

**Egalite v Lara**

2021 NY Slip Op 33297(U)

July 7, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 608988/2018

Judge: Joseph A. Santorelli

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ORIGINAL

SHORT FORM ORDER

INDEX No. 608988/2018  
CAL No. \_\_\_\_\_

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

MOTION DATE 6-10-2020  
SUBMIT DATE 5-20-2021  
Mot. Seq. # 01- MD

-----X  
WILNER EGALITE,  
  
Plaintiff,  
  
-against-  
  
JONNY GIRON LARA and RIGO LIMO  
AUTO CORP.,  
  
Defendants.  
-----X

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Upon the following papers numbered 1 to 54 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 13 - 40; Replying Affidavits and supporting papers 41 - 54; ~~Other~~; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED**, that the motion is determined as follows:

This motion by the defendants for an order granting summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" within the meaning of N.Y. Insurance Law § 5102(d) is denied.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained as the result of a motor vehicle accident which occurred on June 30, 2017. The plaintiff alleges that he was operating a motor vehicle northbound on Straight Path at or near its intersection with Irving Street, Suffolk County, New York, when defendant, Jonny Giron Lara, was operating a motor vehicle, owned by defendant Rigo Limo Auto Corp., and struck the plaintiff's vehicle. It is alleged in the bill of particulars that the plaintiff sustained injuries to

HERNIATED DISC AT C3-C4 FLATTENING ANTERIOR THECAL SAC; BULGING DISC AT L3-L4 FLATTENING THECAL SAC; CERVICAL RADICULOPATHY; LUMBOSACRAL RADICULOPATHY; CERVICAL SPRAIN/STRAIN; LUMBAR SPRAIN/STRAIN; RESTRICTION OF MOTION; HEADACHES; DEPRESSION; ANXIETY; FEAR; EMOTIONAL UPSET AND SHOCK

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In order to effectuate the purpose of no-fault legislation to reduce litigation, a court is required to decide, in the first instance, whether a plaintiff has made out a *prima facie* case of "serious injury" sufficient to satisfy the statutory requirements (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [1982]; *Brown v Stark*, 205 AD2d 725, 613 NYS2d 705 [2d Dept 1994]). If it is found that the injury sustained does not fit within the definition of "serious injury" under Insurance Law § 5102(d), the plaintiff has no judicial remedy and the action must be dismissed (*Licari v Elliott*, *supra*, at 57 NY2d 238; *Velez v Cohan*, 203 AD2d 156, 610 NYS2d 257 [1st Dept 1994]). A "serious injury" is defined 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 constitutes 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." (Insurance Law § 5102 [d]).

The defendant submitted an affirmed medical report prepared by Dr. Arnold T. Berman. At defendants' request, Dr. Berman, an orthopedic surgeon, conducted an independent examination of the plaintiff on February 20, 2020. Dr. Berman's report states that range of motion testing revealed normal joint function in the cervical spine and lumbar spine regions, and that there was "mild tenderness and pain with palpation on range of motion... The neurologic examination of the cervical spine showed reflexes to be normal and equal". He further states that the

neurologic exam of the lower extremities demonstrated deep tendon reflexes (Patellar and Achilles) to be normal. Quadriceps, hamstrings, calf muscles, extensor hallucis longus were normal and equal bilaterally. Sensation testing was normal. Babinski's test was normal. Heel walk was normal, and toe walk was also normal. He was able to squat to 90 degrees with report of pain.

The range of motion testing of the cervical spine revealed "flexion 50 degrees (Normal=50 degrees), extension 60 degrees (N=60 degrees), right rotation 80 degrees (N=80 degrees), left rotation 80 degrees (N=80 degrees), right lateral flexion 45 degrees (N=45 degrees) and left lateral flexion 45 degrees (N=45 degrees)." The range of motion testing of the lumbar spine revealed "flexion 60 degrees (N=60 degrees), extension 25 degrees (N=25 degrees), right lateral flexion 25 degrees (N=25 degrees) and left lateral flexion 25 degrees (N=25 degrees)."

Dr. Berman concludes that

Wilner Egalite reportedly sustained the above-mentioned injuries, which are now resolved with no clinical residuals. There were no objective findings to substantiate his subjective complaints of cervical spine and lumbar spine

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pain on examination. There was no radiculopathy noted on examination. There was no focal strength or sensorimotor deficits. There was no atrophy of the upper extremities or lower extremities indicating normal usage. Grip and pinch testing demonstrated normal strength. Hand grip tested manually was normal bilaterally. The clinical examination was essentially normal. Wilner Egalite can participate in all activities of daily living. He may work full time as a school bus driver, without restrictions. He does not require any further medical treatment or diagnostic testing. Wilner Egalite did not sustain any permanent injury and has no disability as a result of the accident of 06/30/17.

Based on the foregoing, it is the conclusion of the Court that the defendants met their initial burden of establishing, as a matter of law, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (see *McKinney v Lane*, 288 AD2d 274, 733 NYS2d 456 [2d Dept 2001], citing *Gaddy v Eyley*, 79 NY2d 955, 591 NE2d 1176, 582 NYS2d 990; *Licari v Elliott*, 57 NY2d 230, 441 NE2d 1088, 455 NYS2d 570).

In opposition to the defendants' application, the plaintiff submitted an affidavit of Dr. Donald I. Goldman, an orthopedic surgeon, who noted that the plaintiff was referred to his office "due to continuing pain in his neck, back and knee". Orthopedic and neurological testing was performed during the examination on December 18, 2020. Dr. Goldman noted that the testing of the plaintiff's cervical spine

reveals normal flexion. Extension was decreased to about 30 degrees with pain. Right rotation was 40 to 45 degrees with trigger point spasm right trapezius. Right lateral bending was 25 degrees. Left lateral bending was 20 degrees. Left rotation was 35 to 40 degrees with trigger point spasm left trapezius and pain radiating out to the left shoulder.

*\* Cervical spine range of motion chart as per: "Disability Evaluation under Social Security, January 2006." Cervical flexion is 0-30 degrees. Extension is 0-60 degrees. Lateral flexion is 0-50 degrees on the right and 0-50 degrees on the left. Cervical rotation to the right is 0-80 degrees. Cervical rotation to the left is 0 - 80 degrees.*

Dr. Goldman indicated that the examination of the plaintiff's lumbar spine

reveals a normal lordotic curve. The posture does not reverse. There is no spasm in the upright position. The spine midline. He does complain of pain on palpation from approximately T9 to T12 extending down to the lower lumbar vertebra. Trunk flexion was 60 to 65 degrees with pain. Extension was 20 degrees with pain. Right and left lateral bending were both 20 to 25

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degrees with pain. Right rotation was approximately 35 degrees. Left rotation was 45 degrees. Straight leg raising is painful bilaterally. There was no atrophy in the lower extremities. Looking at the right knee, there is some small scarring evident unrelated to 2017.

*\* Lumbar spine range of motion chart as per: "Disability Evaluation under Social Security, January 2006." Lumbar spine flexion is 0-90 degrees. Lumbar spine extension is 0-45 degrees. Lateral flexion to the right and left is 0-25 degrees. Range of motion of the lumbar spine - right and left rotation 45 degrees.*

Dr. Goldman states that the examination of the plaintiff's left knee

reveals generalized pain over the medial joint. There is pain on patella compression. There is pain over the fat pad. The knee is stable at 0 and at 30 degrees. Active range of motion is 125 degrees. Lachman's is negative. There is no pivotal shift. He is not able to perform a full kneel, squat or bend on the left due to guarding and pain in the patellofemoral joint.

*\* Knee range of motion chart as per: "Disability Evaluation under Social Security, January 2006" Flexion and extension is 0-150 degrees. Lachman's should be 0. There should be no pivotal shift. There should be no medial or lateral instability. There should be no anterior drawer, no atrophy, no pain, and no effusion.*

Dr. Goldman opines that

Regarding the cervical spine, an MRI of the neck dated April 2, 2017, identified a herniated disk at C3-C4. Clinically, the patient has evidence of a painful functional restriction of motion by more than 25% based upon objective findings.

Regarding the lumbar spine, the patient sustained a bulging disk at L4-L5 prior to this accident. Clinically, the patient has evidence of a painful functional restriction of motion by about 20%.

Regarding the left knee, the patient has clinical evidence of having chondromalacia with pain on flexion loading and medial joint line pain. Clinically, the patient has evidence of a painful functional restriction of motion by about 20% based upon objective findings.

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In my opinion, to a reasonable degree of medical certainty, the traumatic aggravation of the neck and back and the injury to his left knee were causally related to the accident of June 30, 2017, and at this time should be considered permanent.

“Where the treating physician, in an affidavit supported by exhibits, has set forth the injuries and course of treatment, identified a limitation of movement of the neck of only 10 degrees to the right or left, and on that predicate expressed the opinion that there was a significant limitation of use of a described body function or system, such evidence was sufficient for the denial of summary judgment to defendants” (see *Lopez v Senatore*, 65 NY2d 1017, 484 NE2d 130). Such evidence, coupled with the plaintiff’s examination before trial testimony as to continued pain and physical limitations, is sufficient to raise a triable issue of fact and therefore the motion is denied. (see *Mela v Gentile*, 306 AD2d 388, 761 NYS2d 482[2d Dept 2003]; see also *Singh v Varano*, 306 AD2d 340, 760 NYS2d 545 [2d Dept 2003]).

The foregoing constitutes the decision and Order of this Court.

Dated: July 7, 2021



HON. JOSEPH A. SANTORELLI  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION