

<b>Simmons v Kouame</b>
2021 NY Slip Op 33028(U)
December 7, 2021
Supreme Court, Bronx County
Docket Number: Index No. 21287/2019E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 14**

-----X  
JOSEPH SIMMONS,  
Plaintiff,  
-against-

Index No. 21287/2019E

**Hon.** BIANKA PEREZ  
Justice Supreme Court

YOBOUE KOUAME and JEAN PIERRE TRANS  
INC.,  
Defendants.

-----X  
The following papers numbered 1 to 6 were read on this motion (Seq. No. **001**) seeking **SUMMARY JUDGMENT DEFENDANT** noticed on **May 5, 2020** and submitted on **April 1, 2021**.

Notice of Motion – Order to Show Cause – Affirmation in Support - Exhibits Annexed	No(s). 1-3
Affirmation in Opposition and Exhibits	No(s). 4-5
Replying Affidavit and Exhibits	No(s). 6

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

**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 (1st 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 Plaintiff’s injury is 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, 80 A.D.3d 506 (1st Dept 2011).

To prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a Plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. See, Toure v. Avis Rent a Car Sys., 98 N.Y.2d 345 (2002). An expert's qualitative assessment of a Plaintiff's condition 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. See, Id.

#### Defendants' Motion

The Defendants now move this Court for summary judgment alleging that the Plaintiff has failed to sustain serious injury within the meaning of the Insurance Law. Defendants argue that it is evident from a review of the Plaintiff's Verified Bill of Particulars, the affirmed medical reports of Dr. Steven A. Renzoni and Dr. Jessica F. Berkowitz, and the Plaintiff's deposition transcript that the Plaintiff did not sustain serious injuries and should not be allowed compensation outside of the No-Fault system. Plaintiff's Verified Bill of Particulars alleges serious and severe injuries to the left shoulder, cervical and lumbar spine, namely disc herniations to the cervical and lumbar spine.

In support of this motion, Defendants submit the report of Dr. Renzoni, an orthopedist, who states that Plaintiff exhibited no functional disability and could perform all daily activities. All tests performed on Plaintiff by Dr. Renzoni yielded normal/negative results and range of motion tests were normal or near normal (Exh. D).

Defendants further submit in support an affirmed report dated August 26, 2019, from Dr. Berkowitz, a licensed radiologist who reviewed the MRIs of Plaintiff's left shoulder and lumbar and cervical spine. She opined that the MRI showed preexisting degeneration unrelated to the within accident (Exh E).

Defendants further argue that the 90/180 category of the Insurance Law § 5102(d) is ruled out since it requires proof that the Plaintiff was medically prevented from performing "substantially all" of his/her usual and customary activities for not less than 90 days within 180 days of the occurrence of injury. Defendants point out that as delineated in the bill of particulars, Plaintiff was not admitted to the hospital, was confined to bed for two weeks, was confined to his home for three weeks, and was incapacitated from employment for two weeks.

#### Plaintiff's Opposition

Plaintiff opposes the motion for summary judgment. He argues that the Defendants failed to meet the burden showing that he did not sustain a serious injury as defined by the Insurance Law §5102(d), and therefore, the opposition to the motion need not raise a triable issue of fact.

In addition, Plaintiff submitted medical reports and records showing that Dr. Renzoni found limitations of motion of the lumbar spine and shoulders but made no comments regarding the findings of the Plaintiff's treating doctors. Furthermore, the interpretation of the MRIs Plaintiff underwent for his

lumbar spine, cervical spine, and left shoulder on September 15 and 14, 2017 respectively, differed from that of Defendant's expert. The Plaintiff argues that these discrepancies give rise to triable issues of fact.

Per the records annexed to Plaintiff's opposition, from August 9, 2017 through December 20, 2017, Plaintiff was referred for chiropractic, physical therapy, and acupuncture treatment after Dr. Orenstein saw evidence of severe bilateral median nerve entrapment. At an examination on August 30, 2017, Dr. Sonia Armengol found that Plaintiff exhibited decreased ranges of motion exceeding 12% in several ranges of the cervical spine, left shoulder, and lumbar spine. The medical providers at Malaga Medical diagnosed Plaintiff with tendinitis of the left shoulder, cervicgia, lumbar and cervical radiculopathy, and displacement of cervical discs. Plaintiff argues that these medical findings show a limitation to the normal function of the affected organ, member, or system. As a result of the accident, Plaintiff contends that he still experiences pain and limitations in his shoulder, lower back, and neck and has difficulty walking and lifting items.

### Discussion

In this matter, Defendants carried their initial summary judgment burden of establishing that Plaintiff did not sustain a serious injury resulting in either a "permanent consequential" or a "significant" limitation to his lumbar spine, cervical spine, or left shoulder as a result of this accident. Defendants accomplished this by submitting the sworn reports of Dr. Renzoni, who conducted objective range of motion tests on January 13, 2020, and found normal or near-normal results regarding the affected areas. Furthermore, Dr. Renzoni opined that Plaintiff's cervical, lumbar, and bilateral shoulder sprain and strain have resolved and found no indication of present limitations in use of the affected body parts. Finally, Dr. Berkowitz examined MRIs taken of Plaintiff's cervical spine, lumbar spine, and left shoulder on September 14 and 15, 2017, and found that the irregularities were minimal and in no case was there evidence of acute traumatic injury or a causal relationship between Plaintiff's injury and the car accident.

With the burden shifting to the Plaintiff, Plaintiff met the burden of proof raising a material issue of fact as to whether he sustained a "permanent consequential" or "significant" limitation to his cervical spine, lumbar spine, and left shoulder as a result of the car accident. Dr. Armengol, Plaintiff's physician, evaluated Plaintiff's range of motion a few days after the accident and found near-normal ranges of motion, with a limitation found in Plaintiff's lumbosacral spine rotation short of normal by 10 degrees (Exh 4). Plaintiff's physician, Dr. Palemine, evaluated his range of motion on August 7, 2017, and found limitations in Plaintiff's cervical and lumbar spine, with the cervical spine having a limitation in rotation of 30 degrees (Exh 4). However, when Plaintiff's physician, Hadassah Orenstein, reevaluated Plaintiff's range of motion more than a month later on September 26, 2017, Plaintiff's range of motion for cervical spine and lumbar spine were within normal limits. These discrepancies raise a triable issue of fact that defeats the granting of a summary judgment motion. Furthermore, Plaintiff's doctors opined that with a reasonable degree of

medical certainty, the injuries presented by Plaintiff were causally related to the accident. In contrast, the Defendant's doctor, Dr. Berkowitz, opined that there is no causal relationship. 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 Plaintiff's symptoms were related to the accident based on a full physical examination of Plaintiff).

As to the Defendants' branch of the motion, which argues that the proof rules out a serious injury based on the 90/180-day claim, the Defendant established its entitlement to summary judgment on this element as the Plaintiff admits in the bill of particulars that he was confined to bed for two weeks, confined to home for three weeks, and incapacitated from employment for two weeks. 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 Dep't 2018). In addition, Plaintiff's proof is insufficient to raise a triable issue of fact as the limitations upon which Plaintiff relies, *e.g.*, inability to bowl and walking long distances, do not establish that he was limited to "substantially all" of his daily activities, see McIntyre v. Salluzzo, 159 A.D.3d 1547, 72 N.Y.S.3d 718 (4th Dep't 2018). In Plaintiff's deposition, he readily admits that doctors did not stop him from bowling or working.

As to the Defendants' branch of the motion requesting dismissal of the permanent loss of use claim, the medical proofs establish that Plaintiff did not sustain a complete loss of use of a body organ or member. Dr. Palemire found limited range of motion roughly a month after the accident. However, those figures improved when Plaintiff reevaluated his injuries at Malaga Medical in November 2017. He had full range of motion in his left shoulder and only slight limitations in his lumbosacral spine. Furthermore, Dr. Berkowitz found slightly limited ranges of motion and no evidence of acute traumatic injury. Dr. Palemire never indicated that the injuries were permanent and determined that Plaintiff is only partially impaired. Dr. Hadassah Orenstein opined that Plaintiff has a mild mechanical deficit. Finally, Dr. Renzoni found normal/near normal results on January 13, 2020, and opined that the sprains and strains have resolved and that there is no finding that would result in limitations in use of the body parts examined. Thus, Plaintiff has failed to establish a triable issue of fact regarding that category of the statute. See Oberly v. Bangs Ambulance, Inc., 96 NY2d 295 (2001); Vaughn v. Baez, 305 AD2d 101 (2d Dept. 2003).

### Conclusion

Accordingly, it is

ORDERED, that Defendants' motion for summary judgment is granted only to the extent of dismissing the "90/180 day" claim and the permanent loss of use claim, and it is further

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

This constitutes the decision and order of the Court.

Dated: December 7, 2021

Hon. \_\_\_\_\_

  
BIANKA PEREZ, J.S.C.

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1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY     CASE STILL ACTIVE
2. MOTION IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT