

**Silver v Restelli**

2019 NY Slip Op 32123(U)

July 18, 2019

Supreme Court, New York County

Docket Number: 162308/2015

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. ADAM SILVERA PART IAS MOTION 22**

*Justice*

-----X

STEVEN SILVER, BARBARA SILVER,

Plaintiff,

- v -

MARTINO RESTELLI, CCA CIVIL-HALMAR INTERNATIONAL,  
LLC, HALMAR INTERNATIONAL LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, it is ORDERED that defendants' motion for summary judgment and to dismiss plaintiff's complaint is denied. Before the court is defendants Maritino Restelli, CCA Civil-Halmar International, LLC, and Halmar International, LLC's motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants to dismiss the Complaint of plaintiff Steven Silver and Barbara Silver for failure demonstrate that plaintiff Steven Silver has suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law.

The suit at bar stems from a motor vehicle collision which occurred on December 10, 2012, on the George Washington Bridge in the County, City and State of New York when a vehicle operated by defendant Martino Restelli and owned by defendants CCA Civil-Halmar International, LLC and Halmar International, LLC rear-ended a vehicle transporting passenger plaintiff Steven Silver which allegedly resulted in the serious injury of plaintiff. Plaintiff Barbara

Silver alleges that she suffered loss of services, society, and companionship of her husband as a result of plaintiff Steven Silver's alleged injuries.

"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 eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dep't 1992], citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dep't 1990]). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence (*See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 [1979]).

Here, defendants allege that plaintiff did not sustain a serious injury as a result of the underlying accident. In support of their motion defendants attach the unsworn January 3, 2019, report of Dr. Matthew M. Shatzer who states that defendant suffers from a 50% loss of range of motion in the cervical spine, full extension of the lumbar spine, full extension of the bilateral shoulders, and full flexion and extension of the bilateral knees (Mot, Exh D). While Dr. Shatzer attributes plaintiff's loss of range of motion in the cervical spine to degenerative conditions, Dr. Shatzer's report does not indicate what the normal range of motion is as to any of plaintiff's alleged injured body parts and is thus conclusory. The Appellate Division, First Department, has consistently held that "[t]he report of the doctor...is deficient because he...failed to indicate what the normal range of motion would be" (*Nagbe v Minigreen Hacking Group*, 22 AD3d 326, 327 (1<sup>st</sup> Dep't 2005)).

Further, defendants attach the December 25, 2018, report of Cardiologist Dr. David Harnick who concluded that he could not "definitively determine" whether plaintiff's development of atrial fibrillation was caused as a result of the motor vehicle accident and that it is "impossible to know if" plaintiff's global left ventricular dysfunction was caused by the accident at issue or not. "A defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold" (*Linton v Nawaz*, 62 AD3d 434, 439 [1<sup>st</sup> Dept 2009] citing *Wadford v Gruz*, 35 AD3d 258 [1<sup>st</sup> Dept 2006]). Defendants have failed to satisfy their burden as Dr. Shatzer's report is deficient and Dr. Harnick's report contains issues of fact as to plaintiff's alleged heart trauma. Thus, defendants have failed to meet their burden precluding summary judgment.

Accordingly, it is

ORDERED that defendants' motion for summary judgment to dismiss plaintiffs Steven Silver and Barbara Silver's Complaint on the grounds that plaintiff Steven Silver has not sustained a "serious injury" as defined in 5102 of the Insurance Law is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

7/18/2019  
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	