

Nunez v Nin
2025 NY Slip Op 35595(U)
January 23, 2025
Supreme Court, Richmond County
Docket Number: Index No. 151628/2020
Judge: Orlando Marrazzo, Jr.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
ALEXANDER NUNEZ,

DECISION/ORDER

IAS PART 26

HON. ORLANDO MARRAZZO, JR.

Index No.: 151628/2020
Motion No 2,

Plaintiff(s),

-against-

JORDI NIN and BLUSHAN FOODS LLC.

Defendant(s)

The following numbered 1 to 3 were fully submitted on 23rd day of January 2025

Papers
Numbered

Defendant’s Motion to Dismiss on the Issue of Threshold, with Supporting Papers and Exhibits, Dated, September 9, 2024,	1
Plaintiff’s Affirmation in Opposition, with Supporting Papers and Exhibits, Dated, November 27, 2024,	2
Reply, Dated, January 21, 2025,	3

As outlined below, Defendant’s motion seeking an order for summary judgment pursuant to CPLR 312 dismissing all claims on the ground that Plaintiff’s claimed injuries cannot meet the statutory threshold requirement for “serious injury” as defined by New York State Insurance Law 5102(d) is denied.

The court for the purposes of this motion finds that the plaintiff does meet the requirement and that dismissal of this matter is not warranted. The Court finds Plaintiff demonstrates that he:

1) Sustained significant and permanent injuries to his cervical spine, lumbar spine, and left shoulder, resulting in a left shoulder arthroscopic surgery on September 21, 2020; 2) Plaintiff's injuries are confirmed by Plaintiff's pleadings and findings as affirmed by his treating physicians based upon continued care and recent examination; 3) the findings are confirmed by objective measures; 4) the injuries are serious and traumatic in nature and causally related to Plaintiff's motor vehicle accident dated January 28, 2020; and 5) due to the existence of material issues of fact and accordingly, Defendants request cannot be granted as a matter of law.

This is an action to recover for serious, significant, and permanent personal injuries sustained by Mr. Nunez on January 28, 2020, on West 96th Street, at or near its intersection with West End Street, in the County of New York, State of New York, where the vehicle operated by

Plaintiff collided with the vehicle operated by Defendant JORDI NIN and owned by Defendant BLUSHAN FOODS LLC. As a result of the subject accident, Plaintiff ALEXANDER NUNEZ sustained the following serious, significant, and permanent personal injuries:

CERVICALS PINE

- C3-C4 through C6-C7 disc bulges with nerve encroachment
- Hypolordosis
- Cervical radiculopathy

Cervicalgia

- Cervical epidural steroid injections performed on 8/21/2020

LUMBAR SPINE

- L2-L3 through L5-S1 disc bulges with nerve encroachment
- Hypolordosis
- Lumbar radiculopathy

LEFT SHOULDER

- Hypertrophy of the acromioclavicular capsule

- Impingement syndrome
- Injection performed by Dr. Thompson on 6/9/2020
- **Arthroscopic surgery performed by Dr. Thompson on 9/21/2020**

Plaintiff ALEXANDER NUNEZ appeared for a deposition on October 12, 2023. Plaintiff testifies Defendant's vehicle was traveling at an estimated speed of 30 miles per hour. Plaintiff further testified his vehicle sustained damage to the driver's door, front bumper, and wheels, and all of the front driver's side. Due to the impact, Plaintiff states that his vehicle moved towards the back and a little bit to the side, almost pushing him into the other lane. Plaintiff testifies to treating his neck, lower back, and left shoulder three times a week for six to eight months during the first year and then two times a week for the remaining years. Plaintiff further testifies he believes he stopped treating after two years. He stopped treatment due to the chiropractor recommending back surgery, which he was scared to undergo. Plaintiff continued to testify that he also received an injection to his neck.

Finally, Plaintiff testified he presently still has difficulty sitting for long periods of time, was unable to hold his children, and was unable to bend down for many months.

Due to the accident, Plaintiff received physical therapy treatment, including chiropractic treatment. Due to the failure of this conservative treatment, Plaintiff underwent an epidural injection to his cervical spine on August 21, 2020, shoulder injection performed on June 9, 2020, and left shoulder arthroscopic surgery on September 21, 2020. Plaintiff's recent visit with treating physician, Dr. Sean Thompsen, MD, on November 19, 2024, successfully sets forth objective medical evidence to show Plaintiff's injuries are serious and traumatic in nature and causally related to Plaintiff's motor vehicle accident dated January 28, 2020.

The Range of Motion Test Performed on November 19, 2024

On November 19, 2024, Plaintiff received a range of motion tests to his left shoulder utilizing a goniometer. Dr. Thompsen rendered the following objective findings:

The active range of motion test shows the following results on Plaintiff's left shoulder: 155 degrees as to flexion (normal ROM 180 degrees; loss of 16.7%), 145 degrees as to abduction (normal ROM 180 degrees; loss of 19.5%), 70 degrees as to internal rotation (normal ROM 90 degrees; loss of 22.3%), 80 degrees as to external rotation (normal ROM 90 degrees; loss of 11.2%).

Here, Dr. Thompson demonstrated Plaintiff's physical limitations by comparing same to the normal values. Throughout Dr. Thompson's medical report dated November 26, 2024, Dr. Thompson has demonstrated both the degree and duration of Plaintiff's injury, established both the significance and the permanency of the injury, and had related Plaintiff's limited range of motion of the left shoulder, to his accident on January 28, 2020.

The causal connection between the injury and accident must be established by competent medical proof. Plaintiff must submit medical proof that was contemporaneous with the accident showing range of motion limitations. *Pommels v. Perez*, 4 N.Y.3d 566, 830 N.E.2d

278,797 N.Y.S.2d 380 (2005); *Pajda v. Pedone*, 303 A.D.2d 729, 757 N.Y.S.2d 452 (2nd Dept. 2003); *Alvarez v. New York City Transit Authority*, 2 Misc.3d 1206 (A), 890 N.Y.S.2d 368 (2009).

In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. An expert's qualitative assessment of a plaintiff's injury also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function, or system. *Toure v. Avis Rent A Car Systems*, 98 N.Y.2d 345, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002).

Therefore, based on *Toure*, supra, "limitation of use" may be established in one of two ways, namely by medical proof of a quantitative percentage (e.g., a numeric percentage or a loss of range of motion) or, in the alternative, medical proof of a functional impairment (excluding loss of range of motion), by way of a medical expert's qualitative assessment of a plaintiff's current condition as compared to a

plaintiff's normal function. A physician's designation of numerical values to establish a degree of limitation constitutes valid form of proof. Toure, 98 NY2d at 353. These numerical limitations may be derived by conducting a qualified range of motion test which is considered objective tests relied upon to verify subjective complaints arising from soft tissue damage. O'Sullivan v. Atrium Bus Co., 688 NYS2d167 (1st Dept 1998). Significant injury is then verified by objectively measured and specifically quantified limitations of motion. Davis v. Coleman 289 A.D.2d 365, 734 N.Y.S.2d 620 (2nd Dept. 2002).

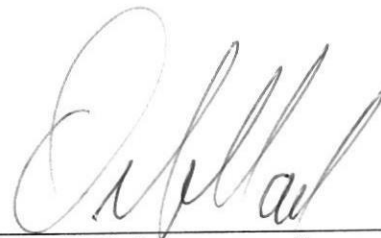
Under the prevailing standard, disposition by summary judgment is warranted only where evidence presents no triable issues of fact. Click & Dolleck, Inc.v. Tri-Pac Export Corp., 22 N.Y.2d 439 (1968). Because a remedy of summary judgment is a drastic one, precedent requires that absence of triable issues of fact be "clear" to the reviewing court. Click & Dolleck, Inc. v. TriPac Export Corp., 22 N.Y.2d 439 (1968).

Where the presence of triable issues of fact leaves room for argument, summary judgment must be denied. Glick, supra at 441. The Court of Appeals has repeatedly admonished that issue-finding, rather than issue-determination, is the key to the summary judgment procedure. Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957); Esteve v. Abad, 271 A.D. 725. The medical evidence submitted by Plaintiff raises material issues of fact surrounding whether Plaintiff sustained serious injuries.

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

. The forgoing constitutes the Decision and Order of the Court.

Dated: January 23, 2025

A handwritten signature in black ink, appearing to read 'Orlando Marrazzo, Jr.', written over a horizontal line.

Orlando Marrazzo, Jr.,
Justice, Supreme Court