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| <b>Lopez v Debraz</b>                                                                                                                                                                                                          |
| 2021 NY Slip Op 33471(U)                                                                                                                                                                                                       |
| December 23, 2021                                                                                                                                                                                                              |
| Supreme Court, Westchester County                                                                                                                                                                                              |
| Docket Number: Index No. 61540/2018                                                                                                                                                                                            |
| Judge: Sam D. Walker                                                                                                                                                                                                           |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X  
JOSE R. LOPEZ,

Plaintiff,

DECISION and ORDER

Index No. 61540/2018

Seq # 1

-against-

GABRIEL DEBRAZ,

Defendant.  
-----X

The following papers were read on a motion for an order, pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment:

Notice of Motion/Affirmation in Support/Exhibits A-E  
Affirmation in Opposition/Exhibits A-B

Factual and Procedural Background

This action arises out of a motor vehicle accident that occurred on March 3, 2018, on the Hutchinson River Parkway, 0.2 miles south of the intersection with Mamaroneck Avenue, in Scarsdale, Westchester County, New York, when the plaintiff was a passenger in an Uber. The plaintiff, Jose R. Lopez ("Lopez/plaintiff") commenced the action on July 30, 2018, by filing a summons and verified complaint. The defendant, Gabriel Debraz ("Debraz/defendant") served and filed a verified answer, joining issue, the parties completed discovery and the plaintiff filed a note of issue and certificate of readiness on March 19, 2021.

The plaintiff's bill of particulars alleges, *inter alia*, the following serious injuries:

[a] - Left Shoulder - partial rotator cuff tear, labral tear, full-thickness tear of distal suprapinatus tendon with tendinosis/tendinopathy, partial tear of the subscapularis with tendinosis/tendinopathy resulting in arthroscopic debridement.

[b] - Thoracic Spine - segment and somatic dysfunction.

[c] - Lumbar Spine - diffuse disc herniation with compression of the anterior thecal sac and bilateral neural foramina and bilateral exiting nerve root at L2/L3. Diffuse disc herniation at L3/L4; diffuse disc bulge with encroachment

on the neural foramina at L4/L5; diffuse disc herniation with compression of anterior thecal sac and bilateral neural foramina and bilateral exiting nerve root at L5/S1.

[d] - Cervical Spine - disc bulge with compression of anterior thecal sac and partial effacement of anterior subarachnoid space at C5/6 with radiculopathy.

[e] - Left Knee - proximal ACL, high grade partial or full thickness tear, 10-mm erosive/osteochondral lesion on the patellar apex.

The defendant now files for an order pursuant to CPLR 3212, granting summary judgment in his favor, dismissing the complaint on the grounds that the plaintiff's injuries do not satisfy the serious injury threshold requirement of Section 5102(d) of the New York Insurance Law, thereby barring the plaintiff's claim for non-economic loss under Section 5104(a) of the statute.

### Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If a sufficient prima facie showing is made, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); *see also*, *Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

Insurance Law §5104(a) provides in pertinent part that:

Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(NY Insurance Law §5104[a])

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. (NY Insurance Law §5102[d])

"The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury." (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; see also, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). "[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law" (*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (see *Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, the plaintiff did not suffer death, dismemberment, significant disfigurement, fracture or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. The other categories are a 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 prevented him from performing substantially all of the material acts which constitute his 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.

In support of the motion, the defendant submits the report Richard N. Weinstein, M.D., a board certified orthopedic surgeon, who conducted an independent orthopedic examination of the plaintiff on September 16, 2020. Dr. Weinstein states that Lopez reports no loss of consciousness, he injured his neck, lower back, right and left shoulder, left hip and left knee, he went to White Plains Hospital on the same day by ambulance, x-rays were taken and no fracture was found, he went to therapy three times a week and is no longer going to therapy.

Dr. Weinstein performed range of motion testing with the use of a goniometer, with the following readings for the cervical spine: 30 degrees of flexion (normal 45); 30 degrees of extension (normal 45); 45 degrees of right and left rotation (normal 80); 30 degrees of right lateral bending and 30 degrees of left lateral bending (normal 45). He further found positive paraspinal tenderness on the left, negative on the right, negative spasm, negative midline bony tenderness, positive trapezial tenderness on the left, negative on the right, spurling's test - negative, cervical compression test - negative, reflexes normal in the bilateral upper extremities and symmetrical, sensation and motor normal in both upper extremities.

Dr. Weinstein further reported range of motion for the plaintiff's thoracolumbar spine and lower extremities of 80 degrees of flexion (normal 90); 20 degrees of extension (normal 30); 20 degrees of right and left rotation (normal 30; and 20 degrees of right and left lateral bending (normal 30. Positive paraspinal tenderness, left and right sides, negative spasm, negative midline bony tenderness, normal alignment, negative straight leg raise bilaterally, reflexes 2+/4 bilaterally and symmetrical, sensation and motor are normal in both lower extremities.

Examination of the left shoulder showed well-healed incisions with range of motion of 160 degrees of forward elevation (normal 180); internal rotation to T10 and external rotation of 60 degrees (normal 60); and 150 degrees of abduction (normal 180). Rotator cuff strength is 5-/5, positive impingement, non-tender AC joint, negative cross-chest addition. Dr. Weinstein found normal range of motion in the right shoulder, bilateral hips and bilateral knees.

Dr. Weinstein's impression is that the plaintiff is status post cervical sprain that is resolved; thoracolumbar sprain that is resolved; left shoulder tenonitis status post arthroscopy, which is resolved and left knee sprain with minor subjective tenderness, otherwise resolution of symptoms.

Dr. Weinstein states that the plaintiff did not seek immediate medical attention on the day of the accident and the first record of treatment was not until approximately one week later on March 8, 2018, when he was seen at Arcadia Acupuncture, with complaints of neck, back, left hip and left knee pain and he then followed up with acupuncture, chiropractic care and physical therapy for his alleged injuries.

Dr. Weinstein states that his examination of the cervical and thoracolumbar spine revealed a decrease in range of motion, which is a subjective finding as the testing is actively performed by the claimant at their own volition. He states that there is no objective evidence of cervical or lumbar radiculopathy. He states that the MRI report findings for the cervical spine revealed a bulge which is typically not due to an acute event. The MRI report findings for the lumbar spine revealed herniations and bulges and the herniations and bulges noted could be pre-existing. Dr. Weinstein states that he would like the opportunity to review the imaging studies to provide further comment. His examination of the left

shoulder revealed a decrease in range of motion and mild impingement. Dr. Weinstein states that he is unable to state within a reasonable degree of medical certainty that the left shoulder procedure was due to the accident of record and would like the opportunity to review the imaging studies along with the color intraoperative photos to provide further comment. Dr. Weinstein states that his examination of the left knee was normal and there was full range of motion with no objective evidence of internal derangement. The MRI report findings noted consistency with a partial or full thickness tear and Dr. Weinstein states that he would like the opportunity to review the imaging studies for the left knee, as they were not provided for his review at the time of the examination.

Dr. Weinstein opines within a reasonable degree of medical certainty, that based on his physical examination, the plaintiff has no disability, his prognosis is good, he is capable of full-duty work without restrictions or limitations and he is able to perform all activities of daily living without restrictions or limitations. .

In opposition, the plaintiff's attorney argues for the denial of the defendant's summary judgment motion because the defendant failed to make out a prima facie case due to positive findings and vague and conclusory opinions. The attorney further argues that the plaintiff's clinical record, diagnostic testing, surgical intervention, examinations and negative health history, reveal that he suffered severe and permanent injuries to his left shoulder and cervical spine resulting in a permanent partial loss of use of those body parts. The plaintiff's attorney asserts that the defendant's proof fails because Dr. Weinstein makes positive findings and does not attribute the injuries to degenerative processes.

The plaintiff's attorney states that while Dr. Weinstein opines that the limitations of motion were subjective, he also found mild impingement. The attorney also contends that, although Dr. Weinstein reviewed the plaintiff's left shoulder MRI report dated April 10, 2018, which indicates a finding of a full thickness tear of the supraspinatus with tendonitis and further reviewed the operative report of Dr. Dowd, dated April 18, 2018, which indicates a postoperative diagnosis second partial rotator cuff tear of the left shoulder, a labral tear of the left shoulder, synovitis of the left shoulder, subacromial adhesions and impingement of the left shoulder, Dr. Weinstein merely sets forth an impression of left shoulder tendonitis status post arthroscopy, which is resolved. The attorney proffers that he put down tendonitis, but forgot about the tears and opined that it was resolved even though the plaintiff complained to him about his shoulder. The plaintiff's attorney also argues that the defendant's orthopedists failed to address the 90/180 claims. The attorney states that Dr. Weinstein said that he would like the opportunity to review the imaging studies to provide further comment, so he clearly felt that he did not have enough information to make an accurate determination, but set forth an opinion that the bulges and herniations were not related to the accident anyway. The attorney additionally argues that the plaintiff's medical evidence raises a question of fact.

Upon review and viewing the facts in the light most favorable to the plaintiffs, this Court finds that the defendant has failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiff suffering a 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 prevented him from performing substantially all of the material acts which constitute his 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.

Dr. Weinstein performed the range of motion testing using a goniometer, but still opined in a conclusory manner that the decreased range of motion can be considered a subjective finding, since the testing is actively performed by the claimant at his own volition. If such is the case, then no range of motion limitations should be taken into account. He also stated that the bulges and herniations could be pre-existing and would like the opportunity to review the imaging studies to provide further comment, showing that he did not have all of the information to make an accurate determination, but still set forth an opinion. Further, Dr. Weinstein did not address the 90/180 category.

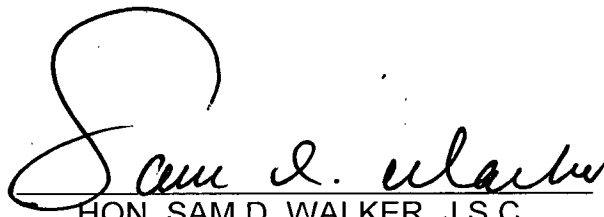
The Court finds that the issues presented are to be decided by the trier of fact and are not questions of law and the defendant has failed to make a prima facie showing. Since, the defendant has failed to make a prima facie showing, the Court need not address the adequacy of the plaintiff's opposition.

Accordingly, based on the foregoing, it is hereby;

ORDERED that the defendant's motions for summary judgment is denied.

The parties are directed to appear before the CRT - ADR Part on a date to be determined. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York  
December 23, 2021



HON. SAM D. WALKER, J.S.C.