

**Buccio v Singh**

2023 NY Slip Op 34220(U)

November 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 524859/2021

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of November 2023

HONORABLE FRANCOIS A. RIVERA

-----X  
EDWARD BUCCIO

Plaintiff,

**DECISION & ORDER**

Index No.: 524859/2021

- against -

SUKHINDER SINGH and JOHN DOE,

Defendants.  
-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on February 6, 2023, under motion sequence one, by defendant Sukhinder Singh for an order pursuant to CPLR 3212 granting summary judgment in his favor and dismissing the complaint of plaintiff Edward Buccio on the basis that the plaintiff has not suffered a serious injury as defined in Insurance Law § 5102 (d). The plaintiff has opposed the motion.

- Notice of Motion
- Supporting Affirmation
  - Exhibits A to F
- Statement of Material Facts
- Affirmation in Opposition
  - Exhibits A to F
- Reply Affirmation

**BACKGROUND**

On September 30, 2021, plaintiff Edward Buccio commenced the instant action for damages for personal injuries by filing a summons and verified complaint with the Kings County Clerk's office.

On October 22, 2021, defendant Sukhinder Singh (hereinafter Singh or defendant) joined issue by interposing and filing a verified answer. On December 13, 2022, Buccio filed a note of issue.

Buccio's verified complaint, bill of particulars and deposition testimony alleges the following salient facts. On April 7, 2021, at approximately 5:30 p.m., Buccio was a pedestrian at or near the intersection of Hicks Street and Atlantic Avenue, Brooklyn, New York. At that date, time and place, a 2015 Toyota motor vehicle bearing a New York license plate owned and operated by defendant Singh (hereinafter the adverse vehicle) ran over the plaintiff's foot (hereinafter the subject accident). The contact by the adverse vehicle was caused by the driver's negligent operation of the adverse vehicle. The subject accident caused the plaintiff to sustain serious physical injury.

#### **LAW AND APPLICATION**

In the instant action, Buccio's complaint and verified bill of particulars alleges that due to the subject accident the plaintiff sustained a serious injury to his right ankle, right knee and to his thoracic, cervical, and lumbar spine. The defendant seeks dismissal of the verified complaint on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law § 5102 (d).

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible

form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions (CPLR 3212 [b]; *Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]). The moving party's submissions must show that there is no defense to the cause of action or that the cause of action or defense has no merit (*Gobin v Delgado*, 142 AD3d 1134 [2d Dept 2016]).

Insurance Law § 5102 (d) 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.

A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 [d] by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical

findings support the plaintiff's claim (*Nunez v Alias*, 162 AD3d 1058, 1059 [2d Dept 2018], quoting *Grossman v Wright*, 268 AD2d 79, 83 [2d Dept 2000]). With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*Grossman*, 268 AD2d at 84).

The plaintiff in such a situation must present objective evidence of the injury (*id.*). In support of the motion the defendant submitted, among other things, the affirmed reports of Dr. Pierce J. Ferriter, an orthopedic surgeon and Dr. Scott A. Springer, a radiologist. On May 15, 2022, Dr. Ferriter conducted an independent medical examination of the plaintiff and offered an opinion regarding his claimed injuries. Among the range of motion testing Dr. Ferriter performed was a sitting and supine straight leg raise. He indicated that both tests were negative, bilaterally with no radiculopathy. Dr. Ferriter did not compare his findings to what is normal in the straight leg raise test (*see Shirman v Lawal*, 69 AD3d 838 [2d Dept 2010], citing *Walker v Public Adm'r of Suffolk County*, 60 AD3d 757 [2d Dept 2007]).

Dr. Ferriter stated that based on the history provided by Buccio and review of medical records, the injuries Buccio sustained were a result of the accident in question. Dr. Springer, on the other hand opined that the anomalies in the plaintiff's spine were due to degenerative disc disease. The defendant's experts had conflicting opinions regarding the cause of plaintiff's spinal injuries.

For all the foregoing reasons, the defendant failed to meet his prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of

Insurance Law § 5102 [d] as a result of the subject accident (*see Pupko v Hassan*, 149 AD3d 988, 989 [2d Dept 2017], citing *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

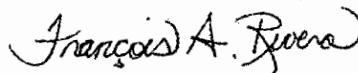
Inasmuch as the defendant failed to meet his prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*see Espinal v Shortis*, 164 AD3d 1217 [2d Dept 2018], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

#### CONCLUSION

The motion by defendant Sukhinder Singh for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint of plaintiff Edward Buccio on the ground that the injuries he claimed do not satisfy the serious injury threshold requirement of the Insurance Law § 5102 (d) is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA  
J.S.C.