

<b>Grau v Dias</b>
2017 NY Slip Op 32172(U)
October 16, 2017
Supreme Court, New York County
Docket Number: 151305/2016
Judge: Paul A. Goetz
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S.C.  
Justice

PART 22

GRAU, ANDREW  
-v-  
DIAS, AMRISH

INDEX NO. 151305/2016  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits + 600 | No(s). 1 + 2  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 3  
Replying Affidavits \_\_\_\_\_ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is

Defendant Amrish Dias's motion for summary judgment pursuant to CPLR 3212 on the grounds that the injuries allegedly sustained by Plaintiff Andrew Grau as a result of the June 30, 2015, motor vehicle accident fail to establish serious injury thresholds as defined by Insurance Law § 5102 (d) and Plaintiff's cross motion for summary judgment on the issue of liability are decided as follow:

### DEFENDANT'S THRESHOLD MOTION

Plaintiff's bill of particulars alleges he sustained injuries to his cervical spine, left shoulder, mouth, including fractures. Other than averring that Plaintiff's "injuries are permanent in nature" Plaintiff does not state in his bill of particulars which of the categories of serious injuries set forth in Insurance Law § 5102 (d) are applicable to his injuries.

Defendant's orthopedist, Dr. Jeffrey Passick, found during his examination of Plaintiff on July 20, 2016, normal ranges of motion of and negative objective tests for his cervical spine and left shoulder (as well as right shoulder and wrist, left wrist and both knees although injury to these body parts was not alleged in the bill of particulars; Dr. Passick notes "[e]xamination of the right shoulder was performed for comparison purposes only"). Dr. Passick also reviewed Plaintiff's medical records and determined that his cervical and left shoulder contusions are resolved. Dr. Passick "defer[s] comment regarding reported injury to the face/teeth injury [sic] to the appropriate specialty."

Defendant also annexes to his motion the IME report prepared by a chiropractor/acupuncturist, Dr. Ji Hoon Kim dated August 10, 2015. Dr. Kim found during the chiropractic examination of Plaintiff normal ranges of motion of and negative objective tests for his cervical spine and left shoulder (as well as

Dated: \_\_\_\_\_ 1075 \_\_\_\_\_, J.S.C.

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- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S.C. Justice

PART 22

INDEX NO. \_\_\_\_\_  
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The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

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his thoracic and lumbar spine, right shoulder and right wrist, and left wrist). Dr. Kim’s acupuncturist’s examination was also normal. Dr. Kim’s diagnosis of Plaintiff is a resolved cervical spine sprain/strain and a normal thoracic and lumbar spine. Dr. Kim does not state a chiropractic diagnosis regarding Plaintiff’s left shoulder.

In addition to the IME reports discussed above, Defendant includes with his motion uncertified Bellevue Hospital records, unaffirmed records from Health SOS and Plaintiff’s deposition transcript.

Defendant failed to meet his prima facie burden of showing that Plaintiff’s claimed dental injuries do not constitute a serious injury. There is no IME from Defendant addressing the dental injuries detailed in the bill of particulars, rather, citing *Sanchez v Romano* (292 AD2d 202 [1st Dept 2002]), Defendant argues that a chipped tooth does not fall within the statutory definition of serious injury. However, Defendant does not address Plaintiff’s claims in his bill of particulars that he suffered a “buccal fracture below the gingival margin of tooth #7 [and] [f]ractures of the incisal edges of teeth #8 and #9.” Fractures to teeth come within the “fracture” category of Insurance Law 5102(d) (*Newman v Datta*, 72 AD3d 537 [1st Dept 2010]). In any event, an injury to a tooth meets the statutory threshold of a serious injury where it requires dental treatment (*Torrwes v Dwyer*, 84 AD3d 626 [1st Dept 2011]) and Defendant did not present any evidence that Plaintiff did not require any treatment for his alleged dental injuries.

Defendant also failed to meet his prima facie burden concerning Plaintiff’s cervical spine. Dr. Passick found that Plaintiff’s cervical *contusion* had healed while Dr. Kim found that Plaintiff’s cervical

Dated: OCT 16 2017 2015 \_\_\_\_\_ J.S.C.

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**HON. PAUL A. GOETZ**  
**J.S.C.**

PRESENT: \_\_\_\_\_  
*Justice*

PART **22**

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
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Upon the foregoing papers, it is ordered that this motion is

spine *sprain/strain* had resolved. Where as here, Defendant presents contradictory findings regarding a plaintiff's injuries, summary judgment in favor of Defendant is precluded (*Martinez v Pioneer Trans. Corp.*, 48 AD3d 306 [1<sup>st</sup> Dept 2008]).

Defendant made a prima facie showing that Plaintiff did not sustain a serious injury to his left shoulder through the affirmation of Dr. Passick who upon examination found normal ranges of motion and negative objective tests for Plaintiff's left shoulder (*Fernandez v Hernandez*, 151 AD3d 581 [1<sup>st</sup> Dept June 20, 2017] [holding "[d]efendants made a prima facie showing that plaintiff did not suffer significant or permanent limitations to her lumbar spine or knees as a result of the accident" through orthopedic surgeon's report "who found normal ranges of motion, negative objective test results, and resolved sprains, strains and contusions . . ."). Moreover, since Dr. Kim did not state a chiropractic diagnosis regarding Plaintiff's left shoulder, there was no contradictory finding as with the cervical spine. Plaintiff failed to submit any medical evidence to raise an issue of fact on whether he suffered a serious injury to his left shoulder (*Id.*).

Defendant also met his prima facie burden as to Plaintiff's 90/180-day claim by relying on his deposition testimony that he returned to work the day after the accident and continued to work without missing any time as a result of the accident. (*Reyes v Park*, 127 AD3d 459 [1<sup>st</sup> Dept 2015]. Plaintiff's opposition does not raise a triable issue of fact.

Dated: OCT 16 2017 395 \_\_\_\_\_, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. PAUL A. GOETZ
J.S.C.

PRESENT: \_\_\_\_\_
Justice

PART 22

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Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

PLAINTIFF'S CROSS MOTION ON LIABILITY

Plaintiff failed to establish his prima facie entitlement to summary judgment on the issue of liability because he did not demonstrate his freedom from comparative negligence. The collision between Plaintiff while he was riding his bicycle in the designated bicycle lane on 1st Avenue at its intersection with East 33rd Street occurred at approximately 8:35 PM when Defendant attempted to make a left turn from 1st Avenue onto East 33rd Street, crossing into the bike lane (Cf Sarac-Marshall v Mikalopas, 125 AD3d 570 [1st Dept 2015] [observing summary judgment movant must demonstrate freedom from comparative negligence]). While Plaintiff's bicycle was equipped with lights, none of the bicycle's lights were illuminated when the collision occurred, a potential violation of VTL 1236(a)(b)'s requirement that bicycles use a light on the front that illuminates at least 500 feet one half hour after sunset. There was no evidence presented that the sun had not yet set. Therefore, a question of fact remains whether Plaintiff's failure to have proper illumination on his bicycle was a proximate cause of

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: OCT 16 2017 4/9/5 \_\_\_\_\_, J.S.C.

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. PAUL A. GOETZ  
J.S.C.

22

PRESENT: \_\_\_\_\_  
Justice

PART \_\_\_\_\_

Index Number : 151305/2016  
GRAU, ANDREW  
vs  
DIAS, AMRISH  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

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Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

the collision.

Accordingly, based on the foregoing it is hereby

**ORDERED** that Defendant's summary judgment motion is GRANTED as to Plaintiff Andrew Grau's claim of serious injury to his left shoulder; and it is further

**ORDERED** that Defendant's summary judgment motion is GRANTED as to Plaintiff Grau's claim of serious injury under the 90/180-day category; and it is further

**ORDERED** that Defendant's summary judgment motion is DENIED as to Plaintiff Grau's dental and cervical spine serious injury claims; and it is further

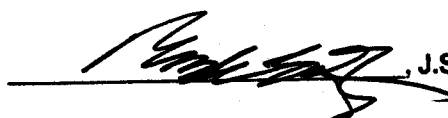
**ORDERED** that Plaintiffs' cross motion for summary judgment on the issue of liability is DENIED; and it is further

**ORDERED** that the parties are directed to appear for a settlement conference 80 Centre Street, Room 136 on October 31, 2017, at 9:30 AM.

This constitutes the Decision and Order of the Court.

Dated: 10/16/17

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 J.S.C.

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