

Etienne v Gauthier

2025 NY Slip Op 34905(U)

December 15, 2025

Supreme Court, Kings County

Docket Number: Index No. 517166/2022

Judge: Kerry J. Wade

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At an IAS Term, Part 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of December, 2025.

PRESENT:

HON. KERRY J. WARD, A.J.S.C.

XAVIER E. ETIENNE,

Plaintiff,

-against-

OLDY O. GAUTHIER,

Defendant.

DECISION/ORDER

Index No.: 517166/2022
Mot. Seq. 4

Defendant Oldy O. Gauthier (“Defendant”) moves for summary judgment and dismissal of Plaintiff Xavier E. Etienne’s (“Plaintiff”) Complaint pursuant to CPLR §3212 on the basis that Plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law §5102 (d). Plaintiff opposes the motion.

The motion is hereby denied, as Defendant failed to establish a *prima facie* entitlement to summary judgement.

Background and Procedural History

This action arises out of a motor vehicle accident which occurred on November 6, 2021 (the “Accident”) at approximately 1:03AM on Flatlands Avenue, at or near its intersection with East 93rd Street in Kings County, New York. Plaintiff filed their Summons and Complaint on June 14, 2022 (Exhibit A, NYSCEF Doc. 35), and on May 6, 2025, Defendant interposed an Answer (Exhibit B, NYSCEF Doc. 36).

Defendant’s Medical Experts

In support of his motion, Defendant submits the medical reports of Dr. Pierce J. Ferriter (“Dr. Ferriter”), retained to perform an orthopedic examination of Plaintiff (Exhibit D, NYSCEF Doc. 38). Regarding the cervical and lumbar spine, Dr. Ferriter’s assessment revealed that there was no swelling, discoloration, deformity or muscle spasm upon palpation of the paracervical

muscles (*Id.* at p. 4, 5). Both examinations revealed normal active ranges of motion (*Id.*). Regarding the left shoulder and left knee, Dr. Ferriter's assessment indicated normal active range of motion, and inspection of both revealed there was no heat, swelling, effusion, erythema, or crepitus appreciated (*Id.* at p.6).

Defendant also submits the medical reports of Dr. Joseph Mazzie ("Dr. Mazzie"), retained to perform a cervical and lumbar spine, left knee, and left shoulder MRI examination of Plaintiff (Exhibit E, NYSCEF Doc. 39). Regarding the cervical and lumbar spine MRI's, Dr. Mazzie concluded that there was no fracture, subluxation, or prevertebral soft tissue swelling (*Id.* at p. 3). Additionally, Dr. Mazzie stated that there is diffuse disc desiccation in both the lumbar and cervical spine which could not have developed in the time interval between the examination and the incident and is indicative of degenerative disc disease (*Id.*). Regarding the left knee MRI, Dr. Mazzie stated there is no fracture or dislocation (*Id.* at p. 7). Additionally, the posterior cruciate ligament, collateral ligament, lateral collateral ligament, medial meniscus, lateral meniscus, and surrounding musculature are all intact. Further, there is no traumatic bone marrow edema (*Id.*). Finally, regarding the left shoulder MRI, Dr. Mazzie stated there is no fracture, dislocation or acromioclavicular joint separation (*Id.* at p. 8). While there was evidence of arthritis of the acromioclavicular joint with capsular hypertrophy, Dr. Mazzie stated this is degenerative and not related to trauma (*Id.*). Moreover, Dr. Mazzie states that the subscapularis tendon, teres minor tendon, long head biceps tendon, glenohumeral joint articular, and glenoid labrum are all intact without tear (*Id.*).

Plaintiff's Medical Experts

In rebuttal, Plaintiff submits the medical report of Dr. Christopher Durant, ("Dr. Durant"), a duly licensed Orthopedic Surgeon who had been treating Plaintiff after the accident (Exhibit A, NYSCEF Doc. 53). Regarding the injuries sustained to the cervical and lumbar spine, Dr. Durant reported that Plaintiff continues to suffer from severe neck and low back pain and has ongoing range of motion loss in the cervical and lumbar spine (*Id.*). In addition, Plaintiff's injury to his left shoulder revealed partial rotator cuff tear, labral tear, synovitis, and subacromial adhesions (*Id.* at p.9). Plaintiff suffers from continued left shoulder tenderness and painful and limited range of motion which has restricted up to 75% (*Id.*). Regarding Plaintiff's left knee injury, Dr. Durant states that he sustained an ACL sprain and Chondromalacia patellae (Grade 1), which has caused continued left knee pain associated with clicking, popping, and cracking of the knee, as well as

ongoing range of motion loss up to 29% (*Id.*).

Plaintiff further submits the medical reports of Dr. Roman Shulkin (“Dr. Shulkin”), a pain physician, who performed Plaintiff’s lumbar surgery on June 17, 2022 (Exhibit C, NYSCEF Doc. 55). Dr. Shulkin noted that the procedure was medically necessary after the Plaintiff had more than eight weeks of conservative treatment, failed conservative treatment, continued complaining of severe lower back pain with radiculopathy, and had severe functional limitation (*Id.*).

Plaintiff also submits the medical report of Dr. Isaac Kreizman (“Dr. Kreizman”), who examined Plaintiff on April 6, 2022 (Exhibit D, NYSCEF Doc. 56). The report indicates that Plaintiff’s lower back pain was 8-9/10 with pain in the neck at 3-4/10 (*Id.*). The pain was described as constant, sharp, stabbing, radiating to the extremities with numbness and muscle weakness (*Id.*).

Finally, Plaintiff submits the medical reports of Dr. Jordan Fersel (“Dr. Fersel”), who examined Plaintiff on November 9, 2021 (Exhibit E, NYSCEF Doc. 57). During the assessment, Plaintiff reported that his current pain at the time of examination was 8/10 for left shoulder, 8/10 for lumbar spine, and 8/10 for left knee (*Id.*). Dr. Fersel indicated that due to the severity of Plaintiff’s pain, he was required to perform a left sacroiliac joint injection under ultrasound guidance on the same date (*Id.*).

Law and Analysis

Pursuant to CPLR §3212, “[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party” (CPLR §3212 [b]; *see Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018]). The motion for summary judgment must also “show that there is no defense to the cause of action” (*Id.*). The party moving for summary judgment must make a *prima facie* showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *see also Brill v City of New York*, 2 N.Y.3d 648 [2004]). In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them (*see Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012]). Once a *prima facie* showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial (*see Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

Under the No Fault law, to maintain an action for personal injury, a plaintiff must establish that a serious injury has been sustained (*see Licari v. Elliot*, 57 NY2d 230 [1982]). In moving for summary judgment, the proponent must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *see also Winegrad v. New York Univ. v. Medical Center*, 64 NY2d 851 [1985]). In addition, a defendant has the burden of proving, by submitting competent evidence in admissible form, that plaintiff has not suffered a serious injury (*see Lowe v. Bennett*, 122 AD2d 728 [1st Dept. 1986], *affirmed*, 69 NY2d 701 [1986]). If a defendant's motion is sufficient to raise the issue of whether a serious injury has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of a serious injury (*see Lopez v. Senatore*, 65 NY2d 1017 [1985]).

In the present case, Defendant's evaluating doctor, Dr. Ferriter, stated that Plaintiff did not sustain any significant or permanent injury because of the accident, and that the injured body parts alleged in the Bill of Particulars have since resolved (Exhibit D, NYSCEF Doc. 38 at p. 7). Dr. Ferriter further concluded there were no objective clinical findings indicative of a present disability or functional impairment, which prevent Plaintiff from engaging in normal activities of daily living ("ADL"), and usual activities including work, school, and hobbies (*Id.*). Similarly, Dr. Mazzie ultimately concluded that Plaintiff did not suffer any posttraumatic changes which are causally related to the accident (Exhibit E, NYSCEF Doc. 39).

Based upon the evidence presented, Defendant has sufficiently demonstrated a *prima facie* showing that he is entitled to summary judgement as Plaintiff did not sustain a serious injury under Insurance Law §5102(d) (*see Castillo v. MTA Bus Co.*, 163 AD3d 620 [2d Dept. 2018]; *see also Byrd v. J.R.R. Limo*, 61 AD3d 801 [2d Dept. 2009]).

However, in rebuttal, Plaintiff has raised a triable issue of fact as to whether he sustained a serious injury (*see Donadio v. Doukhnych*, 55 AD3d 532 [2d Dept. 2008]). Notably, Dr. Durant indicated that Plaintiff's injuries to the cervical and lumbar spine, left shoulder, and left knee were a direct result of the accident that occurred on November 6, 2021 (Exhibit A, NYSCEF Doc. 53). He further concluded that Plaintiff may be prone to future exacerbations of his symptoms and future post-traumatic arthritic changes may be expected to the injured joints as the patient ages (*Id.*). As such, Plaintiff's disabilities are partial but permanent and have resulted in chronic pain with progressive remission and exacerbation during overuse, which means Plaintiff will continue

to suffer from pain and limitations of his activities (*Id.* at 9). Dr. Durant indicated that for this reason, the prognosis for a total recovery is poor, with continuing chronic pain (*Id.*). Similarly, Dr. Shulkin concluded that there is a direct causal relationship between the accident and Plaintiff's current injuries (*Id.* at 10). In addition, Dr. Kreizman concluded that Plaintiff has suffered significant and quantifiable loss of use and function, which are both causally related and traumatically induced by the accident (Exhibit D, NYSCEF Doc. 56). Finally, Dr. Fersel prescribed physical therapy three to four times per week for four to six weeks for the cervical spine, lumbar spine, left shoulder, and left knee, and reports that Plaintiff's prognosis will depend on Plaintiff's engagement in physical therapy and continued assessment (Exhibit E, NYSCEF Doc. 57).

Therefore, Plaintiff has successfully rebutted Defendant's motion for summary judgment (*see Donadio v. Doukhnych*, 55 AD3d 532 [2d Dept. 2008]).

Based on the evidence, the Court finds that Plaintiff has submitted sufficient evidence to raise a triable issue of fact as to whether he sustained a serious injury, successfully refuting Defendant's motion for summary judgment.

Accordingly, Defendant's motion for summary judgment pursuant to Insurance Law §5102(d) is denied.

This constitutes the Decision and Order of the Court.

ENTER

KW

Hon. Kerry J. Ward, A.J.S.C.

Hon. Kerry J. Ward, A.J.S.C.,