

Perez v Shing Seto

2025 NY Slip Op 35184(U)

May 22, 2025

Supreme Court, Bronx County

Docket Number: Index No. 22970/2020E

Judge: Patsy Gouldborne

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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: PART

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GREGORY PEREZ,

Plaintiff,

- v -

SHING SETO, MONIE SETO

Defendant.

INDEX NO. 22970/2020E

MOTION DATE 07/31/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (9-20, 26-30, 31) (Motion 001) were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, Defendants Monie Seto and Shing Seto seek an Order granting summary judgment pursuant to CPLR §3212 dismissing the complaint against them on the basis that (1) they did not breach any duty owed to the plaintiff, and, therefore, is not a proximate cause of the subject accident, and that (2) plaintiff Gregory Perez did not sustain a "serious injury" under Insurance Law §5102(d), and for such other and further relief as this Court deems necessary and proper.

In support of the motion Defendant submits the pleadings, bill of particulars, certified police report, deposition transcripts of the parties, photographs, and the IME report of Dr Walsh.

This action arises from a motor vehicle accident that occurred on February 18, 2020, on the I 87 N/B Major Deegan Expressway by/near 146th Street. Defendant testified that the accident occurred around 1:30 p.m. Defendant testified that prior to the accident she saw the plaintiff's vehicle traveling in the right lane and defendant was in the middle lane. Defendant testified that the plaintiff vehicle was traveling ahead of her vehicle in a different lane, being the right lane. Prior to impact the plaintiff put on his left signal indicating he was going to merge into defendant's lane of travel. Defendant testified that the plaintiff's vehicle was a little less than halfway into her lane. Defendant testified that she tried to brake. After the impact she was in middle lane and the plaintiff moved his vehicle a few feet in front of her and stopped there. Thereafter, defendant pulled her vehicle to the side.

Defendant testified that the back left tail of plaintiff's vehicle and the front right of defendant's vehicle came into contact.

Plaintiff testified that he was operating his vehicle on the date of the accident. He testified that the accident occurred around 9 or 10 am. Plaintiff testified that he sustained damage to the back of his vehicle and observed damage to the right front area of the vehicle defendant was

operating. Plaintiff testified that he does not recall the traffic conditions, which lane he was traveling, nor whether he switched lanes prior to the accident. Plaintiff does not recall if his vehicle was fully within the lane of travel after the accident. Plaintiff does not recall what type of vehicle the defendant operated. Plaintiff thinks he was totally stopped at the time of impact and then testified he was totally stopped at the time of the accident. Plaintiff testified that he does not recall why he was stopped in traffic. Plaintiff testified that he felt one impact to the rear of his vehicle.

Plaintiff testified that he was experiencing pain to his back and neck area. Plaintiff read the police report, did not agree with it and it was amended. Plaintiff testified that he recognized the photograph depicting the defendant's vehicle, "sort of".

Liability

"It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident." (*Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]) citing *Turani v County of Suffolk*, 10 NY3d 906,908 [2008]). However, "not every rear-end collision is the exclusive fault of the rear most driver. The foremost driver also has a duty not to stop suddenly or slow down without proper signalling so as to avoid a collision. Thus, when the foremost driver operated his vehicle in a negligent manner, the issue of comparative negligence is for a jury to decide." (*Gaeta v Carter*, 6 AD3d 576, 577[2nd Dept 2004]).

Defendant's submissions demonstrates that during the "stop and go" traffic, Plaintiff attempted to enter the lane of travel of the Defendant's vehicle that was moving at the time of the accident. The Plaintiff's testimony is devoid of any relevant facts as to what occurred prior to impact, whether he switched lanes prior to impact, what lane he entered from onto the highway, what lane he was traveling in prior to impact, whether he entered defendant's lane of travel prior to impact. Plaintiff states he was struck in the rear, while stopped in traffic. Generally, "[t]he question of whether the accident occurred as [movant] described it...or whether it occurred as [plaintiff describes it, is a classic dispute of fact" and "raises issues of credibility that should be left to the jury" (*Ramos v Rojas*, 37 AD3d 291, 292 [1st Dept 2007]). Accordingly, this branch of the Defendant's motion is denied as the parties present conflicting testimony as to how the accident occurred.

Threshold

When a Defendant seeks summary judgment alleging the plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action *Franchini v Palmieri*, 1 NY3d 536 [2003]. "Such evidence includes 'affidavits or affirmations of medical experts who examined the plaintiff and concluded that no objective medical findings support the plaintiff's claim'" *Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011] [internal quotes omitted]. A defendant may also meet their burden with sufficient evidence demonstrating that the plaintiff's injuries are not causally related to the accident. *Farrington v Go On Time Car*

Service, 76 AD3d 818 [1st Dept 2010], citing *Pommels v Perez*, 4 NY 3d 566, 572 [2005]. Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective evidence, admissible medical proof. *Toure v Avis Rent a Car Sys.*, 98 NY 2d 345, 350 [2002].

Here, the Defendants have established that Plaintiff's alleged injuries to his cervical spine and lumbar spine, were not permanent or significant in nature. Defendant accomplished this by submitting the affirmed report of Dr. William Walsh, M.D., dated February 9, 2022, who found normal range of motion in Plaintiff's cervical spine, thoracic spine, and lumbar spine with diagnostic testing being normal or negative. (*Riollano v Leavey*, 173 AD3d 494, 495 [1st Dept 2019]). Dr. Walsh found the cervical range of motion reveals flexion at 50 degrees (50 degrees normal), extension at 60 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). Orthopedic Tests: " Distraction - negative. " Compression - negative. " Jackson's - negative. " Soto-Hall - negative. The thoracic range of motion reveals 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). Scapular Winging: Negative. The lumbar range of motion reveals flexion at 60 degrees (60 degrees normal), extension at 25 degrees (25 degrees normal), right lateral flexion at 25 degrees (25 degrees normal), and left lateral flexion at 25 degrees (25 degrees normal). Orthopedic Tests: " Bilateral straight leg raise is negative bilaterally at 80 degrees (normal 80 degrees). " Fabere - negative. " Ely's - negative. " Kemp's - negative. " Lasègue's sign – negative.

With respect to the "right elbow there was no heat, swelling, effusion, erythema, or crepitus appreciated. Range of motion was not performed due to complaints of pain. Tinel's and Apley's negative. Cervical, thoracic, lumbar spine, and right elbow sprain/strain resolved. Dr. Walsh states there is no evidence of orthopedic disability." The plaintiff's bill of particulars allege plaintiff sustained personal injuries to his "right elbow - joint effusion; thinning of the articular cartilage of the radiocapitellar articulation with some subchondral signal changes; focus of subchondral signal abnormality noted in the distal humerus between the capitellum and trochlear surface; and decreased range of motion.

The defendant's expert did not discuss the issue as to causation, after opining that the cervical, thoracic, lumbar spine, and right elbow sprain/strain resolved. *See Henry v Carr*, 161 AD3d 424 [1st Dept 2018]. Accordingly, the burden now shifts to the Plaintiff as to permanent consequential limitation and significant limitations of the cervical spine and lumbar spine. (*Lewis v Revello*, 172 AD3d 505, 505-506 [1st Dept 2019]).

In opposition to the motion, Plaintiff submits the affirmed report from Dr. Alexandre Grigorian who examined the plaintiff on November 10, 2023. Dr. Grigorian found restricted ranges of motion to the cervical spine and lumbar spine. Dr. Grigorian found the "cervical spine range of motion is grossly decreased throughout all range of motion testing and is as follows: Flexion: 20/50. Extension: 30/60. Left rotation: 60/80. Right rotation: 40/80. Left lateral bending: 20/45. Right lateral bending: 20/45 Foraminal compression test: positive with radiation

to right Paraspinal muscle tenderness and spasms appreciated more on right side No midline tenderness palpated. The thoracic spine: No paraspinal muscle tenderness and spasms palpated. No midline tenderness palpated. The lumbosacral spine range of motion is grossly decreased throughout all range of motion testing and is as follows: Forward flexion: 70/90. Extension: 20/30 Straight leg raising supine: and negative bilaterally. No paraspinal muscle tenderness and spasms appreciated bilaterally No midline tenderness palpated”.

It is noted that the guidelines, methods or instruments, if any, to determine how Dr. Grigorian came to the above results were not discussed. It is particularly important, wherein the IME Dr. Walsh and Dr. Grigorian value of normal differs with respect to the degrees of the lumbar spine range of motion. *See Dinc v Shalesi*, 208 AD3d 558 [2nd Dept 2022].

Dr. Grigorian’s assessment of the plaintiff was “1.Chronic neck pain/ Cervical radiculopathy / C3-4/C4-5/CS-6/C6-7 herniated discs. 2.Chronic lower back pain/ R/o Lumbar radiculopathy / LS-51 herniated disc. Prognosis: Injuries sustained of a partial permanent nature”. Dr. Grigorian states that the plaintiff “has reached maximum medical improvement (in regard to non-surgical/non-invasive treatment modalities)”; the injuries sustained are solely and directly caused by the motor vehicle accident of 2/18/2020”.

With respect to gap in treatment, the accident occurred on February 18, 2020. Dr. Grigorian’s report indicates that plaintiff “started on a course of physical therapy/chiropractic treatments for neck/midback/lower back symptoms” and he attended about six months of physical therapy. In addition, Dr. Grigorian states the plaintiff has reached maximum medical improvement (in regard to non-surgical/non-invasive treatment modalities)”. *See Ayala v Cruz*, 95 AD3d 699 [1st Dept 2012]; *see also Bermudez v Pate*, 2014 NY Slip Op 30064(U) [Sup Ct Queens Cty 2014].

The unsigned note of Dr. Mark Gladstein, M.D. indicates he examined the plaintiff on September 1, 2020 and found he had restricted range of motion of the cervical and lumbar spine and radiculopathy. The note is not affirmed nor signed. The cervical and lumbar spine MRI reports from All County, LLC are not affirmed. Plaintiff’s unaffirmed MRI reports of his cervical and lumbar spine; and the unaffirmed report of Dr. Gladstien cannot be considered as they are not in admissible form; and Dr. Gladstein’s report does not comply with CPLR 2106. *See Burgess v Avignon Taxi, LLC*, 211 AD3d 522 [1st Dept 2022]; *see also Barry v Arias*, 94 AD3d 499 [1st Dept 2012].

Moreover, “the defendant’s expert’s review of such unaffirmed reports “did not open the door to [plaintiff’s] reliance on them, since defendants did not submit such reports in support of the motion, nor did the expert rely on them in forming their conclusions.” *Hernandez v Almanzar*, 32 AD3d 360 [1st Dept 2006].

The plaintiff’s submissions fail to raise an issue of fact as to whether Plaintiff sustained an injury under “permanent consequential limitation” or “significant limitation” categories of injury to his lumbar spine. (*Encarnacion v Castillo*, 146 AD3d 600, 601 [1st Dept 2017]).

Here, Defendants established their entitlement to dismissal of Plaintiff’s “90/180 day” injury claim. Plaintiff’s Bill of Particulars indicates that he was confined intermittently to his

home and bed. The Plaintiff was not disabled for the requisite period. Therefore, Plaintiff's claims under the "90/180-day" category are dismissed. *Tejada v LKQ Hunts Point Parts*, 166 AD3d 436, [1st Dept 2018].

There is also no evidence on this record that Plaintiff sustained a "permanent loss of use" of any body part-which requires a "total" loss of use (*Swift v New York City Transit. Authority*, 115 AD3d 507, 509 [1st Dept 2014]).

Accordingly, it is hereby;

ORDERED, that Defendants motion for summary judgment on the issue of liability is **DENIED**; and it is further

ORDERED, that Defendants motion for summary judgment and dismissal of Plaintiff's complaint, on the grounds that Plaintiff has not sustained a "serious injury" pursuant to the provisions of Insurance Law § 5102 (d), is **GRANTED to the extent** that Plaintiff's claims of "serious injury" under the "fracture," "permanent loss of use," and "90/180-day" categories of injury, as well as claims that Plaintiff sustained a "significant limitation" or "permanent consequential limitation" of his lumbar spine, are dismissed, and the motion is otherwise **DENIED** as indicated above; and it is further

ORDERED, that the Clerk shall mark motion Seq. 1 as decided in all court records.

This constitutes the Order of the Court.

Dated: May 22, 2025

Hon. 
PATSY GOULDBORNE, J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED x GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT