

**Hierro v Decastro**

2025 NY Slip Op 35387(U)

January 13, 2025

Supreme Court, Queens County

Docket Number: Index No. 725237/2021

Judge: Karina E. Alomar

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Short Form Order

**NEW YORK SUPREME COURT - QUEENS COUNTY**

Present: Honorable **KARINA E. ALOMAR**  
Justice

IA PART 23

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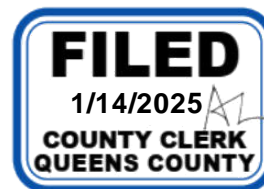
CARLOS HIERRO,

Index No.: 725237/21  
Motion Date: 12/12/24  
Motion Seq. No.: 1

Plaintiff,

-against-

ANGEL DECASTRO and "JOHN DOE", a  
fictitious name intended to be a defendant driver  
herein,



Defendants.

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The following numbered papers read on this motion by defendant Angel Decastro for summary judgment

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.....	16 - 26
Opposition Papers.....	30 - 33
Replying.....	34

Upon the foregoing cited papers, it is ordered that defendant's motion are determined as follows:

Plaintiff commenced the instant action to recover for injuries he allegedly sustained in a motor vehicle accident that occurred on August 1, 2021, on 14<sup>th</sup> Street at or near its intersection with West Side Highway in County, City and State of New York. Defendant now moves for summary judgment on the grounds that plaintiff did not suffer a "serious injury," as defined in Insurance Law § 5102(d).

Pursuant to CPLR 3212, the burden on a motion for summary judgment rests with the moving party to bring forth sufficient proof to enable a court to determine entitlement to judgment as a matter of law (*see Zuckerman v New York*, 49 NY2d 557, 560 [1980]). Where the moving party makes a *prima facie* showing, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact which require a trial of the action" (*Wallice v Waterpointe at Oakdale Shores, Inc.*, 249 AD2d 383, 383 [1998]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]).

In support of defendants' motion, defendants submit, among other things, plaintiff's deposition transcript, and the reports of Dr. Kiernan, Dr. Springer and Dr. Fitzpatrick.

Plaintiff testified at his deposition that he was employed in maintenance at the time of the accident. He stated that he did not miss any days from work, but missed hours when he went to therapy. Plaintiff testified that he first sought medical treatment for his injuries on Monday or Tuesday following the accident. He further testified that he is unable to work because of his back pain.

Dr. Kiernan, orthopedic surgeon, stated that he performed an examination of the plaintiff on June 8, 2023. He noted in his report that plaintiff had normal range of motion in his cervical and lumbar spine, right shoulder, left shoulder, right hip and left hip. The doctor concluded that the plaintiff did not sustain any significant or permanent injury as a result of the motor vehicle accident claimed herein. Moreover, he stated that there are no objective clinical findings indicative of a present disability, and functional impairment, which prevents the examinee from engaging in ADL, and usual activities including work, school, and hobbies. Additionally, the plaintiff is able to return to full duty work without restrictions.

Dr. Springer review the MRI reports of the cervical spine, lumbar spine, right shoulder and left shoulder. The MRI of the cervical spine revealed, straightening of the normal cervical lordosis, mild degenerative changes, C3-C4 through C6-C7, disc desiccation, C2-C3 through C5-C6, disc space height loss, C2-C3 through C5-C6, disc herniations, C3-C4, C4-C5 and C5-C6, disc osteophyte complex, C3-C4, no fracture or subluxation, no posttraumatic changes causally related to the 8/1/2021 incident. The lumbar spine MRI revealed, straightening of the normal lumbar lordosis, mild degenerative changes, L4-L5 and L5-S1, disc desiccation, L4-L5 and L5-S1, disc space height loss, L5-S1, disc herniations, L4-L5 and L5-S1, neural foraminal narrowing, L4-L5 and L5-S1, no fracture or subluxation, no posttraumatic changes causally related to the incident. The right shoulder MRI revealed, hypertrophic change and narrowing, acromioclavicular joint, small joint effusion, small subacromial/subdeltoid bursal fluid collection, tendinosis, supraspinatus, infraspinatus and subscapularis tendons, partial thickness tear, articular surface of distal infraspinatus tendon, low-grade tear, anterior portion of supraspinatus tendon, SLAP tear which extends into the biceps anchor, tear, biceps labral complex extending into the anterior superior labrum, no fracture, dislocation or acromioclavicular joint separation, no posttraumatic changes causally related to the incident. Lastly, the MRI of the left shoulder revealed, hypertrophic change and narrowing, acromioclavicular joint, small subacromial/subdeltoid bursal fluid collection, tendinosis, supraspinatus and infraspinatus tendons, small tears, supraspinatus and infraspinatus tendons at the insertion on the footprint of rotator cuff, degenerative change, greater tuberosity, subchondral bone cysts, greater tuberosity, tendinitis and tendinosis, long head of the biceps tendon, no fracture, dislocation or acromioclavicular joint separation, no posttraumatic changes causally related to the incident.

Dr. Fitzpatrick, board certified radiologist, stated in his report that on May 27, 2024, he performed an independent radiology evaluation. He concluded that based on the MRI of the cervical spine there was no traumatic injury. He further concluded that tendinosis is a non-traumatic entity that is the result of chronic overuse, resulting in protracted tendon degeneration over the course of months to years. He stated that this chronic overuse causes micro-tears of the tendon at a cellular level, without inflammation, leading to an increase in tendon repair cells and collagen composition of the tendon. He opined that this results in increased tendon bulk with reduced tensile strength, thus resulting in painful range of motion. Tears of the labrum are usually not of a traumatic etiology unless there is a history or imaging findings of dislocation. Most labral tears are degenerative and are due to repetitive, normal stress placed on the labrum over time due

to the range of motion in the femoral acetabular joint. Because the labrum is an intra-articular structure, acute, traumatic tears of the labrum are accompanied by soft tissue capsular edema and joint effusion which are absent in this case.

As to the left hip MRI, he stated there is no traumatic injury. Tendinosis is a non-traumatic entity that is the result of chronic overuse, resulting in protracted tendon degeneration over the course of months to years. This chronic overuse causes micro-tears of the tendon at a cellular level, without inflammation, leading to an increase in tendon repair cells and collagen composition of the tendon. This results in increased tendon bulk with reduced tensile strength, thus resulting in painful range of motion. Tears of the labrum are usually not of a traumatic etiology unless there is a history or imaging findings of dislocation. Most labral tears are degenerative and are due to repetitive, normal stress placed on the labrum over time due to the range of motion in the femoral acetabular joint. Moreover, he stated that because the labrum is an intra-articular structure, acute, traumatic tears of the labrum are accompanied by soft tissue capsular edema and joint effusion which are absent in this case.

The physical examination of the doctor took place outside of the scope of the first 180 days following the subject accident, and the doctor failed to address the claim, clearly set forth in the bill of particulars, that the plaintiff sustained a medically determined injury which prevented her from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*see e.g. Mugno v Juran*, 81 AD3d 908, 908 [2011]; *Pinder v Salvatore*, 69 AD3d 823, 823-24 [2010]; *Menezes v Khan*, 67 AD3d 654, 654 [2009]). A physician's normal examination results coupled with deposition testimony that plaintiff had no restriction in activity can sometimes overcome this obstacle (*see Kouros v Mendez*, 41 AD3d 786, 788 [2007]). Here, however, when plaintiff was asked what curtailments he experienced after the accident, he proclaimed limitations.

Inasmuch as defendant failed to meet his *prima facie* burden, it is unnecessary to examine the sufficiency of plaintiff's opposition papers (*see Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993]; *Wallace v Adam Rental Transp. Inc.*, 68 AD3d 856, 857 [2009]; *Ortiz v S & A Taxi Corp.*, 68 AD3d 734, 735 [2009]).

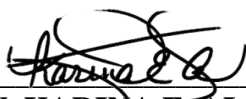
Nevertheless, even if defendants had met their burden, their motion would still be denied as in response, plaintiff submits, among other things, the report of Dr. Christopher Kyriakides.

Dr. Kyriakides states in his report that the plaintiff sustained a permanent partial disability and significant limitation of the neck, back, shoulders and hips that was causally related to the August 1, 2021 accident. Dr. Kyriakides has set forth his findings, based on his clinical visits with the plaintiff, numerically quantifying the impaired diminution, and relating the findings to his reading of the MRI films of the neck, back, shoulders and hips. As he stated, in his examinations he continued to find impaired range of motion and complaints of pain. It was his opinion in his last examination of September 18, 2024 that Mr. Hierro's limitations still existed and that they would persist. Plaintiff has presented numerically quantified impairments of range of motion, the objective tests performed by the doctors who treated him, the MRI results of the neck, back, hips and shoulders, studies showing injury, thereby raising a triable issue of fact (*see Rodriguez v Reyes*, 51 AD3d 654, 655 [2008]; *Grullon v Perez*, 41 AD3d 783 [2007]).

Accordingly, defendant's motion is denied in its entirety.

This constitutes the decision and order of this Court.

Date: January 13, 2025

  
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HON. KARINA E. ALOMAR, J.S.C.

