

<b>Narvaez v Pershinsky</b>
2020 NY Slip Op 34995(U)
April 16, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 603205/2017E
Judge: William B. Rebolini
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK**

**I.A.S. PART 7 - SUFFOLK COUNTY**

**ORIGINAL**

**PRESENT:**

**WILLIAM B. REBOLINI**  
**Justice**

Luisa K. Narvaez,

Plaintiff,

-against-

Robert Pershinsky, Cody Robert Pershinsky,  
Muhammad A. Naqvi and Ali J. Naqvi,

Defendants.

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Motion Sequence No.: 001; MG; CD

Motion Date: 6/5/19

Submitted: 7/10/19

Motion Sequence No.: 002; MD

Motion Date: 6/5/19

Submitted: 7/10/19

Motion Sequence No.: 003; MD

Motion Date: 7/10/19

Submitted: 7/10/19

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Clerk of the Court

Upon the following papers read on these **electronically filed** motions for summary judgment: Notice of Motion and supporting papers by Naqvi defendants, filed April 3, 2019; by Pershinsky defendants, filed April 17, 2019; by Naqvi defendants, filed May 24, 2019; Answering Affidavits and supporting papers by plaintiff, filed June 24, 2019; by Pershinsky defendants, filed July 2, 2019; Replying Affidavits and supporting papers by Naqvi defendants, filed June 28, 2019; by Naqvi defendants, filed June 28, 2019; by Naqvi defendants, filed July 8, 2019; by Naqvi defendants, filed August 7, 2019; it is

**ORDERED** that the motions by defendants Muhammad Naqvi and Ali Naqvi and the motion by defendants Robert Pershinsky and Cody Pershinsky are consolidated for purposes of a determination herein; and it is further

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**ORDERED** that the motion by defendants Muhammad Naqvi and Ali Naqvi for summary judgment dismissing the complaint against them based on plaintiff's failure to meet the serious injury threshold of Insurance Law § 5102 (d) is granted; and it is further

**ORDERED** that the motion by defendants Robert Pershinsky and Cody Pershinsky for summary judgment dismissing the complaint against them based on plaintiff's failure to meet the serious injury threshold of Insurance Law § 5102 (d) is granted; and it is further

**ORDERED** that the motion by defendants Muhammad Naqvi and Ali Naqvi for summary judgment dismissing the complaint against them on the basis of liability is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Luisa Narvaez, as a result of a multi-vehicle accident, which occurred on December 11, 2015, on Bay Shore Road, near its intersection with Brook Avenue, in Babylon, New York. It is alleged that the accident occurred when the vehicle owned by defendant Robert Pershinsky and operated by defendant Cody Pershinsky struck the rear of the vehicle owned by defendant Muhammad Naqvi and operated by defendant Ali Naqvi. The Naqvi vehicle was then propelled forward into the vehicle in which plaintiff was a passenger. Plaintiff alleges, in relevant part, that she suffered various injuries as a result of the motor vehicle accident, including sprains to her right shoulder, right knee, cervical and lumbar regions of her spine, a tear of the anterior labral of her right shoulder, aggravation of degenerative changes to the lumbar region of her spine, and aggravation of dislocation of her right hip, post-surgical intervention.

The Naqvi defendants seek an order granting summary judgment dismissing the complaint against them on the ground that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). They submit, in support of the motion, copies of the pleadings, the bill of particulars, the transcript of plaintiff's deposition testimony, and the affirmed medical report of orthopedic surgeon Gary Kelman, M.D. In a subsequent motion, the Naqvi defendants move for summary judgment dismissing the complaint against them on the ground Ali Naqvi was not negligent in the operation of his vehicle. They submit, among other things, copies of the pleadings, an uncertified police report, and the transcripts of the deposition testimony of plaintiff, Ali Naqvi, and Cody Pershinsky.

The Pershinsky defendants also seek an order granting summary judgment dismissing plaintiff's complaint on the ground that she did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). They submit, in support of the motion, copies of the pleadings, the bill of particulars, and the unaffirmed medical reports of neuroradiologist Michele Rubin, M.D., and radiologists Mehool Shukla, M.D., and Vincent Frazzini, Jr., M.D.

In opposition to the motions, plaintiff argues that successive summary judgment motions are strongly disapproved and that a triable issue of fact remains as to whether she sustained a serious injury. Plaintiff submits, among other things, a certified police report, no-fault claim forms, and the affirmed medical reports of Kevin Weiner, M.D., Michele Rubin, M.D., and Felix Karafin, M.D.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to

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eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Insurance Law § 5102 (d) defines “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.”

A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing, *prima facie*, that the plaintiff did not sustain a “serious injury” (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Beltran v Powow Limo, Inc.*, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant’s motion relies upon the findings of the defendant’s own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (*Brite v Miller*, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff’s deposition testimony and unsworn medical reports and records prepared by the plaintiff’s treating medical providers (*Uribe v Jimenez*, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; *Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Pagano v Kingsbury*, *supra*). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which raises a material issue of fact (*Gaddy v Eyley*, *supra*; *Zuckerman v City of New York*, *supra*; *Beltran v Powow Limo, Inc.*, *supra*).

A plaintiff claiming injury within the “permanent consequential limitation” or “significant limitation” of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence demonstrating the extent or degree of the limitation of movement caused by the injury and its duration (*Schilling v Labrador*, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; *McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose, and use of the body part (*Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Toure v Avis Rent A Car*

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*Systems, Inc., supra; McEachin v City of New York*, 137 AD3d 753, 25 NYS3d 672 [2d Dept 2016]). Proof of a herniated or bulging disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a “serious injury” within the meaning of the statute (*Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Hayes v Vasilios*, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; *Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; *Stevens v Sampson*, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; *Catalano v Kopmann*, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; *Casimir v Bailey*, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; *Keith v Duval*, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). The mere existence of a tear is not a serious injury without objective evidence of the extent and duration of the alleged physical limitations resulting from the injury (see *Bamundo v Fiero*, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; *McLoud v Reyes, supra; Resek v Morreale*, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]; *Simanovskiy v Barbaro*, 72 AD3d 930, 899 NYS2d 324 [2d Dept 2010]; *Little v Locoh*, 71 AD3d 837, 897 NYS2d 183 [2d Dept 2010]; *Larson v Delgado*, 71 AD3d 739, 897 NYS2d 167 [2d Dept 2010]). Sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*Rabolt v Park*, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; *Washington v Cross*, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; *Maenza v Letkajornsook*, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Further, a plaintiff seeking to recover damages under the “90/180-days” category of “serious injury” must prove the injury is “medically determined,” meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*Pryce v Nelson*, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; *Strenk v Rodas*, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; *Beltran v Powow Limo, Inc., supra*). A plaintiff must demonstrate that his or her usual activities were curtailed to a “great extent rather than some slight curtailment” (*Licari v Elliott*, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

The Naqvi defendants’ submissions established a prima facie case that plaintiff’s alleged injuries do not constitute “serious injuries” within the meaning of Insurance Law § 5102 (d) (see *Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra; Beltran v Powow Limo, Inc., supra*). Plaintiff’s alleged 90/180-day injury was sufficiently refuted, prima facie, by her bill of particulars that she was confined to bed or home for less than one month following the accident and by her testimony that she missed two full days of college classes and returned to work, albeit with some limitations, two weeks after the accident (*Ferazzoli v Hamilton*, 141 AD3d 686, 35 NYS3d 654 [2d Dept 2016]; *Pryce v Nelson, supra; Strenk v Rodas, supra; Beltran v Powow Limo, Inc., supra*). In addition, the Naqvi defendants presented competent evidence that none of plaintiff’s alleged injuries fall under the “permanent consequential limitation,” “permanent loss,” or “significant limitation” of use categories of the statute (*Perl v Meher, supra; Schilling v Labrador, supra; Rovelov v Volcy, supra*).

The affirmed medical report of Dr. Kelman stated, in relevant part, that during a May 2018 orthopedic examination, plaintiff exhibited normal joint function in her cervical and lumbar regions, and that no spasm, muscle atrophy, or tenderness was detected upon palpation of her spine. Dr. Kelman found plaintiff’s sensory responses intact throughout her upper and lower extremities. Plaintiff tested negative in the foraminal compression and straight leg raising tests. Dr. Kelman acknowledged that plaintiff had a pre-existing condition of lumbar spondylosis. Further, he opined that plaintiff exhibited normal joint function in her shoulders, and that no tenderness, muscle atrophy, or crepitus was present. In addition, plaintiff tested negative in the impingement and

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O'Brien's tests. Dr. Kelman also stated that plaintiff exhibited normal joint function in her hips, and that he detected no tenderness upon palpation. Dr. Kelman acknowledged that plaintiff had a pre-existing condition of a right hip dislocation in 2014 with subsequent surgery that left a healed scar. Finally, Dr. Kelman stated that plaintiff exhibited normal joint function in her knees, and that he did not detect tenderness, muscle atrophy, or patello-femoral crepitus. Plaintiff tested negative in the McMurray's, Lachman's, anterior and posterior drawer signs, and Sage tests. Dr. Kelman diagnosed plaintiff as having suffered sprains to her cervical and lumbar regions, right shoulder, right hip, and right knee, and concluded that such conditions have resolved (*see Brite v Miller, supra; Damas v Valdes, supra; Pagano v Kingsbury, supra*). Further, Dr. Kelman found "no orthopedic disability" based upon the examination and medical documentation he reviewed.

The Naqvi defendants having met their initial burden on the motion, the burden then shifted to plaintiff to raise a triable issue of fact (*see Gaddy v Eyler, supra; Zuckerman v City of New York, supra; Beltran v Powow Limo, Inc., supra; Pagano v Kingsbury, supra*). Plaintiff failed to raise an issue of fact as to whether her injuries constitute "serious injuries." Plaintiff's submissions are insufficient to raise a triable issue of fact as to whether she sustained non-permanent injuries that left her unable to perform substantially all her normal daily activities for at least 90 of the 180 days immediately following the accident (*see John v Linden, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; Il Chung Lim v Chrabaszcz, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; Rivera v Bushwick Ridgewood Props., Inc., 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]*). In addition, the subjective complaints of pain expressed by plaintiff in her affidavit are insufficient to raise a triable issue of fact (*see Licari v Elliott, supra; Rovelov v Volcy, supra; Christian v Waite, 61 AD3d 581, 877 NYS2d 319 [1st Dept 2009]; Dantini v Cuffie, 59 AD3d 490, 873 NYS2d 189 [2d Dept 2009]*).

In his affirmed report, Dr. Weiner stated, in relevant part, that during a March 10, 2016 examination, plaintiff exhibited significant limitations in joint function in her cervical and lumbar regions and that he detected tenderness upon palpation of her cervical region. Dr. Weiner opined that plaintiff had "limited range of motion" in her right shoulder and tested positive in the Yergason's and drop arm sign tests. He further opined that plaintiff exhibited "limited internal and external rotation" and that he detected tenderness upon palpation of her right hip. Dr. Weiner stated that during a March 24, 2016 examination, plaintiff presented to Dr. Weiner again with complaints of pain and tested positive in the Spurling's test on the right side and in the Tinel's test over the cubital tunnel. Dr. Weiner further stated that on May 5, 2016, plaintiff received an epidural injection to her lumbar region. On May 19, 2016, plaintiff again complained of pain and Dr. Weiner found limited range of motion in her lumbar region. During a May 2019 examination, plaintiff complained of back and right shoulder pain. She again exhibited significant limitations in joint function of her cervical and lumbar regions.

However, Dr. Weiner's findings of range of motions restrictions are based only on examinations performed in March 2016, May 2016, and May 2019, approximately three, five, and 40 months, respectively, after the accident. Therefore, Dr. Weiner's affirmation is insufficient to demonstrate the duration of the claimed range of motion limitations, and that such limitations are causally related to the subject accident (*see Pryce v Nelson, supra; Rovelov v Volcy, supra; McLoud v Reyes, supra*). In addition, Dr. Weiner failed to set forth the objective tests utilized to measure the joint function of plaintiff's spine, such as through the use of a goniometer or inclinometer (*see Black*

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*v Robinson*, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]; *Gamberg v Romeo*, 289 AD2d 525, 736 NYS2d 64 [2d Dept 2001]; *Junco v Ranzi*, 288 AD2d 440, 733 NYS2d 897 [2d Dept 2001]; *see also Bayk v Martini*, 142 AD3d 484, 35 NYS3d 923 [2d Dept 2016]; *Schilling v Labrador*, *supra*; *Durand v Urick*, 131 AD3d 920, 15 NYS3d 475 [2d Dept 2015]).

Dr. Rubin's radiological findings failed to raise a triable issue of fact. Dr. Rubin opined that the magnetic resonance imaging ("MRI") examination of plaintiff's right shoulder conducted approximately three months after the accident showed posttraumatic deformity of the anterior glenoid margin, an anterior labral tear, granulation tissue within the rotator interval secondary to capsulitis, supraspinatus impingement, and a possible Hill-Sachs lesion of the humeral head. However, Dr. Rubin failed to provide additional objective medical evidence showing that the accident resulted in significant physical limitations (*see Pommells v Perez*, *supra*; *Hayes v Vasilios*, *supra*; *Scheker v Brown*, *supra*) or that any of these conditions are causally related to the accident (*see Perl v Meher*, *supra*; *Schilling v Labrador*, *supra*).

Dr. Karafin's findings also failed to raise a triable issue of fact. Dr. Karafin opined that the electromyography ("EMG") examination of plaintiff conducted approximately three months after the accident revealed evidence of bilateral L5-S1 radiculopathy. However, Dr. Karafin failed to provide additional objective medical evidence showing that the accident resulted in significant physical limitations (*see Pommells v Perez*, *supra*; *Hayes v Vasilios*, *supra*; *Scheker v Brown*, *supra*) or that any of these conditions are causally related to the accident (*see Perl v Meher*, *supra*; *Schilling v Labrador*, *supra*).

Accordingly, the motion by defendants Muhammad Naqvi and Ali Naqvi for summary judgment dismissing the complaint for plaintiff's failure to meet the serious injury threshold of Insurance Law § 5102 (d) is granted. Therefore, in light of this determination, the motion by the Pershinsky defendants for summary judgment dismissing the complaint for plaintiff's failure to meet the serious injury threshold is granted. The motion by the Naqvi defendants for summary judgment on the issue of liability is denied, as academic.

Dated: April 16, 2020

**WILLIAM B. REBOLINI**/s/ electronically signed (Covid-19) **HON. WILLIAM B. REBOLINI, J.S.C.**

  X   FINAL DISPOSITION            NON-FINAL DISPOSITION