

<b>Ellis v Barranco-Alvarez</b>
2020 NY Slip Op 34668(U)
July 22, 2020
Supreme Court, Dutchess County
Docket Number: Index No. 2018-52504
Judge: Christi J. Acker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X  
LLOYD ELLIS,

Plaintiff,

**DECISION AND ORDER**

-against-

Index No.: 2018-52504

JOHAN M. BARRANCO-ALVAREZ,  
Defendant.

-----X

The following papers, numbered 1 to 12, were read on Defendant Johan M. Barranco-Alvarez’s (hereinafter “Defendant”) motion for summary judgment pursuant to CPLR §3212 on the grounds that Plaintiff Lloyd Ellis (hereinafter “Plaintiff”) did not incur a “serious injury” as defined under Insurance Law §5102(d):

Notice of Motion-Affirmation of Chris M. Hatzis, Esq.-Exhibits A-D.....	1-6
Affirmation in Opposition of Mark P. Cambareri, Esq.-Exhibits 1-4 .....	7-11
Reply Affirmation of Constantine Hatzis, Esq. ....	12

Plaintiff commenced this personal injury action against Defendant alleging that he was injured as the result of an accident that occurred on December 13, 2015 on Main Street and Hoffman Avenue in Poughkeepsie, New York. Plaintiff was a pedestrian crossing in a painted crosswalk when he was struck by the vehicle driven by Defendant.

Defendant moves for summary judgment on Plaintiff’s claims, alleging that said Plaintiff fails to meet the “serious injury” threshold pursuant to the New York State Insurance Law. In support of his summary judgment application, Defendant submits copies of the pleadings;

Plaintiff's Verified Bill of Particulars and the December 4, 2019 affirmed report of Edward L. Mills, M.D., who examined Plaintiff on December 4, 2019 (attached to the Hatzis Affirmation as Exhibit D, hereinafter referred to as the "Mills Report").

The New York Insurance Law defines "serious injury" as

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.

N.Y. Ins. Law § 5102(d) (McKinney's 2018)

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trials." *Licari v. Elliott*, 57 NY2d 230, 237 [1982]. Any injury outside the definition of "serious injury" is considered an insignificant injury and, therefore, a trial is not allowed under the no-fault statute. *Id.* at 235. The term "significant" refers to "something more than a minor limitation of use". *Id.* at 236.

Whether a claimed injury falls within the statutory definition of "serious injury" is a question of law that may be decided by the court on a motion for summary judgment. *See Licari, supra*, at 237. A defendant seeking summary judgment bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury." *Toure v. Avis Rent A Car Sys. Inc.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955 [1992]. Once a defendant has made a *prima facie* showing, the burden shifts to the plaintiff to submit evidence, in admissible form, sufficient to create a material issue of fact necessitating a trial. *Franchini v. Palmireri*, 1 N.Y.3d

536 [2003]; *Grossman v. Wright*, 268 AD2d 79, 84 [2d Dept 2000]. The plaintiff must submit “quantitative objective findings in addition to an opinion as to the significance of the injury.”

*Grossman, supra*.

A cursory review of the submissions demonstrates that Defendant fails to satisfy his *prima facie* burden establishing of that Plaintiff did not suffer a serious injury. At the examination on December 4, 2019, Defendant’s expert, Dr. Mills, measured various ranges of motion of Plaintiff’s cervical spine and the reported findings show limitations in Plaintiff’s cervical ranges of motion between 20 and 60 degrees less than normal ranges of motion. As to Plaintiff’s lumbar spine, Defendant’s expert measurements show limitations in Plaintiff’s lumbar ranges of motion between 10 and 50 degrees less than normal ranges of motion. Similar limitations are noted upon examination of Plaintiff’s left wrist, left elbow and both knees. As a result of his examination, Dr. Nunez diagnosed Plaintiff with resolved sprains of his cervical and lumbar spine, left elbow, left wrist and both knees. Significantly, Dr. Ellis does not opine as whether these purported “resolved” sprains were, or were not, the result of the accident at issue herein.

As Defendant relies solely on Dr. Ellis’ report in support of the instant motion,<sup>1</sup> he fails to establish his *prima facie* case. Dr. Ellis found significant range of motion restrictions in Plaintiff’s neck, back, knees, left wrist and left elbow and failed to adequately explain and substantiate his belief that these limitations were self-imposed. *Rivas v. Hill*, 162 AD3d 809, 810-11 [2d Dept. 2018]. Moreover, as Defendant failed to meet his *prima facie* burden, it is unnecessary to determine whether the papers submitted by Plaintiff in opposition were sufficient

---

<sup>1</sup> Indeed, Defendant does not submit any medical records nor any deposition testimony in support of his motion.

to raise a triable issue of fact. *Id.* at 811. Accordingly, Defendant's motion is denied in its entirety.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Now, therefore, it is hereby

ORDERED that Defendant's motion is DENIED in its entirety; and it is further

ORDERED that this matter is scheduled for a virtual settlement conference on August 26, 2020 at 10:00 a.m via Skype. Please refer to Section III(F) of the Court's Individual Part Rules regarding the documents due on or before that date.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York  
July 22, 2020

  
CHRISTI J. ACKER, J.S.C.

To: All parties via ECF