

**Mostacero v Lee**

2021 NY Slip Op 33282(U)

March 22, 2021

Supreme Court, Ulster County

Docket Number: Index No. EF2018-3218

Judge: Christopher E. Cahill

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ULSTER

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CRISTHIAN O. MOSTACERO,

Plaintiff,

-against-

**Decision and Order**  
Index No. EF2018-3218

RENEE D. LEE, GREGG RENEE and RICHER E.  
RAZO,

Defendants.

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Supreme Court, Ulster County  
Adjourned Motion Return Date: November 28, 2020

APPEARANCES:

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**CAHILL, J.**

Defendants move for an order pursuant to CPLR § 3212 granting summary judgment dismissing the complaint on the ground that plaintiff Christian O. Mostacero (“Mostacero” or “plaintiff”) did not sustain a serious injury as defined by Insurance Law § 5102 (d). Plaintiff opposes the motion, contending that a question of fact exists as to the extent of his injuries.

The instant action arose on July 19, 2016 as a result of a rear end collision in which a commercial box truck operated by Mostacero was struck in the rear by a vehicle operated by defendant Richard E. Razo (“Razo”). Mostacero alleges that as a result of this accident he suffered injuries to his lumbar spine, cervical spine and right knee.

The question before the court is whether any of the alleged injuries constitute a “serious injury” as defined under the New York Insurance Law. Insurance Law § 5102 (d) defines a “serious injury” 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 nonpermanent 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.

In his bill of particulars, Mostacero claims that, with regard to the lumbar spine, cervical spine and/or right knee injuries, he suffered permanent loss of use; and/or a permanent consequential limitation; and/or a significant limitation and a medically determined injury or impairment of a non-permanent nature which prevents him from performing substantially all of the acts which constitute his usual and customary daily activities for the time period set forth in the statute.

Defendants have met the initial burden on their motion via the medical report of expert orthopedist Gregory Chiarmonite, M.D., which opines that Mostacero did not sustain a serious injury as a result of the July 19, 2016 accident. In his report, Dr. Chiarmonite states that there is no evidence of a disability; Mostacero is able to perform activities of daily living without any restriction, and, upon examination, there are no objective clinical findings consistent with pathology. As a result of the examination, it appeared that Mostacero ambulated with a normal gait without the use of any assistance devices. While there was some restriction of motion of the right knee, it was considered to be subjective “in light of negative correlative findings.”<sup>1</sup> The knee showed no swelling or effusion and all objective tests revealed normal or negative results. With regard to the cervical spine, there was no tenderness or spasm noted and the range of motion results were normal with flexion, extension and rotation. With regard to the lumbar spine, there was no spasm or tenderness noted and the range of motion results were normal for

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<sup>1</sup> Exhibit G, Affirmation of Stephen Schioppi, Esq. dated July 29, 2020.

flexion, extension and straight leg raise. Dr. Chiarmonte based his opinion on his physical examination of the plaintiff and a review of his bill of particulars.

Defendants Lee and Renee also argue that Mostacero's medical records do not establish an objective injury that has restricted him in any significant degree; they contend that all of his complaints are subjective in nature. Specifically, an EMG done on August 17, 2016 shortly after the accident showed no evidence of lumbrosacral radiculopathy. Moreover, an MRI taken on August 29, 2016 of the cervical and lumbar spine and one done on April 13, 2017 of the lumbar spine, both show a normal spine. Additionally, the MRI of the right knee taken on December 7, 2016 showed no evidence of ligamentous tendinous, osseous or cartilaginous injury to the right knee. Finally, as pointed out by defendants, it does not appear that Mostacero has treated since 2017 for the injuries claimed to result from the accident.

The burden has shifted to plaintiff to bring forward admissible evidence that he sustained a serious injury (*Lanuto v Constantine*, 192 AD2d 989 [3<sup>rd</sup> Dept 1993] *lv. den.*, 82 NY2d 654). Plaintiff must demonstrate "the extent or degree of physical limitation" by an expert's designation of a numeric percentage of his loss of range of motion or by an expert's qualitative assessment of his condition provided that the evaluation has an objective basis and compares his limitations to the normal function, purpose and use of the affected function or system (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]; *see also Mrozinski v St John*, 304 AD2d 950, 951 [3<sup>rd</sup> Dept

1993]). In order to raise a question of fact that plaintiff sustained a serious injury, a medical expert must render an opinion that he has sustained a loss of range of motion of the spine and sufficiently describe the loss of range of motion qualitatively or quantitatively (*Toure* at p. 353).

Plaintiff has submitted two reports dated September 8, 2020 and April 25, 2017 affirmed in accordance with CPLR § 2106 from his treating physician Gabriel L. Dassa, D. O., F.A.A.O.S. a board certified orthopedic surgeon.<sup>2</sup> Dr. Dassa obtained a complete medical history from Mostacero. A review of his reports establishes, for purposes of this motion, that Mostacero sustained a right knee baker's cyst, lumbar and cervical musculoligamentous injuries and cervical and lumbar radiculopathy. Dr. Dassa opines that said injuries and impairments were caused by the accident on July 19, 2016. Specifically, Dr. Dassa found a loss of range of motion to the cervical spine with measurements as follows: forward flexion measured 40 degrees when normal is 60 degrees; extension measured 30 degrees when normal is 75 degrees; lateral bending measured 25 degrees when normal is 45 degrees, and lateral rotation measured 40 degrees when normal is 80 degrees. In total, Mostacero's loss of range of motion to his cervical spine, according to Dr. Dassa, is approximately 50% and the loss was directly caused by the instant motor vehicle accident.

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<sup>2</sup> Exhibit A to Affirmation in Opposition of Alexander E. Mainetti, Esq. dated October 29, 2020.

As to the lumbar spine, Dr. Dassa found a significant loss of range of motion as follows: forward flexion measured 60 degrees when normal is 90 degrees; forward extension measured 25 degrees when normal is 30 degrees; lateral bending measured 25 degrees when normal is 40 degrees, and lateral rotation measured 25 degrees when normal is 30 degrees.

Finally, with regard to the right knee, Dr. Dassa found a significant loss of range of motion with flexion measuring 125 degrees, when the normal measurement is 140 degrees. Dr. Dassa also found internal derangement of Mostacero's right knee, which he concluded was causally related to the instant motor vehicle accident.

Plaintiff also submitted medical reports of Luis A. Mendoza, Jr., MD prepared following medical examinations on August 19, 2016 and October 16, 2016.<sup>3</sup> Dr. Mendoza quantified restricted range of motion to the neck as well as restricted range of motion to the thoracic and lumbar spine. He also found a torn meniscus of the right knee and lumbar neuropathy, noting that plaintiff's complaints of severe pain and numbness were a "direct result" of the instant accident. Plaintiff also treated with a chiropractor, Dr. David L. Rosenblum from August 8, 2016 through August 18, 2019.<sup>4</sup>

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<sup>3</sup> Exhibit B to Affirmation in Opposition of Alexander E. Mainetti, Esq. dated October 29, 2020.

<sup>4</sup> Exhibit C to Affirmation in Opposition of Alexander E. Mainetti, Esq. dated October 29, 2020.

Dr. Rosenblum found a significant loss of motion to Moscatero's lumbar spine together with ligament damage and injuries which he concluded were causally related to the motor vehicle accident on July 19, 2016. Dr. Rosenblum opined that plaintiff suffered a permanent serious consequential injury to his lower back and neck as a result of the instant accident.

The law requires that plaintiff's limitation of use be more than minor, mild or slight and that plaintiff's claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*see Lanuto v Constanine* at 991). Here, plaintiff's evidence is that he sustained a consequential limitation of use of his cervical spine, lumbar spine and right knee and Dr. Dassa opines that these injuries and limitations are significant and permanent. On the other hand, defendants cannot on the record before the court, establish conclusively that the July 19, 2016 accident played no role in causing plaintiff's injuries or curtailing his normal activities (*Creech v Walker*, 11 AD3d 856 [3<sup>rd</sup> Dept 2004]; *Marks v Brown*, 3 AD3d 648 [3<sup>rd</sup> Dept 2004]). Additionally, plaintiff has presented objective evidence of a serious injury by quantified deviations from normal functioning together with concrete proof of impairment sufficient to overcome defendants' motion for summary judgment (*Clements v Lasher*, 15 AD3d 712 [3<sup>rd</sup> Dept 2005]; *Martin v Fitzpatrick*, 19 AD3d 954 [3<sup>rd</sup> Dept 2005]). Here, Dr. Dassa's two reports and properly affirmed opinion, meet the criteria set forth by the Court of Appeals in *Toure*. Triable issues of fact exist as to the

proximate cause of plaintiff's injuries and the extent of said disability, if any.

A question of fact exists as to whether Mostacero, as a result of the July 19, 2016 motor vehicle accident, suffered a permanent consequential loss of use of his cervical spine, lumbar spine or right knee, or a significant limitation of his cervical spine, lumbar spine or right knee. There is a conflict in the medical opinions as to whether plaintiff sustained such injuries to his cervical spine, lumbar spine or right knee. There is also a question of fact as to whether any of the claimed losses of range of motion caused significant limitations and restrictions in plaintiff's daily living and activities. The credibility and weight to be afforded to the opinions of the respective health care providers should be left to the trier of fact as should the question of whether the plaintiff's continuing complaints and symptoms were a direct result of the motor vehicle accident on July 19, 2016.

Summary judgment is a drastic remedy and should not be granted if there is any doubt as to the existence of a triable issue of fact (*Andre v Pomeroy*, 35 NY2d 361 [1974]). Although defendants met their initial burden on the motion (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1984]), plaintiff has sufficiently rebutted defendants' evidence to raise triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

Accordingly, it is hereby

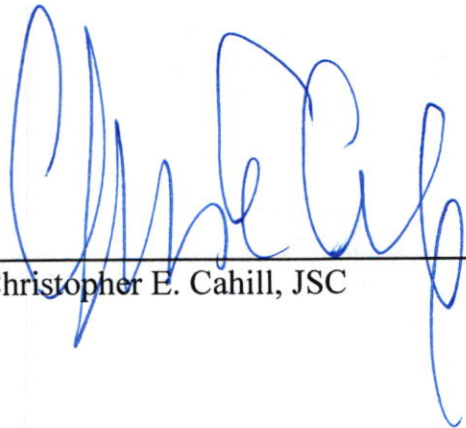
**ORDERED**, the defendants' motions for summary judgment are denied, without

costs.

This shall constitute both the decision and order of this court. The signing of this decision and order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that section concerning filing, entry and notice of entry.

**ENTER**

**Dated: March 22, 2021**  
**Kingston, New York**

  
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Christopher E. Cahill, JSC

Papers Considered:

1. Defendant Richer E. Razo's Motion for Summary Judgment;
2. Affirmation of Stephen Schioppi, Esq. dated 7/29/2020 in Support of Motion with Exhibits A-G annexed;
3. Cross Motion of Defendants Lee and Renee for Summary Judgment;
4. Affirmation of Patrick T. Finnegan, Esq., dated 9/2/2020 in Support of Cross Motion for Summary Judgment with Exhibits A-C annexed;
5. Affirmation in Opposition of Alexander E. Mainetti, Esq. dated 10/29/2020 with Exhibits A-E annexed;
6. Affirmation in Reply of Stephen Schioppi Esq., dated 10/30/2020.