| **Millien v Delarosa** |
| --- |
| 2016 NY Slip Op 31391(U) |
| July 19, 2016 |
| Supreme Court, New York County |
| Docket Number: 158086/12 |
| Judge: Leticia M. Ramirez |
|  |
|  |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

----------X

JEAN MILLIEN,

Plaintiff(s),

-against-

JAVIER DELAROSA,

Defendant(s).

----------X

Index #: 158086/12
Mot. Seq: 01

DECISION/ORDER

HON. LETICIA M. RAMIREZ

Defendant's motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) is denied.

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of a triable issue of fact or if there is even arguably such an issue. *Hourigan v McGarry, 106 A.D.2d 845*, appeal dismissed *65 N.Y.2d 637 (1985); Andre v Pomeroy, 35 N.Y.2d 361 (1974).* The function of the court in deciding a summary judgment motion is to determine whether any issues of fact exist which preclude summary resolution of the dispute between the parties on the merits. *Consolidated Edison Co. v Zebler, 40 Misc.3d 1230A (Sup. Ct. N.Y. 2013); Menzel v Plotnick, 202 A.D.2d 558 (2nd Dept. 1994).* In deciding motions for summary judgment, the Court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad, 237 A.D.2d 123 (1st Dept. 1997); Assaf v Ropog Cab Corp., 153 A.D.2d 520 (1st Dept. 1989).*

Detection of a muscle spasm on palpation is objective medical evidence of a "serious injury." *Toure v Avis Rent-A-Car Systems, Inc., 98 N.Y.2d 345 (2002); Vidal v Maldonado, 23 Mic.3d 186 (Sup. Ct. Bronx 2008); Martin v Fitzpatrick, 19 A.D.3d 954 (3rd Dept. 2005); Pugh v DeSantis, 37 A.D.3d 1026 (3rd Dept. 2007).* In addition, an acute sprain or strain that causes a significant physical limitation may constitute a "serious injury" within the meaning of §5102(d) of the New York State Insurance Law. *Licari v Elliot, 57 N.Y.2d 230 (1982); Smith-Carter v Valdez, 2008 NY Slip OP 31231U (Sup. Ct. N.Y. 2008); Rodriguez v Russell, 2013 NY Slip Op*

*33954U, (Sup. Ct. Bronx 2013); Maenza v Letkajornsook, 172 A.D.2d 500 (2nd Dept. 1991); Konco v E.T.C. Leasing Corp., 160 A.D.2d 680 (2nd Dept. 1990).* Furthermore, proof of radiculopathy or a bulging or herniated disc may also constitute evidence of a "serious injury" in accordance with the Insurance Law. *Cruz v Lugo, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); Shvartsman v Vildman, 47 A.D.3d 700 (2nd Dept. 2008); Tobias v Chupenko, 41 A.D.3d 583 (2nd Dept. 2007); Lewis v White, 274 A.D.2d 455 (2nd Dept. 2000).* However, such claims must be supported by objective competent medical evidence demonstrating a significant physical limitation resulting therefrom. *Licari v Elliot, 57 N.Y.2d 230 (1982); Pommells v Perez, 4 N.Y.3d 566 (2005).*

In this action, defendant failed to meet his burden of making a prima facie showing that plaintiff has not sustained a "serious injury" as a matter of law. *Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986).*

According to plaintiff's Bill of Particulars, he alleges sustaining, inter alia, severe right cervical torticollis; cervical and lumbar radiculopathy with paresthesias; sensory deficit/hypersensitivity on the left at C5-C8, on the right at C5-C7 and bilaterally at T1 and L4, L5 and S1; myospasms and derangement and/or malalignment of the bilateral upper cervical spine, right upper and middle thoracic spine and bilateral lumbar spine; thoracic myelopathy; and lumbar neuritis as a result of the subject accident of August 6, 2012.

In support of his motion, defendant submitted, inter alia, the affirmed report of orthopedist, Dr. Martin Barschi, who examined plaintiff on September 30, 2015. In his report, Dr. Barschi noted that plaintiff had full range of motion of the cervical spine without muscle spasm. However, Dr. Barschi did not measure the ranges of motion of plaintiff's thoracic or lumbar spine or address plaintiff's claims of thoracic or lumbar muscle spasms. He only mentioned that plaintiff did not have any tenderness in the lumbar spine and that a straight leg raising test was negative.

As Dr. Barschi did not measure the ranges of motion of plaintiff's thoracic or lumbar spine or address plaintiff's claims of thoracic or lumbar muscle spasms, plaintiff's claimed thoracic and lumbar spine injuries as alleged in his Bill of Particulars are not sufficiently challenged. Therefore, defendant failed to demonstrate that plaintiff has not sustained a "serious

injury" pursuant to the "significant limitation" and "permanent consequential limitation" categories of the Insurance Law.

It is unnecessary for the Court to consider plaintiff's opposing papers as to said categories, as defendant has not met his burden of demonstrating the absence of a "serious injury," as a matter of law. *Licari v Elliot, supra.*; *Winegrad v New York Univ. Med. Ctr., supra.; Alvarez v Prospect Hosp., supra.*; *Manceri v Bowe, 19 A.D.3d 462 (2nd Dept. 2005).*

It is also unnecessary for the Court to evaluate the remainder of plaintiff's claimed injuries, since if plaintiff is able to establish a "serious injury" at trial, plaintiff may recover for all injuries sustained in the subject accident. *McClelland v Estevez, 77 A.D.3d 403 (1st Dept. 2010).*

In light of the foregoing, those portions of defendant's motion seeking dismissal of plaintiff's claims of sustaining a "serious injury" in accordance with the "significant limitation" and "permanent consequential limitation" categories of the Insurance Law are denied.

Next, that portion of defendant's motion seeking summary judgment based upon the "90/180" category of the Insurance Law is also denied. Plaintiff sufficiently raise triable issues of fact with his deposition testimony, his affidavit and the affidavit of chiropractor John Rupolo. According to plaintiff, he was the President of a real estate growth and development corporation at the time of the accident. He claims that he was unable to go to his office to work for approximately six months after the accident. He stated that he could not perform his normal and customary job duties, which included "driving around looking for real estate deals; acquiring properties; developing properties and then reselling them." Instead, he worked from home in a limited capacity due to pain resulting from the subject accident, during which time he underwent medical treatment three times weekly. He stated that chiropractor Rupolo recommended that he "refrain from performing any strenuous activities which would aggravate my neck and back pain, including sitting, lifting and traveling outside of the home."

In his affidavit, chiropractor Rupolo confirmed that plaintiff's "work required him to drive for extended periods, sit for extended periods and travel for extended periods". As such, he advised plaintiff to "refrain from strenuous activities that would exacerbate his cervical, thoracic and lumbar spines, including working." Chiropractor Rupolo stated that he first saw plaintiff on August 7, 2012. At that time, the plaintiff had a 66%-80% limitation of motion of his cervical

spine, a 20%-83% limitation of motion of his thoracic spine and a 60%-83% limitation of his lumbar spine. He stated that plaintiff continued to treat at his office three times weekly through January 28, 2013 and that he advised plaintiff to "abstain from working for a six month period following the accident."

In light of the foregoing, defendant's summary judgment motion is denied in its entirety.

Plaintiff is directed to serve a copy of this Decision, with Notice of Entry, upon defendant within 20 days of this Decision.

This constitutes the Decision/Order of the Court.

Dated: July 19, 2016
New York, New York

HON. LETICIA M. RAMIREZ, J.S.C.