

**Millord v Muriq**

2022 NY Slip Op 31348(U)

April 5, 2022

Supreme Court, Kings County

Docket Number: Index No. 516673/2017

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5<sup>th</sup> day of April, 2022.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

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JULIO MILLORD,

Plaintiff,

-against-

FATON MURIQ and HANANYA EDERI,

Defendants.

-----X

DECISION AND ORDER  
Index No. 516673/2017

Mot. Seq. No. 3

FILED  
KINGS COUNTY CLERK  
2022 APR 21 AM 10:28

The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion, Affirmations, Memorandum of Law,  
and Exhibits Annexed \_\_\_\_\_  
Opposing Affirmations and Exhibits Annexed \_\_\_\_\_  
Affirmation in Reply \_\_\_\_\_

33-41  
47-54  
55

In this action to recover damages for personal injuries, defendants Faton Muriq and Hananya Ederi (the “defendants”) move (Seq. No. 3) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the action as against them on the ground that plaintiff Julio Millord (the “plaintiff”) did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) as a result of the subject accident.

**Background**

On August 28, 2017, the plaintiff commenced this action to recover damages for serious personal injuries he allegedly sustained, in the course of his employment as a delivery helper for nonparty Empire Supply Company, as a result of the collision of the

defendants' vehicle with his employer's vehicle on May 11, 2017 (the "accident"). The plaintiff's complaint, as amplified by his Verified Bill of Particulars, dated April 24, 2018 (the "BOP"), alleges that the plaintiff sustained, as a result of the accident, a qualifying serious injury in one or more of the following categories: (1) permanent loss of use; (2) permanent consequential limitation of use; (3) significant limitation of use; and (4) the 90/180-day category (BOP, ¶ 21). Specifically, the BOP alleges that, as a result of the accident, the plaintiff injured his neck, back, and left knee (BOP, ¶ 8). After discovery was completed and a note of issue was filed on March 13, 2020, the defendants served the instant motion.

### **The Parties' Contentions**

#### *Defendants' Position*

In support of their motion, the defendants proffer the affirmed IME report, dated March 5, 2020, prepared by orthopedic surgeon Dana A. Mannor, M.D. ("Dr. Mannor") (NYSCEF Doc No. 41). Dr. Mannor's report summarized her examination of the plaintiff which she apparently performed on the same day, March 5, 2020, approximately 34 months after the accident. Dr. Mannor, with the use of a hand-held goniometer, found that the plaintiff had a full range of motion in the cervical and lumbar areas of his spine (*i.e.*, his neck and back), without any tenderness to palpitation or muscle spasm. Dr. Mannor, with the use of a hand-held goniometer, found that the plaintiff had a full range of motion in his left knee. Dr. Mannor opined that all of the sprains/strains in the plaintiff's cervical spine, lumbar spine, and left knee had resolved, without any objective evidence of any disability, and that the plaintiff was unrestricted (from the orthopedics points of view) in working and

performing normal daily tasks. Although Dr. Mannor did not address the claim in the 90/180-day category, the plaintiff's pretrial testimony (which is submitted by the defendants as part of their motion papers) reflects that: (1) he did not present to a medical provider for treatment immediately after the accident; (2) he continued working for his employer that same day; and (3) he missed, at most, no more than one month from work with his employer after the accident.<sup>1</sup>

### *Plaintiff's Opposition*

In opposition, the plaintiff submits four categories of documents: (1) the affirmed "Final Narrative," dated September 20, 2020, prepared by his former physician Gordon C. Davis, D.O.<sup>2</sup> ("Dr. Davis") (NYSCEF Doc No. 54); (2) the records of Dr. Davis's clinic, Graham Wellness Medical, as certified by its record custodian, non-physician Rodelie Pointdujour (the "clinic's records") (NYSCEF Doc No. 49); (3) the MRI reports of the plaintiff's cervical and lumbar spine (as well as that of his left knee), with each report (one report per area studied) affirmed by neuroradiologist Sasan Azar, M.D. (collectively, the "MRI reports") (NYSCEF Doc Nos. 51-53); and (4) the two affirmed medical reports prepared by consulting orthopedic surgeon Dov J. Berkowitz, M.D. ("Dr. Berkowitz"), for approval, by the Workers' Compensation Board, of recommended arthroscopic surgery on the patient's left knee (collectively, "Dr. Berkowitz's reports") (NYSCEF Doc No. 50).

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<sup>1</sup> Plaintiff's EBT tr at page 14, lines 15-23; page 19, lines 12-18; page 35, lines 6-22; page 38, lines 3-22; page 40, lines 8 10; page 51, lines 15 22 (NYSCEF Doc No. 40).

<sup>2</sup> Dr. Davis is a Doctor of Osteopathic Medicine, rather than a Medical Doctor as he inaccurately describes himself on page 7 of his final narrative report. CPLR 2106 does permit a Doctor of Osteopathic Medicine to make an affirmation in lieu of an affidavit.

Turning to the final narrative report, the Court notes that Dr. Davis prepared it (in essence) with the benefit of hindsight because he composed it approximately three months *after* the defendants moved for summary judgment. Despite having advance notice of the defendants' position, however, Dr. Davis's report is ambiguous on several key points. The final narrative report indicates that the plaintiff's treatment *commenced* on May 30, 2017 when he first presented to the clinic with complaints of pain in his neck, lower back, and left knee. However, the report is silent as to when the plaintiff's treatment (physical therapy, chiropractic manipulations, and acupuncture) *ended*.<sup>3</sup> Further, while the final narrative report lists the decreased range of motion ("ROM") of the cervical and lumbar areas of the plaintiff's spine (as was measured with a goniometer), the report fails to identify *when* (and, equally important, by whom) those ROM measures were taken.<sup>4</sup>

As to the clinic's records, the Court finds them inadmissible because the records are neither sworn nor affirmed (*see Nicholson v Kwarteng*, 180 AD3d 695, 696 [2d Dept 2020]). A *certification* of the clinic's records by its non-physician custodian is not equivalent to an *affirmation* of their contents (*see Irizarry v Lindor*, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]; *Hui-Lin Wu v City of New York*, 183 AD3d 411, 123 NYS3d 590 [1st Dept 2020]; *McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; *Buntin v Rene*, 71 AD3d 938, 939, 896 NYS2d 894 [2d Dept 2010]).

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<sup>3</sup> Dr. Davis's statement (at page 5 of his report) that the "Patient [*i.e.*, the plaintiff] is . . . discharged home this date [*i.e.*, on September 20, 2020] with instruction to continue physical therapy and exercise at home" offers no detail as to when the clinic stopped treating the plaintiff.

<sup>4</sup> The final narrative report (at page 3 thereof) fails to reflect objective ROM measurement of the plaintiff's left knee.

The third category of documents encompasses three affirmed radiology reports of the MRIs of the plaintiff's cervical and lumbar spine, and left knee. Each of the three MRIs was performed on August 18, 2017, or approximately three months after the accident. The MRI of the plaintiff's *cervical spine* was significant for disc dessiccation (dryness) at the C3-C4 and C4-C5 disc levels, in each instance, with the posterior bulge impinging on the anterior thecal sac (NYSCEF Doc No. 51). Next, the MRI of the plaintiff's *lumbar spine* was "unremarkable" (NYSCEF Doc No. 52). Lastly, the MRI of the plaintiff's *left knee* found (1) "focal tendinopathy of the proximal patellar tendon" and (2) "focus of edema within the superior aspect of the Hoffa's fat pad [*i.e.*, a fat layer behind the knee cap] compatible with the focus of patellar tendon/lateral femoral condyle friction syndrome" (NYSCEF Doc No. 53 [unnecessary capitalization omitted]).

The fourth and final category of documents consists of Dr. Berkowitz's two reports, the first, dated October 16, 2017 (or approximately five months post-accident), and the second, dated December 10, 2018 (or approximately nineteen months post-accident). As noted, both reports are limited in scope to the condition of the plaintiff's left knee at the time of the respective report, and were prepared by Dr. Berkowitz, to obtain approval from the Workers' Compensation Board for recommended arthroscopic surgery on the plaintiff's left knee. Notwithstanding Dr. Berkowitz's pro-surgery recommendations, the plaintiff did not undergo surgery at the time of his pretrial examination on February 26, 2020, which was conducted approximately fourteen months after Dr. Berkowitz's second report (Plaintiff's EBT tr at page 46, line 24 to page 47, line 3). Although Dr. Berkowitz found, on both examinations, that the plaintiff had a limited ROM in the left-knee flexion,

he failed to specify in either of his reports which instrument he used (if any) in measuring it. In fact, in the second report, he does not relate his finding to normal range.

### Applicable Law

“A defendant can establish that the plaintiff’s injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Nuñez v Teel*, 162 AD3d 1058, 1059 [2d Dept 2018] [internal quotation marks omitted]). Once the defendant makes a *prima facie* showing, the burden shifts to the plaintiff to present objective evidence to show a triable issue of fact on the question of serious injury (*see Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]).

As noted, the plaintiff contends that he sustained, as a result of the accident, a qualifying serious injury within one or more of the following four statutory categories: (1) permanent loss of use; (2) permanent consequential limitation of use; (3) significant limitation of use; and (4) the 90/180-day category.

To recover under the “permanent loss of use” category, a plaintiff must demonstrate a *total* loss of use of a body organ, member, function, or system (*see Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 299 [2001]). To recover under the “permanent consequential limitation of use” and/or the “significant limitation of use” categories, a plaintiff, in each instance, must present objective medical evidence reflecting the extent/degree of the limitation of movement caused by the claimed injury and its duration (*see Schilling v Labrador*, 136 AD3d 884, 885 [2d Dept 2016]; *Rovelo v Volcy*, 83 AD3d 1034, 1035 [2d Dept 2011]; *McLoud v Reyes*, 82 AD3d 848, 849 [2d Dept 2011]). The

extent/degree of physical restriction in the “permanent consequential limitation of use” and/or the “significant limitation of use” categories is shown, in each instance, by (1) a specific percentage of ROM loss (the “quantitative” finding) and/or (2) an objective, detailed description of the physical restrictions which are correlated to (and are compared with) the normal function, purpose, and use of the affected body part (the “qualitative” finding) (*see Perl v Meher*, 18 NY3d 208, 217 [2011]). Further, to recover under the 90/180-day category, a plaintiff must submit medical evidence of “a medically determined injury or impairment of a non-permanent nature” which prevented him/her from performing his/her usual and customary activities for 90 of the 180 days post-accident (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 357 [2002], *rearg denied* 98 NY2d 728 [2002]; *John v Linden*, 124 AD3d 598, 599 [2d Dept 2015]).

### Analysis

The defendants, by way of Dr. Mannor’s affirmed report, have established that the plaintiff did not sustain, as a result of the accident, a serious injury of the cervical and/or lumbar areas of his spine (and/or of his left knee) qualifying under any of the following categories: (1) the permanent loss of use; (2) the permanent consequential limitation of use; and (3) the significant limitation of use. In that regard, Dr. Mannor, using a hand-held goniometer, found the plaintiff to have a full range of motion in the cervical and lumbar areas of his spine, as well as that in his left knee, and that all the prior sprains/strains in those areas have resolved (*see e.g. Bienaime v All Seasons Taxi Corp.*, 175 AD3d 1232, 1233 [2d Dept 2019]). There was no need for Dr. Mannor to address the plaintiff’s presenting “complaints of pain in the neck, lower back, and left knee,” inasmuch as

“subjective pain cannot form the basis of a serious injury” (*Canner v Diamond*, 187 AD3d 1127, 1128 [2d Dept 2020]). Lastly, the plaintiff’s conclusory allegations, as set forth in his BOP, that he sustained a serious injury in the 90/180-day category, are belied by his pretrial testimony, *inter alia*, that he continued working on the day of the accident and that he missed no more than one month of work following the accident (*see Islam v Makkar*, 95 AD3d 1277, 1278 [2d Dept 2012]; *Kuperberg v Montalbano*, 72 AD3d 903, 904 [2d Dept 2010]; *Howell v Williams*, 239 AD2d 558 [2d Dept 1997]).

In opposition, the plaintiff’s submissions, viewed either individually or collectively, have failed to raise a triable issue of fact. As noted, the final narrative report is substantively deficient, in that it fails to specify *when* (and by whom) the ROM measurements were taken; namely, whether those ROM measurements were contemporaneous with the accident or, in the alternative, whether they were contemporaneous with the date of the report which was approximately forty-one months after the accident.<sup>5</sup> Next and as noted, the clinic’s medical records are inadmissible because they are unaffirmed. The third category of the plaintiff’s submissions – the MRI

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<sup>5</sup> Compare *Perl v Meher*, 18 NY3d 208, 218 (2011) (“We . . . reject a rule that would make *contemporaneous quantitative measurements* a prerequisite to recovery.”); and *Sukalic v Ozone*, 136 AD3d 1018, 1019 (2d Dept 2016) (“The affirmation of the plaintiff’s examining physician . . . failed to raise a triable issue of fact as to whether the plaintiff sustained a serious injury under the *permanent consequential limitation* of use category of Insurance Law § 5102 since [the plaintiff’s examining physician] failed to set forth any objective medical findings from a *recent* examination.”) with *Estrella v Geico Ins. Co.*, 102 AD3d 730, 732 (2d Dept 2013) (“[The treating physician’s] quantitative findings from *the two examinations* [the first examination was approximately one month after the accident, whereas the subsequent examination was approximately one year after the accident] raised a triable issue of fact as to whether, as a result of the subject accident, the . . . plaintiff sustained a *significant limitation of use* in the cervical and lumbar regions of his spine.”) (emphasis added).

reports – do not, in and of themselves, establish the existence of a serious injury for two reasons. As a threshold matter, the MRI of the plaintiff’s *lumbar spine* is “unremarkable.” More fundamentally, “the mere existence of a bulging or herniated disc [as was found on the MRI of the plaintiff’s *cervical spine*] is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration” (*Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49 [2d Dept 2005]; *see also Scheker v Brown*, 91 AD3d 751, 752 [2d Dept 2012]). For the same reason, the presence of a “focal tendinopathy of the proximal patellar tendon” and the “focus of edema within the superior aspect of the Hoffa’s fat pad” (as was found, in each instance, on the MRI of the plaintiff’s *left knee*) is insufficient to establish serious injury in the absence of objective evidence of the extent of the resulting physical limitations (*id.*). The fourth and final category of the plaintiff’s submissions (*i.e.*, Dr. Berkowitz’s reports), which, as noted, are limited to the plaintiff’s left knee, do not reflect (as the defendants correctly point out in ¶ 20 of their reply) that the ROM testing was performed with an objective test instrument, such as a goniometer (*see Gersbeck v. Cheema*, 176 AD3d 684, 107 NYS3d 705 [2d Dept 2019]; *Durand v Urick*, 131 AD3d 920, 15 NYS3d 475 [2d Dept 2015]). Further, although Dr. Berkowitz recommended surgery on the plaintiff’s left knee, the plaintiff did not undergo recommended surgery, nor has he submitted an affidavit explaining why he decided to forgo it (*see Mullings v Huntwork*, 26 AD3d 214, 216, 810 NYS2d 443, 444 [1st Dept 2006]; *Kuczinski v. Bd. of Trs. of N.Y. City Fire. Dep’t*, 8 AD3d 283, 777 NYS2d 693 [2d Dept 2004]).

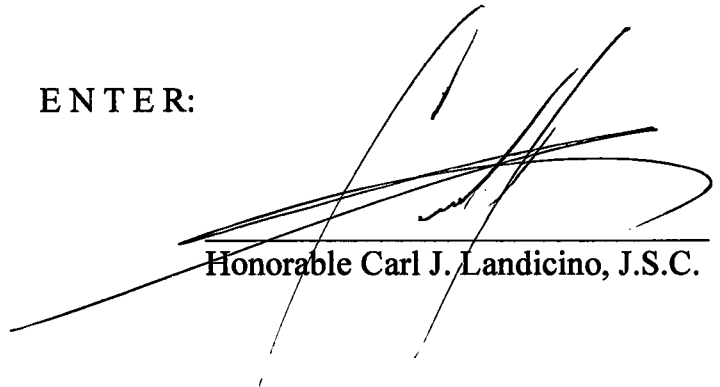
**Conclusion**

Based upon the foregoing, it is hereby

ORDERED that the defendants' motion for summary judgment is *granted in its entirety*, and the complaint is dismissed as against both defendants without costs and disbursements.

This constitutes the decision and order of the Court.

ENTER:



Honorable Carl J. Landicino, J.S.C.

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