

**Plasencia v Velazquez**

2022 NY Slip Op 34880(U)

October 27, 2022

Supreme Court, Kings County

Docket Number: Index No. 525174/2018

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 27th day of October 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X  
ERICKSON PLASENCIA,

Index No.: 525174/2018

*Plaintiff,*

-against-

DECISION AND ORDER

EDWIN VELAZQUEZ,

Motions Sequence #2

*Defendants.*

-----X  
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	23-25, 27-35,
Opposing Affidavits (Affirmations).....	38-39, 42-52,
Reply Affidavits (Affirmations).....	53-54,
Memorandum of Law.....	26, 40

After a review of the papers and oral argument the Court finds as follows:

This action concerns a motor vehicle accident that occurred on July 7, 2018. The Plaintiff, Erickson Plasencia (hereinafter the "Plaintiff"), claims that he was injured when his vehicle was involved in a collision with a vehicle owned and operated by Defendant Edwin Velasquez (hereinafter "the Defendant"). The Plaintiff alleges that the collision occurred at Jamaica Avenue, at or near its intersection with Cypress Hill Street in Brooklyn, New York. The Plaintiff claims, in his Verified Bill of Particulars, that he sustained a number of serious injuries including, *inter alia*, injuries to his left shoulder (including surgery), cervical spine, and lumbar spine. The Plaintiff also alleges that he was prevented from "performing substantially all of the material acts which constitute plaintiffs usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence." ("90/180 claim").

The Defendant now moves (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that none of the injuries allegedly sustained by the Plaintiff meet the “serious injury” threshold requirement of Insurance Law § 5102(d). In support of this application, the Defendant relies on the deposition of the Plaintiff and the reports of Dr. Pierce J. Ferriter, Dr. Daniel J. Feuer and Dr. Jessica Berkowitz.

The Plaintiff opposes the motion. The Plaintiff contends that the Defendant has failed to meet his *prima facie* burden. The Plaintiff also contends that he has submitted sufficient proof to create a material issue of fact that should prevent the Court from granting summary judgment.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

In support of the Defendant's motion, the Defendant proffers the affirmed medical reports of Pierce J. Ferriter, Dr. Daniel J. Feuer, and Dr. Jessica Berkowitz. Dr. Pierce J. Ferriter, a board certified orthopedic surgeon, examined the Plaintiff on October 12, 2020, more than two years and three months after the date of the accident. Dr. Ferriter conducted range of motion testing of the Plaintiff's cervical spine, lumbar spine and left shoulder. As to the Plaintiff's cervical spine, Dr. Ferriter measured range of motion using a goniometer and found "flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right lateral flexion to 45 degrees (45 degrees normal) and left lateral flexion to 45 degrees (45 degrees normal), and right rotation to 80 degrees (80 degrees normal) and left rotation to 80 degrees (80 degrees normal)." As to the Plaintiff's lumbar spine, Dr. Ferriter found "flexion to 60 degrees (60 degrees normal), extension to 25 degrees (25 degrees normal), right lateral flexion to 25 degrees (25 degrees normal) and left lateral flexion to 25 degrees (25 degrees normal)." As to the left shoulder, Dr. Ferriter found that this "[e]xamination reveals a well healed arthroscopic scar[s] [sic]." He also found "flexion at 180 degrees (180 degrees normal), extension at 40 degrees (40 degrees normal), abduction at 180 degrees (180 degrees normal), adduction at 30 degrees (30 degrees normal), internal rotation at 80 degrees (80 degrees normal), and external rotation at 90 degrees (90 degrees normal)." Dr. Ferriter found "1. Cervical spine sprain / strain -resolved. 2. Lumbar spine sprain / strain - resolved. 3. Status post left shoulder surgery performed on 11/14/2018 – healed." He also stated that "there is a causal relationship between the accident of record and the claimants' reported injury." (See Defendants' Motion, Report of Dr. Ferriter, Exhibit E).

Dr. Daniel J. Feuer, a neurologist, examined the Plaintiff on October 27, 2020, more than two years and three months after the date of the accident. Dr. Feuer also conducted range of motion testing of the Plaintiff's cervical spine, lumbar spine and left shoulder and found normal ranges of motion for each area measured. Dr. Feuer found that "[t]he claimant is a twenty-three year old male whose present neurological examination is within normal limits." Dr. Feuer also opined that "[b]ased on a reasonable

degree of medical certainty, I believe the claimant, Mr. Erickson Plasencia, does not demonstrate any objective neurological disability or neurological permanency." He further opined that the Plaintiff "is neurologically stable to engage in full active employment as a construction worker, as well as the full activities of daily living without restriction." (See Defendants' Motion, Report of Dr. Feuer, Exhibit F).

Dr. Jessica F. Berkowitz did not examine the Plaintiff but reviewed the MRIs of the Plaintiff's cervical spine, lumbar spine and left shoulder. The cervical spine MRI was performed on August 21, 2018, *about one month after the Plaintiff's accident*. Dr. Berkowitz states that "[n]o disc bulges or herniations are noted in the cervical spine." Dr. Berkowitz opined that "[t]here is no evidence of acute traumatic injury to the cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma." The lumbar spine MRI was performed on August 21, 2018, about one month after the Plaintiff's accident. As to the lumbar spine, Dr. Berkowitz found "[t]he submitted examination consists of sagittal T1, T2, inversion recovery and axial T1 and T2 weighted pulse sequences of the lumbar spine." Dr. Berkowitz opined that "[n]o disc bulges or herniations are present." The left shoulder MRI was performed on July 17, 2018, approximately one week after the Plaintiff's accident. Dr. Berkowitz found that "[n]o joint effusion is present." Dr. Berkowitz also stated that "[n]o rotator cuff tear is identified." Dr. Berkowitz further opined that the "[e]valuation of this MRI examination reveals no causal relationship between the claimant's alleged accident and the findings on the MRI examination." Dr. Berkowitz opined that there was a "[v]ery small amount of tendinopathy of the distal posterior supraspinatus tendon." Dr. Berkowitz also found that "[t]his tendinopathy is related to chronic repetitive microtrauma to the rotator cuff." (See Defendants' Motion, Report of Dr. Berkowitz, Exhibit G).

When the Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no such claim, Defendant movant may utilize those factors in support of its motion for summary judgment. *See Master v. Boiakhtchion*, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904,

899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008]. In this case, the Verified Bill of Particulars indicates that the Plaintiff was confined to his bed and home for two days after the alleged incident. The Plaintiff indicated as part of his deposition, when asked how long he was out of work after his shoulder surgery, that “[a]fter the surgery, I take a week at home.” (See Defendant’s Motion, Exhibit “H”, Page 92). However, when asked if there was anything he could not do anymore, the Plaintiff stated “I used to -- before the accident, I used to place [sic] softball.” He then stated “[e]very summer I played softball and after the accident, I don’t play no more.” When asked what else, the Plaintiff stated “when I am going to carry my baby, you know, he’s now kind of heavy. I feel pain in my arm and it is not the same.” (See Defendant’s Motion, Exhibit “H”, Page 94).

Assuming that the Defendant has made a *prima facie* showing that the Plaintiff had not sustained a serious injury as defined by the statute, it is incumbent upon the Plaintiff to establish that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, in order to avoid the dismissal of his action. See *Jackson v United Parcel Serv.*, 204 AD2d 605 [2d Dept 1994]; *Bryan v Brancato*, 213 AD2d 577 [2d Dept 1995]. In this regard, the Plaintiff must submit quantitative objective findings, in addition to opinions as to the significance of the Plaintiff’s injuries and causation. See *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 AD3d 641, 642, 775 N.Y.S.2d 546, 547 [2d Dept 2004]; *Burnett v Miller*, 255 AD2d 541 [2d Dept 1998]; *Beckett v Conte*, 176 AD2d 774 [2d Dept 1991].

Aleksandr Khaimov, D.O. examined the Plaintiff on October 11, 2018, about three months after his accident. Dr. Khaimov stated that “I diagnosed him with the following injuries as a result of his accident: (1) rotator cuff tendinitis, left shoulder.” Dr. Khaimov also stated that “[t]he MRI of the left shoulder revealed lateral downsloping acromion, tendinosis of supraspinatus and infraspinatus tendon.” Dr. Khaimov stated that when the Plaintiff continued to complain of shoulder pain “I discussed physical and diagnostic findings and the lack of improvement to date. I recommended that Mr. Plasencia undergo

a left shoulder arthroscopy.” Dr. Khaimov performed the procedure on November 14, 2018, and stated as part of his report that “[t]his procedure confirmed the preoperative diagnosis of posttraumatic internal derangement of the left shoulder and revealed of tear of the anterior labrum with intact attachment, adhesions and synovitis, left shoulder.” Dr. Khaimov opined that “I have determined that the injuries sustained by Mr. Plasencia are a direct result of the accident he was involved in on July 7, 2018, and the injuries he sustained are consistent with the results of his MRI and Range of Motion Testing, and clearly indicate that at the time of his treatment, under my care, he continued to suffer as a result of the motor vehicle accident that occurred on July 7, 2018.” (See Plaintiff’s Affirmation in Opposition, Report of Dr. Khaimov, Exhibit F).

Igor Cohen, M.D. examined the Plaintiff on October 18, 2018, about three months after his accident. Dr. Cohen stated that “[I]f left shoulder examination revealed tenderness in the rotator cuff.” Dr. Cohen also stated that “Plaintiff was experiencing neck pain that is radiating to the left upper extremity with numbness and tingling.” Dr. Cohen also opined that “[t]o a reasonable degree of medical certainty, his symptoms will be permanent in nature as they have been persisting despite undergoing proper treatment.” (See Plaintiff’s Affirmation in Opposition, Report of Dr. Cohen, Exhibit G).

Arkadiy Shusterman, D.O., examined the Plaintiff on October 1, 2018, about three months after his accident. Dr. Shusterman reviewed the Plaintiff’s left shoulder, cervical spine and lumbar spine MRIs. Dr. Shusterman stated that “[t]he MRI film of the left shoulder revealed lateral downsloping acromion, tendinosis of the supraspinatus and infraspinatus tendons.” As to the cervical spine, Dr. Shusterman found that “[t]he MRI film of the cervical spine revealed bilobed posterolateral disc bulges between C3 and C6 with foraminal narrowing.” As to the lumbar spine, Dr. Shusterman found that “[t]he lumbar spine revealed L4-L5 left foraminal herniation with regional exiting nerve encroachment, L4-L5 and LS-S1 posterior disc bulges with central regional nerve root encroachment.” Dr. Shusterman opined that “I am in complete disagreement with defendants’ doctors who claim that the injuries in plaintiffs left shoulder

were degenerative and related to repetitive microtrauma to the rotator cuff.” Dr. Shusterman also stated that “[t]here was no prior microtrauma.” He further stated that “[a]ny degeneration to his left shoulder was asymptomatic and it is clear the tear caused him to sustain the radiating pain he experienced post-accident.” Dr. Shusterman also found that “[d]espite considerable treatment, Mr. Plasencia continues to suffer from the injuries she sustained on 07/07/2018, which have resulted in a permanent loss of use of neck, back and left shoulder.” (See Plaintiff’s Affirmation in Opposition, Report of Dr. Cohen, Exhibit H).

Priyesh Patel, M.D., a neurologist, did not examine the Plaintiff but reviewed the MRI of the Plaintiff’s left shoulder. Dr. Patel stated that “MRI of the left shoulder was performed using T1, T2, and PD, axial, coronal and sagittal sequences obtained on July 17th, 2018.” Dr. Patel also stated that “[t]he MRI films of the left shoulder revealed evidence of (a) Lateral downsloping acromion (b) Tendinosis of the supraspinatus and infraspinatus tendons.” (See Plaintiff’s Affirmation in Opposition, Report of Dr. Patel, Exhibit I).

Ida Tetro, M.D., examined the Plaintiff on March 2, 2022, more than three years and six months after the date of the accident. Dr. Tetro conducted range of motion testing of the Plaintiff’s cervical spine, lumbar spine and left shoulder using a goniometer. As to the Plaintiff’s cervical spine, Dr. Tetro found “[f]lexion 45 (normal) 35 (examination) 22% (percentage of ROM limitation) extension 45 (normal) 35 (examination) 22% (percentage of ROM limitation), right lateral flexion 45 (normal) 35 (examination) 22%(percentage of ROM limitation), left lateral flexion 45 (normal) 35 (examination) 22% (percentage of ROM limitation), right rotation 45 (normal) 35 (examination) 22% (percentage of ROM limitation), left rotation 45 (normal) 35 (examination) 22 (percentage of ROM limitation).” As to the lumbar spine, Dr. Tetro found “[f]lexion 90 (normal) 85 (examination) 6% (percentage of ROM limitation), extension 30 (normal) 25 (examination) 17% (percentage of ROM limitation) right lateral flexion 30 (normal) 25 (examination) 17% (percentage of ROM limitation) left lateral flexion 30 (normal) 25 (examination) 17%

(percentage of ROM limitation) right rotation 30 (normal) 25 (examination) 17% (percentage of ROM limitation) left rotation 30 (normal) 25 (examination) 17 (percentage of ROM limitation).” As to the left shoulder, Dr. Tetro found “[f]or. elev. 150 (normal) 140 (examination) 7% (percentage of ROM limitation Abduction 150 (normal) 135 (examination) 10 (percentage of ROM limitation).” Dr. Tetro opined that “I feel that the accident on 07/07/2018 is the competent cause for cervical and lumbar sprain/strain, for straightening of cervical and lumbar lordosis compatible with muscle spasm, for contusion of left shoulder.” Dr. Tetro also opined that “[d]ue to the mechanism of this traumatically induced injury, there is weakening of the supportive soft tissue structures.” Dr. Tetro also opined that “[w]ith a reasonable degree of medical certainty, I believe that the injuries that I have outlined are permanent in nature and are directly related to the motor-vehicle accident on 07/07/2018.” (See Plaintiff’s Affirmation in Opposition, Report of Dr. Patel, Exhibit K).

In relation to the Defendant’s reply, the Plaintiff did discuss the purported gap in treatment and provided an adequate explanation for the gap in his treatment history. See *Pommells v. Perez*, 4 N.Y.3d 566, 576, 830 N.E.2d 278, 284 [2005]. An affidavit stating that a Plaintiff stopped receiving treatment because his benefits were terminated and he could not afford to continue to pay for such treatment out of pocket is an adequate explanation for the gap in his treatment history. See *Delorbe v. Perez*, 59 AD3d 491, 492, 873 N.Y.S.2d 198, 199 [2d Dept 2009]; see also *Black v. Robinson*, 305 AD2d 438, 439–40, 759 N.Y.S.2d 741, 742 [2d Dept 2003][plaintiff testified at EBT that she underwent therapy until her insurance ran out created sufficiently addressed gap in treatment]. Here, as part of his affidavit, the Plaintiff stated that “I did not have a ‘gap in treatment’ these past few years because I decided I felt better - I would have continued to seek further treatment had my no-fault benefits not been cut off by the provider.” He also stated that “I am not a rich man and I don’t have the means to pay for private doctors.” (See Plaintiff’s Affirmation in Opposition, Exhibit “E”, Paragraph 4). This is an adequate explanation for the alleged gap in treatment. See *Gutierrez v. Yonkers Contracting Co.*, 61 A.D.3d 823, 824, 877 N.Y.S.2d 226, 227 [2d

Dept 2009][Plaintiff stated in affidavit that he stopped treatment because his no-fault benefits were terminated and he could not afford to pay "out of pocket"].

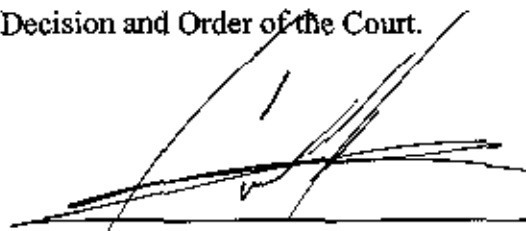
As a result of these examinations, particularly the examinations and reports of Dr. Khaimov and Dr. Tetro, the Court finds that even assuming a prima facie showing by Defendant, the Plaintiff has raised material issues of fact that prevent the Court from granting summary judgment to the Defendant. See *Chul Koo Jeong v. Demike*, 137 AD3d 1189, 1190, 28 N.Y.S.3d 393, 394 [2d Dept 2016]; *Casiano v. Zedan*, 66 AD3d 730, 730, 887 N.Y.S.2d 613, 614 [2d Dept 2009]. "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." *Toure v Avis Rent A Car Systems Inc.*, 98 NY2d 345, 774 N.E.2d 1197 [2002]; see also *Mitchell v. Casa Redimix Concrete Corp.*, 83 AD3d 1015, 1015, 921 N.Y.S.2d 543 [2d Dept 2011]. As a result, the Court finds that the Plaintiff has presented sufficient evidence to raise a material issue of fact regarding whether he suffered a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system as required by Insurance Law 5102.

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Defendant (motions sequence #2) is denied.

This constitutes the Decision and Order of the Court.

ENTER:

  
Carl J. Landicino, J.S.C.

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KINGS COUNTY CLERK  
FILED

