

**Vitale v Warfield**

2017 NY Slip Op 32347(U)

October 30, 2017

Supreme Court, Queens County

Docket Number: 3238/2016

Judge: Robert J. McDonald

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Short Form Order

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

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ANTHONY VITALE, Index No.: 3238/2016  
Plaintiff, Motion Date: 10/18/17  
- against - Motion No.: 217  
AUSTIN WARFIELD, S. L. WARFIELD-HALL, Motion Seq No.: 1  
Defendants.

- - - - - x

The following papers numbered 1 to 9 read on this motion by defendants for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1 - 4
Affirmation in Opposition-Exhibits.....	5 - 7
Reply Affirmation.....	8 - 9

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This is a personal injury action in which plaintiff seeks to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred on November 13, 2015 at the intersection of Banfi Plaza West and Boeing Plaza, in Suffolk County, New York. Plaintiff alleges that as a result of the accident he sustained serious injuries to his cervical spine and lumbar spine.

Plaintiff commenced this action by filing a summons and complaint on March 10, 2016. Defendants joined issue by service of an answer on April 4, 2016. Defendants now move for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

Plaintiff appeared for an examination before trial on September 15, 2016. He testified that he was involved in the subject accident. He was taken from the scene in an ambulance and transported to St. Joseph's Hospital where he was prescribed pain medication for his lower back and mid back. He then sought treatment with Dr. Alexander Grigorian at Woodhaven Chiropractic Clinic. He underwent treatment there for approximately seven months. He ended physical therapy treatment because his no-fault benefits were cut off. He then sought treatment with Dr. Arden Kaisman who referred him to a spinal surgeon, Dr. Michael Gerling. Dr. Gerling recommended a spinal fusion. At the time of the deposition, he was still treating and had an upcoming follow up appointment with Dr. Kaisman for an injection. For the first few months after the accident, he would come home from work, lay down, and take pain medication. At the time of the deposition, he still had pain. He had no prior injury to his lower back and he did not re-injure his back after the accident. The pain in his lower back radiates down, including numbness to the legs. He wakes up twenty minutes earlier in the morning to do exercises. Putting on sox hurts. He can no longer run or play basketball and has difficulty doing daily chores because of the pain.

In support of the motion, defendants submit the St. Joseph Hospital Emergency Room Report. The records reflect that plaintiff went to the Emergency Room following the accident and complained of mild non-radiating pain in his mid-back. The attending physician examined plaintiff, and reported no tenderness or limitations in his neck. His back was tender in the mid thoracic region, but no limitations were reported. He had normal range of motion in both his upper and lower extremities. His neurological examination was normal. Plaintiff was sent for x-rays of his thoracic spine, which revealed scoliosis. Plaintiff was discharged and diagnosed with muscle strain and back pain.

Anthony Spataro, M.D. performed an orthopedic examination on March 28, 2016. Plaintiff presented with current complaints of pain in the mid back and pain in the low back which sometimes radiates to his legs and feet with numbness. Dr. Spataro identifies the records reviewed prior to rendering his report. Dr. Spataro performed a physical examination of plaintiff, including range of motion testing with a goniometer. He found normal ranges of motion in plaintiff's thoracic spine and lumbar spine. Dr. Spataro opines that there is no evidence of an orthopedic disability. Plaintiff is capable of working and can perform his activities of daily living without restrictions or limitations. Dr. Spataro further opines that further orthopedic treatment including physical therapy and massage therapy are not medically necessary; there is no medical necessity for household

help, special medical supplies, special transportation or diagnostic testing. There is no medical necessity for injections of surgery. There is a causal relationship between the subject accident and plaintiff's reported injuries.

S. Murhty Vishnubhakat, M.D. performed a neurological independent medical examination on plaintiff on November 8, 2016. Plaintiff reported current complaints of low back pain. Dr. Vishnubhakat identifies the records reviewed, performed range of motion testing with a goniometer, and found normal ranges of motion in plaintiff's cervical spine and lumbar spine. Based upon the records and physical examination, Dr. Vishnubhakat concludes that there is no evidence of neurologic disability, permanency, or adverse prognostic indicators related to the subject accident. Dr. Vishnubhakat opines that the MRI report of the lumbar spine revealed central disc bulges with annular tear which is a result of pre-existing degenerative disease. Dr. Vishnubhakat further opines that plaintiff can carry out all activities of daily living.

Jonathan Lerner, M.D. reviewed the MRI study of plaintiff's lumbar spine taken on November 23, 2015. The MRI reveals a lobulated diffuse disc bulge at L4-L5 eccentric to the left with bilateral facet osteoarthritis. There is effacement of the thecal sac and mild left neural foraminal narrowing. There is a broad based right paracentral disc protrusion at L5-S1 and bilateral facet osteoarthritis. There is a mild central and right lateral recess narrowing. There is a mild narrowing of the right neural foramen. Dr. Lerner opines that the findings suggest a chronic degenerative process as opposed to an acute traumatic event. Dr. Lerner concludes that the MRI reveals no causal relationship between the subject accident and the findings on the MRI.

Defendants contend that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in permanent loss of use of a body organ, member, function or system; a significant limitation of use of a body function or system; permanent consequential limitation of use of a body organ or member; or a medically determined injury or impairment of a nonpermanent nature which prevented him for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of his usual daily activities.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v

Gruz, 35 AD3d 258 [1st Dept. 2006]). “[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim” (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Here, defendants failed to meet their prima facie burden of showing that plaintiff did not sustain a serious injury as a result of the subject accident. Neither expert addressed plaintiff's allegations in his bill of particulars that the subject accident aggravated and exacerbated pre-existing injuries to plaintiff's thoracic and lumbar spine (see Keenum v Atkins, 82 AD3d 843 [2d Dept. 2011]; Washington v Asdotel Enterprises, Inc., 66 AD3d 880 [2d Dept. 2009]). Although defendants contend that plaintiff's injuries are degenerative in nature, Dr. Spataro noted that the injuries were caused by the subject accident. Thus, defendants' submitted medical reports create issues of fact between themselves as to whether plaintiff's injuries were caused or exacerbated by the subject accident.

Based on the foregoing, defendants failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiffs did not each sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]). Where a defendant fails to meet the defendant's prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]; David v Bryon, 56 AD3d 413 [2d Dept. 2008]).

In any event, plaintiff's opposition raises triable issues of fact. In opposition, plaintiff submits the affirmed medical reports of Michael Green, M.D.; Alexandre Grigorian, M.D.; Arden M. Kaisman, M.D.; Michael Gerling, M.D.; and Donald Goldman, M.D.

Dr. Green affirms that he supervised the MRI of the lumbar spine taken on November 23, 2015. The MRI revealed a low signal from the L5-S1 disc with a transitional S1-S2 disc space seen, a central disc herniation at the L4-L5 level producing impingement upon and indenting the ventral portion of the thecal sac, and an area of broad based central and more prominent right central disc herniation at the L5-S1 disc space.

Dr. Grigorian first examined plaintiff on November 17, 2015. He performed a physical examination of plaintiff including range of motion testing which revealed decreased ranges of motion in plaintiff's thoracic spine and lumbar spine. Other objective testing was positive. Plaintiff continued to treat with Dr. Grigorian until May 2016. Dr. Grigorian noted continued restrictions in range of motion of plaintiff's thoracic spine and lumbar spine.

Dr. Kaisman initially examined plaintiff on February 18, 2016. Plaintiff presented with current complaints of pain in his low back radiating to his left lower extremity with numbness and tingling. He performed range of motion testing which revealed decreased ranges of motion in plaintiff's lumbar spine. He diagnosed plaintiff with herniated discs at L4-L5 and L5-S1 with lumbar radiculopathy and myofascial pain syndrome. He opines that the injuries are causally related to the subject accident noting that plaintiff has preexisting degenerative disease of the lumbar spine. Dr. Kaisman performed a lumbar epidural steroid injection on October 25, 2016, January 3, 2017, and May 9, 2017.

Dr. Gerling examined plaintiff on May 20, 2016 and August 12, 2016. He noted restriction of motion due to pain in plaintiff's thoracolumbar spine and fitted plaintiff with bracing. Dr. Gerling suggested a L5-S1 discectomy and noted that plaintiff will try an injection first.

Dr. Goldman examined plaintiff most recently on September 6, 2017. He found decreased range of motion in plaintiff's lumbar spine. Straight leg test was positive. He diagnosed plaintiff with lumbar herniation L4-L5 and L5-S1, lumbar derangement, and radiculopathy. He opines that the injury to the lumbar spine was causally related to the subject accident and should be considered permanent.

Based on the above, this Court finds that plaintiff raised triable issues of fact as to whether he sustained a serious injury to his lumbar spine and thoracic spine by submitting medical reports indicating that plaintiff sustained injuries as a result of the subject accident, finding that plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination, and concluding that the limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD2d 367 [2d Dept. 2009]).

Accordingly, and for the above stated reasons, it is hereby  
ORDERED, that defendants AUSTIN WARFIELD and S. L. WARFIELD-  
HALL's motion for summary judgment is denied.

Dated: October 30, 2017  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**