

<b>Hernandez v Vittorini</b>
2021 NY Slip Op 32916(U)
May 12, 2021
Supreme Court, Orange County
Docket Number: Index #EF007010-2018
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York,  
held in and for the County of Orange, at 285 Main Street,  
Goshen, New York 10924 on the 12th day of May, 2021.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

\_\_\_\_\_  
OSCAR E. HERNANDEZ,

PLAINTIFF,

-AGAINST-

DAVID W. VITTORINI and PETER G. TALARICO,

DEFENDANTS.

\_\_\_\_\_  
VAZQUEZ-DOLES, J.S.C.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

**DECISION & ORDER**  
INDEX #EF007010-2018  
Motion date: 12/21/2020  
Motion Seq.# 2

The following papers were read on the motion for summary judgment by defendants, pursuant to CPLR §3212, dismissing the complaint alleging plaintiff's failure to meet the serious injury threshold required by Insurance Law §5104(a) and §5102(d):

Notice of Motion/ Affirmation in Support/ Memorandum of Law/ Exhibits A - AD;  
Affirmation in Opposition/ Exhibits 1 - 7/ Reply Affirmation;

**Background and Procedural History**

This personal injury action arises out of a motor vehicle accident that occurred on April 11, 2016 at Walsh Avenue in the Town of New Windsor. Plaintiff commenced this action by filing a Summons and Verified Complaint on July 9, 2018 (Exhibit A to moving papers). Defendant served a Verified Answer with Affirmative Defenses on November 8, 2018 (Exhibit B). Plaintiff served a Verified Bill of Particulars, dated August 8, 2019 (Exhibit C). The Examination Before Trial of plaintiff was held on February 10, 2020 (Exhibit D).

### Discussion

Defendants moves for summary judgment on the ground that plaintiff has failed to establish a serious injury. In support of their motion, defendants offer plaintiff's Bill of Particulars, plaintiff's deposition transcript, and medical records. Defendant also submitted reports by Dr. Audrey Eisenstadt, M.D. (Radiologist), Dr. Bradley D. Weiner, M.D. (Orthopedist) and Dr. Ira Neustadt, M.D. (Neurologist) (Exhibits G, AC, and AD).

Dr. Eisenstadt conducted an independent review on July 7, 2020 of plaintiff's right shoulder, cervical spine, and lumbar spine, based on examinations prior and after the subject accident, which allegedly displayed no new disc herniations, preexisting degenerative changes throughout the lumbar spine, and no new labral tear. Dr. Weiner performed an independent orthopedic examination on June 22, 2020 of plaintiff. According to defendant, such displayed cervical spine strain superimposed on a pre-existing mechanical axial dysfunction and preexisting bilateral C5-6 radiculopathy. Dr. Neustadt examined and interviewed plaintiff on June 11, 2020, and based on plaintiff's MRI studies of the cervical and lumbrosacral spine after the subject accident, there is evidence of chronic degenerative disc disease. Defendant further argues that plaintiff did not sustain a serious injury under the 90/180 threshold because he did not testify on being confined to his home after the accident, and there is no evidence from any of his doctors suggesting he be restricted in performing any of his activities.

Plaintiff asserts that the movant has failed to sustain his initial burden of proof. That defendant has failed to show, *prima facie*, lack of a serious injury which results in a permanent consequential limitation of use of a body organ or member or the significant limitation of a body function or system. Plaintiff provided medical records and narrative reports by Dr. Steven Jacobs,

dated November 12, 2020, and Dr. Gabriel Dassa, dated April 8, 2020, which plaintiff alleges displayed significantly limited range of motion (Exhibits 6 and 7). Plaintiff argues that a triable issue of fact exists as to whether there was an aggravation of plaintiff's prior medical conditions caused by the subject accident.

Section 3212(b) of the Civil Practice Law & Rules states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section 3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact" (*Anyanwu v Johnson*, 276 AD2d 572, 714 NYS2d 882 [2d Dept 2000]). Issue finding, not issue determination, is the key to summary judgment. (*Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]). In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party. (*See, Kutkiewicz v Horton*, 83 AD3d 904, 920 N.Y.S.2d 715 [2d Dept 2011]).

Defendants move for summary judgment, claiming that plaintiff has failed to meet the threshold requirements of Insurance Law §5102, because he has not provided proof that he sustained a serious injury. As defined by that section, "'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" (*D'Iorio v. Brancoccio*, 115 AD2d 634 [2d Dept , 634, 496 N.Y.S.2d 293, 294 (1985). Defendant bears the initial burden of establishing a *prima facie* case that plaintiff did not sustain a serious injury (*Toure v. Avis Rent-A-Car Sys.*, 98 NY 2d 345 [2002]).

Here, the medical report of the defendants orthopedist Dr. Weiner, who had examined plaintiff, provided limitations of the range of motion in plaintiff's cervical and lumbar spine, and right shoulder (Exhibit AC, p 4 and 5). Defendants neurologist Dr. Neustadt had also indicated loss of range of motion in plaintiff's lumbar and cervical spine (Exhibit AD, p 9). Defendant has failed to meet their initial burden of establishing a *prima facie* case. Plaintiff's papers in opposition are sufficient to raise a triable issue of fact. (*Omar v Bello*, 13 AD3d 430 [2d Dept 2004]; *see, Coscia v 938 Trading Corp.*, 238 AD2d 538 [2d Dept 2001]; *see also Mariaca-Olmos v Mizrhy*, 226 AD2d 437 [2d Dept 1996]).


Based upon the foregoing it is hereby

**ORDERED** that defendant's motion is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 12th, 2021  
Goshen, New York

ENTER:

  
HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Counsel of Record Via NYSCEF