

**Rodriguez v Diaz**

2017 NY Slip Op 32712(U)

December 29, 2017

Supreme Court, New York County

Docket Number: 155678/2015

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S.C. Justice

PART 22

RODRIGUEZ, JESUS

INDEX NO. 155678/2015

-v-

DIAZ, VICTOR NICONOR

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1

Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 2

Replying Affidavits \_\_\_\_\_ No(s) 3

Upon the foregoing papers, it is ordered that this motion is

Defendants Victor Niconor Diaz and Julio O. Urena’s motion for summary judgment pursuant to CPLR 3212 on the grounds that the injuries allegedly sustained by Plaintiff as a result of the October 12, 2014, accident fail to establish a serious injury threshold as defined by Insurance Law § 5102 (d) is decided as follows:

Plaintiff’s bill of particulars alleges injuries to his cervical and lumbar spine, headaches, vertigo and PTSD. Plaintiff’s bill of particulars avers that his injuries meet the following Insurance Law § 5102 (d) criteria: dismemberment; significant disfigurement; fracture; permanent loss of use; significant limitation of use; and 90/180-day.

Defendants’ neurologist, Dr. Edward M. Weiland, conducted an IME of Plaintiff on October 18, 2016. During his examination of Plaintiff, Dr. Weiland found normal ranges of motion of and negative/normal objective tests for his cervical and lumbar spine. Dr. Weiland conducted a neurological examination of Plaintiff and found that he had a normal examination. Dr. Weiland diagnosed Plaintiff as having resolved, cervical and lumbar spine strain/sprain.

Defendants’ radiologist, Dr. A. Robert Tantleff reviewed MRI’s of Plaintiff’s cervical and lumbar spine (both taken on October 29, 2014) on October 18, 2016. Dr. Tantleff’s findings on the MRI of Plaintiff’s cervical spine include “chronic degenerative disease and cervicothoracic spondylosis as described with advanced discogenic changes manifested by disc desiccation, degeneration and spondylitic spurring. . .” as well as other markers of longstanding degenerative disc disease and no evidence of acute disc herniations and no evidence of bone marrow edema or contusion. Dr. Tantleff concludes that his findings depict “chronic, degenerative and longstanding changes, requiring years and decades to develop as presented. . . [and] are consistent with [Plaintiff’s] age and are not causally related

Dated: \_\_\_\_\_, J.S.C.

12/29/2017

104

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S.C.  
*Justice*

PART 22

RODRIGUEZ  
-v-  
DIAZ

INDEX NO. 155678/15  
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Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

to a traumatic event . . . “ Dr. Tantleff’s findings on the MRI of Plaintiff’s lumbar spine include “advanced discogenic changes manifested by disc desiccation, degeneration and spondylitic spurring with real loss of disc at L5-S1, markers of longstanding degenerative disease” and found no evidence of acute disc herniations and “no evidence of bone marrow edema or contusion to suggest traumatic changes.” Dr. Tantleff concludes that his findings depict “chronic, degenerative and longstanding [changes] requiring years and decades to develop as presented. The findings are consistent with [Plaintiff’s] age and [are] not causally related to a traumatic event . . .”

Concerning 90/180-day, Defendants refer to Plaintiff’s deposition testimony wherein he testified that after the accident he did not go to the hospital and returned to work the next day and continued to work five day work weeks thereafter.

Defendants’ submissions fail to eliminate triable issues of fact as to whether Plaintiff sustained a serious injury to his cervical and lumbar spine. Dr. Weiland concludes that Plaintiff’s injuries to his cervical and lumbar spine are resolved strains/sprains but Dr. Tantleff concludes that Plaintiff’s injuries are the result of degeneration. These contradictory findings concerning Plaintiff’s cervical and lumbar spine raise triable issues of fact for the jury to resolve (*Karounos v Doulalas*, 153 AD3d 1166 [1<sup>st</sup> Dept 2017]; *Johnson v Salaj*, 130 AD3d 502 [1<sup>st</sup> Dept 2015]; *Martinez v Pioneer Transp. Corp.*, 48 AD3d 306 [1<sup>st</sup> Dept 2008]). Defendants submission did not address Plaintiff’s claim of PTSD. To the extent that Plaintiff is proceeding with his claim of PTSD, Defendants failed to make a prima facie showing *Reys v Diaz*, 82 AD3d 484 [1<sup>st</sup> Dept 2011]). Therefore, the burden does not shift to Plaintiff to submit evidence sufficient to raise an issue of fact on whether he sustained a serious injury to his cervical and lumbar spine and whether he suffers from PTSD as a result of the accident (*Jackson v Leung*, 99 AD3d 489 [1<sup>st</sup> Dept 2012]; *Singer v Gae Limo Corp.*, 91 AD3d 526 [1<sup>st</sup> Dept 2012]).

Dated: \_\_\_\_\_, J.S.C.

294

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S.C Justice

PART 22

RUDRIGUEZ

-v-

DIAZ

INDEX NO. 155678/15

MOTION DATE \_\_\_\_\_

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Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

To the extent that headaches and vertigo may be considered a serious injury, Defendants' met their prima facie burden by submitting Dr. Weiland's report with his observation that Plaintiff had a normal neurological examination (*cf Pendleton v Bizzoco*, 152 AD3d 711 [2<sup>nd</sup> Dept 2017]; *Marshall v Marshall*, 117 AD3d 805 [2<sup>nd</sup> Dept 2014]). Defendants also met their prima facie burden regarding Plaintiff's 90/180-day claim by submitting Plaintiff's deposition testimony that he returned to work the next day after the accident and continued to work five day work weeks thereafter (*Cf Fathi v Sodhi*, 146 AD3d 445 [1<sup>st</sup> Dept 2017]). Plaintiff's opposition does not raise a triable issue of fact as to Plaintiff's claims of headaches and vertigo and his 90/180-day claim. The only admissible medical evidence submitted by Plaintiff, a report by Dr. Boris Tsatskis, does not address Plaintiff's allegations of headaches and vertigo or his 90/180-day claim. However, in the event that Plaintiff proves serious injury to his cervical and/or lumbar spine or PTSD then he will be able to recover for all his claimed injuries including his claim of headaches and vertigo (*Karoumos v Doulalas*, 153 AD3d 1166 [1st Dept 2017] [holding "[i]f plaintiff establishes a serious injury to her cervical or lumbar spine at trial, she will be entitled to recover damages for any other injuries caused by the accident, even those that do not meet the serious injury threshold."]; *Boateng v Yiyan*, 119 AD3d 424 [1st Dept 2014]; *Caines v Diakite*, 105 AD3d 404 [1st Dept 2013]; *Delgado v Papert Transit, Inc.*, 93 AD3d 457 [1st Dept 2012] [holding "[o]nce a serious injury has been established, it is unnecessary to address additional injuries to determine

MOTION CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: \_\_\_\_\_ 394 \_\_\_\_\_, J.S.C.

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S.C. Justice

PART 22

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Upon the foregoing papers, it is ordered that this motion is

whether the proof is sufficient to withstand defendants' summary judgment." ]).

Accordingly, based on the foregoing it is hereby

**ORDERED** that Defendants' summary judgment motion and cross motion are GRANTED as to Plaintiff's claims of headaches and vertigo and his 90/180-day claim and DENIED as to his PTSD and cervical and lumbar spine claims of serious injury; and it is further

**ORDERED** that the parties are directed to appear for settlement conference in Part 22, at 80 Centre Street, Room 136, at 9:30 on February 20, 2018.

This constitutes the Decision and Order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/29/17

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[Signature] J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
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