

**Tineo v Almonte**

2022 NY Slip Op 32242(U)

January 31, 2022

Supreme Court, Bronx County

Docket Number: Index No. 25603/2018E

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**

-----X  
ELVIN M. TINEO,

Plaintiff,

-against -

**Index No. 25603/2018E  
DECISION/ORDER  
Motion Seq. 1**

ORLANDO ALMONTE

Defendant.

-----X  
**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 defendant ORLANDO ALMONTE (defendant) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff ELVIN M. TINEO (plaintiff) has not sustained a “serious injury” as defined by Insurance Law 5102(d).

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 April 14, 2016 (the Accident). Plaintiff underwent an MRI of the right shoulder before the Accident in 2003.

In the bill of particulars and opposition papers, in relevant part, plaintiff alleges that as the result of the Accident, plaintiff suffered injuries to the cervical spine, lumbar spine and right shoulder that satisfy the following Insurance Law 5102(d) threshold categories: permanent loss of use; 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 [4<sup>th</sup> 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]).

Defendant seeks summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under Insurance Law 5102(d). Defendant argues 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, an attorney affirmation, photographs, plaintiff’s deposition transcript, and the expert affirmation of Dr. Ferriter (orthopedist).

Dr. Ferriter (orthopedist) examined plaintiff over four years post-Accident, on November 9, 2020. The doctor states that he reviewed the bill of particulars and plaintiff’s medical records. The expert finds no loss of range of motion in the cervical spine, thoracic spine, lumbar spine, both knees and right shoulder with negative objective tests.

In the impression section of the report, the expert concludes that the cervical spine, thoracic spine, lumbar spine and right shoulder are “sprain/strain-resolved”. The expert opines that plaintiff is capable of performing plaintiff’s activities of daily living as plaintiff was doing prior to the Accident. He finds no evidence of orthopedic disability, permanency or residuals.

Based on the submissions, defendant sets 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, submitting an attorney affirmation, plaintiff’s affidavit and deposition transcript, the affirmation of Dr. Bhatia (neurological), the affirmation Dr. Damien (radiologist) and plaintiff’s medical records (Dr. Haselkorn).

In total, plaintiff's evidence raises triable issues of fact as to plaintiff's claims of "serious injury" as to the cervical spine and lumbar spine (*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 some substantial limitations in motion in the relevant body parts after the Accident, and at the recent examination by plaintiff's expert in August 2021 (see *Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's expert finds that, as a result of the Accident, plaintiff suffered loss of range of motion and bulging discs in the cervical spine, and lumbar spine. The bulging discs are confirmed by MRI. The expert opines that these 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 cervical spine and lumbar spine. 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]).

In contrast, defendant establishes *prima facie* that there was no 90/180 day injury by submitting plaintiff's own testimony that plaintiff returned to work within a month of the Accident and plaintiff's submissions fail to raise an issue of fact (*Morales v Cabral, supra*).

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 defendant ORLANDO ALMONTE (defendant) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that

plaintiff ELVIN M. TINEO (plaintiff) has not sustained a “serious injury” as defined by Insurance Law 5102(d) is denied..

This action is now four years old and lacks a Note of Issue. The attorneys are reminded of the Chief Justice’s mandate and the companion court rules requiring that all attorneys make numerous good faith efforts (via letter, email and telephone) to resolve any discovery issue before seeking court intervention and to complete discovery in a timely manner. The Note of Issue may not be filed until a stipulation signed by all parties stating that discovery is completed is uploaded to NYSCEF.

The foregoing constitutes the decision and order of the court.

Dated: January 31 2022

E N T E R,

s/Hon. Veronica G. Hummel/signed 01/31/2022  
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