| **Peralta v EAN Holdings LLC** |
| --- |
| 2020 NY Slip Op 33548(U) |
| September 21, 2020 |
| Supreme Court, Bronx County |
| Docket Number: 28421/2018E |
| Judge: John R. Higgitt |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, **PART 34**

----------X

**PERALTA, ROBERTO, et ano**

- against -

**EAN HOLDINGS LLC, et ano**

----------X

Index №. **28421/2018E**

Hon. **JOHN R. HIGGITT**, J.S.C.

The following papers in the NYSCEF System were read on this motion to **VACATE ORDER/JUDGMENT**, duly submitted as No. ___ on the Motion Calendar of **August 21, 2020**

| | **NYSCEF Doc. Nos.** |
|---|---|
| Notice of Motion – Order to Show Cause - Exhibits and Affidavits Annexed | 96-101 |
| Notice of Cross Motion – Order to Show Cause - Exhibits and Affidavits Annexed | N/A |
| Answering Affidavits and Exhibits | 103-115, 116-120 |
| Replying Affidavits and Exhibits | N/A |

Upon plaintiff Peralta's July 15, 2020 notice of motion and the affirmation and exhibits submitted in support thereof; the August 7, 2020 affirmation in opposition of defendant EAN Holdings, LLC (EAN) and the exhibits submitted therewith; defendant Shirley's August 12, 2020 affirmation in opposition and the exhibits submitted therewith; and due deliberation; plaintiff's motion for an order vacating the June 30, 2020 decision and order of the undersigned, which granted the separate summary judgment motions of defendants EAN and Shirley, and, upon such vacatur, for an order denying the motions, is granted in part.

In Motion Sequence #3, defendant EAN moved for summary judgment on the grounds that the claims against it were barred by the Graves Amendment and that plaintiff had not sustained a "serious injury" in the subject motor vehicle accident. In Motion Sequence #5, defendant Shirley moved for summary judgment, adopting defendant EAN's arguments and proof with respect to the issue of "serious injury." By decision and order dated June 30, 2020, the court granted both motions without opposition, after having advised the parties by email on two occasions that the motions were unopposed.

**VACATUR**

"A party seeking relief under CPLR 5015(a)(1) must demonstrate a reasonable excuse for his or her default and a meritorious claim or defense" (*60 E. 9th St. Owners Corp. v Zihenni*, 111 AD3d 511, 512 [1st Dept 2013]). In the absence of a reasonable excuse, the merit of the claim is immaterial (*see Wade v Giacobbe*, 176 AD3d 641 [1st Dept 2019]; *Matter of Amirah Nicole A. (Tamika R.)*, 73 AD3d 428 [1st Dept 2010], *lv dism* 15 NY3d 766 [2010]). Generally, "[t]he preference for deciding cases on the merits does not justify vacating a default judgment where the moving party fails to satisfy the two-prong test of showing a reasonable excuse for the default *and* a meritorious [claim or defense]" (*Leader v Parkside Grp.*, 174 AD3d 420, 421 [1st Dept 2019] [emphasis added]).

Plaintiff Peralta's excuse for failing to respond to or seek an adjournment of the summary judgment motions amounts to a general plea of coronavirus-related uncertainty. However, as tempting as it may be to sympathize with parties whose office functions were stunted by the pandemic by overlooking the myriad procedural shortcomings that ensued, relief of the nature sought herein may not be granted by mere recitation of a buzzword, regardless of how evocative the buzzword. Plaintiff Peralta acknowledges having received at least one of this chambers's emails advising the parties of the status of

**Check one:** ☐ Case Disposed in Entirety ☒ Case Still Active
**Motion is:** ☐ Granted ☐ Denied ☒ GIP ☐ Other
**Check if appropriate:** ☐ Schedule Appearance ☐ Fiduciary Appointment ☐ Settle Order ☐ Submit Order

the motions, sent on *and after* the return date of the motions, but fails to explain why he did not simply respond to the emails – sent not by an automated mailbot but by my principal law clerk, complete with an email signature containing her name, email address, phone number, and fax number – and request an adjournment (*see* 22 NYCRR § 202.8[e][2]). Plaintiff Peralta could easily have avoided his professed reluctance to engage in an ex parte conversation with my chambers by hitting "reply all" to any of these emails (*see* 22 NYCRR § 100.3[b][6] ["A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding"]). My law clerk's emails to the parties in this action having been sent on weekends and after hours indicates that the stricture of the "workweek" was not rigidly enforced during the closure of the court necessitated by the pandemic. Counsel's assertion that, knowing the motions had been submitted, he had no recourse, rings hollow. The court thus finds the explanation to be conclusory (*see Matter of Tri-State Consumer Ins. Co. v Hereford Ins. Co.*, 167 AD3d 416 [1st Dept 2018]) and inadequate (*see Agosto v Western Beef Retail, Inc.*, 175 AD3d 1192 [1st Dept 2019]).

Nevertheless, "[CPLR 5015(a)] does not provide an exhaustive list as to when a default judgment may be vacated. Indeed, the drafters of that provision intended that courts retain and exercise their inherent discretionary power in situations that warranted vacatur but which the drafters could not easily foresee" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). A court possesses the inherent discretionary authority to open its own judgments "for sufficient reason, in the furtherance of justice" (*Ladd v Stevenson*, 112 NY 325, 331 [1889]). Here, plaintiff acted with dispatch upon learning of the June 30 decision, has demonstrated the potential merit of his cause of action for "serious injury," and has demonstrated that the lapse in attention to the action was a singular occurrence in his prosecution of the action (*see U.S. Bank Natl. Assn. v Richards*, 155 AD3d 522 [1st Dept 2017]). Given the consequences of not considering plaintiff's opposition to the dispositive motions, and the unprecedented impact the coronavirus pandemic has had on the practice of law, the court finds that the situation calls for the exercise of its discretionary authority in granting vacatur of the June 30 decision.

**GRAVES AMENDMENT**

Contrary to plaintiff Peralta's assertion, defendant EAN's proof was sufficient to meet its prima facie burden (*see Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248 [1st Dept 2011]). "There is nothing 'self-serving,' in a legal sense, about [] testimony that favors the party giving it. Rather, testimony is said to be self-serving when it contradicts prior testimony -- a situation that does not exist here" (*Lewis v Rutkovsky*, 153 AD3d 450, 455-56 [1st Dept 2017]).

Plaintiff Peralta opposes defendant EAN's motion on the ground that its deposition is outstanding. Plaintiff Peralta, however, waived EAN's deposition by filing a note of issue (*see Hui-Lin Wu v City of N.Y.*, 183 AD3d 411, 412 [1st Dept 2020]; *Chichilnisky v Trustees of Columbia Univ. in the City of N.Y.*, 52 AD3d 206 [1st Dept 2008]), and thus waived the argument that the outstanding discovery warrants denial of the motion (*see Rodriguez v City of N.Y.*, 105 AD3d 623, 625 [1st Dept 2013]).

In any event, the mere hope that a party might be able to uncover some evidence during the discovery process is insufficient to deny summary judgment (*see Castaneda v DO & CO New York Catering, Inc.*, 144 AD3d 407 [1st Dept 2016]; *Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010]; *Planned Bldg. Servs., Inc. v S.L. Green Realty Corp.*, 300 AD2d 89 [1st Dept 2002]). That discovery might remain outstanding does not warrant the denial of the motion, particularly where the opposition fails to indicate what discovery might be expected that would raise an issue of fact as to defendant EAN's liability (*see Doherty v City of New York*, 16 AD3d 124 [1st Dept 2005]). The

opposition "advanced no non-speculative basis to believe that additional discovery might yield evidence warranting a different disposition" (*Rosario v N.Y. City Transit Auth.*, 8 AD3d 147, 148 [1st Dept 2004]). Plaintiff Peralta's "mere expressions of hope" that disclosure might yield relevant information are insufficient to raise an issue of fact (*Piccinich v New York Stock Exch.*, 257 AD2d 438, 439 [1st Dept 1999]; *see also A & E Stores, Inc. v U.S. Team, Inc.*, 63 AD3d 486, 486-87 [1st Dept 2009] ["speculation that useful information may be learned during discovery does not constitute grounds for denying the motion"]).

**"SERIOUS INJURY"**

Plaintiff Peralta claims injuries to the cervical and lumbar aspects of his spine, and alleges "serious injury" under the Insurance Law § 5102(d) categories of permanent loss of use, significant limitation and 90/180-day injury (*see* CPLR 3043[a][6]).

Defendant Shirley met her prima facie burden of demonstrating that plaintiff Peralta did not sustain a significant limitation of use of his cervical and lumbar spine (*see Bianchi v* Mason, 179 AD3d 567 [1st Dept 2020]). The examining orthopedic surgeon measured full ranges of motion in all tested planes of movement of plaintiff Peralta's cervical and lumbar spine, with no objective clinical findings to substantiate plaintiff Peralta's subjective complaints of pain.

Defendant Shirley furthermore demonstrated that plaintiff Peralta did not have "some reasonable explanation" (*Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 907 [2013], *rearg den* 22 NY3d 1102 [2014]) for his cessation of treatment six months after the accident (*see Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Vila v Foxglove Taxi Corp.*, 159 AD3d 431 [1st Dept 2018]; *Merrick v Lopez-Garcia*, 100 AD3d 456 [1st Dept 2012]). While plaintiff Peralta testified that he felt better and the insurance "stopped covering," he also testified that he had private health insurance and never inquired about coverage for further treatment.

Plaintiff Peralta's bill of particulars alleged that he was confined to bed and home for only five days following the accident, but that he was not incapacitated from his full-time employment as a driver. Plaintiff Peralta testified that he missed no time from work. This proof was sufficient to warrant dismissal of the 90/180-day injury claim.

Finally, it was apparent that plaintiff Peralta had not sustained the complete loss of use of any body part; accordingly, the permanent loss of use claim was dismissed.

In opposition to the prima facie showing of entitlement to summary judgment, plaintiff Peralta now submits the affirmed report of Dr. Ciechorska, uncertified and unsworn records from Healthway Medicare Care, P.C., (Healthway) and unsworn and uncertified reports of MRIs of plaintiff's cervical and lumbar spine.[1]

The Healthway records depict examinations occurring on November 21, 2017, December 28, 2017 and February 22, 2018, at which plaintiff was found to have decreased ranges of cervical and lumbar motion.

---

[1] Defendants' doctor stated that he had reviewed and duly noted the findings of various of plaintiff's medical records, including diagnostic testing and MRI reports; however, there is no indication that he *relied* on the records in reaching his conclusions, so as to render the records admissible (*see Shapiro v Spain Taxi, Inc.*, 146 AD3d 451 [1st Dept 2017]; *Malupa v Oppong*, 106 AD3d 538 [1st Dept 2013]; *Clemmer v Drah Cab Corp.*, 74 AD3d 660 [1st Dept 2010]; *Hernandez v Almanzar*, 32 AD3d 360 [1st Dept 2006]). In the absence of such express reliance, plaintiff's expert may not "bootstrap" the findings of unaffirmed reports by reciting them in his or her affirmation (*see Malupa, supra*). Nevertheless, neither defendant EAN nor defendant Shirley objected to the admissibility of plaintiff's proffered proof, thus waiving objection to the court's consideration of same (*see Thompson-Shepard v Lido Hall Condos.*, 168 AD3d 614 [1st Dept 2019]; *Long v Taida Orchids, Inc.*, 117 AD3d 624 [1st Dept 2014]; *Akamnonu v Rodriguez*, 12 AD3d 187 [1st Dept 2004]).). Indeed, neither defendant offered substantive argument as to the sufficiency of plaintiff's medical proof.

The records of plaintiff's course of treatment indicate limitations in cervical and lumbar function, which Dr. Ciechorska causally related to the accident and to objective MRI evidence, thus raising an issue of fact as to whether plaintiff sustained a significant limitation of use of his cervical and lumbar spine (*see Montoya v Rosenberger*, 176 AD3d 581 [1st Dept 2019]; *De Los Santos v Basilio*, 176 AD3d 544 [1st Dept 2019]).[2]

Neither plaintiff nor Dr. Ciechorska satisfactorily explain why plaintiff was discharged from treatment approximately five months after the accident. Plaintiff's assertion that insurance stopped covering is insufficient, in light of his testimony that he failed to inquire as to coverage through his private insurance (*see Latus, supra*; *Vila, supra*; *Merrick, supra*). Accordingly, because the cessation occurred several months after the accident, he failed to raise an issue of fact as to whether he sustained a permanent injury (*see Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]; *Arias v Martinez*, 176 AD3d 548 [1st Dept 2019]; *Tejada v LKQ Hunts Point Parts*, 166 AD3d 436 [1st Dept 2018]; *Holmes v Brini Transit Inc.*, 123 AD3d 628 [1st Dept 2014]), let alone one involving a total loss of use (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]; *Riollano v Leavey*, 173 AD3d 494 [1st Dept 2019]; *Swift v N.Y. Transit Auth.*, 115 AD3d 507 [1st Dept 2014]; *Melo v Grullon*, 101 AD3d 452 [1st Dept 2012]; *Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]).

Accordingly, it is

ORDERED, that the aspect of plaintiff's motion for an order vacating the June 30, 2020 decision and order of the undersigned, which granted the separate summary judgment motions of defendants EAN and Shirley, is granted; and it is further

ORDERED, that upon such vacatur, the aspect of defendant EAN's motion for summary judgment dismissing the claims of plaintiff Peralta on the ground that the claims against it are barred by the Graves Amendment is granted (Motion Sequence #3); and it is further

ORDERED, that defendant EAN's motion is otherwise denied as moot; and it is further

ORDERED, that upon such vacatur, the aspects of defendant Shirley's motion for summary judgment dismissing plaintiff Peralta's claims of "serious injury" under the Insurance Law § 5102(d) categories of permanent loss of use and 90/180-day injury are granted (Motion Sequence #5); and it is further

ORDERED, that defendant Shirley's motion for summary judgment is otherwise denied.

This constitutes the decision and order of the court.

Dated: September 21, 2020

Hon. John R. Higgitt, J.S.C.

[2] It is not entirely clear whether Dr. Ciechorska's report was intended to describe a recent examination; however, neither defendant raised this point. Viewing the evidence in the light most favorable to plaintiff Peralta as the non-movant (*see Medina-Ortiz v Seda*, 157 AD3d 499 [1st Dept 2018]), giving plaintiff Peralta the benefit of all reasonable inferences to be drawn from the evidence (*see Segree v St. Agatha's Convent*, 77 AD3d 572 [1st Dept 2010]), and considering plaintiff Peralta's counsel's explanation that opposition to the motions required a recent examination, the court finds the report sufficient to raise an issue of fact.