

**Hernandez v Bah**

2017 NY Slip Op 30767(U)

March 28, 2017

Supreme Court, Bronx County

Docket Number: 304397/13

Judge: Howard H. Sherman

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NEW YORK SUPREME COURT - COUNTY OF BRONX  
**PART 4**



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JOSE HERNANDEZ,

Index No.: 304397/13

Plaintiff,

**DECISION/ORDER**

-against-

IBRAHIMA BAH and A VA SERVICE CORP.,

Present:  
Hon. Howard H. Sherman  
J.S.C.

Defendants.

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The following papers numbered 1-3 read on this motion for summary judgment defendant noticed and duly submitted on the motion calendar of September 25, 2015.

	<u>PAPERS NUMBERED</u>	
Notice of Motion- Exhibits and Affirmation Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affirmation	3	

Upon the foregoing papers this motion by defendants for summary judgment dismissing plaintiff's complaint for lack of serious injury (see, Insurance Law 5102[d]) is decided as set forth below.

Plaintiff commenced this action in July 2013 seeking damages for personal injuries alleged to have been sustained in an October 13, 2012 motor vehicle accident. Issue was joined in October 2013 and the Note of Issue was filed on July 13, 2015.

Motion

Defendants timely move for summary judgment contending that the complaint must be dismissed for plaintiff's failure to meet the no-fault statute's threshold for tort recovery (see, Insurance Law §5102[d]). The motion is supported by copies of the pleadings [Exhibit A], and the

transcript of plaintiff's deposition testimony [Exhibit B], and the affirmed report of their orthopedic expert, John H. Buckner, M.D. [Exhibit E], and the operative report of Steven Struhl, M.D. [Exhibit D]. The report of the biomechanical engineer tendered [Exhibit F] is unsworn, and consequently, inadmissible here.

Plaintiff opposes the motion and tenders copies of contemporaneous diagnostic studies as well as the affirmed report of a recent medical examination.

#### Verified Bill of Particulars

The accident-related injuries asserted include a left knee meniscal tear of the posterior horn necessitating surgical repair on 12/17/12, and herniations and bulges of the lumbar and cervical spine [¶ 11]. It is alleged that plaintiff was confined to bed and home for two weeks after the accident, and that his injuries qualify as serious in three statutory categories: "permanent consequential" and "significant" limitations of use, and "90/180" [¶¶ 13, 20].

#### Medical Reports in Support

1) Dr. Struhl performed a left knee arthroscopy two months post-accident and his post-operative diagnosis is stated as "loose body, chondral lesion of the medial femoral condyle and patella." During the operation, he found the medial meniscus to be "normal," and he observed a partial tear of the PCV with a flap trapped at the medial compartment.

2) John H. Buckner conducted an orthopedic examination of plaintiff on November 3, 2014. For purposes of his evaluation, defendants' expert reviewed contemporaneous medical reports, including the surgical report, and diagnostic studies [Report ¶¶ 10-12].

On examination Dr. Buckner found plaintiff to have full extension of both knees and there were negative findings on objective testing including McMurray's Sign, and Apleg's; Lachman's; pivot shift and drawer signs.

There was no reported tenderness or palpable spasm on examination of the cervical, thoracic

and lumbar spine, and tests conducted, including Spurling's and Laseque's and McNabb's, revealed negative findings, and straight leg raising was negative to 90 degrees.

Dr. Buckner concluded that there were no findings of acute injury in any medical report reviewed or on examination and opined that the left knee arthroscopy, and the "mild findings" on clinical presentation, were related to a chronic osteochondral condition unrelated to the motor vehicle accident.

#### Deposition

Plaintiff testified that he returned to work on the Monday following his accident,<sup>1</sup> and on his doctor's recommendation stayed home from work for one month after his 12/17/12 surgery [60-61].

#### Discussion and Conclusions

Upon consideration of the moving papers the court finds that defendants have met their initial burden on the motion by coming forward with probative medical evidence and deposition testimony to demonstrate as a matter of law the lack of serious injury in the three categories asserted.

To defeat defendants' prima facie showing it is incumbent upon plaintiff to come forward with probative medical evidence that he sustained an accident-related serious injury.

Plaintiff submits the May 6, 2013 affirmed Final Narrative Report of physician Bozena Augustyniak, M.D., a board certified neurologist who commenced treatment of plaintiff five-days post accident [Exhibit A]. Upon initial examination, which included findings spasm and quantified restrictions of the range of motion of the cervical and lumbar spine and significantly decreased flexion of the left knee, Dr. Augustyniak prescribed a course of physical therapy and referred plaintiff for MRI studies of these areas and orthopedic evaluations. There were four follow-up examinations, and on March 6, 2013, while there was full range of motion of the cervical spine, there

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<sup>1</sup> 10/13/12 was a Saturday.

was “decreased” range of motion in all directions of the lumbar, with muscle spasm over paraspinal muscles, bilaterally. Dr. Augustyniak opines that the motor vehicle accident was the producing cause of plaintiff’s cervical and lumbar myofascitis and the multi-level cervical bulges and herniated and bulging lumbar discs, and L4 radiculopathy, and the left knee “meniscal tear.”

Plaintiff submits copies of the MRI reports [Exhibit B]. Although neither sworn nor affirmed, they are properly before the court as having been relied upon by Dr. Buckner. Also tendered in the affirmed EMG/NCV report of 1/17/13 evidencing a L4 radiculopathy [Exhibit C], and the affirmed surgical report [Exhibit D].

Finally, plaintiff submits the affirmed report of Gideon Rapaport, M.D. who examined plaintiff upon an initial visit on August 27, 2015. The examination consisted of range of motion testing the cervical and lumbar spine and of the left knee.


While the probative value of the treating physician’s report and that of the examining physician and significantly diminished by the failure to submit the contemporaneous reports on which they rely, and that of Dr. Rapaport further diminished by his failure to explain the discrepancy between his findings of restriction of range of motion of the cervical spine with the “full” range of motion assessed by the treating physician five months post-accident, as afforded all favorable inferences, it is submitted that plaintiff has raised an arguable issue of fact of an accident-related “significant” and “permanent consequential” limitation of use of the lumbar spine and left knee.

Plaintiff presents no evidence to raise an issue of fact with respect to the 90/180 claim asserted.

Accordingly the motion is granted solely to the extent of awarding defendants summary judgment dismissing the claim of serious injury in the 90/180 category.

This constitutes the decision and order of this court.

Dated: March 28, 2017  
Bronx, New York

  
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Howard H. Sherman  
J.S.C.