

**Murrell v Sow**

2020 NY Slip Op 31225(U)

April 29, 2020

Supreme Court, Kings County

Docket Number: 519266/17

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 9**

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**SHAUNDEL R. MURRELL and JACQUELINE PEREZ,**

**Plaintiffs,**

**-against-**

**MAMADOU DIAO SOW, CITY BRONX LEASING TWO  
INC., and CITY BRONX LEASING INCORPORATED,**

**Defendants.**

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**DECISION / ORDER**

**Index No. 519266/17**

**Motion Seq. No. 1**

**Date Submitted: 3/5/20**

**Cal No. 30**

**Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants Mamadou Diao Sow and City Bronx Leasing Two Inc.'s motion for summary judgment.**

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>15-31</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>37-52</u>
Reply Affirmation.....	<u>53</u>

**Upon the foregoing cited papers, the Decision/Order on this application is as follows:**

This is a personal injury action which arises from a motor vehicle accident which took place on March 5, 2016 at the intersection of Brooklyn Avenue and East New York Avenue in Brooklyn, NY. Plaintiff Shaundel R. Murrell was the driver of one of the two vehicles, and plaintiff Jacqueline Perez was his passenger. The other vehicle was a taxi owned by defendant City Bronx Leasing Two Inc. and was driven by defendant Mamadou Diao Sow. The vehicles collided in the intersection, and both drivers told the responding police officer that he had a green light. The officer noted on the police report that the airbags in both cars had deployed. Plaintiffs were removed from the scene of the accident in an

ambulance and were taken to Kings County Hospital. At the time of the accident, both plaintiffs were approximately twenty-nine years of age.

Defendants contend that they are entitled to summary judgment dismissing the complaint as neither plaintiff sustained serious injuries as a result of the accident, as defined by Insurance Law § 5102(d).<sup>1</sup> Defendants support their motion with an attorney's affirmation, the pleadings, plaintiffs' deposition transcripts and the affirmed IME reports from a neurologist, Chandra M. Sharma, and an orthopedist, Alan J. Zimmerman, M.D. Movants also provide affirmed reports from a radiologist, Scott A. Springer, D.O., who examined the plaintiffs' MRIs, and from Bernard L. Chang, M.D., who reviewed plaintiffs' emergency room records.

### **Shaundel R. Murrell**

In his Bill of Particulars, plaintiff Shaundel R. Murrell alleges that as a result of the accident, he sustained injuries to both of his knees, to his right shoulder, his cervical and lumbar spine and to his left wrist.

Dr. Chandra M. Sharma, a neurologist, examined plaintiff Shaundel R. Murrell on October 23, 2018 on behalf of the defendants, and reports a that Murrell is "neurologically normal." Dr. Sharma tested the range of motion in Murrell's cervical and lumbar spine, states that the results were normal, and concludes that plaintiff sustained sprains/strains to his cervical and lumbar spine, which have resolved with no permanent injuries.

Dr. Alan J. Zimmerman, an orthopedist, examined Murrell on March 12, 2019 on behalf of the defendants, and reports that plaintiff had normal ranges of motion in his

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<sup>1</sup> While the Notice of Motion names only Shaundel Murrell, it refers to plaintiffs, and the supporting and opposition papers address both plaintiffs. Thus, the court has considered the motion in full, with regard to both plaintiffs.

cervical spine, “greater than normal” ranges of motion in his lumbar spine, normal ranges of motion in his shoulders, wrists and knees, with otherwise negative test results. He states that plaintiff had a normal orthopedic examination, with no findings that “would result in orthopedic limitation in use of the body parts examined,” and concludes that Murrell’s subjective complaints do not correlate with the negative clinical test results. He states that plaintiff is “capable of functional use of the examined body parts for normal activities of daily living and working.” Dr. Zimmerman opines that plaintiff’s “crepitus and chondromalacia of both knees are preexisting.” He notes that plaintiff injured his left knee in a prior accident and has had surgery to that knee.

Dr. Bernard P. Chang reviewed plaintiff Murrell’s emergency room records on behalf of defendants and states that they provide no indication that Murrell sustained any significant injury as a result of the subject accident. He concludes that the injuries claimed in the plaintiff’s bill of particulars are inconsistent with his initial presentation and documentation in the emergency room records and that the injuries claimed do not have an acute traumatic origin and so cannot be causally related to the subject accident.

Dr. Scott A. Springer reviewed the plaintiff’s MRIs. First, he reviewed the films of Murrell’s cervical spine, taken on 3/26/16, and opines that they indicate “chronic degenerative changes with no posttraumatic changes causally related to the 3/5/16 incident.” He states that the films were taken 21 days after the accident, and the disc desiccation he sees could not have developed in that short time. Dr. Springer next reviewed the MRIs of Murrell’s left knee taken on 3/26/2016. He reports that the films show “mild chondromalacia of the undersurface of the patella that could not have developed in the interval between the incident and the examination”, normal joint fluid and intact ligaments and menisci. He finds no post-traumatic changes causally related to the subject

accident. Dr. Springer next reviewed the MRI of the plaintiff's right knee taken on 6/22/16. He states that the films show narrowing of the medial, lateral and patellofemoral joint spaces, which is a chronic process, as well as chondromalacia of the undersurface of the patella, which could not have developed in the short period of time between the subject accident and the MRI. In addition, he finds no posttraumatic changes which are causally related to the subject accident. He states that the films indicate intact ligaments and menisci. Dr. Springer also reviewed an MRI of Murrell's right shoulder taken on 3/26/16. Dr. Springer states that these films show various degenerative, developmental and/or chronic conditions, with no evidence of any "posttraumatic changes causally related to the 3/5/16 incident."

Defendants contend that their medical evidence eliminates this accident as the cause of the conditions alleged in the plaintiff's bill of particulars, thereby eliminating all categories of injuries in the statute. Further, they maintain that insofar as Shaundel Murrell testified at his EBT that he missed only three days from work, his testimony rules out the 90/180-day category of injury.

The court finds that defendants have made a *prima facie* showing of their entitlement to summary judgment with respect to plaintiff Shaundel Murrell (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). The affirmed reports of orthopedist Alan J. Zimmerman, M.D. and neurologist Chandra M. Sharma, M.D., who both examined Murrell as well as, radiologist, Scott A. Springer, D.O., who examined the MRIs taken of Murrell, and Bernard L. Chang, M.D., who reviewed Murrell's emergency room records, all show that Murrell did not sustain a serious injury as a result of the subject accident. Further, Murrell's testimony that he missed only three days of work as a police officer (EBT 63-64), make a *prima facie* showing on the 90/180-day category of injury (see

*Dacosta v Gibbs*, 139 AD3d 487, 488 [1<sup>st</sup> Dept 2016] [“Plaintiff's testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked “light duty” is fatal to her 90/180–day claim”]; *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013] [plaintiff returned to work on a partial basis during the relevant period of time ]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007] [“The plaintiff testified at trial that he missed only one month of work, that he then returned to work on a part-time basis, and that, after another month, he had resumed working on a full-time basis”). The burden of proof then shifts to plaintiff.

Plaintiff counters that the medical evidence he has submitted overcomes the motion and raises a triable issue of fact as to whether plaintiff sustained serious injuries under Insurance Law § 5102(d).

Dr. Leonard Bleicher has treated plaintiff Murrell since shortly after the accident and he examined plaintiff most recently on July 2, 2019. In his affirmed report, he states that his exam produced significant restrictions in the range of motion in plaintiff's cervical/thoracic and lumbar spine, right shoulder, and left knee. He diagnoses plaintiff with seven injuries, with seven diagnosis codes: “right shoulder sprain with rotator cuff tear, symptomatic; left wrist contusion/sprain, fair recovery; contusion/sprain of the left and right knees, symptomatic; chondromalacia patella, left knee, symptomatic; cervical spine sprain/fibromyositis, symptomatic; discogenic neck pain with right C-7 radiculopathy, symptomatic; lumbosacral spine sprain/fibromyositis r/o discogenic lower back pain.”

Further, Dr. Bleicher opines that “there is a causal relationship between Murrell's symptom complex and the motor vehicle accident on 3/5/16” and that “the injuries are significant and permanent.” He recommends monitoring and possible arthroscopic surgery to plaintiff's right shoulder and left knee.

Plaintiff Murrell has come forward with sufficient evidence to overcome the motion and raise an issue of fact as to whether he sustained a “permanent consequential limitation of use of a body organ or member” or “a significant limitation of use of a body function or system” as a result of the subject accident (*White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]). Murrell’s medical records and the affirmed report of Dr. Leonard Bleicher, who finds significant and quantified restrictions in the plaintiff’s range of motion, both contemporaneously with the accident and recently, and opines that his injuries were caused by the subject accident, overcomes the motion and raises a triable issue of fact requiring a trial.

### **Jacqueline Perez**

In her Bill of Particulars, plaintiff Jacqueline Perez alleges that as a result of the accident, she sustained injuries to her left shoulder, her left wrist, her cervical and lumbar spine, her left knee, plus head trauma and facial laceration/abrasions.

Dr. Chandra M. Sharma, a neurologist, examined plaintiff Perez on September 11, 2018 on behalf of defendants. She reports that Perez is “neurologically normal.” Dr. Sharma tested the range of motion in Perez’s cervical and lumbar spine, states that the results were normal, and concludes Perez sustained sprains/strains to her cervical and lumbar spine, which have resolved, with no permanent injuries.

Dr. Alan J. Zimmerman, an orthopedist, also examined Perez on September 11, 2018, on behalf of defendants. He tested her range of motion and reports that Perez had normal ranges of motion in her cervical, thoracic and lumbar spine, left shoulder, left wrist and left knee, with otherwise negative test results. He states that plaintiff had “a normal orthopedic examination with no findings that would result in orthopedic limitation in use of the body parts examined” and avers that Perez’s “subjective complaints do not correlate

with negative clinical test results.” He states that Perez is “capable of functional use of the examined body parts, for normal activities of daily living, as well as all usual daily activities including regular work duties.”

Dr. Bernard P. Chang examined plaintiff Perez’s emergency room records from Mount Sinai-Brooklyn from the day after the accident<sup>2</sup> on behalf of defendants. He states that there is no indication in the records that Perez sustained any serious injury as a result of the subject accident. He concludes that the injuries claimed in the plaintiff’s bill of particulars are inconsistent with her initial presentation and documentation in the hospital records, and that the injuries alleged do not have an acute traumatic origin and so could not be causally related to the subject accident.

Dr. Scott A. Springer first reviewed the MRI films of Perez’s brain taken on 3/15/16. He states that it is a normal exam and indicates no evidence of posttraumatic changes causally related to the 3/5/16 incident. Dr. Springer next reviewed the MRIs of Perez’s cervical spine taken on 3/26/2016. He states that he observes degenerative changes and two disc bulges, but “no posttraumatic change causally related to the 3/5/16 incident.” Dr. Springer next reviewed the MRIs of Perez’s lumbar spine taken on 4/13/16. He states there are degenerative changes and six disc bulges visible, including two in the thoracic spine, at T11-T12 and T12-L1, with “no posttraumatic change causally related to the 3/5/16 incident.” Dr. Springer next reviewed the MRIs of Perez’s left knee taken on 3/26/2016. He states that the films show “mild tricompartmental narrowing. . . . There is chondromalacia

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<sup>2</sup> Dr. Springer erroneously states that Perez did not seek medical attention immediately after the accident when she was in fact taken by ambulance to the emergency room at Kings County Hospital. He does not consider those records. Apparently, she went to the emergency room at Mount Sinai Brooklyn the next day. Nevertheless, his analysis of the records from the following day remain relevant.

and narrowing of the patellofemoral joint, greater laterally.” He states this could not have developed in the twenty-one days after the accident. He finds “no post-traumatic change causally related to the subject accident.” Dr. Springer also reviewed an MRI of Perez’s left shoulder taken on 3/26/16. He states that the test “reveals hypertrophic change and narrowing of the acromioclavicular joint, which are degenerative findings typical of arthritis. A laterally downsloping acromion is noted, which is a developmental variant unrelated to trauma. Physiologic fluid, or the normal amount, is seen in the glenohumeral joint. Tendinosis at the musculotendinous junction of the supraspinatus tendon is noted, which is a chronic finding related to repetitive motion that could not have occurred in the short time interval between the incident and the examination.” He states that the films show various degenerative, developmental and/or chronic conditions, “with no evidence of posttraumatic changes causally related to the 3/5/16 incident.”

Defendants contend that this evidence eliminates the accident as the cause of the plaintiff’s injuries alleged in the bill of particulars, thereby eliminating all categories of injury in the statute. Further, they maintain that insofar as plaintiff Jacqueline Perez alleges in her bill of particulars to have been confined to her bed and home for only two weeks, her pleading eliminates the 90/180-day category of injury.

The court finds that defendants have failed to make a *prima facie* case for summary judgment dismissing the complaint with regard to plaintiff Perez. Defendants include plaintiff’s EBT in their motion papers. The EBT was held on June 29, 2018. Her testimony therein is considered to be sworn testimony. She testified that she missed between five and five-and-a-half months of work as a nursing coordinator because of the accident (EBT Pages 52, 56-57). Defendants misinterpret the statement in the bill of particulars, as it states that plaintiff was “confined to her bed and home . . . for two weeks.” This generally

means she stayed home for two weeks before venturing out for treatment. It does not mean she returned to work after two weeks. In fact, the next sentence states that “lost wage information will be provided under separate cover.”

Thus, while Dr. Chang, who is board certified in emergency medicine, claims that plaintiff did not sustain her claimed injuries as a result of the accident, he did not examine her or review her treatment records. He cannot establish, as a matter of law, solely from his review of plaintiff’s emergency room records, that plaintiff did not “sustain a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 of the 180 days following the accident” (see *Fils-Aime v Colombo*, 152 AD3d 493, 494 [2d Dept 2017] [“defendants’ submissions failed to eliminate triable issues of fact as to whether the plaintiff sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d)”]; *Sullivan v Illoge*, 50 AD3d 886 [2d Dept 2008] [“defendants’ motion papers did not adequately address the plaintiff’s claim . . . that [he] sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident]).

As the defendants have failed to meet their burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition with respect to Perez (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148

AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

However, it should be noted that had defendants made a *prima facie* case for dismissal, plaintiff Perez's treating doctor's affirmation is sufficient to overcome the motion and raise an issue of fact as to whether Perez sustained a "serious" injury as a result of the subject accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). Dr. Bleicher's affirmed reports indicate significant and quantified restrictions in Perez's range of motion, both contemporaneously with the accident and recently, and he opines that her injuries were caused by the subject accident. He thus raises a "battle of the experts." This is sufficient to raise an issue of fact which requires a trial.

Accordingly, it is

**ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: April 29, 2020

ENTER:



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Hon. Debra Silber, J.S.C.