

**Vasquez v Preval**

2021 NY Slip Op 34104(U)

April 7, 2021

Supreme Court, Bronx County

Docket Number: Index No. 31916/2017E

Judge: Bianka Perez

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 14**

-----X  
THOMAS VASQUEZ,

Index No. 31916/2017E

Plaintiff,

-against-

**Hon. BIANKA PEREZ**

EUGENE PREVAL JR., WILNER  
BYAS JR.,

Justice Supreme Court

Defendants.  
-----X

The following documents numbered **1-6** were read on this motion (Mot. Seq. **4**) for **SUMMARY JUDGMENT DEFENDANT** noticed on **December 10, 2020**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1-3
Answering Affidavit and Exhibits	No(s). 4-5
Reply Affidavit and Exhibits	No(s). 6

Upon the foregoing papers, defendant moves for an Order pursuant to CPLR 3212 granting summary judgment on the grounds that plaintiff has not sustained a serious injury pursuant to the Insurance Law. Plaintiff opposes.

**Standard of Review**

In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold. See, Linton v. Nawaz, 62 A.D.3d 434 (1st Dept 2009). It is well established that the legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries, and as such, objective proof of a plaintiff's injury is required in order to satisfy the statutory serious injury threshold. See, Toure v. Avis Rent a Car Sys., 98 N.Y.2d 345 (2002).

Insurance Law § 5102(d) defines the term "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.”

An affirmed report concerning the lack of evidence of disability establishes defendant’s prima facie burden that plaintiff did not suffer a serious injury as defined by Insurance Law 5102(d), and shifts the burden to plaintiff to raise an issue of fact. See, Quinones v. Ksieniewicz, 80 A.D.3d 506 (1st Dept 2011).

To prove the extent or degree of physical limitation, an expert’s qualitative assessment of a plaintiff’s condition also may suffice, 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 N.Y.2d 345 (2002).

### **Procedural History**

This is a negligence action to recover damages for personal injuries sustained by plaintiff as a result of an accident which occurred on January 23, 2017 at approximately 7:30 p.m. at the intersection of Amsterdam Avenue and 145<sup>th</sup> Street. The summons and complaint were filed December 23, 2017. Issue was joined in this action by defendant’s service of a verified answer on February 27, 2018. Discovery was exchanged. In a July 14, 2020 decision and order, Judge Higgitt denied plaintiff’s motion for summary judgment on the issue of liability.

Plaintiff’s Verified Bill of Particulars alleges that plaintiff sustained permanent loss of use, permanent consequential limitation and significant limitation of the right shoulder, cervical spine, and lumbar spine as a result of the accident and/or plaintiff sustained a non-permanent medically determined injury which prevented plaintiff from performing substantially all of the material acts which constituted his usual and customary duties for at least ninety of the first one hundred and eighty days after the accident (90/180 claim). Plaintiff further alleged that he has been incapacitated from household duties for ten months following the accident. There is no claim for loss of earnings.

### **Defendant’s Motion:**

In the instant motion, defendants allege that pursuant to Insurance Law 5104(a), plaintiff did not sustain a serious injury as required by Insurance Law 5102(d). Defendant argues that it is evident from a review of the plaintiff’s Verified Bill of Particulars, the affirmed medical reports of Dr. John H. Buckner and Dr. Mark J. Decker, and the plaintiff’s deposition transcript that the

plaintiff did not sustain serious injuries and should not be allowed compensation outside of the No-Fault system.

In support of the motion, defendants submit the report of Dr. Buckner, a Board Certified orthopedic surgeon (Exh. F), who conducted an independent medical examination of plaintiff on August 24, 2020. Dr. Buckner reports normal findings on a myriad of objective tests, with full or near normal ranges of motion in the cervical spine, no muscle spasms in the lumbar or thoracic spines, and no functional disability. He opines that plaintiff has no permanency as a result of the accident. Dr. Buckner's report states that his diagnostic impressions of plaintiff include no objective evidence of cervical spine, lumbar spine, and right shoulder injury. Dr. Buckner reviewed MRI reports, which found no signs of recent trauma in plaintiff's lumbar spine, cervical spine, and right shoulder. Dr. Buckner concludes that plaintiff can work, and "has neither causally-related injury nor a causally-related disability related to" his cervical spine, lumbar spine, and right shoulder.

In further support of the motion, defendants submit the affirmed report of Dr. Mark J. Decker, M.D., a Musculoskeletal and Spine Radiologist who reviewed plaintiff's MRIs of the cervical spine, lumbar spine, and right shoulder from February 2017. Dr. Decker reports that there was no evidence of acute traumatic injury in the aforementioned body parts. With respect to plaintiff's cervical and lumbar spines, Dr. Decker found those injuries were degenerative, longstanding, and not causally related to the accident (Exh. E).

Lastly, defendant submits plaintiff's deposition transcript (Exh. D). Plaintiff testified that after the accident, he did not lose time from work. However, plaintiff also testified that he missed two days of work, and at the time of his deposition was employed by a different company.

Plaintiff's Opposition:

In opposition, plaintiff submits the affirmation and narrative report of Dr. Camari Wallace, plaintiff's treating physician (Exh. D). Plaintiff first treated with Dr. Wallace's practice on January 26, 2017, three days after the accident; on that date, Dr. Julie M. Weaver, D.O., found that plaintiff had restrictions in ranges of motion exceeding 15% in all ranges in the right shoulder, cervical spine, and lumbar spines, except for an 11% restriction in extension of the right shoulder, and a 14% restriction of adduction of the right shoulder. Dr. Wallace reviewed plaintiff's medical records and imaging results (Exh. C [Emergency Room Records from Lincoln Hospital], Exh. E [Physical Therapy Records], Exh. H [MRI and CT Scan Records], Exh. I [Radiological Records]).

Dr. Wallace concluded that plaintiff sustained the following injuries as a result of the accident: disc herniation at L2-3, L3-4, C3-4, C5-6, disc bulging at L4-5, rotator cuff tear, SLAP tear, bicep tendon tear in right shoulder, bilateral cervical and lumbar facet syndrome, bilateral cervical and lumbar radiculopathy, knee derangement, cervical sprain, lumbar sprain, right shoulder sprain, and pain in the aforementioned body parts.

Dr. Wallace most recently examined plaintiff on November 25, 2020. At that visit, Dr. Wallace observed that the right shoulder exhibited 18% restriction in abduction, 10% restriction in flexion, and normal range of motion in adduction and extension, with a final evaluation impression of right shoulder fibromyositis and pain. Dr. Wallace observed that the cervical spine exhibited 37% restriction in left rotation, 12% restriction in right rotation, 16% restriction in extension, 55% restriction in left lateral bending, 11% restriction in right lateral bending, and normal range of motion in flexion, with a final evaluation impression of left and right cervical facet syndrome and radiculopathy. Dr. Wallace observed that the lumbar spine exhibited 40% restriction in extension, 33% restriction in flexion, and 40% restriction in lateral right and left flexion, with a final evaluation impression of left and right lumbar facet syndrome and radiculopathy. Dr. Wallace opines that plaintiff did not have trauma prior to the accident, and concludes that to a reasonable degree of medical certainty, the injuries are not degenerative, and are permanent in nature requiring conservative care for many months (Exh. D). Dr. Wallace further concludes that any future conservative care “would not result in a cure but can perhaps provide relief for [plaintiff’s] pain.”

In further opposition, plaintiff also submits the affidavit of Dr. Arden M. Kaisman, M.D., plaintiff’s treating physician who performed a percutaneous lumbar discectomy at L2-3 and L3-4 levels on January 17, 2018 (Exh. F). Dr. Kaisman first evaluated plaintiff on January 2 2018, approximately one year after the accident, and observed reduced ranges of motion in the lumbar spine exceeding 25%. Dr. Kaisman’s pre and post-operative diagnosis of plaintiff’s condition is bulging discs at L2-3 and L3-4, and lumbar radiculopathy. Dr. Kaisman observed plaintiff on November 12, 2020, and observed the following restrictions in the lumbar spine: 50% restriction in forward flexion, 37% restriction in extension, 37% restriction in right and left lateral bending, and 43-50% loss in right and left lateral rotation. Dr. Kaisman also observed spasms in the lumbar spine. Dr. Kaisman concludes that to a reasonable degree of medical certainty, plaintiff’s injuries are chronic and permanent, and causally related to the accident.

Lastly, plaintiff submits radiological imaging reports from February 2017 by Dr. Thomas M. Kolb of Kolb Radiology (Exh. I). Dr. Kolb's diagnostic impression of plaintiff's cervical spine CT Scan was disc herniation at C3-4 and C5-6. Dr. Kolb's diagnostic impression of plaintiff's lumbar spine was disc herniation at L2-3 and L3-4 with disc bulging at L4-5. Dr. Kolb's diagnostic impression of plaintiff's right shoulder MRI was a partial rotator cuff tear, a partial tear of the extra-articular segment of the bicep tendon, a SLAP tear, and a discrete tear of the inferior labrum.

### **Discussion**

In this matter, Defendants carried their initial summary judgment burden of establishing that Plaintiff did not sustain a serious injury resulting in either a "permanent consequential" or a "significant" limitation to his lumbar spine, cervical spine or right shoulder as a result of this accident. Defendants accomplished this by submitting the sworn reports of radiologist Dr. Decker, who reviewed the MRI films of plaintiff's cervical spine, lumbar spine and right shoulder taken less than one month after this accident. With respect to the cervical spine, lumbar spine, and right shoulder, Dr. Decker opined that the MRI showed non-traumatic degenerative changes unrelated to this accident (see Lee v. Lippman, 136 A.D.3d 411, 412 [1st Dept 2016]; Orellana v. Roboris Cab Corp., 135 A.D.3d 607 [1st Dept 2016]). Defendants additionally submitted the sworn report of Dr. Buckner. While Dr. Buckner did not compare plaintiff's range of motion values to normal values, he nevertheless examined plaintiff's lumbar spine, cervical spine and right shoulder, and opined that there was full or near normal ranges of motion and no objective evidence of injury after administering diagnostic tests resulting in negative findings (Rodriguez v. Konate, 161 A.D.3d 565, 566 [1st Dept 2018]).

With the burden shifting onto plaintiff, the Court next finds that plaintiff met its burden of proof and raised a material issue of fact as to whether he sustained a "permanent consequential" or "significant" limitation to his cervical spine, lumbar spine and right shoulder as a result of the subject accident. Dr. Wallace and Dr. Kaisman's affirmations state that all of plaintiff's injuries are both permanent in nature and are causally related to the accident with sufficient objective findings and qualitative assessment. See, Linton v. Nawaz, 62 A.D.3d 434 at 439 (holding that plaintiff raised an issue of fact regarding causation as the doctor concluded that plaintiff's symptoms were related to the accident based on a full physical examination of plaintiff). Plaintiff's doctors adequately addressed the issue of degeneration, by stating the plaintiff had no prior history of traumatic injury and by ascribing his injuries to the subject accident; thus, the doctors' opinions

were sufficient to raise an issue of fact (Moreira v. Mahabir, 158 A.D.3d 518, 519 [1st Dept 2018]). The above submissions are sufficient to raise material issues of fact as to whether plaintiff sustained a “permanent consequential” or “significant” limitation of use of his cervical spine, lumbar spine, and right shoulder as a result of this accident (Encarnacion v. Castillo, 146 A.D.3d 600, 601 [1<sup>st</sup> Dept 2017]).

As to defendants’ branch of the motion, which argues that the proof rules out a serious injury based on the 90/180-day claim, the Court finds that defendants established their entitlement to summary judgment by submitting plaintiff’s testimony, in which he stated that he did not miss work after the accident. The effect of the admission in establishing no serious injury under the 90/180-day category renders unnecessary any medical proof (see Sanchez v. Oxcin, 157 A.D.3d 561 [1st Dept 2018]; Pakeman v. Karekezia, 98 A.D.3d 840 [1st Dept 2012]). In opposition, plaintiff submitted Dr. Wallace’s affirmation, which stated that plaintiff testified at his deposition that he could not perform his usual and customary daily activities for at least 90 out of the first 180 days after the accident, such as exercise, sports, and household chores. These subjective complaints are insufficient to raise a triable issue of fact (see Abreu v. Miller, 181 A.D.3d 435 [1st Dept 2020]), and plaintiff’s deposition testimony defeats his 90/180 claim (see Gordon v. Hernandez, 181 A.D.3d 424 [1st Dept 2020]).

As to defendants’ branch of the motion requesting dismissal of the permanent loss of use claim, the medical proofs plainly establish that plaintiff did not sustain a complete loss of use of a body organ or member. Plaintiff’s own physician Dr. Wallace opines in his report that the plaintiff exhibited some normal ranges of motion in the right shoulder and retains partial ranges of motion in the cervical and lumbar spines. Thus, the plaintiff has failed to establish a triable issue of fact as to that category of the statute. See Oberly v. Bangs Ambulance, Inc., 96 N.Y.2d 295 (2001); Vaughn v. Baez, 305 A.D.2d 101 (2d Dept 2003)

### **Conclusion**

Accordingly, it is

ORDERED, that defendants’ motion for summary judgment is granted only to the extent of dismissing the 90/180 claim and the permanent loss of use claim for plaintiff’s right shoulder, cervical spine, and lumbar spine, and it is further

ORDERED, that defendants’ motion for summary judgment is otherwise denied.

This constitutes the decision and order of the Court.

**Dated: April 7, 2021**

**Hon.**  \_\_\_\_\_  
**BIANKA PEREZ, J.S.C.**

1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY     CASE STILL ACTIVE

2. MOTION IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER

3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     SCHEDULE APPEARANCE

FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT