

**Alvero v Siemasko**

2019 NY Slip Op 33949(U)

June 20, 2019

Supreme Court, Dutchess County

Docket Number: 2017-50273

Judge: Hal B. Greenwald

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT- STATE OF NEW YORK  
DUTCHESS COUNTY

Present:

Hon. HAL B. GREENWALD

Justice.

SUPREME COURT: DUTCHESS COUNTY

\_\_\_\_\_  
MARCK ALVERO,

Plaintiffs,

DECISION AND ORDER  
Index No. 2017-50273  
Motion Sequence No. 1

-against-

CHRISTOPHER SIEMASKO and ANASTASIA SIEMASKO,  
Defendants.

\_\_\_\_\_ x  
The following documents were read and considered on the motion filed by the defendants seeking dismissal of the complaint on the grounds that plaintiff did not suffer a "serious injury" as defined under New York Insurance Law 5102(d), 5104(a).

NYSCEF Nos.12-23. 37. 25-36, 41,42

BACKGROUND AND RELEVANT PROCEDURAL HISTORY

The within action was commenced by plaintiff to recover for damages he suffered from a motor vehicle accident that took place on February 5, 2015 at the intersection of Route 22 and Old Route 22 in the City of Patterson, Putnam County, New York State. The action was commenced by the filing of a Summons and Verified Complaint on February 3, 2017. Defendants interposed an Answer on April 6, 2017 that contained several affirmative defenses. Plaintiff and defendants were both traveling south when Defendant's vehicle spun out of control and ended up facing north, striking the front of Plaintiff's vehicle with the front of Defendant's vehicle.

SIEMASKO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The instant Motion for Summary Judgment was filed on behalf of the Defendants seeking an order pursuant to CPLR 3212 dismissing the Complaint on the grounds that Plaintiff did not sustain a "serious injury" as defined under New York Insurance Law 5102(d). According to Defendants, the Complaint must be dismissed under New York Insurance Law 5104(a). Defendants' reasoning is that Plaintiff has not shown that he has suffered any significant disfigurement, permanent consequential limitation, significant limitation or has met the 90/180 day threshold.

Subsequent to the accident, Plaintiff went to Hackensack University Medical Center. CT scans showed an enlarged spleen and the lumbar and thoracic scans were resolved as being "unremarkable". Regarding the enlarged spleen, Plaintiff was seen by Dr. Nicholas Yanakis who indicated that this condition was not caused by the accident, but was due to some prior medical condition.

Dr. Gregory Galano, a board-certified orthopedic surgeon performed an independent orthopedic examination of the Plaintiff on August 9, 2018. The Plaintiff's "Chief Complaints" as reported by Dr. Galano was that Averso "...stated that he feels pain in the neck and mid-back.". Plaintiff's Cervical Spine and Lumbar Spine were tested for Range of Motion (ROM) by a standard hand-held goniometer. As to the Cervical Spine there was no spasms and the ROM of the "claimant" was Normal. Regarding the Lumbar Spine there were no "paraspinal spasms" and again the ROM for "claimant" was Normal. The diagnoses presented by this independent report were that both the Cervical and Lumbar Spine strains were "resolved".

There was an issue regarding Plaintiff's diagnosis of splenomegaly. A prior Independent Medical Examination, that focused on Plaintiff's spleen, was performed on August 1, 2018 by Dr. Stuart Stauber, a board-certified internist. Dr. Stauber concluded in his report that the incidental finding of splenomegaly was "...unrelated to the motor vehicle accident and/or injury sustained therein."

The movant seeks Summary Judgment and a dismissal of Plaintiff's complaint by reason that Defendants allege Plaintiff has not suffered a 'serious injury' as required by Insurance Law §5102(d). Defendants base their instant Motion on the medical opinions of the physicians named above.

#### PLAINTIFF ALVERO OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT

Plaintiff filed his opposition to the aforesaid Motion for Summary Judgment on January 22, 2019. The complete records of Hackensack University medical Center proffered by Plaintiff indicate that Plaintiff complained of 10/10 severity of pain in the abdomen and 8/10 neck pain. Plaintiff was discharged with diagnoses of back and head issues and splenomegaly. After discharge his primary care physician, Dr. Nicholas Yanakis noted neck pain and his concern about Plaintiff's enlarged spleen. Affidavits attached to the Opposition papers indicated that Plaintiff was out of work for two months and received Workers Compensation benefits.

Alvero was seen by Dr. Eric Freeman, a pain management specialist who diagnosed several issues relating to the cervical spine, including cervical spine radiculitis, tenderness, and range of motion issues. After Workers Compensation found that Plaintiff was not in need of any further treatment, and upon this determination being challenged, Plaintiff was then evaluated by Dr. Michael Cohen, an orthopedist, as Plaintiff was complaining of daily cervical and spine pain, who found there that Plaintiff suffered from significant limitations to his daily living activities. Dr. Cohen's diagnoses after a second evaluation were:

Chronic posttraumatic strain and sprain of the cervical spine  
Cervical radiculitis  
Disc Bulge C2-C3  
Herniated disc C4-C5, C5-C6, MRI positive  
Status post pain management with cervical epidural blocks

Importantly, Dr. Cohen concluded that Plaintiff's injuries were because of the February 5, 2015 automobile accident, and that Plaintiff suffered a 62 ½ % of partial total permanent orthopedic impairment.

#### DECISION

On a summary judgment motion, the moving party has the initial burden to show it is entitled to summary judgment as a matter of law. (*see Zuckerman v. City of N.Y.*, 49 NY2d 557 [1980]). It is up to defendant herein to demonstrate to the Court that Plaintiff did not suffer any of the following pursuant to Insurance Law §5102(d): (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation of use as a body organ or member; significant limitation of use of a body function or system; or (3) a medically determined injury or impairment which prevented the injured party from performing all his usual and customary daily activities for not less than 90 days of the 180 days immediately following the occurrence of the injury. If this is accepted, the burden shifts to the Plaintiff opposing the motion to demonstrate by evidentiary facts that genuine issues of fact exist regarding whether the Plaintiff sustained a "serious injury", so as to defeat summary judgment.

Reviewing all the evidence presented in the light most favorable to plaintiff, the non-moving party (*see Martin v Briggs*, 235 AD2d 192, 196 [1<sup>st</sup> Dept 1997]), the Court finds that defendants have failed to meet their burden on the summary judgment motion (*see CPLR 3212 [b]; Bush v St. Claire's Hospital*, 82 NY2d 738, 739 [1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; Even assuming that defendants' IME reports satisfied the burden to establish by sufficient evidence in admissible form that plaintiff's claim has no merit, plaintiff has raised triable issues of fact by providing medical opinions that conclude to a reasonable degree of medical certainty that as a result of the accident, plaintiff sustained a significant limitation of use of a body function or system, namely cervical, sprain/strain and disc injuries with cervical radiculopathy and range of motion issues, disc bulge C2-C3, herniated disc C4-C5, C5-C6 were caused by the accident. In support of his medical conclusions, Dr. Cohen quantified plaintiff's partial total permanent orthopedic impairment as being 62½%.

Accordingly, the Motion and supporting papers, affidavits and exhibits, as well as the Opposition and its supporting papers, affidavits and exhibits raise material issues of fact as to whether Plaintiff sustained "serious injury" as defined in Insurance Law §5102(d) that was causally related to the underlying automobile accident.

As a consequence of all the foregoing it is:

ORDERED that Defendant's Motion for Summary Judgment is denied based upon the conflicting medical evidence and documentary evidence related to the "serious injury" threshold;

and it is further

ORDERED that a status conference is hereby scheduled for **August 20, 2019 at 9:30 a.m.** before the Hon. Hal B. Greenwald.

The foregoing constitutes the decision and order of this court

Dated: June 20, 2019  
Poughkeepsie, New York

ENTER:



HON. HAL B. GREENWALD, J.S.C.

Dawn S. DeWeil, Esq.  
Rothenberg, Rubinstein, Berliner & Shinrod, LLC  
*Attorneys for Plaintiff*  
70 South Orange Avenue, Suite 205  
Livingston, NJ 07039

Sami P. Nasser, Esq.  
Burke, Conway & Dillon  
*Attorneys for Defendants*  
*Christopher Siemasko &*  
*Anastasia Siemasko*  
10 Bank Street, Suite 1200  
White Plains, NY 10606

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of entry, the appeal must be taken within thirty days thereof.

**When submitting motion papers to Judge Greenwald's Chambers, please do not submit any copies. Submit only the original papers.**