

**Lee v Barajas**

2018 NY Slip Op 34213(U)

July 12, 2018

Supreme Court, Nassau County

Docket Number: Index No. 603894/16

Judge: Jeffrey S. Brown

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.

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN  
JUSTICE**

-----X		<b>TRIAL/IAS PART 12</b>
<b>JAMES LEE,</b>		<b>INDEX # 603894/16</b>
	<b>Plaintiff,</b>	
	<b>-against-</b>	
<b>MARIO BARAJAS JR. and MARIO BARAJAS,</b>		<b>Mot. Seq. 2</b>
		<b>Mot. Date 5.8.18</b>
		<b>Submit Date 6.8.18</b>
	<b>Defendants.</b>	
-----X		

The following papers were read on this motion:	Documents Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	28
Answering Affidavit .....	35
Reply Affidavit.....	42

Defendants Mario Barajas Jr. and Mario Barajas move by notice of motion pursuant to CPLR § 3212 for an order granting summary judgment and dismissing plaintiff James Lee’s complaint on the grounds that he did not sustain a “serious injury” as defined under New York Insurance Law § 5102 (d).

Pursuant to Article 51 of the New York State Insurance Law, “serious injury” is defined as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ or member; function, or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury of a non-permanent nature that prevents the injured person from performing substantially all of his/her usual and customary daily activity for not less than 90 days during the 180 days immediately following the occurrence of the injury. (See McKinney’s Consolidated Laws of New York, Insurance Law § 5102 [d]).

This action arises out of an automobile accident that occurred on June 8, 2015 on the Long Island Expressway near its intersection with Guinea Woods Road in the Village of Old Westbury, New York. By his verified bill of particulars, plaintiff alleges that he sustained

injuries to his lumbar spine, including a bulging disc at L4/5, cervical sprain/strain, cervicalgia, thoracic sprain/strain, and severe right shoulder pain accompanied by a shoulder sprain/strain, derangement, and swelling. Further, plaintiff alleges that he was confined to bed for more than 14 days and to home for more than 90 days following the accident. Plaintiff alleges injuries falling within the third, seventh, eighth, and ninth statutory categories.

Plaintiff testified at deposition that he did not seek treatment immediately after the accident. One week later, he sought treatment at Nara Pain Clinic and complained of pain in his neck and back. He was prescribed a course of physical therapy, chiropractic care, and acupuncture. He treated at the clinic three times per week for approximately six months. Plaintiff also testified that he had diagnostic testing performed on his right shoulder and lower back and that his doctor recommended surgery for his right shoulder. Plaintiff testified that he returned to work ten days after the accident and was not confined to bed or home. He tried to avoid raking leaves and cutting grass but there is no activity that he cannot do at all as a result of the accident.

Plaintiff also testified that he was involved in a prior motor vehicle accident on March 5, 2014 and had surgery to his right shoulder in 2008 following a slip and fall.

To meet the threshold for serious injury, the law requires that the claimed limitation be more than minor, mild, or slight and that the claim be supported by proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. (*Licari v. Elliott*, 57 NY2d 230 [1982]; see also *Gaddy v. Eyles*, 79 NY2d 955 [1992]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation will be deemed “insignificant” within the meaning of the statute. (*Licari*, 57 NY2d 230; *Grossman v. Wright*, 268 AD2d 79, 83 [2d Dept. 2000]).

When, as in this case, a claim is raised under the “permanent consequential limitation of use of a body organ or member, function, or system” or “significant limitation of use of a body function or system” categories, then, in order to prove the extent of the physical limitation, an expert’s designation of a numeric percentage of plaintiff’s loss of range of motion is acceptable. (*Toure v. Avis Rent A Car Systems*, 98 NY2d 345, 353 [2002]). In addition, an expert’s qualitative assessment of a plaintiff’s condition is also probative, provided that: (1) the evaluation has an *objective* basis, and (2) the evaluation compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system. (*Id.*). Thus, whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose, and use of a body part. (*Dufel v. Green*, 84 NY2d 795, 798 [1995]).

In *Perl v. Meher*, 18 NY3d 208 [2011], the Court of Appeals held that a quantitative assessment of a plaintiff’s injuries does not have to be made during an initial examination but may be conducted much later, even in connection with litigation. Thus, a plaintiff need not show

quantitative, i.e. range of motion testing, contemporaneous with the accident or injury. (*Id.* at 218). Nonetheless, “a contemporaneous doctor’s report is important to proof of causation; an examination by a doctor years later cannot reliably connect the symptoms with the accident.” (*Id.* at 217-218; *see also Rosa v. Mejia*, 95 AD3d 402 [1st Dept 2012] [“*Perl* did not abrogate the need for at least a qualitative assessment of injuries soon after the accident.”]).

Finally, “[w]hile a cessation of treatment is not dispositive – the law surely does not require a record of needless treatment in order to survive summary judgment – a plaintiff who terminates therapeutic measures following the accident, while claiming ‘serious injury,’ must offer some reasonable explanation for having done so” (*Pommells v. Perez*, 4 NY3d 566, 574 [2005]; *see also Ramkumar v. Grand Style Transp. Enterprises Inc.*, 22 NY3d 905 [2013]; *Browne v. Covington*, 82 AD3d 406 [2d Dept 2011]; *Wright v. Rodriguez*, 49 AD3d 532 [2d Dept 2008]).

With these guidelines in mind, the court turns to the motions at bar.

In support of this motion, defendants rely on plaintiff’s deposition transcript as well as the December 18, 2017 affirmed medical report of Ronald A. Light, M.D., a board certified orthopedic surgeon. Dr. Light noted that the plaintiff reported undergoing prior right shoulder surgery and receiving treatment for a March 5, 2015 motor vehicle accident for the shoulders, cervical spine, and ribs. Plaintiff also reported working on a full-time basis and performing his duties without limitation. Upon examination, Dr. Light found no spasm or tenderness of plaintiff’s cervical spine, thoracic spine or lumbar spine. Range of motion testing of these areas with the use of a handheld goniometer was normal in all aspects when compared to the values published in the AMA’s “Guidelines to the Evaluation of Permanent Impairment,” 5th edition. With respect to plaintiff’s shoulder, Dr. Light found no heat, swelling, effusion, erythema, or crepitus. Range of motion was slightly restricted (flexion 170/180) but Dr. Light noted that range of motion is subjective and as allowed by the plaintiff. Dr. Light concludes that the plaintiff has a resolved cervical spine sprain, a resolved thoracic sprain, a resolved lumbar sprain, and resolved bilateral shoulder sprain. He states that there is no evidence of a disability and that the plaintiff is capable of working without restrictions.

Finally, Dr. Light states that “[a]fter reviewing Mr. Lee’s medical file, taking a complete history, and performing a physical examination, it is apparent to a reasonable degree of certainty that the injuries sustained and accident reported are causally and solely related.”

In opposition, plaintiff contends that the moving defendants have failed to make a prima facie showing of entitlement to summary judgment. Considered alone, defendant’s proof establishes that the plaintiff did not sustain a “serious injury” within the meaning of Insurance Law §5102(d). Having made a prima facie showing, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant’s submissions by demonstrating a triable issue of fact that a “serious injury” was indeed sustained (*Pommells*, 4 NY3d 566 [2005]; *Grossman*, 268 AD2d 79).

Plaintiff also submits his own affidavit and the affirmations of his treating physicians, David Mun, M.D., Hoeok Kwak, D.C., Benjamin Chang, M.D., and Alan Greenfield, M.D., as well as medical records produced by Springfield Radiology Imaging P.C.

By his affidavit, plaintiff states that at the time of the accident he was 63 years old and in good health. The impact to his vehicle was heavy and his body violently moved forward, hitting his chest on the steering wheel. He reported to Dr. Mun on June 15, 2015 and began a course of physical therapy and acupuncture as well as chiropractic treatment. He received treatment for nine months and was informed that his injuries are permanent and any further treatments would only be palliative in nature. He was instructed to perform home physical therapy exercises and stretching exercises at home to help alleviate pain. Further, plaintiff states that once his no-fault benefits terminated, he stopped treating because he could not afford to pay for care and treatment out of pocket.

Dr. Mun affirms that he conducted an initial examination of the plaintiff James Lee, on June 15, 2015, a few days after the accident. Upon evaluation, the plaintiff complained of back pain involving the cervical and upper thoracic region, along with the shoulders. Medical history was significant for a right shoulder surgery approximately ten years ago. Dr. Mun conducted orthopedic and range of motion testing on plaintiff's cervical spine and shoulders with the use of a goniometer. The range of motion was obtained objectively by measuring involuntarily muscle spasms at the end of ranges. Dr. Mun found significant restrictions in range of motion of plaintiff's cervical spine with muscle tenderness to palpation. Range of motion of plaintiff's shoulders was also significantly restricted with associated pain. Because of his physical condition, the plaintiff was instructed to avoid strenuous activities including vocational duties, which prohibit proper healing and recovery. Dr. Mun found plaintiff's MRI to be consistent with plaintiff's physical examination and opined to a reasonable degree of medical certainty that the injury is causally related to the motor vehicle accident of June 8, 2015.

Dr. Mun also states that the plaintiff began a course of chiropractic treatment, physical therapy, and acupuncture for nine months at two to three times weekly. Dr. Mun states that at the end of his treatment, the plaintiff was informed that he had reached a plateau with regard to his injuries and further treatments would be only palliative in nature and was instructed to perform home therapy exercises and stretching exercises at home to alleviate pain. Dr. Mun also confirms the authenticity of the medical records attached to his report.

Plaintiff attaches the affidavit of chiropractor Hoseok Kwak, D.C., who states that he first saw the plaintiff on June 15, 2015 for an initial chiropractic evaluation following the June 8, 2015 accident. The plaintiff complained of neck pain, upper and lower back pain and bilateral shoulder pain, with limitations in walking, moving, carrying and handling objects. Pain was aggravated by sitting, standing, walking, using stairs, bending, carrying and turning the neck or body. Plaintiff reported right shoulder surgery ten years ago but denied any pain or physical restrictions at the time of the accident.

Dr. Kwak conducted range of motion tests with the use of a goniometer. End ranges were assessed by the presence of involuntary muscle spasms. Dr. Kwak found significant restrictions in range of motion of plaintiff's cervical, thoracic, and lumbar spine with associated tenderness, spasm, and stiffness of the surrounding musculature. Due to the plaintiff's condition, he was instructed to avoid strenuous activities including vocational duties. Plaintiff was advised to commence chiropractic manipulative therapy, which treatments lasted approximately nine months at a frequency of two to three times per week. The plaintiff experienced temporary relief, but his ranges of motion were still restricted with pain. At the end of his treatment, plaintiff was informed that he had reached a plateau with regard to his injuries and further treatment would be only palliative in nature. Dr. Kwak concludes to a reasonable degree of medical certainty that the plaintiff's injuries were sustained in the subject accident on June 8, 2015. Dr. Kwak also confirms the authenticity of the medical records attached to his report and affirms the statements contained therein.

Alan Greenfield, M.D. reviewed the films of an MRI taken of plaintiff's lumbar spine on October 5, 2015. Dr. Greenfield found lumbar spine injuries consisting of straightening of the lordotic curvature, bulging disc with flattening of the dural sac at L4-L5, where hypertrophic facet changes can be seen bilaterally. In addition, Dr. Greenfield affirms the accuracy of the attached documents produced from his office and confirms their authenticity.

Benjamin Chang, M.D. examined the plaintiff on April 16, 2018. In his report, Dr. Chang notes the proper treatment by Dr. Mun and Dr. Kwak and the findings of their initial examinations. At these initial examinations, the plaintiff complained of pain in the neck, upper and lower back and shoulders and had restricted ranges of motion. Dr. Chang also states that he reviewed the MRI of plaintiff's right shoulder which was performed on October 1, 2015. According to Dr. Chang, the MRI revealed post-traumatic joint effusion, swelling involving the acromioclavicular joint, subcortical cyst involving the head of the humerus and biceps tendonitis. Dr. Chang opines that these findings are consistent with the plaintiff's physical examination and that despite the plaintiff's prior surgery, the MRI impressions revealed recent trauma-related injuries to the patient's right shoulder. Further, according to the MRI impressions and the examination results, Dr. Chang opines that the plaintiff's right shoulder injury is causally related to the motor vehicle accident of June 8, 2015.

In addition, Dr. Chang reviewed the MRI of plaintiff's lumbar spine taken on October 5, 2015. The test revealed straightening of the lordotic curvature and bulging disc at L4-L5. Dr. Chang opines that these findings are consistent with the plaintiff's physical condition and causally related to the subject accident.

Dr. Chang conducted orthopedic tests and range of motion testing on April 16, 2018 of plaintiff's neck, lower back, and shoulders. Range of motion extremes were measured with the use of a goniometer and end of ranges were determined by measuring involuntary muscle spasms. At the time of this examination, plaintiff still complained of pain and stiffness in the neck, upper and lower back with restriction of movement. He also complained of bilateral

shoulder pain, which was aggravated by overhead activities and repetitive use. Dr. Chang found restricted ranges of motion of plaintiff's cervical and lumbar spine with associated muscle spasms and soft tissue inflammation. Range of motion of plaintiff's bilateral shoulders was also restricted with plain in the right shoulder. Dr. Chang opines that the plaintiff continues to suffer with a post traumatic cervical sprain, post traumatic lumbar sprain with muscle spasms and disc bulging, post traumatic cervical, thoracic and lumbar myofascial pain syndrome, and bilateral shoulder strain. Dr. Chang further states that the plaintiff's chronic painful conditions are substantiated by the positive objective findings of the MRI and physical examinations. Dr. Chang opines that the plaintiff's has a reduction in normal range of motion which is permanent and limits his customary daily activities. Dr. Chang also concludes that the injuries to the plaintiff's neck, upper and lower back and bilateral shoulders were sustained in the subject motor vehicle accident and not caused by the any prior accident or degenerative condition.

The court does not consider the report of radiologist Ayoob Khodadadi, M.D. dated 10/01/2015 as the report is not sworn to or affirmed.

Despite the fact that the defendant made a prima facie showing that the plaintiff did not sustain a "serious injury" pursuant to the Insurance Law, the plaintiff successfully countered this showing with medical evidence demonstrating the existence of material issues of fact that plaintiff has in fact sustained a "serious injury." Plaintiff's treating physicians as well as Dr. Chang performed range of motion tests on the plaintiff and found significant limitations. These observations as to actual limitations of movement qualify as objective evidence as does Dr. Greenfield's findings with regard to plaintiff's lumbar MRI. (*See Grossman*, 268 AD2d 79). Plaintiff's expert physicians each conclude, in his expert opinion, that the injuries of the plaintiff are causally related to the accident. Dr. Chang opines that these injuries are permanent in nature. Further, plaintiff and his expert physicians present a sufficient justification for cessation in treatment.

Defendants aptly point out the lack of discussion by plaintiff's physicians of any injuries sustained in the prior motor vehicle accident in March of 2015. However, the report of defendants' own expert Dr. Light, wherein he determined that the injuries and the accident are "causally and solely related" after having noted plaintiff's prior motor vehicle accident and prior surgery raises a triable issue of fact as to causation. Accordingly, based on conflicting medical affidavits, the motion must be denied. (*See Ocasio v. Zorbas*, 14 AD3d 499).

With respect to the 90/180 category of "serious injury," according to his own testimony together the reports of Dr. Mun and Dr. Kwak, plaintiff had returned to work within ten days following the accident and continued physical therapy, chiropractic treatment and acupuncture along with a home exercise program with instructions to avoid strenuous activities, including vocational duties. He was not prohibited from working and was not confined to bed or home. Accordingly, there is no competent medical evidence here establishing that the plaintiff "was unable to perform substantially all of [his] daily activities for not less than 90 out of the first 180 days as a result of the subject accident" (*Picott v. Lewis*, 26 AD3d 319, 321 [2d Dept 2006]; *see*

also *Williams v. Perez*, 92 AD3d 528 [1st Dept 2012] [“The evidence that plaintiff missed less than 90 days of work in the 180 days immediately following the accident and indeed otherwise ‘light duty’ is fat[al] to the 90-180 claim.”]; *Barzey v. Clarke*, 27 AD3d 600, 601 [2d Dept 2006] [affirming summary judgment where “there was no competent medical evidence to support a claim that the plaintiff was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days as a result of the subject accident.”]).

Finally, to establish a claim under the significant disfigurement category of serious injury, the plaintiff must establish that “a reasonable person viewing the plaintiff’s face would, as a result of the remnants of the injury, regard it as unattractive or objectionable, or as the object of pity and scorn.” (*Maldonado v. Piccirilli*, 70 A.D.3d 785, 786 [2d Dept 2010]). Plaintiff makes no factual allegations in support of a claim of significant disfigurement and none of the medical evidence here would support such a claim.

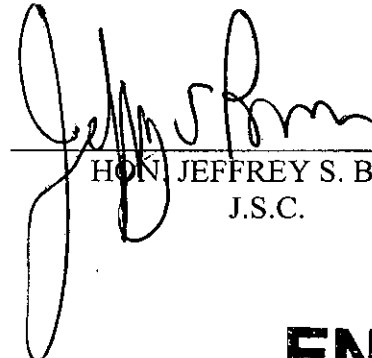
For the foregoing reasons, it is hereby

ORDERED, that defendant’s motion for summary judgment is **granted** with respect to the third and ninth statutory categories of “serious injury” and is **denied** with respect to the seventh and eighth categories.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York  
July 12, 2018

ENTER:



HON. JEFFREY S. BROWN  
J.S.C.

Attorney for Plaintiff  
Law Offices of Gary Park, PC  
39-01 Main Street, Ste. 608  
Flushing, NY 11354  
718-445-1300  
[gpark@garyparklaw.com](mailto:gpark@garyparklaw.com)

Attorneys for Defendants  
Martyn Toher Martyn & Rossi, Esqs.  
330 Old Country Road, Ste. 211  
Mineola, NY 11501  
516-739-0000  
[5167390329@fax.nycourts.gov](mailto:5167390329@fax.nycourts.gov)

**ENTERED**

JUL 13 2018

NASSAU COUNTY  
COUNTY CLERK'S OFFICE