

**Duran v Venture Leasing LLC.**

2021 NY Slip Op 34050(U)

July 29, 2021

Supreme Court, Bronx County

Docket Number: Index No. 27662-2019E

Judge: Veronica G. Hummel

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This opinion is uncorrected and not selected for official publication.

**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, upon all parties.**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IAS PART 31**

-----X  
VICTOR DURAN,

Plaintiff,  
-against -

**Index No. 27662-2019E  
DECISION/ORDER  
Motion Seq. 2**

VENTURE LEASING LLC. and JEREMIE BERRIOS-CUEVAS,  
Defendants.

-----X  
**VERONICA G. HUMMEL, A.S.C.J.**

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to the motion of defendants VENTURE LEASING LLC and JEREMIE BERRIOS-CUEVAS (defendants) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff VICTOR DURAN (plaintiff) has not sustained a “serious injury” as defined by Insurance Law 5102(d).

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained as a result of a two-car motor vehicle accident that occurred on May 11, 2019, at or near the intersection of Forest Avenue and East 158<sup>th</sup> Street, N.Y. (the Accident).

In the amended bill of particulars, in relevant part, plaintiff alleges that as the result of the Accident he suffered injuries to the left and right shoulders, the cervical spine, and the lumbar spine that satisfy the following Insurance Law 5102(d) threshold categories: permanent loss of use; permanent consequential limitation; significant limitation; and 90/180 days. As

plaintiff fails to address the ground of permanent loss of use on this motion, however, that ground is deemed waived (*Burns v Kroening*, 164 AD3d 1640 [4<sup>th</sup> Dept 2018]). In any event, as plaintiff does not allege a total loss of a body part, the claim is dismissed (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 29 [2001]).

While plaintiff has the burden of establishing a *prima facie* case of “serious injury” at trial (*Licari v. Elliott*, 57 NY2d 230 [1982]), defendants on a summary judgment motion must first present evidence establishing that plaintiff has not sustained a “serious injury” as a matter of law, and only after that burden has been met must plaintiff go forward and submit evidence to raise a question of fact (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Brown v Mat Enterprises of N.Y. Inc.*, 97 AD3d 401 [1st Dept 2012]). Defendants bear the initial burden of establishing the absence of a “serious injury” as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case (*McElroy v Sivasubramaniam*, 305 AD2d 944 [3d Dept 2003]). If defendants fail to meet this burden, the motion is denied without consideration of the opposition papers. If defendants meet this burden, defendants have established *prima facie* entitlement to summary judgment.

It then becomes incumbent on the plaintiff to submit proof, in admissible form, of the existence of triable issues of fact with regard to the existence of a “serious injury” (*Franchini v Palmieri, supra*; *Shinn v Catanzaro*, 1 AD3d 195 [1st Dept. 2003]; see *Cabrera v Ahmed*, 189 AD3d 403 [1st Dept 2020]). Specifically, plaintiff must demonstrate that there is a “serious injury” under the Insurance Law, that summary judgment is not warranted and that the action mandates resolution by trial. Additionally, and equally important, plaintiff must establish, through admissible medical evidence, that the injuries sustained are causally related to the accident claimed (see *Pommells v Perez*, 4 NY3d 566 (2005); *Tusu v Leone*, 187 AD3d 655 [1st Dept 2020]).

Here, defendants seek summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under Insurance Law 5102(d). Defendants argue that plaintiff’s claimed injuries are not “serious,” and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motion is supported by the pleadings, the bill of particulars, plaintiff’s deposition transcript, and the expert affirmations of Dr. Katz (orthopedist) and Dr. Decker (radiologist).

Dr. Katz bases his opinion on the details of a physical examination conducted of plaintiff on November 11, 2020 (one year post-Accident). The doctor writes that he reviewed the bill of particulars. He states that plaintiff reported being in an accident in 2015 and another accident after the collision at issue in this action. Plaintiff reported that he did not suffer injuries in the prior or subsequent accident.

Dr. Katz conducted objective tests on the right and left shoulders. He finds decreased flexion, abduction, internal rotation and external rotation in the right shoulder. The objective test is normal. As for the left shoulder, the physician finds decreased flexion, adduction, internal rotation, and external rotation. The objective tests are negative.

The expert finds “bilateral shoulders sprain/strain-resolved”. He opines that there is no evidence of an orthopedic disability, permanency or residuals and “limited ranges of motion are as allowed by the claimant”. Plaintiff is capable of working without restrictions.

In a report dated April 4, 2020, Dr. Decker reviews the June 19, 2019 MRI (one month post-Accident) of plaintiff’s left shoulder. He finds a cyst on the humeral head, with no fracture or tear. There is supraspinatus tendinopathy and fraying at the anterior insertion with bursitis and capsular thickening. He opines that these findings are longstanding and not causally related to the Accident. There is no evidence to suggest that an acute traumatic injury was sustained.

As for the right shoulder MRI, he makes similar findings. There are cysts, thickening, and tears arising from degeneration. The findings are all longstanding and not causally related to the Accident and there is no evidence of traumatic injury.

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury to the left and right shoulders under the permanent consequential limitation, significant limitation, and 90/180 day categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; see *Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]). Defendants also establish *prima facie* a lack of causation through the findings in the expert reports, based on the review of the MRIs, that the claimed injuries are chronic and degenerative in nature and not causally related to the accident (*Gjoleka v Caban*, 188 AD3d 458 [1st Dept 2020]).

However, as defendants failed to address plaintiff's alleged injuries to the cervical and lumbar spines, they fail to set forth a *prima facie* showing as to those injuries under the permanent consequential limitation, significant limitation, or 90/180 categories. As such, the motion for summary judgment based on the failure to suffer a serious injury to the cervical spine and lumbar spine is denied without consideration of the opposition. Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra; Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

In any event, as to the shoulder injuries, plaintiff opposes the motion, submitting an attorney affirmation, an affidavit of merit, the affirmation of Dr. Clarke (treating physician), and the affirmation of Dr. Pomerantz (radiologist).

In total, plaintiff's evidence raises triable issues of fact as to his claims of "serious injury" as to both shoulders (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that he received medical treatment for the claimed injuries after the Accident, and that he had substantial limitations in motion in the relevant body parts after the Accident

and at the recent examination by plaintiff's expert in 2020 (see *Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's experts find that, as a result of the Accident, and not degeneration, plaintiff suffered injuries to the shoulders, resulting in a decreased range of motion. The experts opine that these injuries are significant and causally related to the Accident and permanent in nature and the Accident was the primary competent cause of the injuries (*Morales v Cabral, supra*; see *Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Furthermore, the MRI reviews by the plaintiff's expert confirm the injuries in the shoulders. Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under threshold categories of permanent consequential limitation and significant limitation as to the shoulders.

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. Accordingly, it is hereby

ORDERED that the motion of defendants VENTURE LEASING LLC and JEREMIE BERRIOS CUEVAS [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff VICTOR DURAN has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied; and it is further

ORDERED that this matter is scheduled for compliance conference on August 11, 2021 at 2:00p.m. The attorneys are expected to review the revised Part 31 rules for compliance conferences (available on the homepage of the 12<sup>th</sup> J.D.), well ahead of that date and to follow the guidelines for using NYSCEF, rather than appearing in court, to meet their compliance conference obligations.

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The foregoing constitutes the decision and order of the court.

Dated: July 29 , 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 07/29/2021

Hon. Veronica G. Hummel, A.J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY     CASE STILL ACTIVE
  - 2. MOTION IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
  - 3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     SCHEDULE APPEARANCE
  - FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT