

**Cabrera v Denis**

2020 NY Slip Op 34576(U)

October 23, 2020

Supreme Court, Suffolk County

Docket Number: 621300/17

Judge: Carmen Victoria St. George

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**SUPREME COURT – STATE OF NEW YORK  
TRIAL TERM, PART 56 SUFFOLK COUNTY**

**PRESENT:**

*Hon. Carmen Victoria St. George*  
**Justice of the Supreme Court**

\_\_\_\_\_  
**DAVID CABRERA and MARIA I. MELO,**

**Index No.  
621300/17**

**Plaintiffs,**

**-against-**

**Motion Seq:  
001 MG  
Decision/Order**

**LESLY DENIS,**

**Defendant.**  
\_\_\_\_\_

The following electronically filed papers were read upon this motion:

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Defendant moves this Court for an Order dismissing the complaint on the basis that neither of the plaintiffs has sustained a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiffs oppose the requested relief.

The motor vehicle accident giving rise to this action occurred on May 29, 2017, at approximately 8:55 a.m., in Suffolk County, New York. Plaintiff Cabrera claims to have suffered injuries to his left shoulder, including a rotator cuff tear, a superior labrum tear and tendinopathy and tenosynovitis. According to his Bill of Particulars, he was confined to bed for one day and to home for one week immediately after the subject accident. He further claims that he was totally disabled for one week after the accident, and is now partially disabled as a result thereof.

Plaintiff Melo claims to have suffered injuries to her cervical and lumbar spine areas, including bulging and herniated discs, right and left shoulder superior labrum tears, and joint effusion of her left knee. According to her Bill of Particulars, she was confined to bed for one day and to home for two days immediately after the subject accident. She further claims that she

was totally disabled for two days after the accident, and is now partially disabled as a result thereof.

Plaintiffs each claim injuries under the following categories of Insurance Law § 5102 (d): 1) permanent loss of use of a body organ, member, function or system; 2) permanent consequential limitation of use of a body organ or member; 3) significant limitation of use of a body function or system; and 4) a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constituted plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (90/180 claim).

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (*Cauthers v. Brite Ideas, LLC*, 41 AD3d 755 [2d Dept 2007]). The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 [1985]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Id.*) "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiffs (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

The defendant has the initial burden of establishing that a plaintiff did not sustain a causally related serious injury under the categories of injury claimed in the Bill of Particulars (see *Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]).

A defendant can satisfy the initial burden by relying on either the sworn statements of defendant's examining physician, or plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians (*Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). A defendant can demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the alleged injuries were not, in any event, causally related to the accident (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]). Defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (*Browdame v. Candura*, 25 AD3d 747, 748 [2d Dept 2006]).

The Court notes that, a tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*Little v. Locoh*, 71 AD3d 837 [2d Dept 2010]; *Furrs v. Griffith*, 43 AD3d 389 [2d Dept 2007]; *Mejia v. DeRose*, 35 AD3d 407 [2d Dept 2006]). Thus, regardless of an interpretation of an MRI study,

plaintiff must still exhibit physical limitations to sustain a claim of serious injury within the meaning of the Insurance Law. The Court further notes that to qualify as a serious injury within the meaning of the statute, "permanent loss of use" must be total (*Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295, 299 [2001]).

Plaintiff David Cabrera

Defendant submits, *inter alia*, the pleadings, plaintiff's hospital records, plaintiff's deposition transcript, records from plaintiff's treatment providers, and the affirmed reports of defendant's examining physicians (orthopedic and radiological).

Defendant's examining orthopedic physician, Dorothy Scarpinato, M.D., examined plaintiff on April 6, 2019, almost two years after the subject accident. Dr. Scarpinato noted that plaintiff told her that he had massage, physical therapy and chiropractic treatment, but no surgery, as a result of the accident. Dr. Scarpinato also noted that plaintiff's medical history prior the accident is positive for bilateral shoulder pain and for left total knee replacement surgery.

Dr. Scarpinato examined plaintiff's cervical and lumbar spine areas and left shoulder. Range-of-motion measurements were obtained with the aid of an inclinometer and/or a goniometer and normal values were obtained from the A.M.A. "Guides to the Evaluation of Permanent Impairment," Fifth Edition. Dr. Scarpinato also reviewed numerous medical records as listed on pages 3 and 4 of her report.

Plaintiff exhibited normal ranges of motion in all the areas of her body examined by Dr. Scarpinato. In addition, his reflexes, muscle testing and sensory responses were intact throughout all the areas examined. Dr. Scarpinato noted that there was no atrophy of plaintiff's muscles, or swelling, muscle spasms or trigger points upon palpation. Furthermore, the straight leg raising test, performed bilaterally in the supine position, yielded negative results. Although the plaintiff made a subjective complaint of posterior tenderness in his left shoulder, there was no swelling observed; impingement signs were negative and rotator cuff strength was 5/5 according to Dr. Scarpinato. As to his lumbar spine, plaintiff made a subjective complaint of paraspinal tenderness but there were no observable muscle spasms or trigger points elicited upon palpation.

Dr. Scarpinato concluded that her examination of plaintiff's left shoulder was "normal revealing a subject complaint of tenderness with no positive objective findings," and her diagnosis is "resolved left shoulder sprain." She further wrote that, "[t]here is no orthopedic disability noted upon today's examination.

Defendant's examining radiologist, Melissa Span Cohn, M.D., reviewed the left shoulder MRI that was performed approximately two months after the subject accident on July 26, 2017. Dr. Cohn was able to compare the July 26, 2017 MRI with a previous ultrasound of the same shoulder dated March 24, 2017. According to Dr. Cohn, the MRI and ultrasound show degenerative changes in plaintiff's left shoulder. Specifically, the tendinosis and tenosynovitis was present on the ultrasound, prior to the date of accident. Regarding the alleged superior labrum tear, Dr. Cohn states that "[t]he exact age of the labral tear is indeterminate based

exclusively upon its MRI appearance,” but “[t]here are no additional findings such as hemarthrosis, marrow edema or soft tissue swelling to confirm an acute injury to the shoulder.” Dr. Cohn opined as to the labral tear that it is “not associated with any findings to confirm an acute traumatic related injury.” With respect to the alleged acromioclavicular joint/rotator cuff, Dr. Cohn states that the findings of the MRI indicates that the injury “is due to chronic wear and tear and does not represent an acute traumatic related injury.” Further according to Dr. Cohn, “[t]he acromioclavicular joint represents the superior border of the tunnel through which the rotator cuff passes. Each time the patient moves his shoulder, there is abnormal stress upon the underlying rotator cuff. Initially, this will result in fraying of the surface of the tendon. With ongoing use of the shoulder, degeneration or tendinosis will occur.”

The plaintiff’s own treatment records submitted by defendant also document plaintiff’s pre-existing left shoulder osteoarthritis as of May 6, 2015. Plaintiff again made complaint of left shoulder pain on August 3, 2016, and on April 3, 2017, almost two months before the subject accident, plaintiff’s primary care physician assessed plaintiff as suffering from “left shoulder tendinitis and tears on biceps and subscapularis,” bicipital tendinitis, left shoulder,” and bicipital tenosynovitis.” On May 3, 2017, he was again assessed as suffering from “left shoulder tendinitis and tears.”

Accordingly, and based upon the affirmed reports of the defendants’ examining physicians, defendant has established his *prima facie* entitlement to summary judgment as a matter of law with respect to the following categories of injury claimed by plaintiff Cabrera: 1) permanent loss of use of a body organ, member, function or system; 2) permanent consequential limitation of use of a body organ or member, and 3) significant limitation of use of a body function or system.

Moreover, plaintiff Cabrera’s own deposition testimony establishes defendant’s *prima facie* entitlement to summary judgment as a matter of law as to those same categories of injury, as well as to his 90/180 claim (*Kuperberg v. Montalbano*, 72 AD3d 903 [2d Dept 2010]; *Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664 [2d Dept 2008]).

A plaintiff’s allegation of curtailment of recreation and household activities and an inability to lift heavy packages is generally insufficient to demonstrate that he or she was prevented from performing substantially all of his/her customary daily activities for not less than 90 days during the 180 days immediately following the accident (*Omar v. Goodman*, 295 AD2d 413 [2d Dept 2002]; *Lauretta v. County of Suffolk*, 273 AD2d 204 [2d Dept 2000]).

Here, plaintiff Cabrera testified that defendant’s vehicle struck the passenger side sliding door of plaintiff’s minivan vehicle, causing the minivan to spin around several times before it came to rest. Photographs identified by plaintiff indicate that the point of impact was just to the front of the rear driver’s wheel on the minivan. Co-plaintiff Melo was seated in the front passenger seat at the time of the accident. After the collision, plaintiff Cabrera was not bleeding, and he did not sustain any bruising although he testified that the entire left side of his body, including his upper arm and thighs, contacted the driver’s side door. His seat belt held him in. Immediately after the accident, plaintiff was able to converse with a friend of his and his wife’s who happened to be at the location of the accident and witnessed it. According to his testimony,

plaintiff did not experience any pain at the scene of the accident, but did so “a day after or two days after.”

No ambulance came to the accident scene, nor did plaintiff request an ambulance. Plaintiff’s niece was called by plaintiff and the niece drove plaintiff and the co-plaintiff to the hospital (Southside Hospital), where plaintiff Cabrera made no complaints to hospital staff. Only plaintiff Melo was treated and released according to Cabrera. There are, however, medical records from the emergency department of Southside Hospital submitted by defendant indicating that Cabrera was examined, and two x-rays of his left shoulder were taken. No fractures were seen on x-ray, and plaintiff’s acromioclavicular joint appeared to be “aligned and intact,” resulting in the radiologist’s impression: “Unremarkable radiographs of the shoulder.” Plaintiff was released with a patient information sheet entitled “Shoulder Sprain.”

Plaintiff Cabrera testified that he sought medical treatment two days after the accident, but he did not recall the name of the facility. When asked if it was Brentwood Chiropractic, he indicated that was where he went. When confronted with the facility’s records indicating that he did not go there until June 20, 2017, Mr. Cabrera conceded that it was accurate that he did not seek treatment before that date, which is almost three weeks after the accident.

At Brentwood Chiropractic, Mr. Cabrera complained about his left shoulder, back and neck. At deposition, plaintiff stated that he is claiming injury to his neck and left shoulder as a result of the subject accident. Plaintiff received treatment in the form of electrodes, heating pads, acupuncture, chiropractic adjustments and massages. According to his testimony, he was treated twice a week for four or five weeks until “insurance cut us off.” Plaintiff was not prescribed any medications by the providers at Brentwood Chiropractic, and plaintiff was able to drive himself and his wife to the treatment sessions.

Plaintiff further testified that he was referred to Pavilion Medical/Dr. Mosomillo, where he and his wife received “basically” the same type of treatment as they received at Brentwood Chiropractic. Plaintiff treated at Pavilion Medical for “a little more than a month.” Again, plaintiff was not prescribed any medications; however, he was given back and neck braces that he wore for two weeks. Aside from these medical providers, plaintiff did not see any other doctors relative to the subject accident, and no doctor ever advised plaintiff that he needed surgery for his left shoulder or his neck. Plaintiff last treated with a medical service provider relative to the accident “when the insurance cut us off,” which appears to have been some time in 2017, approximately three or four months after the occurrence of the subject accident.

Plaintiff acknowledged that he had an ultrasound of his left shoulder a couple of months before the accident, and that he complained of joint pain in his shoulders and knees as far back as August 2014. Plaintiff further acknowledged that he suffers from “chronic arthritis.” He also acknowledged that in August 2016 he saw his primary care physician for bilateral shoulder pain that had worsened.

When asked at deposition on January 31, 2019 if he had any complaints that he believed are from the subject accident, he answered, “No. not really.” He also testified that he does not take any medication prescribed for him as a result of this accident.

As of 2014, plaintiff retired from the military, and since 2016, he stated that he was receiving disability income as a result of injuries to his hands that he had sustained while he was in the Army. Plaintiff further testified that he cannot play handball as well as he used to before the accident, and that he stopped playing around July 2018; however, he acknowledged that he continued playing handball after the accident until he experienced severe left knee pain and inflammation and a doctor recommended that he stop playing because of his knee, which is not an injury that plaintiff claims to have resulted from this accident. According to plaintiff's testimony, there are no other activities that he did before the accident that are restricted in any way as a result of the accident. Plaintiff had moved to a condominium complex prior to the accident so that he would not have to shovel snow or mow a lawn; therefore, he did not have to hire anyone to help with those chores post-accident.

Plaintiff was able to drive to Washington, D.C. for a vacation with his wife after the accident, in August 2017. He did the driving because his wife does not drive, and they stayed in Washington, D.C. for four days.

#### Plaintiff Maria I. Melo

Mario Melo claims injuries to her cervical and lumbar spine areas, tears in both of her shoulders and a left knee effusion ("water on the knee"). With respect to this plaintiff, defendant submits, *inter alia*, the pleadings, plaintiff's hospital records, plaintiff's deposition transcript, records from plaintiff's treatment providers, and the affirmed reports of defendant's examining physicians (orthopedic and radiological).

The emergency department records submitted by defendant demonstrate that she was treated and released from the hospital on the day of the accident. The hospital records state that she "ambulates well,"<sup>1</sup> and x-rays of her chest and lumbosacral spine did not reveal any acute findings, subluxations or fractures. The soft tissues in her lumbosacral spine were "unremarkable." She was discharged with a form excusing her from work for one day, through May 30, 2017.

Defendant's examining orthopedic physician, Dorothy Scarpinato, M.D., examined plaintiff Melo on April 6, 2019, almost two years after the subject accident. Dr. Scarpinato noted that plaintiff told her that she had massage, physical therapy, acupuncture and chiropractic treatment, but no surgery, as a result of the accident. Dr. Scarpinato also noted that, according to Ms. Melo, there were no prior injuries to the areas allegedly injured as a result of the subject accident. Dr. Scarpinato noted that plaintiff was working at the time of the examination and that she walked with a normal gait.

Dr. Scarpinato examined plaintiff's cervical and lumbar spine areas, left knee and both shoulders. Range-of-motion measurements were obtained with the aid of an inclinometer and/or a goniometer and normal values were obtained from the A.M.A. "Guides to the Evaluation of

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<sup>1</sup> The Court notes that the hospital records of both plaintiffs indicate that there was no airbag deployment as a result of the subject accident; however, each of the plaintiffs testified that the airbags deployed.

Permanent Impairment,” Fifth Edition. Dr. Scarpinato also reviewed numerous medical records as listed on pages 3 and 4 of her report.

Plaintiff exhibited normal ranges of motion in all the areas of her body examined by Dr. Scarpinato. In addition, her reflexes, muscle strength and sensory responses were normal throughout all the areas examined. Dr. Scarpinato noted that there was no atrophy of plaintiff’s muscles, or swelling, muscle spasms or trigger points upon palpation. Additional orthopedic tests yielded negative results. Although the plaintiff made a subjective complaint of paraspinal tenderness during the cervical spine exam, there was no swelling observed; impingement signs in the shoulders were negative and rotator cuff strength was 5/5 according to Dr. Scarpinato. As to Ms. Melo’s lumbar spine, plaintiff made a subjective complaint of paraspinal tenderness but there were no observable muscle spasms or trigger points elicited upon palpation. Regarding plaintiff’s left knee, Dr. Scarpinato noted that there was no tenderness or swelling and “effusion is negative.”

Dr. Scarpinato concluded that her examination of plaintiff allegedly affected body parts revealed no orthopedic disability. According to her report, the examination of plaintiff’s neck, back, bilateral shoulders and left was normal, “revealing subject complaints of neck and back tenderness with no positive objective finding.” Dr. Scarpinato’s diagnosis “is resolved cervical spine strain, resolved lumbar spine strain, resolved bilateral shoulder sprain and resolved left knee sprain.” ’s left shoulder was “normal revealing a subject complaint of tenderness with no positive objective findings,” and her diagnosis is “resolved left shoulder sprain.”

Defendant’s examining radiologist, Melissa Span Cohn, M.D., reviewed the cervical spine MRI (July 7, 2017), the lumbosacral spine MRI (July 7, 2017), the left and right shoulder MRIs (July 8, 2017), and the left knee MRI (July 26, 2017). Dr. Cohn’s reports (Exhibits S through W) note the chronic and degenerative findings of the MRI examinations, rather than any acute traumatic related injuries.

Specifically as to the plaintiff’s shoulder tears, Dr. Cohn’s impression is that “the appearance of the left shoulder is very similar to the right shoulder. In both cases there are acromioclavicular joint degenerative changes and a laterally downsloping acromion process representing arthritis and normal anatomic variation, respectively. Degeneration of the rotator cuff is slightly more advanced in the left shoulder as compared with the right shoulder.” Dr. Cohn continues, writing that, “[s]imilar to the right shoulder, there is degeneration with intrasubstance tearing of the superior labrum. The bilateral symmetrical appearance of the shoulders is consistent with a bilaterally ongoing degenerative process and not with an acute traumatic related injury which would not demonstrate mirror image appearance to the shoulders.”

Dr. Cohn also did not identify any tendon, ligament or meniscal tear in plaintiff’s left knee, only a “trace amount” of fluid, and “[n]o acute traumatic related injury is identified.”

Accordingly, defendant has established his *prima facie* entitlement to summary judgment as a matter of law with respect to the following categories of injury claimed by plaintiff Melo: 1) permanent loss of use of a body organ, member, function or system; 2) permanent consequential

limitation of use of a body organ or member, and 3) significant limitation of use of a body function or system.

Like plaintiff Cabrera, Ms. Melo's deposition testimony establishes defendant's *prima facie* entitlement to summary judgment as a matter of law as to those same categories of injury, as well as to Melo's 90/180 claim.

Ms. Melo testifies that at the time of the accident she was employed in a factory, inspecting and packaging "glasses for cameras," including engraving and lifting boxes. After the subject accident, she missed one day of work and returned to work on the Wednesday or Thursday after Memorial Day. Her duties and hours at work remained the same. As of the date of her deposition on January 31, 2019, she was employed at the factory for nearly seven years.

When the accident occurred, she was the seat-belted, front seat passenger in the vehicle driven her husband and co-plaintiff, Cabrera. She testified that she did not lose consciousness and that her seat belt held her in. She was not bleeding after the accident, nor did she sustain any bruising. Plaintiff testified that her forehead, arm, neck and back came into contact with the interior of the vehicle. Plaintiff did not request an ambulance or medical attention at the accident scene. Her niece arrived on scene and transported plaintiff and Cabrera to Southside Hospital. Plaintiff denied making any complaints at the hospital, but the "checked [her] out." Ms. Melo testified that she took "some pills for the pain," but did not think that she left the hospital with any prescription. After the day of the accident, she went to "[s]ome chiropractor in Brentwood" complaining of pain in her neck, back, right arm and head. According to Ms. Melo, she received treatment perhaps two or three times per week, but she did not recall how long she attended treatment. She agreed that her husband's estimate of four or five weeks sounded right. After treatment at this initial chiropractor, she and her husband received treatment at another facility, including massages, machines and exercises. Ms. Melo estimated that she received this further treatment for an additional period of approximately four weeks.

At the time of her January 2019 deposition, Ms. Melo had no further appointments with any medical providers as a result of the subject accident. She apparently last treated for the alleged injuries in 2017. She further testified that she never injured her neck, back, shoulders, head or knee before the subject accident, nor since the accident.

At deposition, Ms. Melo testified that she was experiencing pain in her neck, which, according to her, is constant. She stated that she takes over-the-counter ibuprofen for pain. She also stated that her back pain is constant, but her right shoulder bothers her when she has a lot of movement in her arm. She also testified that she can no longer perform "normal exercises," and that she gets a lot of pain in her back and hip when she walks a lot. Aside from the foregoing, she testified that no other activities have been affected by the subject accident. Regarding her gym membership, plaintiff testified that she went to the gym "sometimes" prior to the accident. She later explained that she would go three times per week, but after the accident she did not return. She did not recall the name of the gym, or when she first joined that gym. Plaintiff also did not recall precisely when she traveled to Colombia to visit her family, but she did recall going to Washington, D.C. with her husband in August 2017.

A plaintiff's allegation of curtailment of recreation and household activities and an inability to lift heavy packages is generally insufficient to demonstrate that he or she was prevented from performing substantially all of his/her customary daily activities for not less than 90 days during the 180 days immediately following the accident (*Omar, supra; Laretta, supra*).

The burden now shifts to each of the plaintiffs to demonstrate, by the submission of objective proof of the nature and degree of the injury, that they each sustained a serious injury or that there are questions of fact as to whether the purported injury, in fact, is serious (*Perl v Meher*, 18 NY3d 208, 218-219 [2011]).

#### The Opposition

In opposition, plaintiffs submit MRI reports, and affirmations from Maxim Tyorkin, M.D. and Nicholas Martin, D.C.

In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law §5102(d) (*see Toure, supra; Scheer v Koubek*, 70 NY2d 678, 679 [1987]; *Munoz v Hollingsworth*, 18 AD3d 278, 279 [1st Dept 2005]).

Furthermore, a plaintiff cannot defeat a motion for summary judgment, and successfully rebut a *prima facie* showing that he/she did not sustain a serious injury, merely by relying on documented subjective complaints of pain (*Uddin v Cooper*, 32 AD3d 270, 271 [1st Dept 2006] *lv to appeal denied* 8 NY3d 808 [2001]).

None of the affirmed reports of the radiologists accompanying the MRI reports (Plaintiff's Exhibits A and C) causally relate any of the findings for either plaintiff to the subject accident. Glaringly absent is any radiologist's affirmation concerning Ms. Melo's shoulders and left knee, which constitute three of her injury claims in this matter.

Dr. Tyorkin's affirmation relies heavily upon an affirmed report of Timothy Mosomillo, D.O. of Pavilion Medical. Dr. Mosomillo's report dated June 20, 2017 fails to state the objective means by which he obtained range-of-motion measurements of David Cabrera's left shoulder and other uninjured body parts, or does it state the source for the normal measurements to which he compared his findings. Accordingly, plaintiff has failed to establish an objective basis so that the respective qualitative assessments of plaintiff could readily be challenged by any of defendant's expert(s) during cross examination at trial and be weighed by the trier of fact (*see Toure, supra* at 350 [2002]). Not only Dr. Mosomillo's statement as to causality rendered speculative by this failure, but even if it were competent evidence, which it is not, there is nothing in that report remotely suggesting that Mr. Cabrera was prevented from engaging in substantially all of his normal and daily activities shortly after the accident. Moreover, the statement as to causal relation to the subject accident is not only equivocal, but Dr. Mosomillo apparently had not considered Mr. Cabrera's history of left shoulder complaints long before the subject accident. Accordingly, to the extent that Dr. Tyorkin relies on Dr. Mosomillo's report, Dr. Tyorkin's affirmation is unsupported.

Based upon his affirmation, it appears that Dr. Tyorkin first examined David Cabrera on March 4, 2020, little more than one month after defendant made the instant motion. Aside from that one date listed in his affirmation, it is unknown if Dr. Tyorkin is continuing to treat Mr. Cabrera; Dr. Tyorkin does not say. In any event, Dr. Tyorkin fails to state the objective basis for the normal range-of-motion values set forth in paragraph 6 of his Affirmation. Dr. Tyorkin also fails to list what, if any, medical records he reviewed, other than Dr. Mossomillo’s report, indicating Mr. Cabrera’s significant medical history as related to his left shoulder, and how that history relates to the alleged left shoulder injuries claimed by plaintiff Cabrera.

Dr. Martin’s affidavit as relates to plaintiff Melo is likewise defective and unavailing in raising a triable issue of fact. There is no statement contained therein that raises a triable issue of fact as to Ms. Melo’s 90/180 claim, and there is no objective basis for the normal range-of-motion values set forth in paragraph 7 of his affidavit. The fact that the plaintiff may have exhibited muscle tightness and spasm in her cervical and lumbar spine two days after the subject accident does not rise to the level of “serious injury.” Dr. Martin’s narrative as to his last examination of plaintiff’s cervical and lumbar spine areas on September 13, 2017 also fails to set forth the source of the normal values listed in his report.

After the instant motion was filed, Dr. Martin re-examined plaintiff Melo on February 17, 2020, only as to her lumbar and cervical spine. Again, there is no stated objective basis for the normal range-of-motion values set forth. Moreover, nowhere in Dr. Martin’s report does he address the emergency department records showing normal x-rays, including the finding that there were no fractures or subluxation, and soft tissues were unremarkable on the day of the accident. Notably, Dr. Martin makes only a passing and incredibly brief reference to “some desiccation noted on the MRI findings,” he does not directly address Dr. Cohn’s statements as to multilevel degenerative changes in Ms. Melo’s cervical and lumbar spine areas. There is also no specific mention by Dr. Martin as to his ever having examined plaintiff’s shoulders or left knee, and he states that he treated her neck and low back; therefore, the shoulder and knee injuries appear to have been abandoned by Melo.

For all the foregoing reasons, the plaintiffs have failed to raise a triable issue of fact as to any of the categories of injury claimed in their joint Bill of Particulars. Accordingly, defendant’s motion is granted in its entirety and the complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: October 23, 2020  
Riverhead, NY

  
CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ X ] NON-FINAL DISPOSITION [ ]