

**Ferreira v Liz**

2023 NY Slip Op 34010(U)

November 13, 2023

Supreme Court, New York County

Docket Number: Index No. 150480/2019

Judge: James G. Clynes

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

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

*Justice*

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JEUDY D. MERCADO FERREIRA, MANUEL E. INFANTE  
YNFANTE

Plaintiffs,

- v -

WILLIAM A. LIZ, JARINSON JORGE,

Defendants.

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INDEX NO. 150480/2019

MOTION DATE 11/11/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, and following oral argument Defendant Jarinson Jorge’s motion for summary judgment and dismissal of the Complaint of Plaintiffs Jeudy D. Mercado-Ferreira and Manuel E. Infante Ynfante on the grounds that Plaintiffs’ alleged injuries do not meet the serious injury threshold of Insurance Law 5104 (a) and 5102 (d); and Defendant William Liz’s “cross-motion” for the same relief are decided as follows:

Plaintiffs seek recovery for injuries allegedly sustained as a result of an August 21, 2018 motor vehicle accident between a vehicle owned and operated by Defendant William A. Liz within which Plaintiffs were passengers, and a vehicle owned and operated by Defendant Jarinson Jorge. In their Bill of Particulars, Mercado-Ferreira alleges injuries to the left shoulder, for which he underwent arthroscopic surgery on October 4, 2018, right knee, cervical spine, and lumbar spine and Infante Ynfante alleges injuries to his left shoulder, for which he underwent arthroscopic surgery on October 4, 2018 and right knee. Both Plaintiffs allege that their injuries fall into the categories outlined in Insurance Law 5102 (d).

A movant bears the initial burden to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a

showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Lopez v Senatore*, 65 NY2d 1017 [1985]).

In support of his motion, Defendant Jorge relies, in pertinent part, on the independent orthopedic examination reports by Dr. Dana A. Mannor, orthopedic surgeon and the independent radiological reports by Dr. Jessica F. Berkowitz, radiologist.

*Orthopedic Examinations by Dr. Mannor*

Dr. Mannor examined Mercado-Ferreira on September 17, 2020 and concluded that his cervical spine sprain/strain, lumbar spine sprain/strain, and right knee sprain/strain were resolved, and the status post left shoulder arthroscopic surgery was “healed by exam.” Dr. Mannor measured Mercado-Ferreira’s range of motion with a goniometer and compared the measurements to the active range of motion values according to AMA Guidelines. As to Mercado-Ferreira’s cervical spine, lumbar spine, right shoulder, left shoulder, right knee, and left knee, Dr. Mannor found normal range of motion and negative objective tests. Dr. Mannor reported no disability or permanency. Dr. Mannor further noted that Mercado-Ferreira is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities, including work duties.

Dr. Mannor examined Infante Ynfante on September 17, 2020 and concluded that his right knee sprain/strain was resolved and the status post left shoulder surgery on October 4, 2018 was “healed by exam.” Dr. Mannor measured Infante Ynfante’s range of motion with a goniometer and compared the measurements to the active range of motion values according to AMA Guidelines. As to Infante Ynfante’s right shoulder, left shoulder, right knee, and left knee, Dr. Mannor found normal range of motion and negative objective tests. Dr. Mannor reported no disability or permanency. Dr. Mannor further noted that Infante Ynfante is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities, including work duties.

*Radiological Reviews by Dr. Berkowitz*

Dr. Berkowitz undertook an independent review of the MRIs of Mercado-Ferreira's cervical spine taken on September 4, 2018, and the MRIs of his lumbar spine, left shoulder, and right knee taken on September 6, 2018. Dr. Berkowitz reported the following: as to the cervical spine, slight straightening of the normal cervical lordosis, which, she noted, is an unspecific finding and may be due to positioning; as to the lumbar spine, disc bulging and herniation, but noted that these are common findings in the general population, and found no evidence of acute traumatic injury or fracture; as to the left shoulder, a ganglion cyst superior to the acromion, but noted that it is developmental, a band of fat-like signal in muscle belly of infraspinatus that is likely to be related to an old, healed injury; and as to the right knee, no joint effusion, and only a developmental patella alta. Dr. Berkowitz concluded that there was no causal relationship between her findings and the subject accident.

Dr. Berkowitz undertook an independent review of the MRIs of Infante Yfante's cervical spine taken on September 13, 2018, the MRIs of his lumbar spine and left shoulder taken on September 6, 2018, and the MRIs of his right knee taken on September 8, 2018. Dr. Berkowitz reported the following: as to the cervical spine, unremarkable with no bulges or herniations and no evidence of acute traumatic injury; as to the lumbar spine, hypertrophic facet joint changes that, she reported, are chronic and degenerative in origin as well as disc herniations that are common and unlikely to be related to an acute traumatic injury; as to the left shoulder, a small degenerative bony change of the acromioclavicular joint and humeral head and some tearing of the distal posterior supraspinatus tendon that is likely due to repetitive microtrauma and wear and tear of rotator cuff; and as to the right knee, slight patella alta and slight lateral patellar subluxation that, she reported, are developmental as well as a small joint effusion that is nonspecific in etiology, but no evidence of trauma. Dr. Berkowitz concluded that there was no causal relationship between her findings and the subject accident.

Defendant's submission has established a prima facie showing of entitlement to summary judgment. The burden therefore shifts to Plaintiffs to raise an issue of fact as to whether they

sustained serious injuries as a result of the accident and whether they were prevented from performing substantially all of their daily activities for 90 out of the first 180 days after the accident (*Licari v Elliott*, 57 NY2d 230 [1982]).

In support of his cross-motion, Defendant Liz adopted and incorporated the facts, legal arguments, exhibits, and procedural history set forth in Defendant Jorge's motion, and requests identical relief.

In opposition, Plaintiffs raise triable issues of fact that they sustained a serious injury as a result of the subject accident. Plaintiffs rely on the affirmations and operative reports of Dr. Wendell Joseph Gorum, orthopedic surgeon, as well as the affirmations of Dr. David R. Payne, radiologist.

#### *Mercado-Ferreira*

Dr. Gorum affirmed that he performed left shoulder arthroscopy on Mercado-Ferreira on October 4, 2018 and observed a partial thickness tear of the rotator cuff and a tear of the glenoid labrum. Dr. Gorum measured the range of motion of Mercado-Ferreira's left shoulder with a goniometer and compared his findings to normal values based on AMA Guidelines. He found limitations in the range of motion in Mercado-Ferreira's left shoulder and positive objective tests both before and after surgery. Dr. Gorum affirmed that Mercado-Ferreira's injuries are a direct result of and causally related to the subject accident and are permanent in nature.

Dr. Payne reviewed the MRI of Mercado-Ferreira's left shoulder and found a SLAP lesion with anterosuperior extension, a 0.3 cm ganglion or synovial cyst along surface of acromion, and no indication or pre-existing degenerative condition.

Mercado-Ferreira has raised an issue of fact as to his left shoulder to warrant denial of summary judgment. If a claimant can satisfy at least one of the serious injury thresholds, then the claimant is permitted to recover for all damages proximately caused by the accident, even those that are not considered "serious." (*Jiang Chung v State of NY*, 70 Misc3d 775, 786 [Ct Cl 2020]). Thus, the Court need not address whether the other injuries claimed were sufficient to meet the no-fault threshold (*Johnson v KS Transp. Inc.*, 115 AD3d 425, 426 [1st Dept 2014]).

*Infante Ynfante*

Dr. Gorum affirmed that he performed arthroscopy surgery on Infante Ynfante's left shoulder on October 4, 2018 and observed a labral tearing and partial tear of the rotator cuff. Dr. Gorum measured the range of motion of Infante Ynfante's left shoulder, compared his findings to normal values based on AMA Guidelines, and found decreased range of motion and positive objective tests. Dr. Gorum affirmed that Infante Ynfante's injuries are permanent in nature and are directly related to the subject accident.

Dr. Payne reviewed the MRI of Ynfante's left shoulder and found an anteroinferior labral tear compatible with a Bankart tear and no indication of any pre-existing degenerative condition.

Infante Ynfante has raised an issue of fact with respect to whether he sustained a serious injury to his left shoulder. As stated above, if a claimant can satisfy at least one of the serious injury thresholds, then the claimant is permitted to recover for all damages proximately caused by the accident, even those that are not considered "serious." (*Jiang Chung* at 786). As such, the Court need not determine whether Infante Ynfante's other injuries fall into one of the serious injury categories under Insurance Law 5102 (d).

*90/180 Claims*

With regard to the final category claimed under Insurance Law 5102 (d), 90/180, a plaintiff must submit objective medical evidence to establish a claim, namely that s/he was prevented from performing substantially all usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]).

In his EBT, Mercado-Ferreira testified that he was not confined to his bed for any period of time, but that he was confined to his home for two months after the accident. He also testified that he missed sixth months of work following the accident.

Infante Ynfante testified that he could not leave his bed for approximately four to five months, and he did not work for eight months.

Here, Plaintiffs have sufficiently raised issues of fact by relying on the affirmations of Dr. Gorum and Dr. Payne, which outline the permanency of Plaintiffs' injuries as well as Plaintiffs' subjective complaints of pain and limitation. Accordingly, it is

**ORDERED** that Defendant Jorge's motion for summary judgment and to dismiss the Complaint as Plaintiffs fail to meet the serious injury threshold under Insurance Law 5102 (d) is denied; and it is further


**ORDERED** that Defendant Liz's cross-motion for summary judgment and dismissal of Plaintiffs' Complaint as they have failed to meet the serious injury threshold under Insurance Law 5102 (d) is denied; and it is further

**ORDERED** that any relief not expressly addressed herein has nonetheless been considered; and it is further

**ORDERED** that within 30 days of entry, Plaintiffs shall serve a copy of this Decision and Order upon Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

11/13/2023  
DATE

  
JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE