

**Perez v Ahadzi**

2023 NY Slip Op 30154(U)

January 13, 2023

Supreme Court, New York County

Docket Number: Index No. 158720/2018

Judge: James G. Clynnes

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JAMES G. CLYNES PART 22M**

*Justice*

-----X		<b>INDEX NO.</b>	<u>158720/2018</u>
RUBEN PEREZ		<b>MOTION DATE</b>	<u>02/12/2021, 02/15/2021</u>
Plaintiff,		<b>MOTION SEQ. NO.</b>	<u>001 002</u>
- v -			

GLADSTONE AHADZI,

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 33, 35, 37, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 36, 38, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents and following oral argument, Defendant Gladstone Ahadzi's (Defendant) motion for summary judgment, dismissing Plaintiff's Complaint on the grounds that Plaintiff has not sustained a serious injury under Insurance Law 5102 (d) is granted.

Plaintiff seeks recovery for injuries allegedly sustained in a March 25, 2017 accident between Plaintiff cyclist and a motor vehicle owned and operated by Defendant. Plaintiff alleges he sustained serious injuries to his thoracic spine, cervical spine, left shoulder, and left wrist, and that these injuries meet the serious injury threshold under Insurance Law 5102 (d).

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 eliminate any material issues of fact from the case (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*Licari v Elliott*, 57 NY2d 230 [1982]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad* at 853 [1985]). A defendant seeking summary judgment on the ground that a plaintiff's

negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (*Toure v Avis Rent a Car Systems Inc*, 98 NY2d 345, 352 [2002]). In instances where a defendant asserts that the evidence reveals a preexisting injury or a degenerative condition, the plaintiff must present evidence to the contrary (*Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]).

Defendant’s radiologist, Dr. Jessica F. Berkowitz, reviewed MRI scans of Plaintiff’s cervical spine taken on May 31, 2017, lumbar spine taken on June 27, 2017, left shoulder taken on May 9, 2017, and thoracic spine taken on May 31, 2017. Dr. Berkowitz found that the MRI scans of the cervical and lumbar spine showed disc herniations and bulges that were degenerative with no traumatic etiology and that there was no causal relationship with the subject accident. In relation to the May 9, 2017 scan of Plaintiff’s left shoulder, Dr. Berkowitz found it unremarkable with no evidence of acute traumatic injury to the shoulder such as fracture, traumatic bone marrow edema or musculotendinous junction tear. Regarding the May 31, 2017 MRI of Plaintiff’s thoracic spine, Dr. Berkowitz found it unremarkable with no evidence of traumatic injury to the thoracic spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma. The Court notes that Plaintiff’s Bill of Particulars does not include injury to Plaintiff’s lumbar spine and as such will not consider any reference to lumbar spine in its analysis.

Defendant’s orthopedic surgeon, Dr. Gregory Chiamonte, examined Plaintiff on December 18, 2020 and concluded that Plaintiff’s cervical spine, thoracic spine, left shoulder, and left wrist/hand injuries were all sprains/strains that were resolved. Dr. Chiamonte measured Plaintiff’s range of motion with a goniometer pursuant to AMA guidelines and found Plaintiff’s cervical spine flexion at 50 degrees (50 degrees normal), extension at 70 degrees (60 degrees normal), right lateral flexion at 45 degrees (45 degrees normal), left lateral flexion at 45 degrees (45 degrees normal), right rotation at 80 degrees (80 degrees normal), and left rotation at 80 degrees (80 degrees normal); thoracic spine flexion at 45 degrees (45 degrees normal), extension at 0 degrees (0 degrees normal), right lateral flexion at 45 degrees (45 degrees normal), left lateral flexion at 45 degrees (45 degrees normal), right rotation at 30 degrees (30 degrees normal), and left rotation at 30 degrees (30 degrees normal); left shoulder forward 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); left wrist palmar flexion

at 60 degrees (60 degrees normal), dorsiflexion at 60 degrees (60 degrees normal), pronation at 80 degrees (80 degrees normal), supination at 80 degrees (80 degrees normal), radial-lateral motion at 20 degrees (20 degrees normal), and ulnar motion at 30 degrees (30 degrees normal); and left hand thumb: CMC opposition at 90 degrees (90 degrees normal), and adduction at 60 degrees (60 degrees normal), MP at 0-60 degrees (0-60 degrees normal), and IP at 0-80 degrees (0-80 degrees normal), fingers: MP at 0-90 degrees (0-90 degrees normal), PIP at 0-90 degrees (0-90 degrees normal), and DIP at 0-90 degrees (0-90 degrees normal). Dr. Chiaramonte also concluded that Plaintiff can perform his activities of daily living as he did prior to the accident and is capable of working without restrictions.

In opposition, Plaintiff fails to raise a triable issue of fact that a serious injury was sustained within the meaning of Insurance Law 5102 (d) that was caused by the subject accident (*Gaddy v Eyer*, 79 NY2d 955 [1992]). Failure to raise a triable issue of fact requires a court to grant summary judgment and to dismiss the complaint (*Licari v Elliott*, 57 NY2d 230 [1982]). Plaintiff relies on the affirmed reports of orthopedic surgeons, Dr. Barry Katzman and Dr. Mark Kramer, radiologist, Dr. Steve B. Losik, and Plaintiff's treating physician Dr. Yvette Abraham.

As to the claimed left wrist injury, Plaintiff's submission fails to include any evidence of serious injury. Plaintiff's medical experts did not examine the left wrist, and Plaintiff effectively abandoned his claim of left wrist injury by failing to address it in his opposition to Defendant's motion (*Bray v Rosas*, 29 AD3d 422 [1st Dept 2006]).

Regarding Plaintiff's spine injuries, Plaintiff contends that the MRIs of his cervical and thoracic spine revealed disc herniation at C4-C5 and C5-C6 and disc bulging at C6-C7, as well as bulging at T5-T6 and T6-T7 of his thoracic spine. However, herniated discs and disc bulges alone are insufficient to constitute a serious injury within the meaning of Insurance Law 5102 (d) (*Cortez v Manhattan Bible Church*, 14 AD3d 466 [1st Dept 2005]). Rather, to constitute such an injury, a herniated disc or a disc bulge must be accompanied by objective evidence of the extent of alleged physical limitations resulting from the herniated disc (*Onishi v N & B Taxi, Inc.*, 51 AD3d 594 [1st Dept 2008]). Plaintiff's radiologist, Dr. Losik, who reviewed MRI scans of Plaintiff's cervical spine, as well as his left shoulder and thoracic spine does not make any mention of alleged physical limitations resulting from the herniated disc or the disc bulges. Dr. Losik's report also fails to offer any evidence of causation and fails to refute Defendant's evidence of degenerative conditions. Plaintiff's orthopedic surgeon, Dr. Kramer, examined Plaintiff's cervical spine and

found a limitation to his range of motion, but failed to set forth what objective tests he used in arriving at his conclusion concerning the alleged restriction of motion in Plaintiff's cervical spine.

Plaintiff's treating physician, Dr. Yvette Abraham examined Plaintiff shortly after the accident on April 27, 2017, measured Plaintiff's range of motion of his cervical spine and found flexion 45 degrees (60 normal), extension 15 degrees (30 normal), left rotation 30 degrees (45 normal), right rotation 25 degrees (45 normal), "LT" lateral flexion 20 degrees (30 normal), "RT" lateral flexion 15 degrees (30 normal). Plaintiff's range of motion of his cervical spine remained the same at the follow visits on May 22, 2017 and October 8, 2017. Dr. Abraham measured the range of motion of Plaintiff's cervical spine on April 8, 2021 and found flexion 45 (60 normal), extension 40 degrees (50 normal), left rotation 70 degrees (80 normal), right rotation 70 degrees (80 normal), "LT" lateral flexion 30 degrees (45 normal), "RT" lateral flexion 35 degrees (45 normal). Dr. Abraham's report of the cervical spine measurements list different "normal" ranges than those listed in her medical notes, without providing the origin of the normal ranges listed. While these discrepancies may be explainable, Plaintiff's submission fails to explain any basis for the differences. The normal ranges also differ from those listed in Dr. Chiaramonte's report, where he notes the normal ranges are based on published guidelines as per AMA 5<sup>th</sup> edition. Comparing ranges of motion observed in Plaintiff with a baseline norm and reaching accurate comparisons is critical to determining whether there are significant limitations on Plaintiff's range of motion. Dr. Abraham's adjustments in the baseline, absent explanation, thus erode the reliability of her assessments, "leaving the court to speculate" as to their ultimate meaning (*Bray v Rosas*, 29 AD3d 422 [1st Dept 2006]).

While Dr. Abraham's report concludes that Plaintiff's spinal deficits are directly and causally related to the injuries sustained from the accident, the report failed to address the detailed findings of Dr. Berkowitz who found that the cervical MRI showed degenerative changes that were not caused by the subject accident and that the thoracic MRI revealed no evidence of acute traumatic injury such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma. Thus, Dr. Abraham's opinion that the injuries were causally related to the subject accident was speculative (*Delfino v Luzon*, 60 AD3d 196 [1st Dept 2009] failure to address evidence of degeneration renders any finding that the injuries were caused by trauma purely conclusory or speculative).

Regarding Plaintiff's left shoulder injuries, Plaintiff contends that there is a limitation to his range of motion, as indicated in Dr. Katzman's report, which indicated forward flexion is to 120 degrees (180 normal). However, Dr. Katzman fails to note how he measured Plaintiff's range of motion. Dr. Katzman also notes that everything else regarding Plaintiff's left shoulder is normal. The objective tests were negative. Dr. Katzman concluded that Plaintiff's MRI did not show a tear, and diagnosed left shoulder impingement syndrome, without causally connecting this syndrome to the subject accident. Dr. Losik found that the MRI scan of the left shoulder showed no evidence of atrophy, edema, or fatty infiltration, and no masses or fluid collections associated with the glenohumeral joint. Dr. Losik concluded that there was a mild joint effusion consistent with recent trauma but did not causally connect it to the accident.

Plaintiff also failed to submit any competent medical evidence that he was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days subsequent to the subject accident, as he went to work a few days after the accident. Plaintiff indicated that he is unable to work as a roller-skating instructor, however, he has provided no documentation or evidence to support these claims (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]). In his testimony, Plaintiff did note difficulty with general heavy lifting, and sitting and standing for long periods of time, however, these are insufficient to create an issue of fact (*Reyes v Park*, 127 AD3d 459, 461 [1st Dept 2015] [holding in part that plaintiff's "claimed limitations were not "substantially all" of his usual and customary daily activities"])). Defendant's motion is granted.

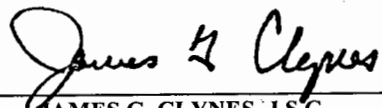
Accordingly, it is

**ORDERED** that Defendant's motion for summary judgment is GRANTED and Plaintiff's complaint is dismissed; and it is further

**ORDERED** that within 30 days of entry, movant shall serve a copy of this Decision and Order upon Plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

1/13/2023  
DATE

  
\_\_\_\_\_  
JAMES G. CLYNES, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: