

**Williams v Perez**

2011 NY Slip Op 34050(U)

February 25, 2011

Sup Ct, Bronx County

Docket Number: 305691/08

Judge: Ben R. Barbato

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3-3-11

PART  PP-3

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

-----X

**WILLIAMS, LAWRENCE**

-against-

**PEREZ, ANDRES**

-----X

Index No. 0305691/2008  
*Ben R. Barba to*  
 Hon. ~~STANLEY GREEN~~  
 Justice.

The following papers numbered 1 to \_\_\_\_\_ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**  
 Noticed on **March 04 2010** and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

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**MAR - 3 2011**

Upon the foregoing papers this *motion is denied in accordance with the attached Decision and Order.*

Motion is Respectfully Referred to:  
 Justice: \_\_\_\_\_  
 Dated: \_\_\_\_\_

Dated: 2/25/2011

Hon. *Ben R. Barba to*  
~~STANLEY GREEN, J.S.C.~~  
 BEN R. BARBA TO, A.J.S.C.

**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX**

**Present:** Honorable Ben R. Barbato

\_\_\_\_\_  
LAWRENCE WILLIAMS and JESSICA WILLIAMS,

Plaintiff,

against-

**DECISION/ORDER**

Index No.: 305691/08

ANDRES PEREZ and NYLL MANAGEMENT LTD,

Defendant.

\_\_\_\_\_  
The following documents papers numbered 1 to 7 read on this motion for summary judgment noticed on March 4, 2010 and duly transferred on February 15, 2011.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Memorandum of Law (Hung)	4
Affirmation in Opposition & Exhibits	5, 6
Reply Affirmation	7

Upon the foregoing papers and after reassignment of this matter from Justice Stanley Green on February 15, 2010, Defendants, Andres Perez and NYLL Management Ltd, seek an Order granting summary judgment and dismissing Plaintiffs' Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). The motion is hereby **denied** solely to the extent as Ordered below.

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on December 10, 2007, at the intersection of East Gun Hill Road at its intersection with Willette Avenue, in the County of Bronx, City and State of New York.

On December 16, 2009, the Plaintiff, Lawrence Williams, appeared for a neurological examination conducted by Defendant's appointed physician Doctor Kulip Sachdev. Upon examination Dr. Sachdev, determined that Plaintiff's range of motion of the cervical spine was

normal with no tenderness or spasm on the right or left side of the paravertebral muscle. He found minimal tenderness over the right trapezius muscles but foraminal compression and Valsalva maneuver were negative. Dr. Sachdev states that there was no tenderness or spasm over the thoracic spine or thoracic paraspinal muscles. His examination of the lumbar spine revealed full range of motion with minimal vertebral tenderness at the L4, L5 and S1 levels of the lumbar spine. He states that there was no tenderness over the sciatic notch and that Valsalva maneuver was negative. Motor, functional muscle, sensory, reflexes, coordination, gait and station, cranial nerve and higher mental function were all normal. Dr. Sachdev determined based upon his examination that the Plaintiff had suffered cervical, thoracic and lumbar strain and sprain which has resolved. He also determined a normal neurological examination with no permanency or residuals as a result of the subject accident.

On December 15, 2009, the Plaintiff, Lawrence Williams, appeared for a orthopedic examination conducted by Defendant's appointed physician Doctor Michael J. Katz. Upon clinical examination of Plaintiff's cervical spine reveals full range of motion with normal motor strength present in the C5-T1 innervated segments. Upon clinical examination of the lumbar spine, Dr. Katz found range of motion to be within normal limits, no muscle spasm or tenderness present, straight leg testing was normal sensory, reflexes were normal. Babinski and Patrick testing were negative. Upon clinical examination of the right and left shoulders Dr. Katz found full range of motion, no impingement, crepitation or deformity to the AC joint, negative apprehension test and sensation in tact in both shoulders. Dr. Katz' examination of the left and right elbows also revealed full range of motion with negative Tinel's and no crepitation. Dr. Katz concludes that Plaintiff sustained resolved strain of the cervical spine, left shoulder contusion and bilateral elbow contusion as a result of the accident. He further states that Plaintiff

is status post successful percutaneous lumbar discectomy and right shoulder arthroscopy. Dr. Katz also indicates a prior examination and report with respect to Plaintiff which was not forwarded with this motion therefore Dr. Katz' determination of Plaintiff's physical condition at the time of the initial examination is unknown.

Defendant also offers the Affirmation of Dr. Robert Tantleff, a radiologist, who reviewed the M.R.I.'s of Plaintiff's cervical and lumbar spines as well as his left shoulder. Dr. Tantleff determined that the MRIs of Plaintiff's cervical and lumbar spines revealed discogenic changes unrelated to the accident. Dr. Tantleff's review of the left shoulder MRI reveals age consistent degenerative changes of the acromioclavicular joint otherwise normal.

Plaintiff offers the Affirmation of Dr. Sebastian Lattuga, who testifies that he has treated the Plaintiff, Lawrence Williams, since April 4, 2008 when he presented at his office complaining of neck and back pain radiating into the upper and lower extremities with numbness, weakness and tingling in the lower extremities. Dr. Lattuga further states that his examination of Plaintiff revealed decreased range of motion of the cervical spine with tenderness and spasm noted. Similarly, Dr. Lattuga found restricted range of motion of the thoracolumbar spine. Dr. Lattuga notes decreased motor strength in the lower extremity. He further states that treatment options were discussed and Plaintiff, a construction worker, was advised to "... refrain from heavy lifting, carrying or bending." On May 5, 2008, Plaintiff underwent Percutaneous Disk Ablation, L5/S1 with Fluoroscopic Lumbar Spine Localization for Post-Traumatic Disc Disease and Lumbar Radiculopathy. Plaintiff presented to Dr. Lattuga on May 8, 2008 and June 5, 2008 on each occasion examination revealed restricted range of motion. On June 5, 2008 Dr. Lattuga's examination revealed a worsening of the cervical spine with altered sensation in the C6, L5 nerve root distribution, positive straight leg test. At that time Dr. Lattuga recommended

continued physical therapy and cervical epidural injections and instructed Plaintiff to refrain from heavy lifting, carrying and bending. On May 7, 2008 Plaintiff underwent trigger point injections. On April 8, 2010 Plaintiff presented to Dr. Lattuga complaining of radiating pain to the upper and lower extremities with numbness, tingling and dysesthesias. Upon examination Plaintiff was again found to have restricted range of motion of the cervical spine, tenderness and spasms in the thoracolumbar spine with restrictive range of motion, abnormalities in Plaintiff's upper and lower extremities, abnormal strength, altered sensation at the L5-S1 nerve root distribution. Plaintiff has further been determined to suffer from cervical and lumbar radiculopathy. Dr. Lattuga opine that Plaintiff suffers significant limitation in his neck and lower back and permanent chronic decreased range of motion as a result of herniations and bulging to his lumbar and cervical spine all of which are a result of the accident which, is the subject matter of this law suit.

Plaintiff further offers the testimony of Dr. Dov J. Berkowitz, who offers that the Plaintiff presented to his office on March 10, 2008 complaining of low back pain radiating down his left leg and bilateral shoulder pain left greater than right. On October 2, 2008 Plaintiff again presented to Dr. Berkowitz, at which time they discussed the possibility of plaintiff undergoing an arthroscopic procedure to his right shoulder. On November 12, 2008 Dr. Berkowitz performed arthroscopy of the right shoulder and subacromial space and a partial distal claviclectomy for impingement syndrome of the right shoulder and was seen for a follow up on November 20, 2008. On January 15, 2009 Plaintiff returned to Dr. Berkowitz examination indicated that Plaintiff possessed only limited forward flexion and abduction of the right shoulder to 90 degrees. Again on February 26, 2009 Plaintiff returned to Dr. Berkowitz still demonstrating decreased forward flexion and abduction. Plaintiff returned to Dr. Berkowitz for

reevaluation April 13, 2009, May 21, 2009 and, April 8, 2010 still lacking full range of motion in his right shoulder. Dr. Berkowitz, opines that Plaintiff has sustained a permanent consequential limitation of the use of his right shoulder, and further states that Plaintiff has been unable to perform his usual and customary employment duties for no less than 90 out of the first 180 days following the accident which is the subject matter of this law suit.

Under the “no fault” law, in order to maintain an action for personal injury, a plaintiff must establish that a “serious injury” has been sustained. *Licari v. Elliot*, 57 N.Y.2d 230(1982) The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). In the present action, the burden rests on Defendants to establish, by submission of evidentiary proof in admissible form, that Plaintiff has not suffered a “serious injury.” *Lowe v. Bennett*, 122 A.D.2d 728 (1<sup>st</sup> Dept. 1986) *aff’d* 69 N.Y.2d 701 (1986). Where a defendant’s motion is sufficient to raise the issue of whether a “serious injury” has been sustained, the burden then shifts and it is incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. *Licari*, *supra*; *Lopez v. Senatore*, 65 N.Y.2d 1017 (1985). Further it is the presentation of objective proof of the nature and degree of a Plaintiff’s injury which is required to satisfy the statutory threshold for “serious injury”. Therefore, disc bulges and herniated disc alone do not automatically fulfil the requirements of Insurance Law §5102 (d). See.: *Cortez v. Manhattan Bible Church*, 14 A.D.3d 466 (1<sup>st</sup> Dept. 2004) Plaintiff must still establish evidence of the extent of his purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1<sup>st</sup> Dept. 2004).

In the instant case Plaintiff has demonstrated by objective and quantitative evaluation that

he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination by a jury. Further, he has demonstrated the extent and duration of his physical limitations sufficient to allow this action to be presented to a trier of facts. The role of the court is to determine whether bona fide issues of fact exist, and not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4<sup>th</sup> Dept. 2000). The moving party must tender evidence sufficient to establish as a matter of law that there exist no triable issues of fact to present to a jury. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986) Based upon the exhibits and deposition testimony submitted, the Court finds that the Defendants have failed to meet that burden.

Therefore it is

**ORDERED**, that Defendants, Andres Perez and NYLL Management Ltd's, motion for an Order granting summary judgment and dismissing Plaintiffs' Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **denied**.

Dated: February 25, 2011

  
Hon. Ben R. Barbato, A.J.S.C.