

**Vlacich v Singh**

2016 NY Slip Op 32093(U)

October 7, 2016

Supreme Court, Queens County

Docket Number: 19706/2013

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

- - - - - x

SILVANO VLACICH, Index No.: 19706/2013  
Plaintiff, Motion Date: 9/23/16  
- against - Motion No.: 101  
BALKAR SINGH and LARKWINDER J. SINGH, Motion Seq.: 2  
Defendants.

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The following papers numbered 1 to 7 read on this motion by defendants for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing plaintiff's 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

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on January 28, 2013 on the JFK Expressway at or near the intersection of 148<sup>th</sup> Street, in Queens County, New York. In the verified bill of particulars, plaintiff alleges that he sustained serious injuries to his cervical and lumbar spine, including herniated and bulging discs.

Plaintiff commenced this action by serving and filing a summons and complaint on October 23, 2013. Issue was joined by service of defendants' verified answer dated November 13, 2013. Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Artur Pogorzelski, Esq.; a copy of the pleadings; a copy of the verified bill of particulars; a copy of the note of issue; a copy of the transcript of the examination before trial of plaintiff taken on June 26, 2015; a copy of the affirmed medical report of Dr. Edward M. Weiland, M.D.; a copy of the MRI review performed by Dr. Michael Setton, D.O.; and a copy of the emergency room records from St. Catherine of Siena Hospital.

At his deposition, plaintiff testified that he exited the vehicle following the accident and told the responding police officer that he did not need medical attention. He presented to the emergency room of St. Catherine of Siena Hospital the day after the accident. He was not confined to his bed and was confined to his home for approximately two weeks following the accident. He missed some time from work.

Dr. Weiland examined plaintiff on August 4, 2015. Dr. Weiland identifies the medical records he reviewed and performed objective range of motion testing using a goniometer. He found full range of motion in plaintiff's cervical spine, lumbar spine, thoracic spine, and shoulders. All other objective tests performed were negative. Dr. Weiland concludes that there is no finding of any neurologic residual or permanency based upon his physical examination.

Dr. Setton reviewed the MRI of plaintiff's lumbar spine which was taken on March 20, 2013. He found mild multilevel degenerative disc disease and spondylosis, mild disc bulging at L3-4 and L4-5, minimal disc bulge at L5-S1, no evidence of disc herniation, and multilevel hypertrophic facet joint degeneration.

Defendants' counsel contends that the medical reports and plaintiff's testimony are sufficient to demonstrate that plaintiff did not sustain a permanent loss of use of a body, organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented plaintiff from performing substantially all of the material acts which constitute his 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.

In opposition, plaintiff submits an affirmation from counsel, Jennifer R. Snider, Esq.; his own affidavit; the medical affirmations of Drs. Robert Diamond, M.D., Sebastian Lattuga,

M.D., and Paul Lerner, M.D.; an affidavit from physical therapist, Gregory Rahn; and the orthopedic independent medical evaluation performed by Drs. Steven J. Litman, M.D. and Paul J. Miller, M.D.

Plaintiff first presented to Kings Park Physical Therapy on February 26, 2013. Physical therapist, Mr. Rahn, performed range of motion testing and found decreased ranges of motion in plaintiff's cervical spine and lumbar spine. On March 20, 2013, plaintiff underwent an MRI of his cervical spine. Dr. Diamond found a posterior disc herniation at C4-5 impressing the ventral CSF, posterior bulging discs at C3-4, C5-6, and C6-7 impressing the CSF in the cervical spine. An MRI test of plaintiff's lumbar spine revealed bulging discs at L2-3, L3-4 extending in to the right and left anteroinferior foramina, L4-05 extending into the right and left foramina, L5-S1 increasing to the left onto the anteroinferior foramina and lumbar lordotic curvature in the lumbar spine. On June 12, 2013, plaintiff underwent a cervical epidural steroid injection with Dr. Angelino at Dr. Lattuga's office. Dr. Lattuga affirms that plaintiff's injuries to his cervical and lumbar spines and the need for his cervical epidural steroid injection are causally related to the subject accident and are not due to a pre-existing condition. Most recently, on August 24, 2016, plaintiff appeared for a comprehensive neurological examination before Dr. Lerner. Dr. Lerner found decreased ranges of motion in plaintiff's cervical and lumbar spines. Dr. Lerner concludes that the injuries are causally related to the subject accident, plaintiff's condition results in an impairment and disability, including pain and loss of normal range of motion, and such condition is considered permanent.

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]).

Where the defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce

evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Plaintiff's counsel first alleges that defendants failed to establish a prima facie case the plaintiff's injuries are not serious as a matter of law within the meaning of the Insurance Law. The two independent medical examinations performed by Dr. Litman on October 15, 2013 and Dr. Miller on April 1, 2013 both find positive range of motion results in plaintiff's cervical and lumbar spines, and Dr. Miller notes that there is evidence of a mild causally related disability. Thus, Dr. Miller's conclusion directly contradicts with defendants' other experts, Drs. Weiland's and Setton's, who conclude that plaintiff's injuries are not causally related to the subject accident and are degenerative in nature. Moreover, defendants failed to contradict the cervical MRI report finding disc herniations and disc bulges, which plaintiff asserts cause him pain. Accordingly, the conclusion that plaintiff had no disability or impairment was, therefore, directly contradicted by Drs. Litman's and Miller's recorded objectively-measured limitations in range of motion (see Grant v Parsons Coach, Ltd., 12 AD3d 484 [2d Dept. 2004]; Lopez v Sentaroe, 65 NYS2d 1017 [1985][finding that providing evidence of a ten degree limitation in range of motion is sufficient for the denial of summary judgment to defendants).

In any event, even if this Court were to find that defendants established a prima facie case, plaintiff raised triable issues of fact as to whether he sustained a serious injury to his cervical spine and lumbar spine by submitting the affirmed medical reports attesting to the fact 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]).

As such, plaintiff demonstrated issues of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v

Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendants, BALKAR SINGH and LARKWINDER J. SINGH, for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: October 7, 2016  
Long Island City, N.Y.

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