

**Calcano v Hajar**

2026 NY Slip Op 31162(U)

March 20, 2026

Supreme Court, Kings County

Docket Number: Index No. 501760/2023

Judge: Anne J. Swern

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This opinion is uncorrected and not selected for official publication.

At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 20<sup>th</sup> day of March 2026.

P R E S E N T: HON. ANNE J. SWERN,  
J.S.C.

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JOSE R. CALCANO,

*Plaintiff,*

*-against-*

CHARAF HAJAR and LAMIAA SOUALY,

*Defendants.*

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**DECISION & ORDER**

Index No.: 501760/2023

Calendar No.: 13

Return Date: 1/8/2026

Motion Seq. No.: 3

*Recitation of the following papers as required by CPLR 2219 (a):*

**NYSCEF  
Papers Numbered**

Notice of Motion, Affirmation in Support, Supporting Exhibits to Affirmation in Support, Affirmation in Opposition, Supporting Exhibits to Affirmation in Opposition, and Affirmation in Reply.....31-43

*Upon the foregoing papers and after oral argument, the decision and order of the Court is as follows:*

Defendants CHARAF HAJAR and LAMIAA SOUALY (“defendants”) move for an Order pursuant to CPLR § 3212 granting summary judgment in favor of defendants and dismissing the Complaint of plaintiff JOSE R. CALCANO (“plaintiff”) for failure to meet the no-fault statute’s threshold for tort recovery pursuant to Sections 5104 (a) and 5102 (d) of the Insurance Law of the State of New York.

This is an action to recover damages for personal injuries sustained as the result of a motor vehicle accident on 7/19/2022. In the verified bill of particulars, plaintiff alleges injuries to the cervical spine, lumbar spine, right shoulder, and left knee.

On behalf of defendants, Dr. Michael Setton, D.O., D.A.B.R., a radiologist, reviewed the MRI of plaintiff's left knee, and Dr. Howard A. Kiernan, M.D. performed an orthopedic Independent Medical Examination (IME) on plaintiff on 1/3/2024. Dr. Kiernan examined the cervical spine, thoracic spine, lumbar spine, right shoulder, and left knee with a hand-held goniometer, and reported normal ranges of motion (*Gersbeck v Cheema*, 176 AD3d 684 [2d Dept 2019]).

Plaintiff submits a physician's affirmation from Dr. Andrew Miller, M.D., FAAOS, a board-certified orthopedic surgeon. Dr. Miller stated that he examined plaintiff concerning his injuries and opined that his right shoulder injury and subsequent arthroscopic surgery are causally related to the 7/19/2022 accident. Dr. Miller further opined that since there was a partial tear of both the rotator cuff and the labrum, plaintiff has the potential to develop a complete tear of both structures which could lead to significant loss of function of the right shoulder and further surgery.

"A party moving for summary judgment must demonstrate that the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment" in the moving party's favor (CPLR 3212 [b]). Thus, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks omitted])."

Where the parties' experts disagree, a question of fact exists as to whether plaintiffs meet the no-fault threshold because the Court cannot resolve the experts' credibility upon a motion for summary judgment (*Perl v Meher*, 18 NY3d 208, 217 [2011]; and see *Rappaport v Sear Roebuck*, 28 AD3d 449 [2d Dept 1992]).

This Court agrees with plaintiff that defendants have not met their burden for summary judgment. Firstly, defendants' orthopedist, Dr. Kiernan, did not review any medical records because defendants' IME physician stated that he was advised (by who, it is unclear) that there were no "legally authenticated" medical records available for his review. Further, Dr. Kiernan did not opine as to what plaintiff's physical condition was before his examination. Consequently, defendants have failed to demonstrate a prima facie defense to the "significant limitation of use of a body function or system" category of serious injury, nor the 90/180 category of serious injury, because those categories contain no permanence requirements.<sup>1</sup> And, because Dr. Kiernan did not opine as to causation, the record contains injuries caused by the accident with no opinion given by Dr. Kiernan as to what the injuries' effects were prior to his examination almost 17 months after the accident occurred. Any opinion as to the necessity of plaintiff's right shoulder surgery was also omitted from Dr. Kiernan's report.

Accordingly, it is hereby

ORDERED that

Defendants' motion for an Order pursuant to CPLR § 3212 granting summary judgment in favor of defendants and dismissing the Complaint of plaintiff for failure to meet the no-fault

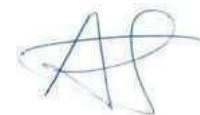
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<sup>1</sup> According to the Supreme Court, Appellate Division, Second Department, ". . . a significant limitation need not be permanent in order to constitute a serious injury" (*Partlow v Meehan*, 155 AD2d 647 [2d Dept 1989] [So long as it is not minor]).

statute's threshold for tort recovery pursuant to Sections 5104 (a) and 5102 (d) of the Insurance Law of the State of New York is DENIED.

This constitutes the decision and order of the Court.

ENTER:

A handwritten signature in blue ink, appearing to be 'AS', is written over a faint circular stamp.

**Hon. Anne J. Swern, J.S.C.**

**Dated: 3/20/2026**