

**Montano v Ivanov**

2020 NY Slip Op 34192(U)

December 4, 2020

Supreme Court, Kings County

Docket Number: 507179/2018

Judge: Reginald A. Boddie

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2020 DEC 10 AM 10:31

At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 4th day of December 2020.

PRESENT:

Honorable Reginald A. Boddie  
Justice, Supreme Court

-----X  
MIGUEL MONTANO,

Plaintiff,

Index No. 507179/2018

Cal. No. 28 MS 7

-against-

DECISION AND ORDER

IGOR IVANOV and OLEKSANDR BOVTENKO,

Defendant.  
-----X

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
MS 7	Docs. # 103-145

Upon the foregoing cited papers, defendant's motion for summary judgment, pursuant to CPLR 3212, is decided as follows:

Plaintiff commenced this action against defendants Igor Ivanov and Oleksandr Bovtenko, to recover for personal injuries allegedly sustained on February 16, 2017, at 11:40 AM, as a result of a motor vehicle accident on Avenue X at or near its intersection with Ocean Parkway, Brooklyn, New York.

At the time of the accident, plaintiff alleged that a motor vehicle operated by defendant Ivanov and owned by defendant Bovtenko struck the motor vehicle he was operating and caused him to sustain serious and permanent injuries to the neck, back and left shoulder. Specifically, plaintiff alleged C5-C6 annular disc bulge, C6-C7 annular disc bulge, and muscle spasm or strain in the neck; L3-L4 2mm broad based right paracentral disc herniation and annular disc bulge;

L4-L5 2mm central disc herniation, annular disc bulge with narrowing of the lateral recesses bilaterally, right worse than left, L5-S1 annular disc bulge with narrowing of the left lateral recess in the back; impingement by the acromioclavicular joint; supraspinatus tendonopathy and subdeltoid bursitis in the left shoulder. Plaintiff was allegedly involved in a subsequent motor vehicle accident on October 29, 2017, in which he sustained injuries to his neck, lower back and right knee.

Defendants moved for summary judgment, pursuant to CPLR 3212, to dismiss the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 § (d). Plaintiff opposed.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman*, 49 NY2d at 562).

Defendants sought summary judgment on the ground that plaintiff did not suffer a serious injury. In a “serious injury threshold” motion for summary judgment, as here, defendant must initially submit competent medical evidence establishing that plaintiff did not suffer a “serious injury” and the injuries are not causally related to the accident (*see* Insurance Law 5102 [d]; *see Kelly v Ghee*, 87 Ad3d 1054, 1055 [2d Dept 2011]; *see Winegrad*, 64 NY2d at 853). “Serious injury” means a personal injury which results in death; dismemberment; significant

disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment (Insurance Law § 5102 [d]). The issue is not whether plaintiff can ultimately establish a "serious injury," but whether there exists an issue of fact in the case on such issue (*Zuckerman*, 49 NY2d at 562).

Here, defendant proffered the report of Jonathan Gross, M.D., a board certified orthopedic physician, who performed an independent orthopedic examination of plaintiff on February 7, 2020. Dr. Gross found no reduced ranges of motion in the right and left elbows, knees, hips, ankles and feet. With respect to the left shoulder, he found no objective signs of internal derangement nor reduced ranges of motion.

Dr. Gross found reduced ranges of motion in the plaintiff's cervical spine and lumbar spine, which he defined as "voluntary" as well as minimal paraspinal spasming of the paraspinal musculature in the back. Additionally, Dr. Gross found that "the [plaintiff was] unable to do heel and toe walk due to back pain." Dr. Gross concluded that "[t]here are residuals and a mild impairment to [plaintiff's] lumbar spine," in which he noted that the plaintiff's October 2017 accident was playing a role in this condition. However, Dr. Gross failed to explain or substantiate, with objective medical evidence, the basis for his conclusion that the limitations were "voluntary" (*see Mondert v Iglesia De Dios Pentecostal Cristo Viene, Inc.*, 69 AD3d 590, 590 [2d Dept 2010]).

Further, because Dr. Gross found that plaintiff continues to present with reduced ranges of motion with continued back pain, defendants have not established a prima facie case that the plaintiff's injuries were not serious (*Asta v Eivers*, 280 AD2d 565, 566 [2d Dept 2001]). Denial of summary judgment is therefore warranted here, regardless of the sufficiency of plaintiff's opposition (*see Winegrad*, 64 NY2d at 853). Accordingly, defendants' motion for summary judgment is denied.

ENTER:



Hon. Reginald A. Boddie  
Justice, Supreme Court

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