

<b>Suero v Camelot Taxi Inc.</b>
2023 NY Slip Op 35008(U)
August 14, 2023
Supreme Court, Kings County
Docket Number: Index No. 509765/2020
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 14<sup>th</sup> day of August 2023

HONORABLE FRANCOIS A. RIVERA

-----X  
ANDREA SUERO,

Plaintiff,

- against -

CAMELOT TAXI INC. and IQBAL HUSSAIN,

Defendants.  
-----X

**DECISION & ORDER**

Index No.: 509765/2020

Oral Argument: 7/6/2020

Cal. No.: 53, Ms. No.: 2

Recitation in accordance with CPLR 2219 of the papers considered on the notice of motion, filed by Camelot Taxi Inc. and Iqbal Hussain (hereinafter the moving defendants), on August 26, 2022, under motion sequence number two for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint of plaintiff Andrea Suero (hereinafter Suero or plaintiff) on the basis that the plaintiff did not sustain a serious injury as set forth in Insurance Law § 5102 (d).

- Notice of motion
- Affirmation in support
  - Exhibits A-F
- Statement of material facts
- Affirmation in opposition
  - Exhibit A-E
- Counterstatement of material facts

**BACKGROUND**

On June 11, 2020, plaintiff commenced the instant action for damages for personal injury by filing a summons and verified complaint with the Kings County Clerk’s office (KCCO). The verified complaint alleges thirty-seven allegations of fact in support of a

single cause of action for negligence. On July 31, 2020, the defendants interposed and filed a joint verified answer with the KCCO.

The plaintiff's complaint and bill of particulars alleges the following salient facts. On January 07, 2019, at approximately 5:20 p.m. plaintiff was a pedestrian lawfully walking on University Place approximately five feet East of East 12 Street, in the County of New York, City and State of New York. At that time, date and place plaintiff was struck by a motor vehicle owned by Camelot Taxi Inc and operated by Iqbal Hussain (hereinafter the subject accident). The subject accident was cause solely by Iqbal Hussain's the negligent operation of the motor vehicle.

#### LAW AND APPLICATION

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 N.Y.2d 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 N.Y.2d 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 N.Y.2d 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 v. Prospect Hospital*, supra, 68 N.Y.2d at 324).

Pursuant to CPLR 3212(b) a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Further, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 [2nd Dept 1990])” (*People ex rel. Spitzer v. Grasso*, 50 AD3d 535, 544 [1st Dep 2008]).

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. (*see Grossman v. Wright*, 268 A.D.2d 79, 83 [2nd 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. The plaintiff in such a situation must present objective evidence of the injury. (*Id.* at 84).

The plaintiff's verified bill of particulars alleges, among other things, an injury to the lumbar spine, cervical spine, left knee and left shoulder. Plaintiff alleged a surgical discectomy at the L5-S1 level to address the injury to the lumbar spine. Plaintiff also alleged injuries under the 90/180 category of Insurance Law § 5102(d).

In support of the instant motion, the defendants submitted the affirmed report of Dr. Jeffrey Guttman, an orthopedic surgeon who they hired to perform an independent medical examination of the plaintiff. Dr. Guttman, conducted the examination on April 8, 2022, over three years after plaintiff's accident. Dr. Guttman did range of motion testing and concluded that the plaintiff had no range of motion restrictions in any area of claimed injury. Dr. Guttman, however, did not offer an opinion regarding plaintiff's physical condition during the first six months after the accident. Nor did he offer an opinion regarding the discectomy procedure performed on June 3, 2019, and his opinions of its effect on the range of motion he conducted. The defendants offered no other evidence addressing the plaintiff's condition during the six-month period after the subject accident.

Considering the foregoing, the defendant's motion papers have failed to adequately address the plaintiff's claims, clearly set forth in the bill of particulars, that the plaintiff sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d) (*Alperin v Herwerth*, 162 AD3d 832, 833 [2nd Dept 2018]; *Che Hong Kim v. Kossoff*, 90 A.D.3d 969 [2<sup>nd</sup> Dept 2011]). Since the defendant failed to meet their 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 (*Youn Koo Lyu v. Aleksandr*, 110 AD3d 715 [2nd Dept 2013] *citing Stukas v. Streiter*, 83 AD3d 18, 24 [2nd Dept 2011]).

**CONCLUSION**

The motion by Camelot Taxi Inc. and Iqbal Hussain for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint of plaintiff Andrea Suero on the basis that the plaintiff did not sustain a serious injury as set forth in Insurance Law § 5102 (d) is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

*Francis A. Rivera*

J.S.C.

2023 AUG 17 AM 10:19  
KINGS COUNTY CLERK  
FILED