

Solano v Olivero

2021 NY Slip Op 34124(U)

August 26, 2021

Supreme Court, Bronx County

Docket Number: Index No. 28745/2018e

Judge: Veronica G. Hummel

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31**

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LUIS A. SOLANO,

Plaintiff,

-against -

**Index No. 28745/2018e
DECISION/ORDER
Motion Seq. 3**

RAYMOND SUGILIO OLIVERO and OPEN ROAD FLEET, INC.,
Defendants.

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VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to: the motion of defendants RAYMOND SUGILIO OLIVERO and OPEN ROAD FLEET, INC.(defendants) [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff LUIS A. SOLANO (plaintiff) has not sustained a “serious injury” as defined by Insurance Law 5102(d); and the cross-motion of plaintiff, made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment finding that plaintiff sustained a “serious injury” as defined by Insurance Law 5102(d) as a matter of law.

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained as a result of a motor vehicle accident that occurred on September 10, 2016, at the intersection of West 187th Street and St. Nicholas Street, New York, N.Y. (the Accident). By decision dated September 29, 2020, plaintiff was granted partial summary judgment as to liability. [NYSCEF No. 67].

In the bill of particulars, in relevant part, plaintiff alleges that as the result of the Accident plaintiff suffered serious injuries to the right shoulder, lumbar spine, and cervical spine that

satisfy the following Insurance Law 5102(d) threshold categories: permanent loss; permanent consequential limitation; significant limitation; and 90/180 days. In the opposition, plaintiff does not claim or address the ground of permanent loss of use and the ground is therefore deemed waived (*Burns v Kroening*, 164 AD3d 1640 [4th Dept 2018]). In any event, as plaintiff does not allege or prove a total loss of a body part, the claim is dismissed (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 29 [2001]).

Defendants seeks summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under Insurance Law 5102(d). Defendants argue that plaintiff’s claimed injuries are not “serious,” and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motion is supported by the pleadings, the bill of particulars, the police report, plaintiff’s deposition transcript, and the expert affirmation/report of Dr. Glassman (orthopedist). The uncertified police report does not constitute admissible evidence on moving papers and is not considered on these motions (*Yassin v Blackman*, 188 AD3d 62 [2d Dept 2020]; see *Xuezheng Dong v Cruz-Martel*, 189 AD3d 613 [1st Dept 2020]).

Dr. Glassman examined plaintiff approximately three years post-Accident, on July 16, 2019. The expert reviewed the bill of particulars and the police report. As for the cervical spine, lumbar spine, and the left shoulder, he finds no decrease in range of motion and the objective tests are negative. In the “diagnoses/impression” section, the expert finds the cervical spine and lumbar spine to be “sprain/strain resolved by objective clinical examination without current complaints”.

In terms of the right shoulder, the expert notes that plaintiff underwent right shoulder surgery on September 21, 2017, one year post-Accident. On examination he finds a “voluntary” range of motion of anterior flexion of 157 degrees (180 degrees normal), abduction of 155 degrees (180 degrees normal), and external rotation to 80-85 degrees (80 degrees normal). The remainder of the examination produced normal results and objective tests were

negative. In the “Impression” section, the doctor finds “status post right shoulder arthroscopy...with satisfactory outcome by objective clinical examination”.

In conclusion, the expert opines that the examination indicates that plaintiff’s injuries have fully resolved and there is no indication for further orthopedic treatment including physical therapy. In his opinion, plaintiff did not sustain any significant or permanent injury as the result of the Accident.

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body parts under the permanent consequential limitation or significant limitation categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; see *Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]).

Plaintiff opposes the motion and cross-moves for a summary judgment finding that plaintiff’s injury to the right shoulder constitutes a serious injury as a matter of law. Plaintiff submits an attorney affirmation, plaintiff’s medical records, including MRI reports, and the affirmation/reports of Dr. Meese (orthopedic surgeon)(dated November 3, 2020).

In total, plaintiff’s evidence raises triable issues of fact as to plaintiff’s claims of “serious injury” as to the right shoulder under the permanent consequential and significant limitation categories (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff’s submissions demonstrate that plaintiff received medical treatment for the claimed injuries after the Accident, and that plaintiff had substantial limitations in motion in the right shoulder, resulting in surgery, after the Accident and at the recent examination by plaintiff’s expert in 2020 (see *Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff’s expert finds that, as a result of the Accident, plaintiff suffered right shoulder injuries that required surgery. The expert opines that the injuries are significant and causally related to the Accident and permanent in nature and the Accident was the primary competent cause of the injuries (*Morales v Cabral, supra*; see *Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Under the circumstances, plaintiff’s

submissions generate a question of fact as to whether plaintiff suffered a serious injury under threshold categories of permanent consequential limitation and significant limitation as to the right shoulder. The evidence submitted by defendants, however, generates an issue of fact as to whether plaintiff's right shoulder injury constitutes a "serious injury" as a matter of law.

Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra; Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

As for plaintiff's 90/180-day claim, defendants establish entitlement to summary judgment by submitting plaintiff's deposition testimony stating that he returned to school after 2-3 days (*Pakeman v Karekezia*, 98 AD3d 840 [1st Dept 2012]; see *Licari v Elliott*, 57 NY2d 230 [1982]), and plaintiff's submissions in opposition fail to generate a question of fact as to the issue (*Tarjavaara v Considine*, 188 AD3d 509 [1st Dept 2020]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendants RAYMOND SUGILIO OLIVERO and OPEN ROAD FLEET, INC.(defendants) [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff LUIS A. SOLANO (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied; and it is further

ORDERED that the cross-motion of plaintiff, made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment finding that plaintiff sustained a "serious injury" as defined by Insurance Law 5102(d) as a matter of law is denied.

This action is scheduled for a virtual eTeams pre-trial conference on November 3, 2021 at 2:00p.m. (Note of Issue filed on 08/20/2020). The Clerk shall record this conference in the court records as the next future appearance in this matter and the eTeams link will be forthcoming from chambers. The attorneys are directed to appear fully familiar with the facts of the case, with authority to discuss settlement, and with the parties available by telephone.

The foregoing constitutes the decision and order of the court.

Dated: August 26, 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 08/26/2021
Hon. Veronica G. Hummel, A.J.S.C.

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1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT