "diagnosis" of DVT or that in some way that this injury/illness/diagnosis is causally related to the accident in 2011.

Next, NYCTA does not dispute that Dr. Guy treated plaintiff for his neck and back for several years. The issue in dispute is whether Dr. Guy is plaintiff's **[*25]** treating physician for his right knee and shoulders. NYCTA annexes Dr. Guy's medical notes for treatment to plaintiff's neck and back pain from 2018 through 2020. Further, Dr. Guy's report dated March 22, 2019 contains a patient history and findings from a physical examination he performed on plaintiff's neck and back and the right and left shoulder. Then on September 30, 2019, Dr. Guy makes notations as to BL shoulder pain and right knee pain. However, a review of Dr. Guy's rehabilitation records for plaintiff don't contain any notes that plaintiff was in fact treated for the pelvis, right knee pain or bilateral shoulder pain. Therefore, Dr. Guy, as plaintiff's treating physician, is precluded from testifying as to injuries to plaintiff's pelvis, bilateral shoulder issues and right knee.

NYCTA contends that Dr. Michael Gerling should be precluded from testifying at the trial because he offered no treatment to plaintiff's knees, shoulders, pelvis or DVT. Plaintiff doesn't oppose this portion of defendant's motion. Therefore, Dr. Gerling is precluded from testifying in this matter.

[9]** Lastly, NYCTA argues that plaintiff should be precluded from offering NYCTA documents, specifically Station **[*26]** Environment & Operations Supervisory Policy and Procedures Manual, because these rules are not only inadmissible but may also impose a higher standard of care on NYCTA. Plaintiff opposes and argues that he will argue that the water leaks should have been categorized as Priority "A" as water on the stairs constitutes a dangerous condition, Priority "A" does not require more than what is required under the common-law standard of reasonable care under the circumstances. Priority "A" defects are to be made safe or repaired within 24 hours. (See NYCTAs Exhibit "3", Section 4-38 of "Station Environment and Operations Supervisory Policy and Procedures Manual").

The court agrees with NYCTA that to allow the Policy and Procedure Manual, more specifically Priority A defects and its description, would impose a higher standard of care on NYCTA. If the court were to accept plaintiff's argument that the water on the stairs is a Priority A, then every water condition in a subway system would require remediation within a 24-hour period. In the Manual Priority A Defects include "any water condition that is affecting or has the potential of affecting train service, customer movement or the collection **[*27]** of revenue". There is no dispute that Transit knew of the leak as early as November 2011 as evidenced by the Service Call Form. However, it is not for plaintiff to categorize what it deems a Priority A defect and repaired within a 24-hour period. Based on the foregoing, plaintiff is precluded from offering the Manual for the purpose of imposing a higher standard of care on NYCTA.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence 10 is granted to the extent that plaintiff is: 1) permitted to introduce evidence of leaking water adjacent to and above the accident location the ML-2A staircase; 2) allowed to introduced Transit's business records that were exchanged during discovery which show persistent water leaking in the area above and adjacent to the ML-2A staircase; and it is further

ORDERED that the balance of motion sequence 10 is denied; and it is further

ORDERED that motion sequence 11 is granted to the extent that defendants are precluded from asking plaintiff about the monetary amounts he received for disability and the court reserves decision on plaintiff's argument that defendants' medical experts are precluded from offering their opinion at trial as **[*28]** to plaintiff's prior back injury or disability until the conclusion of plaintiff's testimony; and it is further

ORDERED that motion sequence 11 is otherwise denied; and it is further

ORDERED that motion sequence 12 is granted and defendant NYCTA is precluded from substituting/ calling as medical experts Drs. Kim and Luchs; and it is further **ORDERED** that motion sequence 13 is granted to the extent that: [1]

; [2] Yarmus cannot base his expert opinion about the alleged underground streams in the area that contribute to water infiltration into the subway based on the discussions with transit authority personnel on the date of his inspection as those statements constitute hearsay. Assuming Mr. Yarmus formulated his opinion on other facts in the record and/or observations, he would be allowed to offer his opinion; [3] Dr. Guy is precluded from testifying as to injuries to plaintiff's pelvis, bilateral shoulder issues and right knee; [4] Dr. Gerling is precluded from testifying at trial; and [5] plaintiff is precluded from offering the Station Environment & Operations Supervisory Policy and Procedures Manual for the purpose of imposing a higher standard of care on NYCTA; and it is further

[10]** **[*29]** **ORDERED** that motion sequence 13 is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 3-11-22

New York, New York

So Ordered:

/s/ Lynn R. Kotler

Hon. Lynn R. Kotler, J.S.C.

End of Document

No *Shepard's* Signal™
As of: March 31, 2025 12:02 PM Z

Thompson v. Silva

Supreme Court of New York, Richmond County

October 21, 2021, Decided

Index No. 152242/2017

Reporter
2021 N.Y. Misc. LEXIS 21081 *

AARON THOMPSON and QUANISHA BAVEGHEMS, Plaintiffs, v. -NOEL SILVA, NEW YORK CITY TRANSIT AUTHORITY, THE METROPOLITAN TRANSPORTATION AUTHORITY, THE METROPOLITAN TRANSPORTATION AUTHORITY BUS COMPANY, TAHIR TAHIRI and SELATIN TAHIRI, Defendants.

Core Terms

permanent, summary judgment, significant limitation, Affirmation, organ, lumbar, spine, serious injury, consequential, impairment, injuries, cervical, daily activities, days immediately, issue of fact, Plaintiffs', occurrence, performing, customary, Exhibits, prevents, shoulder, papers, knee

Judges: [*1] HON. THOMAS P. ALIOTTA, J.S.C.

Opinion by: THOMAS P. ALIOTTA

Opinion

DECISION AND ORDER

Recitation pursuant to *CPLR 2219(a)* of the following papers numbered "1" through "6" were fully submitted on the 12th day of August 2021:

Papers Numbered

Mot. Seq. No. 001

Notice of Motion for Summary Judgment by Defendants, SILVA, NYCTA, MTA, & MTABC, Affirmation and Exhibits (Dated: March 26, 2021) 1,2

Mot. Seq. No. 002

Notice of Motion for Summary Judgment by Defendants TAHIRI, Affirmation and Exhibits (Dated: April 7, 2021) 3, 4

Mot. Seq. No. 001 & 002

Plaintiffs' Affirmation in Opposition with Supporting Exhibits, Memorandum of Law and Response to Statement of Material Facts (Dated: July 27, 2021) 5

Mot. Seq. No. 001

Defendants' Reply Affirmation (Dated: August 11, 2021) 6

Upon the foregoing papers, the defendants' motions for summary judgment dismissing the complaint of plaintiffs, Aaron Thompson (hereinafter "Thompson") and Quanisha Baveghem (hereinafter "Baveghem"), on the grounds that the injuries allegedly sustained by each plaintiff fail to meet the serious injury threshold requirement of *Insurance Law §5102(d)* are denied.

This matter arises out of a March 22, 2017 collision between an S53 bus, and a vehicle owned and operated by the Tahiri defendants. **[*2]** Plaintiffs, passengers on the bus, claim to have sustained "serious" personal injuries by way of, *inter alia,* (1) "permanent consequential limitation of use of a body organ or member; (2) significant limitation of use of a body function or system and (3) medically determined injury or impairment which prevents the plaintiffs from performing substantially all of the material acts which constitute [their] usual and customary daily activities for more than 90 during the 180 days immediately following the occurrence or the accident" *(see* Plaintiffs' Affirmation in Opposition, NYSCEF 83 & 84; Plaintiffs' Verified Bill of Particulars para 6; NYSCEF 17). More particularly, plaintiff Thompson claims that due to this accident he required arthroscopic surgery to his left knee1, a discectomy at L5-S12, lumbar epidural steroid injections at L5-S1,3 lumbar medial branch blocks bilaterally at L3-L4, L4-L54 and that he sustained disc bulges at C3-C4 and C4-C5; herniated discs at C5-C6, T2-T3 and T11-T12, exacerbation of pre-existing injuries

to his cervical and lumbar spine, and right shoulder pain with limited range of motion *(see* Supplemental Bill of Particulars; NYSCEF 21). Plaintiff Baveghems **[*3]** sets forth that due to the accident she sustained serious injuries by way of partial rotator cuff and SLAP tears to her left shoulder,5 patellofemoral syndrome with partial tear of the quadriceps tendon in the left knee, and cervical and lumbar disc herniations with radiculopathy (*see* NYSCEF 17 para. 8-9B; NYSCEF 21 para 10B).

Defendants move for summary judgment against both plaintiffs on the grounds that their claimed injuries are not "serious" within the meaning of the statute. As for Thompson, defendants maintain that alleged injuries to his cervical and lumbar spine are degenerative and the result of a prior (August 2016) automobile accident, as is evident from a comparison of his pre-accident and post-accident MRI films. In support of the motion defendants have submitted, *inter alia,* the affirmation of an orthopedic surgeon, Dr. Satish Kashyap. To the extent relevant, Dr. Kashyap found during his May 6, 2019 examination of Thompson *(see* NYSCEF 67) that he exhibited full range of motion in the cervical, thoracic, and lumbar spine, as well as in both knees and the right shoulder. According to Dr. Kashyap, Thompson suffers from no orthopedic disability and exhibits "no evidence of **[*4]** permanency or residuals" relative to his spine, left knee, or right shoulder.

As for plaintiff, Baveghems, Dr. Kashyap found during his May 20, 2019 examination *(see* NYSCEF 68) that she too enjoys full range of motion of the cervical, thoracic, lumbar spine, both knees and left shoulder, and that she is free from orthopedic disability, and able to work without restrictions.

In opposition, plaintiffs maintain that defendants have failed to meet their burden of proof on the dismissal motion since, *inter alia,* the examinations by Dr. Kashyap were conducted two years after the accident and cannot speak to each plaintiffs alleged "significant limitation of use of a body function or system" for the two-year period immediately following the March 2017 accident. Alternatively, plaintiffs argue that their medical evidence serves to raise a triable issue of fact sufficient to defeat summary judgment. In this regard plaintiffs attach, *inter alia,* the affirmed medical records and reports of each and every treating physician and critically, with respect to Thompson's prior spinal injuries, the June 14, 2021 affirmation of treating orthopedic surgeon Dr. Aron Rovner *(see* NYSCEF 95; *see also* April **[*5]** 13, 2018 entry comparing Thompson's pre and post-accident MRI films) who details the exacerbation of preexisting findings in the cervical and lumbar spine, and explains why Thompson's current reported symptoms are related to the current accident *(see, e.g.,* Nakamura v. Moialvo, 29 NYS3d 285 [1st Dept. 2016]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) *(see Gaddy v. Eyler, 79 NY2d 955 [1992]*; *see also* Akhtar v. Santos, 57 AD3d 593 [2d Dept. 2008]). The defendant may satisfy this burden by submitting the plaintiffs deposition testimony and the affirmed medical report of the defendant's own examining physician *(see* Moore v. Edison, 25 AD3d 672 [2d Dept. 2006]; *[internal citations omitted]).* The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* Winegradv. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; *Boone v. New York City Tr. Auth, 263 AD2d463 [2d Dept. 1999]*).

Here, defendants have made *a prima facie* showing that plaintiffs did not sustain a serious injury within the meaning of Insurance Law §5102(d) through the affirmed reports of Dr. Kashyap *(see* Bailey v. Islam, 99 AD3d 633 [1st Dept. 2012]). The burden therefore shifted to plaintiffs to raise a triable issue of fact *(Gaddy v. Eyler, 79 NY2d 955, 957 [1992]*).

In opposition, plaintiffs raised an issue of fact through the affirmations of their **[*6]** experts, particularly Dr. Kenneth McCulloch on behalf of Thompson and Dr. Michael Gerling on behalf of Baveghems, who examined plaintiffs shortly after the accident and again in 2021 *(see* Toure v. Avis Rent A Car Sys., 98 NY2d 345, 350 [2002]). The doctors provided range of motion measurements as well as results from objective testing before opining that plaintiffs suffered permanent injuries that were caused by this car accident. The Courts have consistently held that evidence of range of motion limitations, especially when coupled with positive MRI test results are sufficient to defeat summary judgment *(see Blocker* v. *Yun BaekSung,* 35 AD494 [1st Dept. 2016]).

Accordingly, this court finds that each plaintiff successfully raised a triable issue of fact to defeat summary judgment with respect to the "limitation(s) of use" categories of Insurance Law §5102(d), *i.e.,* "permanent consequential limitation of use of a body

organ or member" and a "significant limitation of use of a body function or system." Additionally, plaintiffs' sworn deposition testimony as supported by the affirmed medical records provides a triable issue of fact that each plaintiff sustained a "medically determined injury or impairment of a non-permanent nature which prevents plaintiff form performing substantially all of the material acts **[*7]** which constitute plaintiffs usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence".

To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiffs limitations, with an objective basis, correlating plaintiffs limitations to the normal function, purpose and use of the body part *(see Perl v. Meher, 18 NY3d 208 [2011]*). It is well settled that "in order to establish that a plaintiff suffered a significant limitation of use of a body function or system, that plaintiff is required to provide objective evidence of the extent or degree of the limitation and its duration, based on a recent examination of the plaintiff' (*Mejia v. DeRose, 35 AD3d 407, 407 [2d Dept. 2006]*; *[internal citations omitted])*. A minor, mild, or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v. Elliott, 57 NY2d 230*; *Cebron v. Tuncoglu, 109 AD3d 631 [2d Dept. 2013]*).

The Court notes that in paragraph 22 of the Verified Bill of Particulars (NYSCEF **[*8]** 17), plaintiffs claim to have sustained serious injuries "resulting in a fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." However, defendants' motion papers do not address each category with specificity, but rather summarily state that plaintiffs have not sustained a serious injury. Further, plaintiffs' opposition only address the following three categories: 1) permanent consequential limitation of use of a body organ or member; 2) significant limitation of use of a body function or system; or 3) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such **[*9]** person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." Therefore, the Court holds that in view of the evidence presented, this Court is unable to hold as a matter of law that the plaintiffs did not suffer a serious injury under the "permanent consequential limitation," "significant limitation of use" or the "90 out of 180-day" categories of *Insurance Law §5102(d)* *(see also Fuentes v. Sanchez, 91 AD3d 418 [1st Dept. 2012]*). However, the Court finds as a matter of law that plaintiff did not sustain a permanent loss of use of a body organ, member. function, or system.6

Accordingly, it is

ORDERED, that defendants* motions for summary judgment (Motion Sequences 001 and 002) are denied as to (1) "permanent consequential limitation of use of a body organ or member; (2) significant limitation of use of a body function or system and (3) medically determined injury or impairment which prevents the plaintiffs from performing substantially all of the material acts which constitute [their] usual and customary daily activities for more than 90 during the 180 days immediately following the occurrence or the accident"; and it is further

ORDERED, that **[*10]** defendants' motions for summary judgment (Motion Sequences 001 and 002) are granted as to the "permanent loss of use of a body organ, member, function or system" category.

This constitutes the decision and order of the Court.

ENTER

Dated: October 21, 2021

/s/ THOMAS P. ALIOTTA

HON. THOMAS P. ALIOTTA, J. S. C.

1 Left knee arthroscopic partial medial meniscectomy and arthroscopic synovectomy was performed on October 1, 2018 *(see* NYSCEF 129) by Dr. Kenneth McCulloch, M.D.

2 Performed by Dr. Aron Rovner on October 13, 2017.

3 Administered by Dr. Tim Canty at Comprehensive

Spine & Pain Center of New York on May 24, 2018.

4 Administered by Dr. Tim Canty at Comprehensive Spine & Pain Center of New York on July 10, 2018.

5 "SLAP" is an acronym for a tear of the Superior Labrum from Anterior to Posterior. This tear occurs at the point where the tendon of the biceps muscle inserts on the labrum.

6 See Affirmation in Support, page 11, par. 22 (MS001 - NYSCEF 60). In MS002, defendants, TAHIRI, merely incorporate by reference the arguments set forth by defendants, SILVA and MTA/NYCTA. Plaintiffs have not opposed this branch of either motion.

End of Document

No *Shepard's* Signal™
As of: March 31, 2025 12:02 PM Z

Brailyn Osvaldo Duran Adames And Damian Armando Regalado Adames v. Nocona Transp., Daniel Wayne Robinson, City Bronx Leasing Two, And Arcenio Contreras, Defendants

Supreme Court of New York, Bronx County

March 1, 2021, Decided

Index No. 300612/2017E

Reporter
2021 N.Y. Misc. LEXIS 4295 *

BRAILYN OSVALDO DURAN ADAMES and DAMIAN ARMANDO REGALADO ADAMES, Plaintiffs -against- NOCONA TRANSPORT, INC., DANIEL WAYNE ROBINSON, CITY BRONX LEASING TWO INC., and ARCENIO CONTRERAS, Defendants.

Core Terms

spine, cervical, injuries, lumbar, permanent, serious injury, right knee, bill of particulars, range of motion, orthopedic, exhibited, submits, physical therapy, summary judgment, board certified, medical record, deposition, causally, acute, emergency room, consequential, disability, traumatic, pain

Judges: [*1] Hon. BIANKA PEREZ, Justice Supreme Court.

Opinion by: BIANKA PEREZ

Opinion

The following papers numbered 1 to 5 were read on this motion (Seq. No. #003) for SUMMARY JUDGMENT DEFENDANT noticed on January 9, 2020.

Notice of Motion - Cross-Motion-A formations in Support - Exhibits No(s). 1-3

Annexed

Affirmations in Opposition and Exhibits No(s). 4-5

Replying Affidavits and Exhibits N/A

Plaintiffs, who were involved in an automobile accident, brought this action seeking to recover for injuries allegedly sustained in the accident. Defendants Daniel Wayne Robinson and Nocona Transport, Inc. move for summary judgment, pursuant to *CPLR § 3212* contending that plaintiffs cannot meet the serious injury threshold requirement mandated by *Insurance Law §§ 5104(a)* and *5102(d)*. Plaintiff opposes.

Standard of Review

In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold. See, *Linton v. Nawaz, 62 A.D.3d 434 (1 st Dept 2009)*. It is well established that the legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries, and as such, objective proof of a plaintiffs injury is **[*2]** required in order to satisfy the statutory serious injury threshold. See, *Toure v. Avis Rent a Car Sys. 98 N.Y.2d 345 (2002)*.

Insurance Law § 5102(d) defines the term "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

An affirmed report concerning the lack of evidence of disability establishes defendant's prima facie burden

that plaintiff did not suffer a serious injury as defined by *Insurance Law 5102(d)*, and shifts the burden to plaintiff to raise an issue of fact. See, *Quinones v. Ksieniewicz, 80A.D.3d506(1st Dept 2011)*.

To prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiffs loss of range of motion can be used to substantiate a claim **[*3]** of serious injury. See, *Toure v. Avis Rent a Car Sys. 98 N.Y.2d 345 (2002)*. An expert's qualitative assessment of a plaintiffs condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiffs limitations to the normal function, purpose and use of the affected body organ, member, function or system. See, id.

Procedural History

Plaintiffs were in a motor vehicle accident on October 21, 2016 that occurred at the intersection of Webster Avenue and the Cross Bronx Expressway in Bronx County (Exh. G, plaintiffs verified bill of particulars). Plaintiffs were rear-seated passengers in a vehicle owned by defendant City Leasing Two Inc. and operated by defendant Contreras. That vehicle was struck in the rear by the vehicle operated by defendant Robinson, who was employed by defendant Nocona Transportation, Inc. Per the police report, the accident occurred as defendant Robinson attempted to make a left-hand turn at the intersection (Exh. A).

Plaintiffs' verified bill of particulars alleges that plaintiff Duran Adames sustained permanent consequential limitation and significant limitation of the Lumbar and Cervical Spine, as a result of the accident and/or plaintiff sustained a non-permanent medically determined **[*4]** injury which prevented plaintiff from performing substantially all of the material acts which constituted his usual and customary duties for at least ninety of the first one hundred and eighty days after the accident (90/180 claim). The bill of particulars alleges the same categories of injuries for plaintiff Regalado Adames in the Lumbar and Cervical Spine, as well as the right knee. The bill of particulars further alleges that all of the above-noted injuries, their residuals and sequelae are permanent and progressive in nature and will tend to worsen over the lifetime of the plaintiffs, and that the aforementioned accident may have aggravated, precipitated and/or activated a pre-existing and/or latent asymptomatic condition. The bill of particulars states neither plaintiff has a claim for loss of earnings.

In the instant motion, defendants allege that pursuant to *Insurance Law 5104(a)*, neither plaintiff sustained a serious injury as required by *Insurance Law 5102(d)*. Plaintiffs contend in their opposition that the only relevant serious injury categories are "permanent consequential" and "significant" limitation of use of a body function or system.

Defendants' motion as to Plaintiff Duran Adames:

In support of the motion, with **[*5]** respect to plaintiff Duran Adames, defendants annex the affirmed report of Dr. Joseph Elfenbein, M.D., a board certified orthopedist (Exh. J) who conducted an independent examination on Duran Adames. Dr. Elfenbein's report on Duran Adames states that his impressions of plaintiff are (1) aresolved cervical spine sprain; (2) a "healed with good result" status post lumbar spine surgery; and (3) a resolved right knee sprain (Exh. J). The report further states that Duran Adames demonstrated normal ranges of motion in the cervical spine and lumbar spine when compared to the AMA Guidelines (Fifth Edition). The right knee demonstrated restricted ranges of motion for flexion (130 degrees versus the normal 150), but otherwise demonstrated normal ranges of motion. Dr. Elfenbein further noted that Duran Adames tested negative on all objective tests of the spine, and plaintiff demonstrated no swelling, spasms or atrophy. Lastly, the right knee tested negative on all objective tests except for Stable-Varus/Valgus. Dr. Elfenbein concludes that Duran Adames presented with a normal orthopedic examination, indicates no findings of orthopedic limitations, and is capable of functional use of the examined **[*6]** body parts for normal activities of daily living and work.

In further support of the motion, defendants submit the report of Dr. Marc P. Kanter, M.D., a Board Certified Emergency Medicine Doctor, who conducted a review of Duran Adames' emergency room records, bill of particulars, and police report (Exh. M), as well as the emergency room records (Exh. B). Dr. Kanter reports that after the accident. Duran Adames visited the ER, where he exhibited no acute distress. Dr. Kanter notes that the injuries alleged in the bill of particulars are inconsistent with Duran Adames' complaints to the ER staff, as well as the ER staffs physical findings and examinations. Dr. Kanter concludes that within a reasonable degree of medical certainty, "there were no acute traumatic findings to causally relate the subject accident on 10/21/2016 and the claimed injuries."

Defendants submit the affirmed report of Dr. Darren

Fitzpatrick, M.D., a Board Certified Radiologist who reviewed Duran Adames' MRIs of the cervical spine and lumbar spine (Exh. Q). Dr. Fitzpatrick states that Duran Adames exhibited normal spinal alignment, signal and morphology, with no disc bulging. Dr. Fitzpatrick further notes that the MRI **[*7]** findings are not related to acute traumatic injury to the cervical and lumbar spines.

Lastly, defendants submit Duran Adames' deposition transcript (Exh. H). Duran Adames testified that after the accident, he attended physical therapy for approximately two to three months. Duran Adames further testified that he underwent surgery for his lower back on November 7, 2017 at an ambulatory surgical center, after which he was discharged the same day. Duran Adames further testified that he did not see the operating physician until recently before his deposition, and has not received physical therapy since November 2017. Duran Adames testified that he does not have any complaints of pain in his neck and lower back. Duran Adames further testified that since the accident, he cannot play basebatl, lift heavy objects, and exercise. Plaintiff Duran Adames opposition:

In opposition, plaintiff Duran Adames submits certified medical records detailing approximately four months of conservative physical therapy treatment, from October 28, 2016 to February 3, 2017 (Exh. B). On February 10, 2017, Duran Adames underwent an MRI, which was analyzed by Dr. Steve Winter, M.D., a Board Certified Radiologist (Exh. **[*8]** C). Dr. Winter reported clinical impressions, to a reasonable degree of medical certainty, of posterior disc herniations at L4/5, posterior disc herniation at L5/S1, and posterior disc bulging at L3/4. Plaintiff also submits certified medical records from Dr. Arden Kaisman, M.D., a Pain Management Physician, who made objective findings of lumbar spine pain and spasm, as well as restricted ranges of motion in Duran Adames' lumbar spine (Exh. E).

In further opposition, plaintiff Duran Adames submits the affirmed report of Dr. Michael Gerling, M.D., a Board Certified Orthopedic Surgeon and Duran Adames' treating physician (Exh. F). Dr. Gerling found restricted ranges of motion in Duran Adames' lumbar and cervical spine. Dr Gerling also states that "Mr. Duran Adames sustained significant musculoskeletal injuries to his neck and lower back in the above stated accident." Despite "modest improvements with surgical intervention," Duran Adames is severely and permanently disabled, with injuries "directly causally related" to the accident. With respect to any cessation of treatment, Dr. Gerling concludes that "any future physical therapy treatment will only be palliative in nature." Defendant's **[*9]** Motion as to Plaintiff Regalado Adames:

In support of the motion, with respect to plaintiff Regalado Adames, defendants annex the affirmed report of Dr. Elfenbein (Exh. K), who conducted independent examinations on plaintiff Regalado Adames. Dr. Elfenbein's report states that his impressions of Regalado Adames are (1) status post cervical spine surgery, "healed with good result"; (2) a resolved lumbar spine sprain; and (3) a resolved right knee sprain, The report further states that Regalado Adames demonstrated norma! ranges of motion in the lumbar spine, right wrist, left wrist, right hand, and left hand, when compared to the AMA Guidelines (Fifth Edition). The cervical spine demonstrated restricted ranges of motion for flexion (40 degrees versus the normal 50), right lateral flexion (30 degrees versus the normal 45), left lateral flexion (30 degrees versus the normal 45). right rotation (60 degrees versus the normal 80), and left rotation (60 degrees versus the normal 80). Dr. Elfenbein further noted that Regalado Adames tested negative on all objective tests of the spine and wrists, and plaintiff demonstrated no swelling, spasms or atrophy. Lastly, the right knee tested negative **[*10]** on all objective tests except for Stable-Varus/Valgus. Dr. Elfenbein concludes that Regalado Adames presented with a normal orthopedic examination, indicates no findings of orthopedic limitations, and is capable of functional use of the examined body parts for normal activities of daily living and work.

In further support of the motion, defendants submit the report of Dr. Kanter, who also conducted a review of Regalado Adames' emergency room records, bill of particulars, and police report (Exh. N), as well as the emergency room records (Exh. C). Dr. Kanter reports that after the accident, Regalado Adames visited the ER, where he exhibited no acute distress. Dr. Kanter notes that the injuries alleged in the bill of particulars are inconsistent with Regalado Adames' complaints to the ER staff, as well as the ER staffs physical findings and examinations. Dr. Kanter concludes that within a reasonable degree of medical certainty, "there were no acute traumatic findings to causally relate the subject accident on 10/21/2016 and the claimed injuries."

Defendants submit the affirmed report of Dr. Fitzpatrick, who reviewed Regalado Adames' MRIs of the cervical spine, lumbar spine, and right knee **[*11]** (Exh. P). Dr. Fitzpatrick states that Regalado Adames's cervical and lumbar spine MRIs reveal "degenerative disc disease" which is "age-related'* and "not causally related to acute

traumatic cervical spine injury." On the right knee. Dr. Fitzpatrick states that the clinical impression is an "unremarkable right knee" with "no traumatic injury."

Lastly, defendants submit Regalado Adames' deposition transcript (Exh. I). Regalado Adames testified that immediately after the accident, he exited the vehicle on his own. Regalado Adames further testified that he received cervical spine surgery on March 6, 2017, after which he felt an improvement in pain. Regalado Adames also testified that he has not seen the operating physician since August 2017, and had last received treatment for his right knee approximately one year before his deposition. Regalado Adames further testified that he does not have neck or right knee pain. Plaintiff Regalado Adames opposition:

In opposition, plaintiff Regalado Adames submits certified medical records detailing approximately three months of physical therapy treatment, from October 28, 2016 to January 30, 2017 (Exh. G). In addition, plaintiff submits certified medical **[*12]** records from orthopedist Dr. Victor Katz (Exh. I), who found that Regalado Adames objectively exhibited spasms and restricted ranges of motion of the cervical spine. Plaintiff further submits certified medical records from Dr. Arden Kaisman (Exh. J), with whom Regalado Adames underwent cervical epidural steroid injections.

In further opposition, plaintiff Regalado Adames submits the affirmed report of Dr. Michael Gerling, M.D., a board certified orthopedic surgeon and Regalado Adames' treating physician (Exh. L). Per Regalado Adames' certified medical records. Dr. Gerling performed a two level cervical fusion at C4-5 and C5-6 (Exh. K). In his narrative report, Dr. Gerling found restricted ranges of motion in Regalado Adames' lumbar and cervical spine. Dr Gerling also states that "Mr. Regalado Adames sustained significant musculoskeletal injuries to his neck and lower back in the above stated accident." Despite "modest improvements with surgical intervention," Regalado Adames has a "permanent partial disability … directly causally related" to the accident. With respect to any cessation of treatment, Dr. Gerling concludes that "any future physical therapy treatment will only be palliative **[*13]** in nature."

Discussion

As to Duran Adames' alleged lumbar and cervical spine injuries, the Court finds that defendants carried their initial prima facie burden of demonstrating that plaintiff Duran Adames did not sustain a serious injury resulting in either a "permanent consequential" or "significant" limitation through the affirmed reports of Dr. Elfenbein, Dr. Kanter, and Dr. Fitzpatrick, which state there is no evidence of orthopedic disability, no permanency or residuals and that Duran Adames is able to work. See, *Kester v Sendova. 123 A.D.3d 418 (1st Dept 2014)*. See also. *Rodriguez v Abdallah. 51 A.D.3d 590 (1st Dept 2008)*. Similarly, as to plaintiff Regalado Adames' alleged lumbar spine, cervical spine, and right knee injuries, the Court finds that defendants met its initial prima facie burden of demonstrating that plaintiff Regalado Adames did not sustain a serious injury.

With the burden shifting onto plaintiffs, the Court next finds that plaintiffs met their burden of proof and raised a material issue of fact as to whether he sustained a "permanent consequential" or "significant" limitation Dr. Gerling's affirmations for each plaintiff state that the injuries are both permanent in nature and arc causally related to the accident with sufficient objective findings and qualitative **[*14]** assessment. See, *Linton v. Nawaz, 62 A.D.3d 434 at 439* (holding that plaintiff raised an issue of fact regarding causation as the doctor concluded that plaintiffs symptoms were related to the accident based on a full physical examination of plaintifQ- See also *Ramkumar v. Grand Style Trans. Enter. 22 N.Y.3d 905, 976 N.Y.S.2d 1 (2013)*. Furthermore, Dr. Gerling's report established that any further treatment would be palliative in nature, thereby explaining any cessation in treatment. See, *Pommells v. Perez. 4 N.Y.3d 566 (2005)*.

As to defendants' branch of the motion, which argues that the proof rules out a serious injury based on the 90/180-day claim, the Court finds that defendants established its entitlement to summary judgment as the proof clearly shows plaintiffs did not miss work for 90 days out of the first 180 days immediately after the accident or that they were totally confined to bed or home. Though plaintiffs' bill of particulars alleges that plaintiffs were confined to bed and home for at least 90 out of the first 1 80 days, defendants established its prima facie burden through the affirmed reports of Dr. Kanter, who concluded that the injuries claimed in the bill of particulars are inconsistent with plaintiffs' symptoms at the emergency room. See, *Gordon v. Hernandez 18 A.D. 3d 424 (1st Dcpt 2020)*. Further, defendants submitted plaintiffs' deposition transcripts, in **[*15]** which Duran Adames testified that after the accident, he is not able to play baseball, lift heavy objects, exercise, and run; Regalado Adames testified during his deposition that after the accident, he is not

able to go the gym, help around the house, and work continuously as a barber without any breaks. The effect of these admissions in establishing no serious injury under the 90/180-day category renders unnecessary any medical proof. See *Sanchez v. Oxcin. 157 A.D.3d 561, 69 N.Y.S.3d 623 (1st Dept 2018)*. As plaintiffs did not address the 90/180 day category in opposition, plaintiffs failed to establish a triable issue of fact as to that category of the statute.

As to defendants' branch of the motion requesting dismissal of the permanent loss of use claims, the Court finds that defendants established its entitlement to summary judgment as the medical proofs plainly establish that neither plaintiff sustained a complete loss of use of a body organ or member. Dr. Elfenbein's reports on both plaintiffs show that neither plaintiff sustained total loss of range of motion. See *Oberly v. Bangs Ambulance. Inc., 96 N Y2d 295 (2001)*; *Vaughn v. Baez. 305 AD2d 101 (2d Dept. 2003)*. Furthermore, with respect to plaintiff Regaiado Adames, plaintiff's own physician Dr. Gerling opines in his report that Regaiado Adames has a "partial disability." As plaintiffs **[*16]** did not address the permanent loss of use category in its opposition, plaintiffs failed to establish a triable issue of fact as to that category of the statute.

Conclusion

Accordingly, it is

ORDERED, that defendants Daniel Wayne Robinson and Nocona Transport, Inc.'s motion for summary judgment is granted only to the extent of dismissing the "90/180 day" claim and the permanent loss of use claim for plaintiffs Brailyn Osvaldo Duran Adames and Damian Armando Regaiado Adames, and it is further

ORDERED, that the remaining branches of defendants' motion are denied.

This constitutes the decision and order of the Court.

Dated: March 1, 2021

Hon. Bianka Perez

BIANKA PEREZ, J.S.C.

Cited
As of: March 31, 2025 12:02 PM Z

Goldwire v New York City Tr. Auth.

Supreme Court of New York, Appellate Division, First Department

November 5, 2020, Decided ; November 5, 2020, Entered

Appeal No. 12289, Case No. 2019-04233

Reporter
188 A.D.3d 415 *; 135 N.Y.S.3d 89 **; 2020 N.Y. App. Div. LEXIS 6558 ***; 2020 NY Slip Op 06350 ****; 2020 WL 6494145

[**1]** Fantansia Goldwire, Respondent, v New York City Transit Authority et al., Appellants. Index No. 23382/14

Core Terms

driver's, summary judgment, miles per hour, issue of fact, Defendants', co-worker, traveling, struck, speed, rear

Headnotes/Summary

Headnotes

Motor Vehicles—Collision—Bus Collision with Vehicle Exiting Parking Space—Denial of Summary Judgment

Insurance—No-Fault Automobile Insurance—Causal Relation of Injuries to Accident—Issues of Fact

Counsel: **[***1]** Lawrence Heisler, Brooklyn (Alison Estess of counsel), for appellants.

Law Office of Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for respondent.

Judges: Before: Acosta, P.J., Singh, Kennedy, Shulman, JJ.

Opinion

[89]** **[*415]** Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about September 24, 2019, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was injured when her car collided with a bus going **[*416]** in the same direction on Bainbridge Avenue by the intersection of East 207th Street in the Bronx. Plaintiff testified that her vehicle was exiting from a parking space at a speed of between 10 and 20 miles per hour, when the bus struck the rear and left side of her car. A co-worker, who plaintiff drove home that **[**90]** day, stated that he witnessed the accident; and that the bus was traveling between 35 and 40 miles an hour, had crossed the double yellow line in the center of the roadway, overtook the car and struck it as the bus cut back too sharply. The bus driver stated that the bus was traveling at a speed of 10 miles per hour when it was hit by plaintiff's car at an angle in the rear center portion **[***2]** of the bus.

Defendants argue that they demonstrated as a matter of law that their negligence was not a proximate cause of the accident based on the analysis by their accident reconstruction expert. They contend that they demonstrated that it was impossible for the accident to have occurred as plaintiff and/or her coworker claimed and that the physical evidence was consistent with the bus driver's version of events.

The court properly concluded that there were material issues of fact precluding summary judgment. Defendants' expert did not rule out the possibility that the bus driver's negligence may have played some role in the accident (*see* *Gogu v Gap, Inc., 180 AD3d 439, 118 NYS3d 587 [1st Dept 2020]*).

Plaintiff also demonstrated that there were issues of fact concerning whether her injuries were causally related to the accident based on the opinions of two of her treating physicians and the doctor who performed the no-fault examinations of plaintiff. Although defendants assert that plaintiff's medical conditions pre-dated the accident or resulted from a subsequent accident, plaintiff stated that she had no problems with her back, neck or left shoulder prior to the accident and did not re-injure these

parts of her body. Defendants failed to definitively **[***3]** refute these contentions. Concur—Acosta, P.J., Singh, Kennedy, Shulman, JJ.

End of Document

No *Shepard's* Signal™
As of: March 31, 2025 12:02 PM Z

Casuso v. Mercy Care Transp., Inc.

Supreme Court of New York, Richmond County

March 6, 2020, Decided; March 6, 2020, Filed

Index Number: 151159/17

Reporter
2020 N.Y. Misc. LEXIS 23993 *

JASON M. CASUSO and AMBER FOOTE, Plaintiffs, v. MERCY CARE TRANSPORTATION, INC., and VERA P. TORRES, Defendants.

Core Terms

lumbar, films, summary judgment motion, degenerative, spine, scan, issue of fact, cervical, injuries, disease, triable

Judges: [*1] Judith N. McMahon, Judge.

Opinion by: Judith N. McMahon

Opinion

ORDER

Defendants', Mercy Care Transportation and Vera P. Torres, motion (sequence 003) for summary judgment is granted as detailed herein.

Plaintiff alleges that he sustained personal injuries as a result of a motor vehicle accident that occurred on December 4, 2015 in the parking lot of 200 Lafayette Avenue, Staten Island, New York. An ambulance, owned by Defendant Mercy Care and driven by Defendant Vera P. Torres, was parked in front of Plaintiff's truck and backed into Plaintiff's truck.

New York Insurance Law Section 5104 states that,

Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.

In his Bill of Particulars, Plaintiff alleges injuries to his right knee, lumbar spine and cervical spine. Plaintiff does not make a claim for economic loss.

'Serious Injury' is defined in *New York Insurance Law Section 5102* as, a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent **[*2]** loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities…

Defendants are now moving for summary judgment to dismiss the case based upon Plaintiff's failure to sustain a "serious injury" in accordance with *New York Insurance Law 5102*.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996)*; *Ayotte v. Gervasio, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993)*; *Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986)*.

"A defendant can establish that the plaintiff's injuries are not serious within the meaning of *Insurance Law 5102 (d)* by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim." *Grossman v. Wright, 268 A.D.2d 79, 707 N.Y.S.2d 233 (N.Y.A.D. 2nd Dept. 2000)*.

In support of their motion for summary judgment, Defendants submitted the report of Dr. Gregory

Montalbano, a Board Certified Orthopedic **[*3]** Surgeon, who examined Plaintiff on April 16, 2019. In his report, Dr. Montalbano refers to MRIs of Plaintiff from November 2013 and April 2015, which pre-date the accident date of December 4, 2015. Dr. Montalbano concludes that, based upon his "review of the medical records provided and clinical examination, that Jason Casuso did not sustain any injury to the cervical spine or lumbar spine as a result of the accident. It is also [Dr. Montalbano's] opinion that the examinee has a pre-existing condition of degenerative disc disease which is unrelated to the accident in question and is likely the cause of any ongoing symptoms."

As to Plaintiff's allegations related to his knee, Dr. Montalbano states "there are no positive clinical objective signs of a permanent injury to the right knee from the accident…It is my opinion that the right knee is degenerative secondary to his age, occupation (work in construction) and comorbidity of obesity (with aBMI of 36.3)."

Additionally, Defendants also submitted the report of Dr. William Head, a Neurologist, who examined Plaintiff on or about July 16, 2019. In the section of his report titled "Review of films on CDs", Dr. Head states that, "I have reviewed **[*4]** MRI scan films of the lumbar spine from Healthcare Associates in Medicine, dated April 7, 2015. The films were interpreted by Richard Pinto, M.D., a neuroradiologist. The referring physician was Dr. Alastra, a neurosurgeon. Mr. Casuso had been 24 years of age. The reason for this study to be performed was not stated. Dr. Pinto diagnosed 'extruded disc herniation central and paracentral, moreso to the right than to the left, at L5-S1, slightly compressing the thecal sac as well as the exiting right S1 root sleeve.' [Dr. Pinto] also diagnosed 'small central disc herniation L4-L5 with slight to mild thecal sac compression in the midline.' [Dr. Head noted that] These were extraordinary findings in a very young man. Also, these findings pre-existed his accident of December 4, 2015, for which [Dr. Head] was later to examine him."

Dr. Head later stated in his report, "Now that I have reviewed his lumbar MRI scan films, I have noted that Mr. Casuso has extensive lumbar degenerative disc disease."

Regarding the medical history provided by Plaintiff during the examination, Dr. Head noted that, "Mr. Casuso told me he had a history of low back pain, one or two years prior to the December 4, 2015 **[*5]** motor vehicle accident. He claimed that his low back pain had resolved prior to the December 4, 2015 accident, but I note that he had undergone a lumbar MRI scan just 8 months before the December 4, 2015 motor vehicle accident, which indicates that his complaints had not resolved, or such testing would not have been ordered. My review of those April 7, 2015 lumbar MRI scan films revealed extensive degenerative disc disease, as described above, which does not resolve."

In conclusion, Dr. Head stated that his "review of [Plaintiff's] pre-accident April 7, 2015 lumbar scan films and his post accident January 18, 2016 lumbar MRI scan films revealed essentially the same findings, without evidence of disc herniation or trauma, but with evidence of a remarkable amount of lumbar degenerative disease for such a young individual."

As to Plaintiff's cervical spine, Dr. Head concluded that Plaintiff's "cervical MRI scan films also revealed extensive degenerative disease, which had already been present on films obtained shortly after the December 4, 2015 motor vehicle accident and which is not causally related to the accident."

"In reviewing a summary judgment motion, the court must consider the facts **[*6]** in a light most favorable to the nonmoving party, and examine whether the proponent has made a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Once the moving party has done so, the nonmoving party must show facts sufficient to require a trial on any issue of fact. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Lau v. Margaret E. Pescatore Parking, Inc., 30 N.Y.3d 1025, 90 N.E.3d 1276 (2017)*.

Defendants have met their prima facie burden of showing that the Plaintiff did not sustain a serious injury within the meaning of *Insurance Law 5102* as a result of the accident. *See Nicholson v. Kwarteng, 115 N.Y.S.3d 707 (N.Y.A.D. 2nd Dept. 2020)*.

In opposition to Defendants' motion, Plaintiff submitted the Affirmation of Dr. Michael Gerling, a spinal surgery specialist, who began treating Plaintiff Jason Casuso on November 17, 2017.

In laying the foundation for his conclusions, Dr. Gerling states that, "there was no prior history of back disorders."

At his examination before trial, Plaintiff was asked if he

told Dr. Gerling that he had a prior back condition, and Plaintiff answered "yes".

Plaintiff was also asked if he had "ever treated for a prior back condition before the accident." Plaintiff responded **[*7]** that he had, and described it as "just a sore back."

Plaintiff testified that the only treatment for his sore back prior to the date of the accident was one or two visits to a healthcare provider he could not remember the name of and his only treatment was a single injection, and that after the single injection "it was good until the accident."

In his Affirmation submitted by Plaintiff in opposition to Defendants' motion, Dr. Gerling stated that, "I performed surgery on Mr. Casuso on November 12, 2019 at Island Ambulatory Surgical Center. During the surgery, my examination of the patient confirmed herniated discs at L 4-5 and L 5-S1. A discectomy and decompression were performed at the locations."

In conclusion, Dr. Gerling states that, ***"As there is no prior history of cervical or lumbar disorders,*** it is my professional opinion that the cervical and lumbar spine injuries above, treatments above and resultant permanent disability are directly casually *(sic)* related to the above stated accident." (Emphasis added).

In Reply, Defendants argue that Plaintiff's Opposition fails to address Plaintiff's preexisting lumbar condition.

"Summary judgment is a drastic remedy that deprives a litigant **[*8]** of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues. The function of a court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. Thus, summary judgment should only be granted where there are no material and triable issues of fact, and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion." *114 Woodbury Realty, LLC v. 10 Bethpage Rd, LLC, 178 A.D.3d 757, 114 N.Y.S.3d 100 (N.Y.A.D. 2nd Dept. 2019)*.

Dr. Gerling expressly made his conclusion conditioned on the fact that Plaintiff had no prior history of lumbar disorders.

"In opposition, [Plaintiff] failed to raise a triable issue of fact. Contrary to [Plaintiff's] contention, his medical expert's affidavit, submitted in opposition to…the [summary judgment motion], was conclusory, speculative, and without basis in the record, and, therefore, it was insufficient to raise a triable issue of fact." *Giacinto v. Shapiro, 151 A.D.3d 1029, 59 N.Y.S.3d 42 (N.Y.A.D. 2nd Dept. 2017)*.

Dr. Gerling failed to explain in a specific and nonconclusory manner, how Plaintiff's injuries were causally related to the subject accident. *See Wetlstein v. Tucker, 178 A.D.3d 1121, 112 N.Y.S.3d 557 (N.Y.A.D. 2nd Dept. 2019)*. Dr. Gerling's Affidavit listed Plaintiff's medical condition and then posited that because **[*9]** Plaintiff had no prior disorders that the injuries are causally related. This is the definition of a conclusory opinion. *See Luciano v. Luchsinger, 46 A.D.3d 634, 847 N.Y.S.2d 622 (N.Y.A.D. 2nd Dept. 2007)*.

Not only is Dr. Gerling's opinion conclusory, but it failed to address Defendants' Experts' extensive review of medical records related to Plaintiff's prior medical treatment resulting in their opinion of Plaintiff's pre-existing degenerative condition. *See Cavitolo v. Broser, 163 A.D.3d 913, 81 N.Y.S.3d 188 (N.Y.A.D. 2nd Dept. 2018)*.

"Under these circumstances, [Plaintiff] failed to raise a triable fact issue as to causation." *Inzalaco v. Comalvo, 115 A.D.3d 807, 982 N.Y.S.2d 165 (N.Y.A.D. 2nd Dept. 2014)*.

Therefore, Defendants' motion for summary judgment must be granted.

ORDERED that Defendants', Mercy Care Transportation and Vera P. Torres, motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to Defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: 3/6/2020

So Ordered.

ENTER:

/s/ Judith N. McMahon

Hon. Judith N. McMahon

J.S.C.

End of Document

No *Shepard's* Signal™
As of: March 31, 2025 12:02 PM Z

Lopez v. Szerdai

Supreme Court of New York, Kings County

December 26, 2019, Filed

Index No.: 521226/2016

Reporter
2019 N.Y. Misc. LEXIS 42063 *

CYNDIA CRUZ LOPEZ, Plaintiff, v. ZSULT E. SZERDAI and TALISSE MONIKA, Defendants.

Core Terms

Defendants', sequence, summary judgment, serious injury, issue of fact, collision, prima facie burden, prima facie, Cross-Motion, passenger, injuries, papers

Judges: [*1] HON. CARL J. LANDICINO, JUDGE.

Opinion by: CARL J. LANDICINO,

Opinion

DECISION AND ORDER

Recitation, as required by *CPLR 2219(a)*, of the papers considered in the review of **this motion:**

Notice of Motion/Cross Motion and Papers Numbered

Affidavits (Affirmations) Annexed 1/2. 3/4. 5/6.

Opposing Affidavits (Affirmations). 7.8.

Reply Affidavits (Affirmations).

After a review of the papers and after oral argument the Court determines as follows: This action concerns a motor vehicle accident that occurred on July 20, 2016. On that day, the Plaintiff, Cyndia Cruz Lopez (hereinafter the "Plaintiff") was a passenger in a vehicle operated by her husband, non-party Julio Lopez, when it was struck in the rear by a vehicle owned by Defendant Talisse Monika (hereinafter "Defendant Monika") and operated by Defendant Zsult Szerdai (hereinafter "Defendant Szerdai") (hereinafter collectively referred to as "the Defendants"). The accident occurred on Hamilton Avenue at or near its intersection with 18th Street in Brooklyn, New York.

The Plaintiff claims in her Verified Bill of Particulars (Defendants' Motion Exhibit D, Paragraph 8), that as a result of the accident she sustained a number of serious injuries, including but not limited to, injuries **[*2]** to her cervical spine, lumbar spine, neck, left leg, left shoulder, left hand and fingers, and a fractured ankle. The Plaintiff also alleges in Paragraph 12, *Inter alia,* that she "was prevented from performing her usual, customary activities as a homemaker for substantially more than 90 days out of the first 180 days following the accident of July 20, 2016, thus exceeding the 90/180 rule stated in Article 51 of the Insurance Law."

The Plaintiff now moves (motion sequence #2) for an order pursuant to *CPLR 3212* granting Plaintiff summary judgment on the issue of liability. Specifically, the Plaintiff argues that summary judgment should be granted given that there is *prima facie* evidence that the vehicle that the Plaintiff was a passenger in was stopped at the time the Defendants' vehicle hit her vehicle in the rear. The Plaintiff also moves (motion sequence #3) for an order pursuant to *CPLR 3212*, granting summary judgment on the ground that the injuries allegedly sustained by the Plaintiff meet the "serious injury" threshold requirement of *Insurance Law § 5102(d)*.

The Defendants oppose both motions and cross-move (motion sequence #4) for separate relief. The Defendants cross-move (motion sequence #4) for an order pursuant to *CPLR 3212*, granting summary judgment and **[*3]** dismissing the complaint of the Plaintiff on the ground that none of the injuries allegedly sustained by the Plaintiff meet the "serious injury" threshold requirement of *Insurance Law § 5102(d)*.

In opposition to the Plaintiffs motion regarding liability, the Defendants contend that there are issues of fact that should prevent this Court from granting summary judgment in favor of the Plaintiff. Specifically, the Defendants point to the purported contradicting

statements of the parties, in that the Plaintiff testified that the vehicle she was a passenger in was stopped at a red light, while Defendant Szerdai testified that the traffic light was green at the time of the accident.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff, 14 AD3d 493, 787 N.Y.S.2d 392 [2nd Dept, 2005]*, *citing Andre v. Pomeroy, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]*. The proponent for the summary judgment must make *a. prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2nd Dept, 2004]*, *citing Alvarez v. Prospect Hospital,* 68 N.Y.2d320, 324, *68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]*; *Winegradv. New York Univ. Med. Or., 64 N.Y.2d 851, 853,487 N.Y.S.2d 316,476 N.E.2d 642 [1985]*.

Once a moving party has made *a. prima facie* showing of its entitlement **[*4]** to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the *action"Garnham & Han Real Estate Brokers v Oppenheimer, 148 AD2d 493, 538 N.Y.S.2d 837 [2nd Dept, 1989]*. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp., 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]*; *see Menzel v. Plotnick, 202 A.D.2d 558, 558-559, 610 N.Y.S.2d 50 [2nd Dept, 1994]*. However, "[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or *her prima facie* case..." if they can show "...that the defendant's negligence was a proximate cause of the alleged injuries."

Tsyganash v. Auto Mall Fleet Mgmt, Inc., 163 A.D.3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2nd Dept, 2018]; *Rodriguez v. City of New York, 31 N.Y.3d 312, 320, 76 N.Y.S.3d 898, 101 N.E.3d 366, 371 [2018]*.

Liability (Motion Sequence #2)

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented by the Plaintiff to establish, *prima facie,* that the Defendants' vehicle hit the Plaintiff's vehicle when it was stopped. In support of her application, the Plaintiff relies on the Plaintiff's deposition, the deposition of Defendant Szerdai, and a Police Accident Report. When asked whether the vehicle she was a passenger in was moving or stopped at the time of the collision the Plaintiff stated (Plaintiff's motion, Exhibit E, Page 20) that "[w]e were stopped at a red light." When asked **[*5]** how long she was stopped prior to the collision, the Plaintiff stated (Plaintiff's motion, Exhibit E, Page 20) "[approximately about 20 seconds." Even assuming, *arguendo,* that the Police Accident Report, attached to the Plaintiff's' motion is not admissible, given that the Police Officer did not witness the alleged incident *(see Adobea v. Junel, 114 A.D.3d 818, 980 N.Y.S.2d 564 [2nd Dept, 2014]*), the examination before trial of the Plaintiff is sufficient for the Plaintiff to establish a *prima facie* showing. *See Martinez v. Allen, 163 A.D.3d 951, 82 N.Y.S.3d 130 [2nd Dept, 2018]*. This is because "[a] rear-end collision with a stopped or stopping vehicle creates *a prima facie* case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." *Klopchin v. Masri, 45 A.D.3d 737, 737, 846 N.Y.S.2d 311,311 [2nd Dept, 2007]*.

In opposition to the motion, the Defendant has failed to raise a material issue of fact that would prevent this Court from granting the motion. The Defendants rely on the testimony of Defendant Szerdai who stated (Plaintiff's motion, Exhibit F, Page 18) that at the moment of impact the light had been green for "two to five seconds." However, Defendant Szerdai did not testify that the vehicle that the Plaintiff was a passenger in was moving. This evidence, **[*6]** without more, is insufficient as a matter of law to rebut the Plaintiff's *prima facie* showing that the Defendant Szerdais' actions were negligent and the sole proximate cause of the accident. *See Hakakian v. McCabe, 38 A.D.3d 493, 494, 833 N.Y.S.2d 106, 107 [2nd Dept, 2007]*; *see also Tumminello v. City of New York, 148 A.D.3d 1084, 1085, 49 N.Y.S.3d 739, 741 [2nd Dept, 2017]*. The purported contradicting testimony is not material. Under either version, taken as true, the Defendant Szerdai was negligent and the sole proximate cause of the accident. Further, the Defendants have failed to raise a sufficient non-negligent explanation for this rear end collision. Plaintiff's motion for partial summary judgment on the issue of liability is granted as indicated.

Insurance Law £ 5102(d)(Motions Sequence #3, #4)

Turning to the merits of the Plaintiff's summary judgment

application (motion sequence #3), made in relation to *Insurance Law 5102(d)*, the Court finds that the Plaintiff has met her *prima facie* burden. The Plaintiff's evidence, including the affirmed reports of Dr. Robert Diamond, Dr. Howard I. Baum, Dr. Peter G. Passias, Dr. Thomas S. Matthew, Dr. Kenneth Chapman and Dr. Andrew Merola, are sufficient to establish that the Plaintiff met her *prima facie* burden on the issue of serious injury as defined by *Insurance Law §5102*. *See Van Nostrandv. Froehlich, 44 A.D.3d 54, 74, 844 N.Y.S.2d 293, 308 [2nd Dept, 2007]*; *Mustello v. Szczepanski, 245 A.D.2d 553, 667 N.Y.S.2d 63 [2nd Dept, 1997]*. The report of Dr. Passias does causally relate the Plaintiff's **[*7]** injuries to the motor vehicle collision, and he conducted a range of motion examination of Plaintiff's neck/cervical and lumbar spine, using a goniometer, which examination reflects a restricted range of motion. What is more, the report of Dr. Baum addresses the Plaintiff's injury (fracture) to her left ankle and he causally relates this specific injury to the motor vehicle accident dated July 20, 2016. *See Uribe v. Jimenez, 133 A.D.3d 844, 845, 20 N.Y.S.3d 555, 556 [2nd Dept, 2015]*. This evidence, taken together, is sufficient for the Plaintiff to meet *hex prima facie* burden.

The Defendant's evidence, including the affirmed report of Dr. Arnold T. Berman, raises a triable issues of fact with regard to the Plaintiff's claim that the Plaintiff did not sustain a serious injury. Further findings of Dr. Berman are referenced below, in relation to the Defendants' motion. (Defendants' Motion, Exhibit "U") The report of Dr. Berman also addresses the Plaintiff's ankle injury and states that it is unrelated to the subject motor vehicle accident. (See Report of Dr. Berman, Defendants' Cross-Motion, Exhibit "U"). This raises an issue of fact regarding whether the Plaintiff has suffered a serious injury as defined by *Insurance Law §5102(d)*, as a matter of law . As a result, the Plaintiff's **[*8]** motion (motion sequence #3) is denied.

Turning to the merits of the Defendants' summary judgment application (motion sequence #4), made in relation to *Insurance Law §5102(d)*, the Court finds that the Defendants have failed to meet their *prima facie* burden. The Defendants contend that the affirmed reports of Dr. Michael C. Gerling, Dr. Warren E. Cohen and Dr. Arnold T. Berman support their contention that Plaintiff did not suffer a serious injury as defined under *Insurance Law § 5102(d)*. While Drs. Cohen (Defendants Cross-Motion, Exhibit "T") and Berman (Defendants' Cross-Motion, Exhibit "U") found no limitations in range of motion and that the cervical and lumbar sprains were resolved, Dr. Michael Gerling found marked restriction of motion, lumbar disc displacement and cervical disc displacement. (Defendants'

Motion, Exhibit H, Report of Dr. Gerling).[1] What is more, the Defendants' motion papers do not adequately address as a matter of law the Plaintiff's claim as set forth in the subject verified bill of particulars, that she sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities **[*9]** for not less than 90 days during the 180 days immediately following the accident. In this case, "[t]he injured plaintiff was not examined by the defendants' examining neurologist and orthopedist until more than one year after the accident, and both failed to relate their findings to the 90/180 category of serious injury for the period of time immediately following the accident." *Rouach v. Betts, 71 A.D.3d 977, 977, 897 N.Y.S.2d 242, 243 [2nd Dept, 2010]*; *see also Epstein v. MTA Long Island Bus, 161 A.D.3d 821, 823, 75 N.Y.S.3d 532, 534 [2nd Dept, 2018]*; *Steadv. Serrano, 156 A.D.3d 836, 837, 67 N.Y.S.3d 244 [2nd Dept, 2017]*; *Nembhardv. Delatorre, 16 A.D.3d 390, 791 N.Y.S.2d 144 [2nd Dept, 2005]*; *Peplow v. Murat, 304 A.D.2d 633, 758 N.Y.S.2d 160,161 [2nd Dept, 2003]*; *Frier v. Teague, 288 A.D.2d 177, 732 N.Y.S.2d 428 [2nd Dept, 2001]*. In the instant proceeding, the Plaintiff's deposition supports this claim in as much as it indicates that for months after the motor vehicle collision, she was significantly limited in the performance of her daily activities. (See Defendants' Motion, Exhibit "F" Pages 100 through 111).[2]

Even assuming, *arguendo,* that the Defendants had met their *prima facie* burden, there are material issues of fact presented by the Plaintiff that prevent the Court from granting summary judgment in the Defendants'

---

[1] Although the report of Dr. Gerling was not otherwise affirmed, the Plaintiff relies on this report to corroborate the Plaintiff's position. (See Plaintiff's Affirmation in Opposition, Page 14).

[2] The Plaintiff in her deposition speaks to the impact of both her prior motor vehicle accident and the accident in the instant proceeding. The testimony cited above relates to the July 20, 2016 accident in relation to the instant proceeding. The Court notes that the Plaintiff's testimony is sufficient to state a 90/180 claim, which Defendants would have to defeat in order to prevail on their motion (motion sequence #4). However, Plaintiff's testimony alone, without a "medically determined" showing in support, is insufficient for the Plaintiff to establish proof of a 90/180 injury for her motion (motion sequence #3). As such there is a material issue of fact as to whether the Plaintiff has a 90/180 injury.

favor. In opposition, the Plaintiff relies on the reports of Drs. Passias and Berman. Specifically, the report of Dr. Baum addresses the Plaintiff's left ankle fracture and relates this specific injury to the motor vehicle accident at issue. "An expert's qualitative assessment of a plaintiff's condition **[*10]** also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure vAvis* *Rent A Car Systems Inc., 98 N.Y.2d 345, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002]*; *see* *Dufel v. Green, 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995]*. Accordingly, the cross-motion by the Defendants (motion sequence #4) is denied.

Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion (motion sequence #2) is granted. The Plaintiff is awarded summary judgment on the issue of liability as against the Defendants and the matter shall proceed on the issue of damages. The Plaintiff's motion (motion sequence #3) is denied. The Defendants' cross-motion (motion sequence #4) is denied.

This constitutes the Decision and Order of the Court.

ENTER:

—

Carl J. Landicino

J.S.C.

End of Document

No *Shepard's* Signal™
As of: March 31, 2025 12:02 PM Z

Perez v. Oliveira

Supreme Court of New York, New York County

July 22, 2019, Decided

158914/2015

Reporter
2019 N.Y. Misc. LEXIS 4074 *; 2019 NY Slip Op 32176(U) **

[1]** YANIRYS PEREZ, Plaintiff, - v - SEBASTIAN OLIVEIRA, SEB TRUCKING, Defendant. INDEX NO. 158914/2015

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

spine, preexisting, lumbar, serious injury, knee, cervical, injuries

Judges: **[*1]** HON. ADAM SILVERA, Justice.

Opinion by: ADAM SILVERA

Opinion

DECISION AND ORDER

Upon the foregoing documents, it is ORDERED that defendants Sebastian Oliveira and Seb Trucking's motion, for summary judgment, pursuant to *CPLR 3212*, against plaintiff Yanirys Perez on the issue of "serious injury" as defined under Section *§ 5102(d) of the Insurance Law* is denied.

The matter at issue stems from a motor vehicle accident which occurred on the Macombs Bridge in the County of Bronx, City and State of New York, as a result of a motor vehicle accident which occurred on August 11, 2014, between plaintiff Yanirys Perez and a vehicle operated by defendant Sebastian Oliveira and owned by defendant SEB Trucking which allegedly led to plaintiff's serious injury. Plaintiff's Bill of Particulars and Supplemental Bill of Particulars allege injuries to the lumbar spine, left knee, and cervical spine as a result of the accident at issue.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]*) **[**2]** . Once such entitlement has been demonstrated by the **[*2]** moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (*Zuckerman v City of New York, 49 NY2d 557, 560, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]*).

In order to satisfy their burden under *Insurance Law § 5102(d)*, a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc., 98 NY2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002]* [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

Defendants allege that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under *Section 5102(d) of the Insurance Law*. Defendants allege that the injuries plaintiff is seeking relief for are not causally related to the underlying accident and are a result of degenerative disc disease and her "significant pre-accident medical and surgical history." In support of their motion defendants attach plaintiffs deposition held on February 28, 2017, in which plaintiff testified that she was last employed in 2005 and stopped working **[*3]** due to back pain (Mot, Exh D at 10-13). Plaintiff further testified that she treated for her back pain and underwent back surgery in 2005 and 2007 and

continued treating for the surgery through 2013 (*id.*, at 15-21). Plaintiff also testified that in 2007 she was diagnosed with both osteoporosis and osteogenesis imperfecta (*id.*, at 75-76, 82).

Defendants attach the Independent Medical Examination report of Dr. Robert Goldstein who examined plaintiff on May 3, 2017 along with June 19, 2017 and January 16, 2018 supplemental affirmed reports by Dr. Goldstein (Mot, Exh H). Dr. Goldstein's report noted that **[**3]** plaintiff underwent lumbar fusion and decompression in 2005 and 2007 with implantation of a bone stimulator in 2007 (*id.*, at 2). The report further indicated that plaintiff had a normal range of motion of the hips, normal range of motion in both knees, and normal range of motion in the ankles (*id.*, at 5-6). Dr. Goldstein noted that plaintiff's left knee had evidence of generative changes, not an acute injury to the knee, and that such changes/damage were preexisting conditions (*id.*., at 1-3).

Defendants also attach the September 15, 2017 and January 20, 2018 Independent Medical Examination reports of Dr. Afshin Razi (Mot, Exh I). Dr. Razi examined plaintiff on May 26, **[*4]** 2017 and conducted range of motion testing to the cervical spine and lumbar spine finding a normal range of motion in the cervical spine and a decreased range of motion in the lumbar spine (*id.*, at 4). Dr. Razi reviewed plaintiff's medical records and found that a CT scan of the lumbar spine from January 30, 2015 revealed degeneration in plaintiff's lumbar spine and that an X-ray of the cervical spine in 2015 showed spondylosis in the cervical spine which is a degenerative disease (*id.*., at 1). Dr. Razi concluded that the degeneration in both the cervical spine and lumbar spine was preexisting and not causally related to the subject accident on August 11, 2014 (*id.*., at 5 & 14). Thus, defendants have made a prima facie showing of entitlement to summary judgment and the burden shifts to plaintiff to raise an issue of fact.

In opposition, plaintiff addresses defendants' allegations that plaintiff's lumbar spine, cervical spine, and knee injuries are preexisting. Plaintiff avers that while plaintiff did have preexisting issues in her back and degeneration of the knee, that plaintiff's injuries were exacerbated by the underlying accident and that plaintiff had no preexisting condition in her neck which she avers was directly **[*5]** injured as a result of the accident at issue. In support of her **[**4]** opposition plaintiff attaches the affirmation of Dr. Michael Gerling who examined, treated, and performed surgery on plaintiff (Aff in Op, Exh C).

Dr. Gerling opined that plaintiff's neck was injured as a direct cause of the accident, that plaintiff's preexisting lumbar spine condition was exacerbated by the accident, and that there was no preexisting condition in the knee which was also injured as a result of the August 11, 2014 accident (*id.*., ¶ 19). Plaintiffs responding medical submissions raise a triable issue of fact as to plaintiff's injuries. In *Rosa v Delacruz, 32 NY3d 1060, 87 N.Y.S.3d 550, 2018 N.Y. Slip Op. 07040, 112 N.E.3d 856 [2018]*, the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, unlike **[*6]** the plaintiff in *Rosa*, plaintiff's doctor explains why plaintiff's injuries to the neck, knee and spine were not caused by preexisting degenerative conditions but rather due to the accident at issue. Thus, the Court finds that defendants have failed to demonstrate that plaintiff has not suffered a serious injury and defendants' motion for summary judgment to dismiss plaintiff's complaint on the grounds that the injuries alleged by plaintiff do not constitute a "serious injury" is denied.

Accordingly, it is

ORDERED that defendants' motion for summary judgment, on the grounds that plaintiff Yanirys Perez has not sustained a "serious injury" as defined in *5102* and *5104 of the Insurance Law*, is denied; and it is further

[5]** ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

7/22/2019

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

End of Document