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| <b>Perez v Vita</b>                                                                                                                                                                                                            |
| 2020 NY Slip Op 35384(U)                                                                                                                                                                                                       |
| January 28, 2020                                                                                                                                                                                                               |
| Supreme Court, Orange County                                                                                                                                                                                                   |
| Docket Number: Index No. EF004748/2016                                                                                                                                                                                         |
| Judge: Maria S. Vazquez-Doles                                                                                                                                                                                                  |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

At a term of the IAS Part of the Supreme Court of the State of New York,  
held in and for the County of Orange, at 285 Main Street,  
Goshen, New York 10924 on the 28th day of January, 2020.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

MANRIQUE PEREZ,,  
\_\_\_\_\_

PLAINTIFF,

-AGAINST-

WILLIAM J. VITA,  
\_\_\_\_\_

DEFENDANTS.

VAZQUEZ-DOLES, J.S.C.  
\_\_\_\_\_

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

**DECISION & ORDER**

INDEX #EF004748/2016  
Motion date: Nov. 15, 2019  
Motion Seq.# 1

The following papers numbered 1 - 5 were read on the motion for summary  
judgment by defendant, WILLIAM J. VITA, dismissing the complaint alleging no serious injury:

Notice of Motion(Denied)/ Affirmation (Gaztambide) and Exhibits A - H ..... 1 - 3  
Affirmation in Opposition (Phemister) ..... 4  
Reply Affirmation ..... 5

**Background and Procedural History**

This personal injury action arises out of a motor vehicle accident that took place on  
October 20, 2015. At the time of the accident, plaintiff was a pedestrian and contact was made  
between the plaintiff and defendant's vehicle. Plaintiff commenced this action by filing a  
Summons and Complaint (Exhibit A to moving papers) on July 7, 2016. Defendant served a  
Verified Answer with Affirmative Defenses on August 1, 2017. On or about December 1, 2017,  
plaintiff served a Verified Bill of Particulars. (Exhibit B) The Bill of Particulars alleged injury to  
his right leg and cervical spine with pain, tenderness and decreased range of motion.

The Examination Before Trial of plaintiff was held on March 13, 2018. (Exhibit C)

Plaintiff filed his Note of Issue on April 17, 2019.

### **Plaintiff's Deposition Testimony**

Plaintiff was a pedestrian crossing Orchard Drive in the Town of Monroe, State of New York when defendant's vehicle struck him while making a left turn onto Orchard Drive. Plaintiff stated that he put out his hands immediately prior to impact and then the grill made contact with his legs and the hood of the car with his hands. He states that he lost consciousness and when he woke up he was in the hospital, Orange Regional Medical Center. He was admitted due to his concussion and loss of consciousness. At the hospital he complained about his legs, knee, ankle wrist and a "massive headache".

Plaintiff further testified that he was involved in a prior motor vehicle accident in the Bronx twenty years prior in which he injured his lower back. After that accident he received chiropractic care three times a week for approximately six months.

After being discharged from Orange Regional, plaintiff came under the care of Orthopedic & Sports Medicine where he received physical therapy for his legs and right arm approximately three times per week for two to three months. Plaintiff states that he has difficulty walking for long distances and he is unable to do push ups, play catch with his son or lift heavy objects.

### **Defendant's Motion for Summary Judgment**

Defendant moves for summary judgment on the ground that plaintiff has failed to establish a serious personal injury. In support of his motion, defendant offers plaintiff's Bill of Particulars and deposition transcript, the medical records from Orange Regional Medical Center

and Orthopedics & Sports Medicine, P.C.

Defendant also offers the report of orthopedic surgeon, Dr. Adam Soyer, dated April 27, 2019. (Exhibit F) Plaintiff underwent an independent medical examination performed by Dr. Soyer on April 10, 2019. Dr. Soyer states that he reviewed, *inter alia*, the Bill of Particulars; x-ray reports taken at Orange Regional on the date of the accident of plaintiff's right hand, left knee, left ankle left foot, the MRI report of plaintiff's cervical spine taken at Orange Regional on the date of the accident and various CTA scans.

On physical examination, Dr. Soyer found decreased range of motion both in his cervical and lumbar spine, in both his right and left shoulders, in both his right and left wrists as well as both his right and left ankle. Dr. Soyer indicated that there was a positive loss of consciousness. Based upon his review of the medical records and the history presented by plaintiff, his examination led him to the following diagnoses: cervical spine sprain, which has been resolved. There is no diagnosis for any other injury notwithstanding the fact the examination revealed loss of range of motion in plaintiff's shoulders, wrists and ankles. There was also decreased grip strength in his right hand and soft tissue swelling with decreased sensation in both ankles and feet. In regard to the cervical injury, although Dr. Soyer noted a significantly reduced range of motion, he simply states that such testing is subjective.

Concerning plaintiff's headaches and loss of consciousness, Dr. Soyer deferred comment to the appropriate specialty.

#### **Plaintiffs' Opposition**

Plaintiff asserts that the movant has failed to sustain his initial burden of proof. That defendant has failed to show, *prima facie*, lack of a personal injury which results in a permanent

consequential limitation of use of a body organ or member or the significant limitation of a body function or system. Plaintiff relies only upon the documents submitted in the moving papers

At the very least, plaintiff asserts, that the evidence presented creates issues of fact precluding summary judgment.

### Discussion

Section 3212(b) of the Civil Practice Law & Rules states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section 3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact." (*Anyanwu v Johnson*, 276 AD2d 572, 714 NYS2d 882 [2d Dept 2000]) Issue finding, not issue determination, is the key to summary judgment. (*Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]) In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party. (*See, Kutkiewicz v Horton*, 83 AD3d 904, 920 N.Y.S.2d 715 [2d Dept 2011])

Defendants move for summary judgment, claiming that plaintiff has failed to meet the threshold requirements of Insurance Law §5102, because he has not provided proof that he sustained a serious injury. Defendant bears the initial burden of establishing a *prima facie* case that plaintiff did not sustain a serious injury. (*Toure v. Avis Rent-A-Car Sys.*, 98 NY 2d 345 [2002])

Here, the affirmed medical report of the defendant's orthopedist indicated the existence of

limitations in motion of the plaintiff's cervical spine as well as other areas of the body which were injured at the time of the accident. Defendant has failed to meet their initial burden of establishing a prima facie case and therefore, it is unnecessary to consider whether plaintiff's papers in opposition are sufficient to raise a triable issue of fact. (*Omar v Bello*, 13 AD3d 430 [2d Dept 2004]; see, *Coscia v 938 Trading Corp.*, 238 AD2d 538 [2d Dept 2001]; see also *Mariaca-Olmos v Mizrhy*, 226 AD2d 437 [2d Dept 1996])

Based upon the foregoing it is hereby

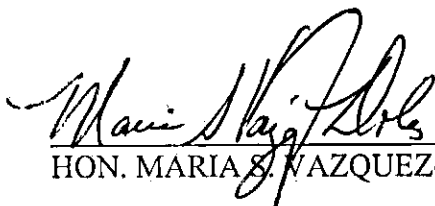
**ORDERED** that defendant's motion is denied; and it is further

**ORDERED** that the parties shall appear for a pre-trial conference on \_\_\_\_\_,  
2020 at 9:30 a.m.

The foregoing constitutes the Decision and Order of this Court.

Dated: January 28, 2020  
Goshen, New York

ENTER:

  
\_\_\_\_\_  
HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Counsel of Record Via NYSCEF