

<b>Placide v Choudury</b>
2022 NY Slip Op 31748(U)
June 1, 2022
Supreme Court, Kings County
Docket Number: Index No. 516885/2019
Judge: Debra Silber
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 9 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 1<sup>st</sup> day of June, 2022.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

MIRIAM PLACIDE,

Plaintiff,

-against-

REJAUL I. CHOUDURY, JOSEPH S. VOLTAIRE,  
MARIE N. VOLTAIRE, OLIMKHON USMONOV,  
and SANAT YUSUPOV,

Defendants.

-----X

**DECISION / ORDER**

Index No. 516885/2019  
Mot. Seq. # 1

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion and Affidavits (Affirmations) Annexed _____	<u>26-35</u>
Opposing Affidavits (Affirmations) _____	<u>38-46</u>
Affidavits/ Affirmations in Reply _____	_____
Other Papers: _____	_____

Upon the foregoing papers, defendants Rejaul Choudury (driver), Joseph S. Voltaire and Marie N. Voltaire (owners), move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff Miriam Placide’s complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Plaintiff commenced this action to recover damages for personal injuries sustained in a motor vehicle accident which occurred on March 22, 2018. In her verified bill of

particulars, plaintiff alleges the following injuries/conditions as a result of the accident: herniation at L2-3 with annular tear; herniation at L3-4 with annular tear and right inferior foraminal encroachment, and bulge and facet arthropathy; herniation at L4-5 with annular tear and right inferior foraminal encroachment, with bulge with thecal sac indentation and facet arthropathy; bulges at T12-L1, L1-2 and L5-S1; lumbosacral strain/sprain; myofascial pain syndrome; low back pain; bulge at C3-4; bulge at C4-5 with contact of the ventral margin of the cord; bulge at C5-6 with foraminal stenosis; bulge at C6-7 with proximal foraminal stenosis; cervical spine strain/sprain neck pain right shoulder strain/sprain; left shoulder strain/sprain; bilateral shoulder pain; left foot plantar fasciitis; tenosynovitis; left foot and heel pain and swelling; and post-traumatic headaches. Plaintiff alleges that she has suffered a permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or system and a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

On March 19, 2021, plaintiff appeared for an examination before trial (EBT). An independent orthopedic examination of plaintiff was thereafter performed by Dr. Pierce Ferriter, M.D. on July 6, 2021. Based upon the EBT testimony of plaintiff, the report of Dr. Ferriter and a review by Dr. Scott A. Springer of plaintiff's x-rays and MRIs, defendants brought the instant motion for summary judgment dismissing the complaint for failure to meet the serious injury threshold.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*id.*). Defendants thus have the initial burden of making a prima facie showing, through admissible evidence, that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), and upon such prima facie showing, the burden shifts to plaintiff to produce sufficient admissible evidence that her injuries satisfied the definition of serious injury (*see Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). Insurance Law § 5102 (d) defines a serious injury as including a “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.”

In support of their motion for summary judgment, defendants cite to plaintiff’s EBT testimony that she walked to the ambulance following the accident and was released from the hospital without any medical devices (EBT Transcript of plaintiff [Tr.], at 25), that she did not undergo any surgery as a result of the subject accident (Tr. at 33), that she did not have any future (post EBT) medical appointments concerning her claimed injuries

from the subject accident (Tr. at 33) and that she was able to leave her home the day following the accident (Tr. at 34).

Defendants further submit the affirmed report of Dr. Ferriter, which states that plaintiff's cervical spine revealed no tenderness to palpation or spasm; range of motion testing was normal: flexion to 50 degrees, extension to 60 degrees, right rotation to 80 degrees, left rotation to 80 degrees, right lateral flexion to 45 degrees and left lateral flexion to 45 degrees; and that objective orthopedic tests including Shoulder Shrug, Hoffman's, Atrophy of Scapula, Jackson's, Soto Hall, Spurling, Traction, and Compression were all negative. Dr. Ferriter found that plaintiff's lumbar spine revealed no swelling, discoloration, or deformity; there was no muscle spasm or complaints of tenderness upon palpation; active range of motion was normal: flexion to 60 degrees, extension to 25 degrees, right lateral flexion to 25 degrees and left lateral flexion to 25 degrees; and that objective orthopedic tests including, Fabere, Soto Hall, Kemp's, Minor's sign, and Laseque's, were all negative.

Dr. Ferriter's examination of plaintiff's shoulders revealed no heat, swelling, effusion, erythema, or crepitus; objective orthopedic tests including, Hawkins/Kennedy Impingement, Neer Impingement Maneuver, Cross Arm Adduction, Empty Can test, Scapular Winging, Drop Arm O'Brien, Painful Arc Atrophy of Deltoid and Rotator Cuff Strength were all negative; active range of motion tests demonstrated normal range of motion: forward flexion to 180 degrees, extension to 40 degrees, abduction to 180 degrees, adduction to 30 degrees, internal rotation to 80 degrees, and external rotation to 90 degrees.

Dr. Ferriter's examination of plaintiff's left ankle revealed no heat, swelling, effusion, erythema, or crepitus; objective orthopedic tests including Drawer and Instability were all negative; active range of motion was normal: dorsiflexion to 20 degrees, plantar flexion to 40 degrees, inversion to 30 degrees, and eversion to 20 degrees; and there were no complaints of tenderness upon palpation.

Examination by Dr. Ferriter of the plaintiff's left foot indicated a normal range of motion: great toe: IP Joint: 0-90 degrees, and MTP Joint: 0-45 degrees, and 0-70 degrees. 0-90 degrees, PIP: 0-100 degrees, and DIP: 0-90 degrees. Dr. Ferriter stated that there were no complaints of tenderness upon palpation.

In his affirmed report, Dr. Ferriter concluded that plaintiff's alleged injuries had resolved and that plaintiff was capable of working without restrictions. Dr. Ferriter further noted that there were no objective clinical findings indicative of a present disability or functional impairment which prevented plaintiff from engaging in her usual and customary daily activities, including work, school, and hobbies.

Defendants further submitted Dr. Springer's affirmed radiological evaluations of the MRI of plaintiff's lumbar spine and cervical spine conducted on April 9, 2018, the MRI of plaintiff's left foot conducted on October 17, 2018 and the X-rays of plaintiff's shoulders taken on March 31, 2018. Upon examination of plaintiff's lumbar spine MRI study, Dr. Springer found no fracture, subluxation or prevertebral soft tissue swelling. Dr. Springer further found multi-level degenerative changes which he states could not have occurred in the time interval between the incident and the examination. Upon examination of the plaintiff's cervical spine MRI study, Dr. Springer found no fracture,

subluxation or prevertebral soft tissue swelling. Dr. Springer further found multi-level degenerative changes which he states could not have occurred in the time interval between the incident and the examination. Upon examination of the plaintiff's left foot MRI study, Dr. Springer found no fracture of the tibiotalar and subtalar joints and states that the joints, the visualized distal Achilles tendon, and the remainder of the visualized plantar fascia were all intact with no soft tissue swelling. Upon examination of the plaintiff's shoulder X-rays, Dr. Springer found no fracture, dislocation, soft tissue swelling, joint effusion or arthritic changes. Dr. Springer concludes that there are no "posttraumatic changes causally related to the March 22, 2018, accident" in all four of his affirmations.

The foregoing physicians' affirmations and medical records are sufficient to demonstrate that plaintiff did not sustain a "permanent consequential limitation of use of a body organ or member" or "a significant limitation of use of a body function or system," but the papers submitted by defendants on their motion fail to eliminate all triable issues of fact regarding plaintiff's claim, set forth in the bill of particulars, that she sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d). While plaintiff was asked at her EBT [Doc 33] about activities, hobbies, or other things that she could not do on the date of the EBT in 2021 (Page 37) as a result of the 2018 accident, she was not asked about the time period right after the accident (90/180 days). Thus, defendants do not make a prima facie case with regard to this category of injury (*see Jong Cheol Yang v Grayline NY Tours*, 186 AD3d 1501, 1502 [2d Dept 2020]).

Since defendants have failed to meet their burden of proof as to all of plaintiff's claimed injuries and all applicable categories of injury in Insurance Law § 5102 (d), the motion must be denied. It is unnecessary to consider the papers submitted by the plaintiff in opposition (*see Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]); *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Even if defendants had established a prima facie case for summary judgment, plaintiff's submissions are sufficient to overcome the motion and raise a triable issue of fact. Plaintiff submits the affirmations of her treating physicians, Dr. Shouhei Yamagami, D.O. and Dr. Thomas S. Mathew, M.D. of DHD Medical, P.C., who treated plaintiff on March 30, 2018 (eight days following the accident) and thereafter. In his affirmation, Dr. Yamagami states that he performed an updated examination of plaintiff on December 30, 2021, and she still complained of persistent pain in her neck, low back, and right shoulder on a daily basis, which pain was exacerbated by lying down and moving around, and that she was unable to sit or stand for long periods before she starts feeling pain. Dr. Yamagami asserts that his cervical and lumbar spine examination revealed tenderness to palpation of the cervical spine and lumbar spine and that plaintiff still suffered from the following range of motion deficits: Cervical Spine- Flexion 20°

(normal 50°); Extension 40° (normal 60°); Right Rotation 55° (normal 80°); Left Rotation 55° (normal 80°); Lumbar Spine- Flexion 80° (normal 90°); Extension 20° (normal 30°); Right Side Bending- 20° (normal 40°); Left Side Bending- 30° (normal 40°). Dr. Yamagami states that all range of motion data was obtained objectively through the use of a handheld goniometer.

Dr. Yamagami asserts that based on plaintiff's course of treatment, the long duration of her symptoms, the MRI studies, previous examinations of plaintiff, her extensive treatment and the results of the most recent examination, plaintiff has sustained serious personal injuries of a significant and permanent nature to her cervical spine and lumbar spine as a direct result of the accident. Dr. Yamagami opines that plaintiff's injuries, the residual sequelae and the limitations of function to plaintiff's cervical spine and lumbar spine constitute a permanent, partial disability which precludes the possibility of complete restoration and, based upon the fact that her symptoms and restrictions in range of motion are still present more than three years after the accident, they constitute a permanent loss.

Dr. Mathew likewise affirms that given plaintiff's course of treatment, the long duration of her symptoms, the MRI studies, previous examinations of plaintiff, her extensive treatment and the results of the most recent examination, plaintiff has sustained serious personal injuries of a significant and permanent nature to her cervical spine and lumbar spine as a direct result the accident and that these traumatic injuries, the residual sequelae and the limitations of function to plaintiff's cervical spine and lumbar spine

constitute a permanent, partial disability which precludes the possibility of complete restoration.

Plaintiff's submissions of medical records and reports of Drs. Yamagami and Mathew evincing that plaintiff was treated from approximately one week following the accident, had nine months of physical therapy, along with the affirmation of Dr. Yamagami, wherein he details, among other findings, that plaintiff had a 30% restriction in cervical spine flexion and a 25% restriction in cervical spine rotation, are sufficient to raise an issue of fact as to whether plaintiff sustained a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Munoz v Salcedo*, 170 AD3d 735, 736-737 [2d Dept 2019]; *Meyer v Gallardo*, 260 AD2d 556 [2d Dept 1999]).

As a result, defendants' motion for summary judgment dismissing the complaint is denied.

The foregoing constitutes the decision and order of the court.

ENTER:



---

Hon. Debra Silber, J.S.C.