

**Alam v Soon Y. Hwang**

2019 NY Slip Op 35202(U)

October 4, 2019

Supreme Court, Queens County

Docket Number: Index No. 702873/2018

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**  
**Justice**

IAS PART 30

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FERROZ ALAM,

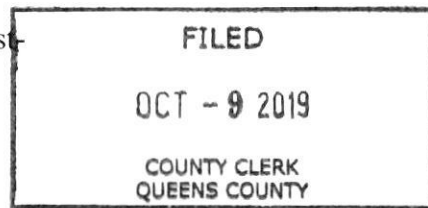
Index No. 702873/2018

Plaintiff,

Motion

Date: September 18, 2019

-against-



Motion Cal. No.: 1

SOON Y. HWANG,

Motion Sequence No.: 1

Defendant.

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The following e-file papers numbered 10-19 and 29-39 submitted and considered on this motion by defendant SOON Y. HWANG (collectively referred to as "Defendant") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 for summary judgment declaring that plaintiff FERROZ ALAM (hereinafter referred to as "Plaintiff") did not incur a "serious injury" as defined under NY Insurance Law §5102 (d).

|  |                 |
|--|-----------------|
|  | Papers          |
|  | <u>Numbered</u> |
| Notice of Motion- Aff. in Support-Exhibits ..... | EF 10-19        |
| Affirmation in Opposition-Exhibits .....         | EF 29-37        |
| Reply Affirmation.....                           | EF 38-39        |

This is a negligence action arising out of a car accident that occurred on Northern Boulevard at or near its intersection with 220 Place in the County of Queens, State of New York. The accident occurred on October 2, 2016 at 3:40 a.m. Plaintiff claims he was stopped at a stop light on Northern Boulevard when he was struck by Defendant in the rear. Plaintiff alleges in his deposition that he sustained injuries to both knees, head, cervical and lumbar spine.

The Defendant, asserts that the Plaintiff did not incur a "serious injury" as defined in NY Insurance Law §5102 (d) (emphasis added) which reads as follows:

“‘Serious injury’ means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; **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 person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.**”

Plaintiff asserts he suffered a “permanent consequential limitation of use of a body organ or member”, and/or “significant limitation of use of a body function or system” and/or “a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment”. NY Insurance Law §5102 (d).

Now, Defendant seeks an Order pursuant to CPLR 3212 for summary judgment declaring that Plaintiff did not incur a “serious injury” as defined in NY Insurance law §5102 (d).

The Court’s function on a motion for summary judgment is “to determine whether material factual issues exist, not to resolve such issues” (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, “it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is ‘arguable’” [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]). Summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to

make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

**90/180 Day Category**

Plaintiff testified as follows (page 20 lines 6-25; page 21 lines 2-14):

Q: Since you started working for Juno two years ago, has there been any period of time two years ago, has there been any period of time that you have not worked continually for Juno?

A: I have to say something. I forgot this, because due to my accident, there were a lot of days that I did not work. First about a two months that I was not able to work at all. I forgot to mention that previously and also due to pain, there are a lot of days off and on that I did not work.

Q: The two months that you just mentioned that you were unable to work was that directly after the accident that brings us here today?

A: Yes.

Q: How many days since the accident have you been unable to work outside of those two months?

A: Since I was working more hours before and more days because of the incident I'm not able to do that. At the present time, all together about maybe a month and a half.

Q: Over what time period is that month and half?

A: Until now.

Q: Was that a continuous month and half or are those the periodic days that you are referring to?

A: Not continuous, on and off.

Within his Bill of Particulars Plaintiff alleges that he "was confined to bed intermittently from the date of the accident" and that he "was confined to the house intermittently from the date of the accident".

Defendant has not established prima facie entitlement to summary judgment as to Plaintiff's claim that he sustained a serious injury as a result of the accident that occurred on October 2, 2016. Specifically, Defendant has not put forth evidence to dispute Plaintiff's claim that he sustained a serious injury under the 90/180 category. The IME report completed by Dr. Alan J. Zimmerman, M.D. states "The claimant is a taxi driver and is presently working. He does not state if there was any time lost from work due to this accident" which creates a triable issue of fact as to Plaintiff's claims.


It must be noted that within his narrative report Dr. Zimmerman states that "[t]he findings on MRI and at surgery are all typical of degeneration and not of trauma". Furthermore, Dr. Zimmerman did not find that Plaintiff lost any range of motion. Plaintiff's expert, Dr. Laxmidhar Diwan, M.D., who also performed a series of range of motion tests on Plaintiff stated in his narrative report that "within a reasonable degree of medical certainty the above-noted injuries were a direct result of job related accident." Furthermore, Dr. Diwan found that Plaintiff lost range of motion in

both his knees. In *Carmelo Noble v. Calvin Ackerman* (252 A.D.2d 392 [1<sup>st</sup> Dept 1998]) plaintiff alleged he sustained serious injuries after an accident with defendant pursuant to Insurance Law §5102 (d) defendant's motion for summary judgment was denied by the lower court. On appeal, defendant moved once again for summary judgment on the issue of whether plaintiff sustained a serious injury (*id*). Both sides presented medical expert opinions. Plaintiff's expert found correlation between the alleged injuries and the accident (*id* at 393). Defendant's experts attributed plaintiff's injuries to, among other things, the normal aging process (*id* at 394). The court held "[w]here conflicting medical evidence is offered on the issue of whether the plaintiff's injuries are permanent or significant, and varying inferences may be drawn therefrom, the question is for the jury" (*id* at 395). Therefore it is,

**ORDERED**, that based on the foregoing Defendant's motion pursuant to CPLR 3212 seeking to dismiss Plaintiff's claim that he sustained a serious injury is denied.

The foregoing constitutes the decision and order of this Court.

Dated: October 4, 2019

  
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**Hon. Chereé A. Buggs, JSC**

FILED  
OCT - 9 2019  
COUNTY CLERK  
QUEENS COUNTY