

Gil-Rodriguez v Vesselchakova

2021 NY Slip Op 34130(U)

November 29, 2021

Supreme Court, Bronx County

Docket Number: Index No. 29937/2018E

Judge: Ben R. Barbato

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15

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ALAMBRY GIL-RODRIGUEZ,

Index No. 29937/2018E

-against-

Hon. **BEN R. BARBATO**

OLGA VESSELCHAKOVA

Justice Supreme Court

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The following papers numbered 1 to 5 were read on this motion (Seq. No. 003)
for **SUMMARY JUDGMENT (DEFENDANT)** noticed on March 16, 2021 .

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1,2
Answering Affidavit and Exhibits	3,4
Replying Affidavit and Exhibits	5

Upon the foregoing papers, the defendant Olga Vesselchakova (“Defendant”) moves for summary judgment, dismissing the complaint of the plaintiff Alambry Gil-Rodriguez (“Plaintiff”) on the ground that he has failed to satisfy the “serious injury” threshold as defined by New York Insurance Law §5102(d). Plaintiff opposes the motion. The motion was transferred to this court by Administrative Judge Doris M. Gonzalez and shall be decided by this court pursuant to CPLR 9002.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the “serious injury” threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Plameri*, 1 N.Y.3d 536 [2003]). “Such evidence includes ‘affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim’” (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept. 2011][internal quotations omitted]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff’s injuries are not causally related to the accident (*see Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

In this case, Defendant carried their initial burden of demonstrating that Plaintiff did not sustain a “permanent consequential” or “significant” limitation of any body part as a result of this accident. Defendant accomplished this by submitting a sworn report from an orthopedist who conducted a physical examination found normal ranges of motion in the spine, left wrist, and left hand, and all diagnostic testing was either normal or negative (*Riollano v. Leavey*, 173 A.D.3d 494, 495 [1st Dept. 2019]). Defendant also

Motion is Respectfully Referred to Justice:
Dated:

submitted a supplemental report from their expert orthopedist who again confirmed, after review of Plaintiff's medical records, that Plaintiff had a normal orthopedic examination of his cervical spine, lumbar spine, and left wrist, with well-healed surgical scars and no evidence of subluxation of the extensor tendon or of disruption of the Triangular Fibrocartilage Complex.

In opposition, Plaintiff failed to raise a triable issue of fact as to whether he sustained a "permanent consequential limitation" category of injury. Plaintiff submits no recent report from a physician establishing that Plaintiff had continuing range-of-motion limitations in any of the allegedly injured body parts. Absent such evidence, Plaintiff failed to rebut Defendant's prima facie showing that such injuries have resolved (*see, e.g., Feliz v. Fragosa*, 85 A.D.3d 417 [1st Dept. 2011]).

Plaintiff, however, raised a triable issue of fact as to whether he sustained a "significant limitation" category of injury to his cervical and lumbar spine. Plaintiff submits a medical consultation report dated October 20, 2017 - within one week of the accident - demonstrating that he sought treatment for complaints of pain to, among other things, his neck, mid back and lower back shortly after the accident. The report notes that Plaintiff had positive clinical test results and tenderness at multiple spinal levels. Reports of MRI examinations taken within weeks of the accident detail, among other things, disc bulging and herniations in the lumbar and cervical spine. Plaintiff further submits his treatment records which indicate that he had quantified range-of-motion restrictions in the cervical spine as of December 27, 2017. Additional records from January 30, 2018 show that Plaintiff had persisting limitations in the cervical and lumbar spine, notably upon flexion in the cervical (66% of normal) and lumbar spine (70% of normal). Similar significant restrictions in those body parts still existed in a follow up examination on March 14, 2018. While these medical reports and records are unsworn, Defendant did not object to their admissibility -they only contended that the treatment records were "without probative value in deciding the motion." Therefore, Defendant waived any objection to the form of the medical records submitted in opposition (*see Shinn v. Cantanzaro*, 1 A.D.3d 195, 197-98 [1st Dept. 2003][defendant waived objection to unsworn affirmation and medical reports submitted in opposition by failing to raise the issue before the motion court]; *see also Jones v MTA Bus Co.*, 123 AD3d 614, 614-615 [1st Dept 2014] [court may not *sua sponte* refuse to consider expert report that is submitted in improper form]; *Long v Taida Orchids, Inc.*, 117 AD3d 624, 625 [1st Dept. 2014]). The above evidence of persisting limitations in the cervical and lumbar spine for several months after the accident sufficiently raised issues as to the significant limitation of use category

with respect to those body parts (*see Mejia v. Ramos*, 124 A.D.3d 449, 450 [1st Dept. 2015]; *Sutliff v. Qadar*, 122 A.D.3d 452 [1st Dept. 2014]; *Echevarria v. Ocasio*, 135 A.D.3d 661 [1st Dept. 2016]; *Arias v. Martinez*, 176 A.D.3d 548 [1st Dept. 2019]; *see generally Vasquez v. Almanzar*, 107 A.D.3d 538, 539 [1st Dept. 2013])[“a significant limitation ... need not be permanent in order to constitute a serious injury”].

Regarding the left wrist injury, Plaintiff submitted the above-referenced October 20, 2017 report indicating that he had pain in the left wrist shortly after the accident. An MRI report conducted shortly thereafter revealed an “abnormal signal in the scaphoid consistent with contusion or nondisplaced fracture. Avn not excluded,” as well as a “partial tear or tendinosis of the compartment 1 tendons as well as the extensor carpi ulnaris tendon.” Plaintiff submitted a report dated June 1, 2018 from his treating physician Dr. Louis Rose, who noted pain and weakness in the left wrist, “decreased” range of motion, and positive objective tests. Dr. Rose listed the range-of-motion measurements but did not compare them to the normal range. Plaintiff also submitted an operative summary indicating that on July 20, 2018, he underwent arthroscopic surgery on the left wrist, and his postoperative diagnosis was “hypertrophic synovium of the left wrist with a tear of the triangular fibrocartilage complex and chondral injury with Dequervain’s disease.” In a follow-up report dated July 27, 2018, Dr. Rose noted “decreased” range of motion in the left wrist and gives specific measurements, but again he did not compare those measurements to the normal range.

The above submissions fail to raise a triable issue of fact as to whether Plaintiff sustained a “serious injury” to his left wrist. First, the records do not indicate the existence of a “fracture,” as the MRI report equivocally states that it revealed a “contusion or nondisplaced fracture,” and Dr. Rose himself never diagnosed Plaintiff with a fracture. Moreover, Plaintiff did not plead a “fracture” category of injury in his bill of particulars. The above records also fail to show the existence of a significant or permanent limitation in the left wrist, since none of Plaintiff’s treatment physicians compare range-of-motion measurements in the wrist to normal. Without such a comparison, this Court is unable to assess the significance of the range-of-motion findings (*see Rivera v. Gonzalez*, 107 A.D.3d 500 [1st Dept. 2013]). Accordingly any claim of “serious injury” to the left wrist must be dismissed (*see Lopez v. Morel-Ulla*, 144 A.D.3d 504, 505 [1st Dept. 2016])[“Absent limitations, there is no serious injury”]. Nevertheless, if a jury determines that Plaintiff has met the threshold for serious injury as to his cervical or lumbar spine, he may recover for all injuries causally-related to the accident, including those that do not meet the threshold- e.g.,

