

Perez v Hussain

2022 NY Slip Op 34133(U)

December 1, 2022

Supreme Court, Kings County

Docket Number: Index No. 524895/2019

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of December, 2022.

P R E S E N T:

HON. CARL J. LANDICINO,
Justice.

-----X

CATHERINE A. PEREZ and SHANI M. KELLY,

Plaintiffs,

-against-

MOHAMMED A. HUSSAIN,

Defendant.

-----X

DECISION AND ORDER

Index No. 524895/2019

Mot. Seq. No. 2

The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion, Affidavits (Affirmations), Memoranda of Law,
and Exhibits Annexed _____

32-46

Opposing Affidavits (Affirmations), Memoranda of Law, and
Exhibits Annexed _____

49-58

Affirmation in Reply _____

59

In this action to recover damages for personal injuries, defendant Mohammed A. Hussain (“defendant”) moves (motion sequence #2) for an order, pursuant to CPLR 3212, granting summary judgment and dismissing this action on the ground that neither plaintiff Catherine A. Perez (“Perez”) nor plaintiff Shani M. Kelly (“Kelly”) sustained a “serious injury” within the meaning of Insurance Law § 5102 (d) as a result of the subject motor-vehicle accident.

Background

Perez and Kelly (collectively, “the plaintiffs”) commenced this action to recover damages for personal injuries they each allegedly sustained on August 8, 2017 as a result of the collision of their vehicle with the defendant’s vehicle (“vehicle collision”). The plaintiffs’ complaint, as amplified by their joint Verified Bill of Particulars, dated January 31, 2020 (the “BOP”), alleges that each plaintiff sustained, as a result of the vehicle collision, a qualifying serious injury under Insurance Law § 5102 (d) in each of the following categories: (1) permanent consequential limitation of use; (2) significant limitation of use; and (3) the 90/180-day category. Specifically, the BOP alleges that, as a result of the subject accident, Perez sustained injuries to her cervical and lumbar spine, and bilateral shoulder, including herniation at disc L5-S1, a bulge at disc C5-C6, cervical radiculopathy, cervical sprain/strain, lumbar radiculopathy, lumbar sprain/strain, and restricted range of motion in her shoulders and back. As to Kelly, it is alleged that he sustained injuries to both of his shoulders, and his cervical and lumbar spine, including a torn rotator cuff, impingement syndrome, shoulder sprain/strain, restricted range of motion in his shoulders and back, internal derangement, herniation at disc C3-C4, herniation at disc L4-L5 impinging on the nerve root, cervical radiculopathy, cervical sprain/strain, lumbar radiculopathy, and lumbar sprain/strain (BOP, ¶ 10). After discovery was completed and a note of issue was filed, the defendant served the instant motion for summary judgment.

The Parties' Contentions

Defendant's Position

In support of the initial branch of his motion to dismiss Perez's claims, the defendant proffers, among other documents, an affirmed report, dated February 25, 2021, and prepared by orthopedist Salvatore Corso, M.D. ("Dr. Corso") (NYSCEF Doc No. 40) who examined Perez on December 5, 2020, more than three years after the accident. Dr. Corso noted that Perez did not undergo surgery as a result of the vehicle collision and that she was able to get on and off the exam table without any difficulty. He determined that she had normal ranges of motion on all planes in her cervical and lumbar areas of her spine and that all objective tests were negative. The tests included Foraminal Compression, Traction, Spurling, Faber, and Lasegue's tests. Dr. Corso also found that Perez had normal ranges of motion in her shoulders with negative Apprehension, Sulcus, Hawkins, Speed's, and O'Brien's tests. He determined that her cervical, lumbar and bilateral shoulder sprains were resolved. Dr. Corso opined that the injuries to Perez's body parts, as alleged in the BOP, had resolved and that Perez did not sustain any significant or permanent injury as a result of the vehicle collision of August 8, 2017. He stated, "[t]here are no objective clinical findings indicative of a present disability and functional impairment" that prevent Perez from engaging in activities of daily living, or usual activities like work, school, and hobbies.

Defendant also submits the affirmed report, dated May 30, 2021, of radiologist Scott A. Springer, M.D. ("Dr. Springer") (NYSCEF Doc No. 39) who reviewed the MRI films taken of Perez's cervical and lumbar spine on September 8, 2017, one month after the

accident. Upon his review of the MRI films taken of Perez's cervical spine, Dr. Springer found that the MRI showed that the C2-C3, C3-C4, and C4-C5, C6-C7, C7-T1 discs demonstrated no bulge or disc herniation. He found a disc bulge on the C5-C6 disc which he opined was related to degenerative ligamentous laxity and weakening of the outer ligamentous fibers with no fracture, subluxation, or disc herniation, and had no traumatic basis. Upon his review of the MRI films taken of Perez's lumbar spine, he determined that the L1-L2, L2-L3, L3-L4, and L4-L5 discs demonstrated no bulge or herniation. The L5-S1 disc demonstrated a mild bulge but he found that it had no traumatic basis, was degenerative in origin, and was related to ligamentous laxity and weakening of the outer ligamentous fibers with no fracture, subluxation, or disc herniation. Dr. Springer concluded that with respect to Perez's cervical and lumbar spine, there were "no posttraumatic changes causally related" to the vehicle collision.

In support of that branch of his motion to dismiss Kelly's claims, the defendant relies on, among other documents, an affirmed report from Dr. Corso (NYSCEF Doc No. 43), dated December 21, 2020. Dr. Corso examined Kelly on December 5, 2020 (more than three years after the accident) and noted that he did not undergo surgery as a result of the accident and was able to get on and off the exam table without any difficulty. Dr. Corso determined that Kelly had normal ranges of motion on all planes in his cervical and lumbar spines and all tests were negative, including Foraminal Compression, Traction, Spurling, Faber and Laseague's tests. He also found that Kelly had normal ranges of motion in his shoulders with negative Apprehension, Sulcus, Hawkins, Speed, and O'Brien's tests. While Dr. Corso found tenderness in his cervical and lumbar spine, and in his right and left

shoulders, he determined that his cervical, lumbar, right and left shoulder sprains had resolved. He concluded that the body parts Kelly alleged were injured in the BOP had resolved and that he had not sustained any significant or permanent injuries as a result of the vehicle collision. Dr. Corso stated that “[t]here are no objective clinical findings indicative of a present disability and functional impairment” that prevent Kelly from engaging in activities of daily living, or usual activities like work, school, and hobbies.

Defendant also submits the affirmed report, dated July 5, 2021, of Dr. Springer (NYSCEF Doc No. 41) who reviewed the MRI films that were taken of Kelly’s cervical and lumbar spine on September 11, 2017, one month and three days after the vehicle collision. As to Kelly’s cervical spine, Dr. Springer found that the MRI showed that there was no fracture, subluxation or prevertebral soft tissue swelling. He observed mild degenerative changes at the C4-C5 and C5-C6 discs, which he stated were chronic in nature and could not have occurred in the time interval between the incident and the MRI examination. The C2-C3 and C3-C4 discs maintained normal heights while C4-C5 discs demonstrate mild loss of disc space height. The C5-C6 and C6-C7 discs demonstrate moderate loss of disc space height while the C7-T1 disc maintains normal height. Dr. Springer found disc desiccation and explained that it is a drying out and loss of disc substance process and could not have developed in the one month and three-day interval between the MRI examination and the vehicle collision. He stated that it was indicative of degenerative disc disease, and given the associated degenerative changes, the disc space height loss is chronic in nature. He found that the C2-C3, C4-C5, C5-C6, C6-C7, and C7-T1 discs demonstrated no bulge or herniation. He determined that the C3-C4 disc

demonstrated a mild bulge and herniation. He observed small posterior osteophytes, which he stated were chronic, bony productive changes. He found that the disc bulging had no traumatic basis and was degenerative in origin, related to ligamentous laxity and weakening of the outer ligamentous fibers. Dr. Springer stated that the most common cause for disc herniations is degenerative disc disease and there was clear evidence of degenerative change with the C3-C4 disc bulging at the same level as the herniation, which supports the chronicity of the disc herniation he observed. Upon review of the MRI films pertaining to Kelly's lumbar spine, Dr. Springer found no fractures and determined that the L1-L2, L2-L3, L3-L4, and L5-S1 discs demonstrated no bulge or herniation. He observed that the L4-L5 disc demonstrated a mild broad-based bulge and no herniation. He determined that the disc bulging, however, had no traumatic basis, and was degenerative in origin. He stated that it is related to ligamentous laxity and weakening of the outer ligamentous fibers. Dr. Springer concluded that, with respect to Kelly's cervical and lumbar spine, there were "no posttraumatic changes causally related" to the vehicle collision.

Defendant also proffers another report by Dr. Springer, dated May 30, 2021, related to his review of the MRI taken of Kelly's shoulders on December 27, 2017, 4 months and 19 days after the vehicle collision (NYSCEF Doc No. 42). Dr. Springer found that the left shoulder revealed a down-sloping acromial process which he stated was a developmental process, trace subacromial/subdeltoid bursal fluid collection, and a bone bruise which he stated occurred long after the vehicle collision. He observed that the labrum and rotator cuff were intact and the mildly narrowed glenohumeral joint was due to a chronic and degenerative process. He saw no fracture, dislocation or ACL joint separation. As to the

right shoulder, Dr. Springer found that the MRI showed a low-grade strain of the superior ACL ligament, trace subacromial/subdeltoid bursal fluid collection, and tendinosis of the supraspinatus tendon without tearing, with no fracture, dislocation or ACL joint separation. He determined that there were no posttraumatic changes to Kelly's shoulders that were causally related to the vehicle collision.

Defendant argues that Perez's 90/180 claim should be dismissed because Perez testified that she was never confined to her bed or home, and that she did not miss any time from work following the vehicle collision. The Defendant further argues that Kelly's 90/180 claim should also be dismissed because he claims to have worked as a self-employed DJ at the time of the vehicle collision but did not file a claim for lost wages. Defendant asserts that based upon the foregoing evidence, the plaintiffs did not suffer serious injuries, as that term is defined in Insurance Law §5102, and thus all of their claims should be dismissed.

Plaintiffs' Opposition

In opposition to that branch of defendant's motion pertaining to Perez, plaintiffs submit, among other documents, an unaffirmed/certified collection of medical records, including those of her treating physician Theodora Ogunjimi, M.D. ("Dr. Ogunjimi") (NYSCEF Doc No. 57). Dr. Ogunjimi examined Perez on November 8, 2017 and found a decreased range of motion in Perez's lumbar spine. Dr. Ogunjimi also examined Perez's left shoulder on February 7, 2018 and found a decreased range of motion. Dr. Ogunjimi opined, to a reasonable degree of medical certainty, that Perez's injuries to her left shoulder and spine were causally related to the vehicle collision. Plaintiffs also submit the affirmed

report of radiologist William Weiner, D.O. (“Dr. Weiner”) (NYSCEF Doc No. 53). Dr. Weiner conducted an MRI of Perez’s cervical and lumbar spine on September 8, 2017. As to her cervical spine, he found bulging in disc C5-C6 impressing on the CSF column and straightening of the lordosis consistent with spasm and pain, and in the lumbar spine he found central protrusion at disc L5-S1 impressing on portions of the “cauda equina.” Further, plaintiffs submit the affirmed report of orthopedist Christopher Kyriakides, D.O. (“Dr. Kyriakides”), who examined Perez on July 19, 2021 (NYSCEF Doc No. 55). Dr. Kyriakides determined that Perez had abnormal/decreased range of motion in her cervical and lumbar spines. Dr. Kyriakides also reviewed the MRI films taken of Perez’s spine dated September 8, 2017. He stated that the films reveal bulging at the C5-C6 disc impressing on the CSF column in the cervical spine and central disc protrusion at L5-S1 impressing on portions of the “cauda equina” in the lumbar spine. He also found cervical derangement with evidence of disc bulge and lumbosacral herniation. He stated that in his medical opinion, to a reasonable degree of medical certainty, the injuries to Perez’s cervical and lumbar spine were causally related to the vehicle collision and were not due to a pre-existing condition or degeneration. Dr. Kyriakides determined that Perez sustained a partial permanently disabling injury as a result of the vehicle collision.

As to Kelly’s claims, the plaintiffs submit an unaffirmed/certified collection of medical records of Dr. Ogunjimi (NYSCEF Doc No. 58). Dr. Ogunjimi found a decreased range of motion in Kelly’s cervical and lumbar spine. He opined, to a reasonable degree of medical certainty, that Kelly’s injuries were causally related to the vehicle collision. Plaintiffs also submit the affirmed report of Dr. Weiner (NYSCEF Doc No. 54) who

conducted an MRI of Kelly's cervical and lumbar spine on September 11, 2017, and on his right shoulder on December 27, 2017. According to Dr. Weiner, the results revealed a central disc protrusion on the C3-C4 disc, impressing on the CSF column and straightening of the lordosis consistent with spasm in the cervical spine, right lateral disc herniation at the L4-L5 disc, narrowing the origin of foramen and impinging on the nerve root and straightening of the lordosis consistent with spasm in the lumbar spine, and superior acromioclavicular ligament strain and joint space widening superiorly, fluid in the region consistent with aggravation and supraspinatus strain of the rotator cuff in the right shoulder.

Further, plaintiffs submit an affirmed report of Dr. Kyriakides (NYSCEF Doc No. 56) who examined Kelly on July 19, 2021. He found abnormal/decreased range of motion in Kelly's cervical and lumbar spine and right shoulder. He reviewed the MRI films taken of Kelly's back and shoulder and found central protrusion at the C3-C4 disc impressing on the CSF column in the cervical spine and right lateral herniation at the L4-L5 disc narrowing the origin of foramen and impinging on the nerve root in the lumbar spine, superior acromioclavicular ligament strain with widening of the superior space and fluid in the region, fluid signal in the greater tuberosity of humeral head consistent with edema from bruising, possible obliquely oriented hairline fracture and possibility of strain and/or partial tear at the insertion site in the left shoulder and supraspinatus sprain of the rotator cuff in the right shoulder, which he determined were causally related to the vehicle collision and were not due to degeneration, pre-existing condition, or prior accident. He concluded that Kelly was partially, permanently disabled due to the vehicle collision.

Plaintiffs argue that defendant fails to establish, *prima facie*, that their injuries are not serious within the meaning of Insurance Law § 5102 (d) because Dr. Corso wrote his report without considering the plaintiffs' medical records and admitted that, if he were to review their medical records, his findings could change. Plaintiffs further argue that Dr. Corso failed to explain how he conducted his range of motion tests and how he determined normal ranges of motion. They contend that Dr. Springer determined that many of their injuries were due to degeneration without having examined either plaintiff, reviewed their medical records, or considered whether or not they had prior injuries. Plaintiffs also contend that Dr. Springer's opinion is in conflict with Dr. Corso's medical opinion because the former attributed plaintiff's injuries to degeneration while Dr. Corso found that their injuries were due to the vehicle collision but had resolved. Plaintiffs contend that this creates a material question of fact.

In addition, plaintiffs assert that Dr. Kyriakides' report conflicts with the reports of defendant's doctors. In this regard, they argue that his report establishes that plaintiffs sustained serious injuries within the meaning of Insurance Law § 5102 (d) that are causally related to the vehicle collision. Plaintiffs contend that, at the very least, the conflicting reports raise questions of material fact which cannot be resolved by a summary judgment motion. Plaintiffs assert that, taken together, the MRI films and other objective medical evidence confirm the existence of their injuries in conjunction with their subjective complaints of pain, the curtailment of their daily activities following the accident, as well as their treating doctors' and experts' affirmed reports. Plaintiffs maintain that the foregoing evidence is sufficient to create a triable issue of fact as to their claim that they

were unable to perform substantially all of their normal activities for 90 out of the first 180 days after the vehicle collision.

Defendant's Reply

Defendant asserts that he has met his initial burden to establish *prima facie* entitlement to summary judgment on the issue of serious injury by submitting the affirmed reports of two doctors which demonstrate that plaintiffs' injuries do not fall within the permanent consequential limitation of use or significant limitation of use categories; nor do they fall under the 90/180-day category of the Insurance Law. Further, defendant argues that the medical submissions proffered by plaintiffs are insufficient to raise a triable issue of fact. In this regard, defendant contends that Dr. Kyriakides' reports are devoid of probative value because they failed to address the findings of Dr. Springer with respect to both Perez and Kelly. As to Perez, defendant notes that Dr. Kyriakides did not address Dr. Springer's finding that her cervical MRI showed a bulge which was degenerative in nature, that there were no post traumatic changes caused by the vehicle collision, and that the lumbar MRI revealed an osteophyte, a bulge, which had no traumatic origin, no fracture, subluxation or disc herniation. He further contends that Dr. Kyriakides' report failed to address the findings that the MRI of her cervical spine showed multi-level degeneration, disc desiccation, osteophytes with no fracture or subluxation, that the herniation was chronic in nature, and that there were no post-traumatic changes that were caused by the vehicle collision.

In addition, defendant notes that Dr. Kyriakides also failed to address Dr. Springer's findings that Kelly's lumbar MRI revealed a bulge which had no traumatic basis, no

fracture, subluxation or disc herniation, and that the left shoulder MRI revealed a down-sloping acromial process, which is a developmental process, trace subacromial/subdeltoid bursal fluid collection, a bone bruise that occurred long after the incident and that the labrum and rotator cuff were intact. The defendant argues that Dr. Kyriakides failed to address the chronic and degenerative nature of Kelly's injuries. Further, defendant argues that Dr. Kyriakides' report is devoid of probative value because he examined plaintiffs nearly four years after the vehicle collision. Defendant asserts that plaintiffs cannot show causation because the medical reports of Dr. Ogunjimi are not properly before the court and lack probative value as they are only certified by the custodian of records of the facility where the exams occurred and not affirmed by the doctor. Additionally, defendant argues that Dr. Kyriakides' report failed to provide an evidentiary foundation for his "vague and conclusory" causation opinions. Dr. Weiner's report, defendant asserts, is also devoid of probative value because he failed to causally connect the pathologies identified in the MRI films to the vehicle collision. Defendant argues that plaintiffs' lack of proof of a causal connection between the vehicle collision and their injuries negate their 90/180-day claim.

Discussion

On a motion for summary judgment the court's function is issue finding, not issue determination (*see Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865 [2d Dept 2018] [internal citations omitted]). "A party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (*Jacobsen v New York City Health & Hosps. Corp.*,

22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). “[T]he 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 demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1986]). In other words, “plaintiff need only raise a triable issue of fact regarding the element or elements on which the defendant has made its prima facie showing” (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 826 [2d Dept 2016] [internal quotation marks omitted]).

“In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party” (*Santiago v Joyce*, 127 AD3d 954, 954 [2d Dept 2015] [internal citations omitted]). “A motion for summary judgment ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’” (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]). “To grant summary judgment it must clearly appear that no material and triable issue of fact is presented” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal citation omitted]).

Insurance Law § 5102 (d) defines “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” (emphasis added).

Thus, a plaintiff must have suffered a “serious injury” by either demonstrating: (1) permanent loss of use of a body organ, member, function or system, or (2) permanent consequential limitation of use of a body organ, member, function or system, or (3) significant limitation of use of a body function or system, or (4) a non-permanent medical injury which prevents her from performing substantially all of her customary daily activities for at least 90 days during the 180 days immediately following the accident. “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” (*Nuñez v Teel*, 162 AD3d 1058, 1059 [2d Dept 2018] [internal quotation marks omitted]). Once the defendant makes a prima facie showing, the burden shifts to the plaintiff to present objective evidence to show a triable issue of fact on the question of serious injury (*see Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]).

To recover under the “permanent consequential limitation of use” and/or the “significant limitation of use” categories, a plaintiff, in each instance, must present

objective medical evidence reflecting the extent/degree of the limitation of movement caused by the claimed injury and its duration (*see Schilling v Labrador*, 136 AD3d 884, 885 [2d Dept 2016]; *Rovelo v Volcy*, 83 AD3d 1034, 1035 [2d Dept 2011]; *McLoud v Reyes*, 82 AD3d 848, 849 [2d Dept 2011]). The extent/degree of physical restriction in the “permanent consequential limitation of use” and/or the “significant limitation of use” categories is shown, in each instance, by: (1) a specific percentage of range of motion loss (the “quantitative” finding); and/or (2) an objective, detailed description of the physical restrictions which are correlated to (and are compared with) the normal function, purpose, and use of the affected body part (the “qualitative” finding) (*see Perl v Meher*, 18 NY3d 208, 217 [2011]). Further, to recover under the 90/180 category, a plaintiff must submit medical evidence of “a medically determined injury or impairment of a non-permanent nature” which prevented him/her from performing his/her usual and customary activities for 90 of the 180 days post-accident (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 357 [2002], *rearg denied* 98 NY2d 728 [2002]; *John v Linden*, 124 AD3d 598, 599 [2d Dept 2015]).

As an initial matter, Dr. Corso’s reports for the Plaintiffs do not indicate the objective method he utilized to determine the Plaintiffs’ respective purported normal ranges of motion (*see Gersbeck v Cheema*, 176 AD3d 684 [2d Dept 2019]; *Durand v Urick*, 131 AD3d 920 [2d Dept 2015]). As such, the reports have no probative value regarding these issues. However, by way of the affirmed reports of Dr. Springer, and the testimony and bill of particulars, have established, *prima facie*, that Perez and Kelly did not suffer, as a result of the vehicle collision, a serious injury of the cervical and lumbar areas of their

respective spines or their shoulders qualifying under any of the following categories: (1) the permanent consequential limitation of use; and (2) the significant limitation of use. In that regard, Dr. Springer determined that the MRI films showed that injuries to Perez's back were degenerative in nature and that there were no posttraumatic changes causally related to the vehicle collision. Regarding Kelly, Dr. Springer's report indicated that Kelly's back and shoulder injuries were chronic and degenerative in nature, and he observed no posttraumatic changes as a result of the vehicle collision. There was no need to address Perez or Kelly's complaints of pain, inasmuch as "subjective pain cannot form the basis of a serious injury" (*Canner v Diamond*, 187 AD3d 1127, 1128 [2d Dept 2020]).

Further, the defendant has also established, by way of Perez's Bill of Particulars and pretrial testimony, that she did not sustain a serious injury under the 90/180 category; namely, that Perez: (1) had been employed prior to the subject accident; (2) remained employed and continued to go to work post-accident; and (3) was not under any medical restriction to leave her residence following the subject accident (*see Richards v Tyson*, 64 AD3d 760, 761 [2d Dept 2009]). When the Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no such claim, Defendant movant may utilize those factors in support of its motion for summary judgment. (*See Master v Boiakhtchion*, 122 AD3d 589, 590 [2d Dept 2014]; *Kuperberg v Montalbano*, 72 AD3d 903, 904, [2d Dept 2010]; *Camacho v Dwelle*, 54 AD3d 706 [2d Dept 2008]).

As to Kelly, his Bill of Particulars states that he was confined to home and restricted in household duties for twelve weeks following the accident. Kelly, during his deposition

stated that he was self-employed as a DJ at the time of the accident. He also stated that he missed significant time from work. (NYSCEF Document 38, pages 8-9). He further stated that he had difficulty lifting objects and cannot stand for long periods of time. He stated that there were sporting activities he could no longer participate in. (NYSCEF Document 38, pages 44-45). Dr. Springer did not relate his findings to the 90/180 period and Kelly's ability to perform his daily activities during this period. As such, Defendant has failed to meet his *prima facie* burden that Plaintiff Kelly did not suffer a serious injury under the 90/180 category as a result of the accident. (See *Staubitz v. Yaser*, 41 AD3d 698 [2d Dept 2007]). In light of this finding, the Court need not address Kelly's opposition.

In opposition, Perez has failed to raise a triable issue of fact. The certified medical reports and records plaintiffs submitted from Metro Pain Specialists, Golden Star Acupuncture, and Lodes Chiropractic, which include the records of Dr. Ogunjimi, fail to raise a triable issue of fact as to causation or a 90/180-day claim because they are inadmissible. "[T]he certification of the medical records and reports by the records custodian of the subject medical facility [is] not sufficient to properly place the medical conclusions and opinions contained in those records and reports before the court, since those opinions must be sworn to or affirmed under the penalties for perjury" (*Irizarry v Lindor*, 110 AD3d 846, 847 [2d Dept 2013]; see also *Nicholson v Kwarteng*, 180 AD3d 695, 696 [2d Dept 2020]).

The report of Perez's expert, Dr. Kyriakides, also fails to raise a triable issue of fact. In his report, Dr. Kyriakides fails to adequately address the findings of defendant's radiologist, Dr. Springer, that plaintiffs' respective injuries to their cervical and lumbar

spines and shoulders were either chronic or degenerative in nature and that there were no posttraumatic changes that were caused by the accident. As such, Dr. Kyriakides' "conclusions were insufficient to raise a triable issue of fact" (*Holmes v Parkinson*, 186 AD3d 1619, 1619 [2d Dept 2020] [no issue of fact raised where plaintiff's experts failed to address the findings of defendants' radiologist that the alleged injuries to cervical and lumbar regions of plaintiff's spine were degenerative in nature]; *see also Cavitolo v Broser*, 163 AD3d 913, 914 [2d Dept 2018]). "[A] contemporaneous doctor's report is important to proof of causation. The absence of a contemporaneous medical report invites speculation as to causation" (*Griffiths v Munoz*, 98 AD3d 997, 999 [2d Dept 2012]).

In addition, Dr. Weiner's reports fail to causally link the injuries found in the MRIs he conducted to the vehicle collision (*see Linden*, 124 AD3d at 599 [plaintiff failed to raise triable issue of fact where "the affirmed magnetic resonance imaging [MRI] report of the plaintiff's examining radiologist...which revealed the existence of disc bulges and disc herniations in the plaintiff's cervical spine and radiculopathy, did not set forth those doctors' opinions on the cause of the findings that they made in their reports"]).

Thus, Perez's insufficient medical submissions fail to raise a triable issue of fact as to a permanent consequential limitation of use or a significant limitation of use within the meaning of the Insurance Law. In addition, "the plaintiff[s] did not proffer any competent medical evidence to establish that [they] sustained any medically determined injuries of a nonpermanent nature which prevented them from performing substantially all of [their] usual and customary daily activities for not less than 90 of the first 180 days" following the collision (*Reefer v Adom Rental Transp., Inc.*, 68 AD3d 1086, 1087 [2d Dept 2009]).

Furthermore, Perez admitted during her deposition that she was never confined to bed or home, and did not miss any time from work following the vehicle collision, which defeats her 90/180-day injury claim (see *Linden*, 124 AD3d at 599 [“The defendant further established through the transcript of the plaintiff’s deposition testimony that the plaintiff missed only one day of work following the accident and, therefore, [s]he did not sustain a serious injury under the 90/180-day category”]; see also *Daë Kyoo Kim v Lemon Transp. Corp.*, 156 AD3d 757, 758 [2d Dept 2017]).

Conclusion

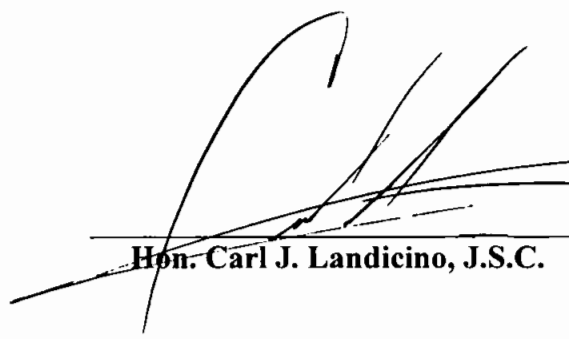
Based upon the foregoing, it is hereby

ORDERED that defendant’s motion for summary judgment dismissing plaintiffs’ complaint is granted in relation to Plaintiff Perez and denied as to Plaintiff Kelly.

The parties remaining contentions are without merit.

This constitutes the decision and order of the Court.

ENTER:



Hon. Carl J. Landicino, J.S.C.

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