

<b>Giannattasio v Liatos</b>
2014 NY Slip Op 33716(U)
April 4, 2014
Supreme Court, Queens County
Docket Number: 17869/08
Judge: Bernice D. Siegal
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**ORIGINAL**

Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**  
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19  
Justice

-----X  
Raffaele Giannattasio, Jr., and Melissa Giannattasio  
F/k/a Melissa Aloisio,  
Plaintiffs,  
  
-against-  
  
Thodoros Liatos,  
Defendant.  
-----X

Index No.: 17869/08  
Motion Date: 1/7/14  
Motion Cal. No.: 83  
Motion Seq. No. 5

**FILED**  
**APR 15 2014**  
COUNTY CLERK  
QUEENS COUNTY

The following papers numbered 1 to 12 read on this motion for an order pursuant to CPLR §3212 granting summary judgment in favor of the defendant, dismissing the Summons and Complaint of the plaintiff Raffaele Giannattasio, Jr., on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of New York Insurance Law §5102(d), and thus his claim for non-economic loss is dismissible as a matter of law.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5- 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendant Theodoros Liatos ("Defendant") moves for an order granting summary judgment pursuant to CPLR §3212 and dismissing plaintiff Raffaele Giannattasio, Jr.'s ("Plaintiff") complaint on the grounds that Plaintiff did not sustain a serious injury under Insurance Law §5102(d). This case arises as a result of a motor vehicle accident between the Plaintiff and Defendant that occurred on January 20, 2007. The Bill of Particulars alleges that as

a result of the accident Plaintiff sustained injuries to his right knee, right ankle, right shoulder, cervical spine, and lumbar spine.

### Analysis

For the reasons set forth below, Defendant's motion for summary judgment is denied.

### Threshold

Defendant moves for summary judgment in his favor on the ground that Plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d). The statutory provision state, in pertinent part that a "serious injury" is defined as:

A personal injury which results in . . . significant disfigurement; . . . 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 party from performing substantially all of the material acts which constitute such a person's customary daily activities for not less than ninety days during one hundred eighty days immediately following the occurrence of the injury or impairment.

Insurance Law §5102(d).

Defendant contends that Plaintiff did not sustain a serious injury based on medical reports of Dr. Marianna Golden ("Dr. Golden"), a Neurologist; Dr. Frank D. Oliveto ("Dr. Oliveto"), an Orthopedic Surgeon; and Dr. Richard A. Heiden ("Dr. Heiden"), a Radiologist. The issue of whether Plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. (*Licari v Elliot*, 57 NY2d 230 [1982]; *Porcano v Lehman*, 255 AD2d 430,

431 [2nd Dept 1998]; *Brown v Stark*, 205 AD2d 725 [2nd Dept 1994].) When moving for summary judgment on threshold, the burden is on the defendant to make a prima facie showing that the injuries the plaintiff sustained from the subject accident are not serious as defined within the meaning of Insurance Law §5102(d). (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Lewis v John*, 81 AD3d 905 [2nd Dept 2011].) A defendant can meet this burden by submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that the plaintiff's injuries are not serious. (see *Magarin v Kropf*, 24 AD3d 733 [2nd Dept 2005]; see also *Gaddy v Eyster*, 79 NY2d 955, 956 [Ct. App. 1992]; *Morris v Edmond*, 48 AD3d 432 [2nd Dept 2008].) Where defendant fails to meet his or her prima facie burden, the motion will be denied, and the court need not review the papers submitted by the plaintiff in opposition. (*Coseia v 938 Trading Corp.*, 283 AD2d 538 [2nd Dept 2001].) Thus, consideration is only given to the plaintiff's opposing papers if the defendant-movant makes a prima facie showing that the plaintiff did not sustain a serious injury. (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002].)

Defendant met his initial burden of establishing that Plaintiff did not sustain a serious injury through the submission of the affirmation of Dr. Golden, Dr. Oliveto and Dr. Heiden. Dr. Golden's neurological examination, conducted on October 26, 2011, concluded that Plaintiff had subjective complaints of discomfort and pain but there was no objective evidence of a causally related disability. Dr. Oliveto's orthopedic examination, conducted on March 4, 2013, concluded that Plaintiff showed no objective limitations to his range of motion. Further, Dr. Oliveto concluded there was no objective evidence of a causally related disability preventing Plaintiff from working. Dr. Oliveto concluded that the restrictions in motion subjective in nature.

Accordingly, Dr. Oliveto adequately explained the subjective restrictions in range of motion, as self-imposed and unrelated to the accident. (*Gonzales v. Fiallo*, 47 A.D.3d 760 [2<sup>nd</sup> Dept 2008]; *Santos v. Taveras*, 55 A.D.3d 405 [1<sup>st</sup> Dept 2008].)

Dr. Heiden reviewed Plaintiff's lumbar spine, right knee, cervical spine, and right shoulder MRI examinations. The lumbar spine and right knee examinations were conducted on February 08, 2007; the cervical spine examination was conducted on February 28, 2007; and the right shoulder examination was conducted on March 19, 2007. All examinations in Dr. Heiden's expert opinion show that Plaintiff suffers from a longstanding, chronic degenerative disease, which requires years to develop and is consistent with Plaintiff's aging. Further, Dr. Heiden concludes that these findings "could not be causally related to the accident of 01/20/2007."

In addition, Defendant provided evidence establishing, prima facie, "that during the 180-day period immediately following the subject accident, he did not have an injury or impairment which, for more than 90 days, prevented [him] from performing substantially all of the acts that constituted [his] usual and customary daily actions." (*Frederique v. Krampf*, 86 A.D.3d 533 [2<sup>nd</sup> Dept. 2011].) Specifically, Defendant submitted Plaintiff's deposition testimony wherein Plaintiff states that he returned to work in a part-time capacity and also, continued, although limited, his side home business.

Defendant has therefore made a prima facie showing that Plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d). Now Plaintiff is burdened demonstrate the existence of a triable issue of fact as to whether he sustained a serious injury.

(*Matthews v. Cupie Transp. Corp.*, 302 A.D.2d 441 [2nd Dep't 2003]; see also *Gaddy v Eyley*, 79 N.Y.2d 955, 956 [1992]; *Greene v. Miranda*, 272 A.D.2d 441 [2nd Dep't 2000].)

Plaintiff, in opposition, met his burden to defeat Defendant's motion for summary judgment on the issue of serious injury. Plaintiff submitted the Affirmation of Dr. David R. Adin ("Dr. Adin"), a physiatrist. Dr. Adin established that Plaintiff sustained a significant limitation and permanent loss of range of motion as a result of the subject accident. Dr. Adin first examined Plaintiff on January 23, 2007 and last examined Plaintiff on November 8, 2013. Dr. Adin affirmed that the January 24, 2007 objective range of motion test revealed significant reductions in various ranges of motion of his spine. Furthermore, Dr. Adin affirmed that the November 8, 2013 objective range of motion testing revealed significant reductions in various ranges of motion of Plaintiff's spine.

The difference of opinions regarding Plaintiff's ranges of motion limitations by experts of both parties demonstrates sufficient triable issue of fact as to whether Plaintiff has sustained a serious injury. (*Lee v. Hossain*, 111 A.D.3d 799 [2<sup>nd</sup> Dept 2013]; *Wilk v. Guthrie*, 110 A.D.3d 988 [2<sup>nd</sup> Dept 2013]; *Matter of Estate of Raskas*, 213 A.D.2d 718 [2<sup>nd</sup> Dept 1995].)

#### Conclusion

For the reasons set forth above, Defendant's motion for summary judgment is denied.

Dated:

April 4, 2014

**FILED**

APR 15 2014

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COUNTY CLERK  
QUEENS COUNTY

Bernice D. Siegal, J. S. C.