

<b>Porfil v City of New York</b>
2021 NY Slip Op 30099(U)
January 11, 2021
Supreme Court, New York County
Docket Number: 151317/2018
Judge: Dakota D. Ramseur
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAKOTA D. RAMSEUR**  
*Justice*

**PART IAS MOTION 5**

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**INDEX NO. 151317/2018**

ANARIELLE PORFIL, RUTH MEJIA,  
Plaintiff,

**MOTION DATE 05/08/2020**

**MOTION SEQ. NO. 001**

- v -

THE CITY OF NEW YORK, NEW YORK CITY SANITATION  
DEPARTMENT, TABITHA SMITH, CARLOS REYES  
Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 58, 59

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiffs Anarielle Porfil<sup>1</sup> and Ruth Mejia (Mejia) commenced this action against The City of New York, New York City Sanitation Department, Tabitha Smith (collectively, the City), and Carlos Reyes (Reyes) to recover for injuries allegedly sustained in a May 19, 2017 motor vehicle accident adjacent to the premises located at 121 East 131st Street, New York, New York. Defendant Reyes now moves pursuant to CPLR 3212 for summary dismissal of Mejia’s complaint. The City defendants also cross-move for summary dismissal of the complaint. Plaintiff opposes the motion and cross-motion. For the reasons below, and after oral argument, wherein the parties consented to the dismissal of this action as against the Sanitation Department, the motion and cross-motion are granted in part.

**BACKGROUND**

Plaintiff Mejia testified that at the time of her accident, she was standing outside of Reyes’ taxicab, when the vehicle was allegedly struck by a sanitation truck (NYSCEF # 44, pla 50-h tr at 27:4-12). Mejia testified that as a result of the impact, the taxicab’s door came in contact with her neck, lower back and right shoulder (*id.* at 29:11-30:2; 30:18-31:2; 31:19-20). Mejia was 19 years old at the time of the accident. At the 50-h hearing on August 28, 2017, Mejia testified that she did not miss any time from school (*id.* at 7:10-12), whereas at her deposition on November 8, 2018, she testified that she missed one day of school (NYSCEF # 45, Mejia tr at 51:6-10). Mejia further testified that as a result of her injuries, she is no longer able to play lacrosse, which she also states she stopped playing after she completed high school and did

<sup>1</sup> Pursuant to the October 13, 2020 stipulation, plaintiff Anarielle Porfil discontinued her claims against all defendants (NYSCEF # 60).

not play in college (*id.* at 53:14-19). Further, Mejia testified that she is also unable to go swimming as a result of her injuries, and that she went swimming a handful of times per month prior to the accident (*id.* at 54:2-4). Moreover, Mejia testified she is also no longer able to use the gym, and that prior to the accident she would use the gym “maybe, like once a week, or a couple times a month” (*id.* 52:21-24).

Mejia’s bill of particulars alleges that she sustained “serious injury” as defined by Insurance Law § 5102 as a result of the accident, including: L4-L5 central herniation; L5-S1 disc bulge with impingement upon the thecal sac and originating S1 root; lumbar and cervical disc bulges; partial thickness articular surface tear of the supraspinatus tendon of the right shoulder; soft tissue contusion within the posterior subcutaneous fat of the right shoulder; left shoulder partial interstitial; tear of the infraspinatus tendon and internal derangement; and post-concussion syndrome (NYSCEF # 24 at 5-6). According to Mejia, she did not suffer from any of the complained of injuries until after the accident.

## THE PARTIES’ EXPERT REPORTS

In support of their respective motions, defendants submit the medical report of Dr. Richard Levitt, an independent medical examiner for defendants, whom performed an orthopedic examination on Mejia on December 6, 2018 (NYSCEF # 43). After examining Mejia, Dr. Levitt diagnosed Mejia with cervical spine sprain, lumbar spine, and bilateral shoulder sprain, all of which he determined to be resolved, and further determined that Mejia had no orthopedic disability (*id.*). Dr. Levitt’s examination found a below normal range of motion for plaintiff’s cervical and lumbar spine and bilateral shoulders (*id.* at 3-4). Dr. Levitt further notes that Mejia discontinued medical treatment related to the accident “last summer” (*id.* at 2). Defendants also submit the medical report of Dr. Dana Mannor, an independent medical examiner for defendants, whom performed an orthopedic examination on Mejia on January 23, 2019 (NYSCEF # 42). Dr. Mannor determined that Mejia’s cervical spine sprain/strain, lumbar spine sprain/strain and bilateral shoulder sprain/strain to be resolved (*id.* at 4). Dr. Mannor further determined that Mejia “[i]s capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties” (*id.*). Dr. Mannor further determined plaintiff had a normal range of motion for plaintiff’s cervical and lumbar spine and bilateral shoulders (*id.*). Defendants also submit the medical report of Dr. Darren Fitzpatrick, a radiologist whom reviewed Mejia’s imaging on December 10, 2019, wherein he determined that Mejia’s alleged injuries were the result of degeneration and not caused by traumatic injury (NYSCEF # 38).

In opposition, Mejia submits the medical report of Dr. Thomas Mathew, whom examined Mejia on three occasions, June 29, 2017, February 28, 2018, and June 23, 2020 (NYSCEF # 53). Dr. Mathew indicated that Mejia undertook physical therapy from her first visit through the second visit, at which point Dr. Mathew determined that Mejia “achieved maximum medical improvement and was unlikely to improve despite continuing rehabilitative treatment” (*id.* at 1). Dr. Mathew determined that after the June 2020 evaluation, Mejia’s range of motion concerning her cervical and lumbar spine and bilateral shoulders are below normal (*id.* at 18-19). Dr. Mathew further states that Mejia’s alleged injuries are traumatically induced, permanent in nature, and causally related to the subject incident (*id.* at 2). Mejia also submits a document entitled

“rebuttal” by Dr. David Delman, the medical director of plaintiff’s treating facility, DHD Medical. According to Dr. Delman, Mejia’s alleged injuries were consistent with a traumatic injury and not degenerative (*id.* at 21-23). Mejia was also treated by Dr. Charles DeMarco on May 31, 2017, June 30, 2017, August 4, 2017 and October 13, 2017 (NYSCEF # 51).

## DISCUSSION

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The movant’s initial burden is a heavy one; on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its prima facie showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant’s papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]).

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 on-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.”

At the outset, defendants meet their prima facie burden that Mejia did not suffer a permanent consequential limitation of use of function or system or a significant limitation of use of a body function or system, by submitting the reports of Dr. Mannor and Dr. Levitt, wherein they each determined that Mejia’s diagnosis concerning her cervical and lumbar spine and bilateral shoulder sprain were resolved and that each body part returned to normal functionality (*see Alverio v Martinez*, 160 AD3d 454, 454 [1st Dept 2018] [finding that plaintiff did not sustain a serious injury by submitting the report of an orthopedic expert, “who found no significant limitations and negative clinical results, and opined that plaintiff had resolved sprains”]; *Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013] [absence of serious injury, where defendant submitted “[t]he affirmed report of his orthopedist, who examined plaintiff 2 ½ years after the accident and found full range of motion, negative test results, and resolved sprains in the cervical spine, lumbar spine, and left shoulder”]). In opposition, Dr. Mathew’s June 23, 2020 evaluation of Mejia, wherein he determined that Mejia suffered from cervical and lumbar spine and bilateral shoulder limitations and that her alleged injuries are permanent in nature, is sufficient to raise an issue of fact requiring trial.

Defendants also argue that Mejia's alleged injuries were not causally related to the subject accident. To that end, defendants contend that Mejia terminated her treatment at or around February 28, 2018 and that she did not seek treatment concerning her injuries until she opposed the instant motion. As noted above, Dr. Matthew determined that Mejia reached her maximum medical improvement and recommended that Mejia discontinue physical therapy. Accordingly, plaintiff has adequately explained her gap in treatment (*see Barhak v. Almanzar-Cespedes*, 101 AD3d 564, 565 [1st Dept 2012] ["Plaintiff also adequately addressed his gap in treatment through his treating doctor's explanation that treatment had stopped because plaintiff reached maximum medical improvement"] [internal quotation marks omitted]; *Ayala ex rel. Quintana v Cruz*, 95 AD3d 699, 700 [1st Dept 2012] [finding an issue of fact where "plaintiffs' treating physician opined that plaintiffs had reached maximum medical improvement when treatment stopped"]).

Defendants further contend that Dr. Fitzpatrick's report demonstrates that Mejia's alleged injuries are due to degeneration—and not the result of the subject accident. As noted above, Dr. Delman's report avers that Mejia's injuries are causally related to the subject accident. Mejia's expert reports along with her "relatively young age" at the time of the accident, and that she did not have any of the complained injuries prior to the accident, raise an issue of fact as to the cause of Mejia's injuries (*see Massillon v Regalado*, 176 AD3d 600, 601 [1st Dept 2019] [finding that plaintiff rebutted defendant's showing that plaintiff's condition was degenerative by producing, among other things, MRI reports, "[a]long with the opinions of plaintiff's treating doctors that the conditions were causally related to the accident"]; *Fathi v Sodhi*, 146 AD3d 445, 446 [1st Dept 2017] ["(p)laintiff raised an issue of fact as to his cervical spine injury by submitting an affirmation by his treating physician, who found limitations in range of motion and opined that the cervical disc conditions were caused by the accident"]).

As for Mejia's 90/180 claim, defendants meet their prima facie burden by submitting Mejia's bill of particulars, wherein she alleges that she was "confined to bed for approximately two days" and "confined to home for approximately two days" (NYSCEF # 36, at ¶ 5) (*see Mitchell v Calle*, 90 AD3d 584, 585 [1st Dept 2011] [finding that defendants made a prima facie showing that plaintiff did not sustain a 90/180-day injury, where plaintiff "[w]as confined to bed for only three days and to home for a only week"]. "When construing the statutory definition of a 90/180-day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment (*Thompson v Abbasi*, 15 AD3d 95, 100–101 [1st Dept 2005], citing *Gaddy v. Eyer*, 79 NY2d 955, 958 [1992]).

In opposition, Mejia raises a triable issue of fact as to some of her 90/180 claims. At the outset, Mejia submits an affidavit wherein she claims she was prevented from performing substantially all of the activities of her daily life from before the accident, that is contradicted, in part, by both her 50-h and EBT transcripts. For instance, Mejia affirmed that she missed two days of school as a result of the accident. Mejia also affirmed that prior to the accident: she played three to four games of lacrosse per weekend; she went swimming three to four times per week; and that she worked out in her school gym four to five times a week (NYSCEF # 50, Mejia aff at 3-4). Mejia's "[a]ffidavit submitted in opposition clearly contradicts [her] own deposition testimony, and appears to have been tailored to avoid the consequences of that

testimony. As such, it is insufficient to raise a triable issue of fact” (*Blackmon v Dinstuhl*, 27 AD3d 241, 242 [1st Dept 2006], citing *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318 [1st Dept 2000]; see also *Nguyen v Abdel-Hamed*, 61 AD3d 429, 430 [1st Dept 2009]).

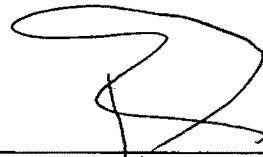
However, the balance of Mejia’s 90/180 claim raises a triable issue of fact. Mejia’s claim that during the relevant period of time she was unable to perform household “chores that required strenuous physical activity,” including “doing the laundry, washing the dishes, sweeping or mopping” and helping to care for her younger sisters as she was able to prior to the accident (Mejia aff at 3-4), coupled with Dr. Mathew’s determination that Mejia’s injuries were attributable to the accident raise issues that only a jury can resolve. Accordingly, the branches of defendants’ motion and cross-motion for summary dismissal of Mejia’s 90/180 claim is granted in part.

Accordingly, it is hereby

ORDERED that the motion of defendant Carlos Reyes, and the cross-motion of The City of New York, New York City Sanitation Department, and Tabitha Smith, for summary dismissal pursuant to CPLR 3212, are granted as to plaintiff Ruth Mejia’s 90/180 claims as discussed above and to the extent that her affidavit submitted in opposition contradicts with her prior testimony, and as to all claims against the New York City Sanitation Department only; and it is further

ORDERED that counsel for defendant Carlos Reyes shall serve a copy of this order, with notice of entry, upon all parties within ten (10) days of entry.

This constitutes the decision and order of the Court.



1/11/2021  
DATE

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DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE

