

**Hoyos v Diallo**

2007 NY Slip Op 30206(U)

March 7, 2007

Supreme Court, Queens County

Docket Number: 0004806

Judge: Joseph P. Dorsa

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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12  
Justice

- - - - - x

ALBERTO HOYOS,

Plaintiff,

Index No.: 4806/05

- against -

Motion Date: 1/24/07

MAMADOU DIALLO,

Motion No.: 12

Defendant.

- - - - - x

The following papers numbered 1 to 7 on this motion:

	<u>Papers Numbered</u>
Defendant's Notice of Motion-Affirmation- Affidavit(s)-Service-Exhibit(s)	1-4
Plaintiff's Affirmation in Opposition- Affidavit(s)-Exhibit(s)	5-7

By notice of motion, defendant seeks an order of the court, pursuant to CPLR § 3212, granting him summary judgment and dismissing the complaint on the grounds that plaintiff has failed to sustain a serious injury within the meaning of N.Y. Ins. Law § 5102(d) and § 5104(a).

Plaintiff files an affirmation in opposition.

The underlying cause of action is a claim by plaintiff for personal injuries alleged to have been sustained in a motor vehicle accident on January 13, 2004, at 94<sup>th</sup> Street at or near the intersection of 57<sup>th</sup> Avenue, Queens County, N.Y.

In support of his motion for summary judgment and dismissal, defendant submits the affirmed report of Dr. Wendy Cohen, based upon an examination conducted on March 8, 2006; and, the affirmed report of Dr. Audrey Eisenstadt. Dr. Eisenstadt reviewed the MRI films taken of plaintiff on February 11, 2004.

Dr. Eisenstadt indicates that "bulging" is seen at the L4-5 and

L5-S1 discs, but concludes that the evidence of bulging is due to degenerative disease brought on by a congenital illness, rather than traumatic abnormality caused by the accident of January 13, 2004.

Dr. Eisenstadt never actually examined plaintiff.

Dr. Cohen never examined the actual MRI films, but only reviews the reports. Dr. Cohen offers no opinion as to whether the disc bulges alleged by plaintiff's experts and acknowledged by Dr. Eisenstadt were causally related to the accident.

In opposition to the motion for summary judgment, plaintiff submits the unaffirmed report of Dr. Dan Lewis, plaintiff's treating physician. According to plaintiff, Dr. Lewis treated him for approximately 8 months.

Dr. Lewis referred plaintiff for both cervical and lumbar spine MRIs because of his condition.

Said report was also reviewed and relied on by Dr. Cohen in drawing her conclusions.

Plaintiff also submits the affirmed report of Dr. Richard Amato. Dr. Amato began treating plaintiff on June 15, 2004. It is noted that Dr. Amato and Dr. Cohen do not agree on the "normal" range of motion for the lumbar spine, among other things. Dr. Amato reviewed plaintiff's MRI films and found posterior bulging discs at C5-6, and C6-7, as well as L4-L5 and L5-S1.

Finally, plaintiff also submits the unaffirmed report of Dr. Marina Neystat (also reviewed and relied on by defendant's experts) based on her examination and treatment of plaintiff on July 20, 2004.

Based upon the foregoing papers the motion is denied as the papers present issues of fact requiring a trial. Specifically, conflicting affidavits establish that issues exist as to whether the plaintiff's injuries to plaintiff's neck and back are causally related to the accident as well as the nature and extent of said injuries. (See, Insurance Law §5102[d]; Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345, Meyer v. Guido, 260 AD2d 556; see also, Jones v. Norwich City Sch. Dist., 283 AD2d 809; McKinney v. Corby, 261 AD2d 454; Wolfram v. Vassilou, 239 AD2d 340; Flanagan v. Hoeg, 212 AD2d 756).

Dated: Jamaica, New York  
March 7, 2007

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JOSEPH P. DORSA  
J.S.C.