

**Ruscalleda v Maspas Cab Corp.**

2021 NY Slip Op 33999(U)

January 21, 2021

Supreme Court, Bronx County

Docket Number: Index No. 25095/2018E

Judge: Bianka Perez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14

CHRISTOPHER RUSCALLEDA,

Index No. 25095/2018E

-against-

Hon. BIANKA PEREZ

MASPASS CAB CORP. AND LIDUVINA
VARGAS,

Justice Supreme Court

The following papers NYSCEF Doc. # 20 to 27 and # 36 to 43 were read on this motion (Seq. No. #002) for SUMMARY JUDGMENT noticed on August 13, 2020.

Table with 2 columns: Document Type, Count. Rows include: Notice of Motion - Affirmation in Support - Exhibits Annexed (1), Affirmation in Opposition and Exhibits (2), Replying Affidavit and Exhibits (N/A).

Plaintiff, who was involved in an automobile accident, brought this action seeking to recover for injuries allegedly sustained in the accident. Defendant moves for summary judgment, pursuant to CPLR 3212 contending that plaintiff cannot meet the serious injury threshold requirement mandated by Insurance Law Section 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 (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).

Motion is Respectfully Referred to Justice:
Dated:

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.

### **Procedural History**

Plaintiff was in a motor vehicle accident on June 27, 2017, as per plaintiff's verified bill of particulars (Exh. B). Plaintiff's bill of particulars alleges that plaintiff sustained permanent consequential limitations and significant limitation of the Lumbar and Cervical Spine, as a result of the accident and/or plaintiff sustained a non-permanent medically determined 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 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 plaintiff, necessitating future surgery and treatment 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 plaintiff does not claim lost wages.

### **Defendant's Motion**

In the instant motion, defendant argues that the Court lacks jurisdiction over the subject matter of this action pursuant to Article 51 of the New York Comprehensive Motor Vehicle Insurance Reparations Act, Sections 5101 to 5108 as plaintiff's injuries are soft tissue injuries that do not rise to the level of a serious injury as that term is defined in the statute.

In support of defendant's arguments, defendant submitted an affirmed report, dated December 30, 2019, from Dr. Pierce J. Ferriter, M.D., a Board Certified Orthopedist (Exh. E) who conducted an independent orthopedic evaluation on the plaintiff. Dr. Ferriter's report states that plaintiff presented with a normal exam. Dr. Ferriter's report further states that there is no evidence of an orthopedic disability and no permanency or residuals. Dr. Ferriter notes the plaintiff's range of motion of the lumbar and cervical spine as near normal at 50 degrees (60 degrees normal). Dr. Ferriter's report also states that the objective tests were all negative, with no muscle spasms or complaints of tenderness upon palpation of the paracervical muscles. Dr. Ferriter's report further states that all orthopedic tests performed were negative/normal: Spurling's test, Shoulder Shrug, Compression, Jackson's, Hoffman's, Atrophy of Scapula and Soto-Halls. Dr. Ferriter's report further states there was no muscle spasm or complaint of tenderness upon palpation of the paralumbar muscles. Straight leg raise was negative bilaterally in both the sitting and supine positions, with no radiculopathy. The following orthopedic tests were performed and found to be negative/normal: Fabere, Minor's Sign, Kemp's, Lasegue Test,

and Soto-Hall Test. Neurological exam of the bilateral lower extremities was also normal. Dr. Ferriter notes his impression to be Cervical spine sprain/strain- resolved and Lumbar spine sprain/strain- resolved. He concludes there is no evidence of orthopedic disability and there is no permanency or residuals and that the Plaintiff is able to work.

In addition, defendant submits in support of its motion an affirmed report dated May 30, 2019 from Dr. Jessica F. Berkowitz, a Board Certified radiologist who reviewed plaintiff's MRI of the cervical spine (Exh. F) states there was no causal relationship between plaintiff's alleged accident and the findings on the MRI.

The defendant further argues that the 90/180-day claim should be dismissed as the plaintiff failed to prove there was a causally related medically determined injury during the first 180 days following the accident.

#### Plaintiff's Opposition

In opposition, plaintiff submitted an affirmation of Dr. Brian Haftel, a Board Certified Pain Management Specialist and Anesthesiologist (Exh. E) which discusses several physical examinations of the plaintiff conducted between December 2017 and August 6, 2020. Dr. Haftel's affirmation dated September 22, 2020 states plaintiff has sustained permanent injuries and remains symptomatic for over three years. Dr. Haftel's affirmation states plaintiff's lumbar range of motion flexion was 55 out of 90 normal degrees (39% loss) and extension was 15 out of 30 normal degrees (50% loss) in August of 2020 when he last saw plaintiff. There was tenderness over the sacroiliac joints, bilateral paralumbar tenderness and spasm and midline tenderness at L4 and L5. Dr. Haftel's affirmation also states plaintiff's cervical range of motion flexion was 35 out of 60 normal degrees (42% loss) and extension was 35 out of 50 normal degrees (30% loss). There was tenderness over the lesser and greater occipital nerves and midline tenderness at C7. He also concluded that the Spurling test was positive.

Dr. Haftel's affirmation states plaintiff will require ongoing medical treatment and possible cervical spine surgery and secondary lumbar surgery and spinal cord stimulator. Dr. Haftel opines that plaintiff's injuries are permanent, as evidenced by plaintiff's symptoms in loss in range of motion of the cervical spine and that the injuries are causally related to the accident. Numerous affirmed medical reports from Dr. Haftel regarding consultations with plaintiff are also annexed.

Dr. Haftel's opinion states that Plaintiff sustained lumbar radiculopathy via history and physical status post lumbar epidural steroid injections x3, cervical radiculopathy via history and physical status post cervical epidural steroid injections x3, status post MicroDiscectomy, failed lumbar surgery syndrome and cervical, thoracic and lumbar sprain/strain causally related to the June 27, 2017 motor vehicle accident. Dr. Haftel's review of the MRI scan findings show they are consistent with trauma and with Plaintiff's subjective complaints and are causally related to the June 27, 2017. Dr. Haftel further opines the limitations in motion are significant and the injuries constitute a permanent, partial disability.

The MRI reports and films referred to by Dr. Haftel were authenticated by Dr. Priyesh Patel, a Board

Certified Radiologist who supervised the taking of the films (Exh. C).

Plaintiff also submitted affirmed reports from Dr. Sudha Patel, M.D., a Chiropractor who treated plaintiff from July 31, 2017 to November 5, 2018 opining that as per the range of motion tests, plaintiff's range of motion is lower in both the cervical and lumbar spines showing the loss by percentages. Dr. Patel opines that the plaintiff's injuries are not degenerative or pre-existing in nature as he was asymptomatic prior to the accident. He further opines that the injuries sustained are causally related to the June 27, 2017 motor vehicle accident and that the prognosis for a full recovery remains extremely poor.

### Discussion

As to plaintiff's alleged lumbar and cervical spine injuries, the Court finds that defendant met its initial prima facie burden of demonstrating that plaintiff did not sustain a serious injury through the affirmed report of Dr. Ferriter which states there is no evidence of orthopedic disability, no permanency or residuals and that the Plaintiff is able to work. See, Kester v Sendoya, 123 A.D.3d 418 (1st Dept 2014). See also, Rodriguez v Abdallah, 51 A.D.3d 590 (1st Dept 2008).

With the burden shifting onto plaintiff, the Court next finds that plaintiff met its burden of proof and raised a material issue of fact as to the plaintiff sustaining a serious injury. Dr. Haftel's affirmation states that the injuries are both permanent in nature and are causally related to the accident with sufficient objective findings and qualitative 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 plaintiff's symptoms were related to the accident based on a full physical examination of plaintiff). See also Ramkumar v. Grand Style Trans. Enter., 22 N.Y.3d 905, 976 N.Y.S.2d 1 (2013).

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 defendant established its entitlement to summary judgment as the proof clearly shows plaintiff did not miss work for 90 days out of the first 180 days immediately after the accident or that he was totally confined to bed or home. Defendants established as a matter of law that plaintiff did not have a claim by submitting plaintiff's bill of particulars in which he admitted that he was not totally confined to his home and bed for the requisite period of time. 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 lift heavy objects, take out the garbage, mop or sweep the building, 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).

As to defendants' branch of the motion requesting dismissal of the permanent loss of use claim, the medical proofs plainly establish that plaintiff did not sustain a complete loss of use of a body organ or member. Plaintiff's own physician Dr. Haftel opines in his report that the limitations in motion are significant and the

injuries constitute a permanent, partial disability, not a total disability. Thus, the plaintiff has failed to establish a triable issue of fact as to 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 defendants’ motion for summary judgment is denied to the extent that plaintiff’s claims of a permanent consequential limitation and a significant limitation of the cervical spine and lumbar spine are viable.

This constitutes the decision and order of the Court.

**Dated:** January 21, 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