

**Linnihan v Rodriguez**

2022 NY Slip Op 34620(U)

December 22, 2022

Supreme Court, Queens County

Docket Number: Index No. 707863/2019

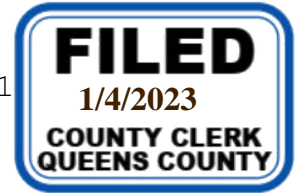
Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101



P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

- - - - - x

KEVIN LINNIHAN and MARY KATE LINNIHAN, Index No.: 707863/2019

Plaintiffs, Motion Date: 12/22/22

- against - Motion No.: 12

JOSE E. RODRIGUEZ, JR., Motion Seq.: 3

Defendant.

- - - - - x

The following electronically filed documents read on this motion by defendant for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

	Papers
	<u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	EF 57 - 64
Affirmation in Opposition-Exhibits.....	EF 65 - 73
Reply Affirmation.....	EF 74 - 75

In this negligence action, plaintiffs seek to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on December 20, 2019. As a result of the accident, plaintiff Kevin Linnihan alleges that he sustained serious injuries to his right shoulder, cervical spine, and lumbar spine.

Plaintiffs commenced this action by filing a summons and complaint on May 3, 2019. Defendant joined issue by service of an answer on September 17, 2019. Defendant now moves for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed by plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

At his examination before trial, plaintiff testified that he drove his vehicle home from the accident scene. He sought medical attention three weeks later. He presented to Fiss Chiropractor where he complained of pain to his head, neck, right shoulder, lower back, and legs. He treated at Fiss Chiropractor for four to six weeks. He switched to Jeffrey Shapiro Chiropractic. He treated at Jeffrey Shapiro Chiropractic for nine to ten months. He stopped treatment because his Worker's Compensation benefits were cut off. At the time of the deposition, he did not have any future appointments scheduled. He was never prescribed any medication.

R. Hillsman, M.D. performed an independent orthopedic examination on plaintiff on March 28, 2022. Plaintiff presented with current complaints of pain in his neck, back, and right shoulder. Dr. Hillsman identifies the records reviewed prior to rendering the report. Dr. Hillsman performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff's cervical spine, thoracic spine, lumbar spine, and bilateral shoulders. All other objective testing performed was negative. Dr. Hillsman concludes that plaintiff does not demonstrate any functional impairment. There is no permanency.

Defendant contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff did not sustain an injury which resulted in a permanent consequential limitation of use of a body organ or member, or significant limitation of use of a body organ, member, function or system. Defendant also contends that based on plaintiff's testimony, plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him for not less than 90 days during the immediate 180 days following the occurrence from performing substantially all of his usual daily activities.

In opposition, plaintiff submits an affidavit, affirming that there was ongoing confusion with his billing, which lasted for almost a year. He performed a home exercise routine during that time. In the summer of 2020, when he first saw orthopedic surgeon, Jonathan Ticker, M.D., he was told that he would need shoulder surgery. Dr. Ticker recommended a course of physical therapy first. However, workers compensation refused to pay for treatment up until one month ago. Additionally in October 2020, he was diagnosed with Stage 4 colon cancer. He had to abandon all attempts to resume treatment of his neck, back, and right shoulder injuries. He hopes that at his next oncology checkup in January, his oncologist will clear him for cervical spine surgery. In the summer of 2022, Dr. Ticker referred him to another orthopedic surgeon, Andrew Tarleton, M.D. Dr. Tarleton

sent him for updated MRIs of his neck and low back. Dr. Tarleton told him that the herniated discs in his neck are putting so much pressure on his nerve roots that he could become paralyzed if he gets rear-ended again. He is still working about 30 hours per week as an Uber driver. He intends to undergo the cervical spine discectomy and fusion surgery as soon as his oncologist clears him for the surgery. Plaitniff submits his medical records from Fiss Chiropractic, Ocean Spine & Joint, and Orlin & Cohen.

Andrew Tarleton, M.D. submits a narrative report. Plaintiff first presented on January 18, 2019 to Fiss Chiropractic. Cervical spine and lumbar spine range of motion was limited. MRI films revealed disc herniations. Most recently, on October 21, 2022, range of motion testing indicated limited ranges of motion in plaintiff's cervical spine, bilateral shoulders, thoracic spine, and lumbar spine. Dr. Tarleton opines that there is a causal relationship between the subject accident and plaintiff's neck, low back, and right shoulder injuries. Plaintiff sought treatment within a month after the accident. Plaintiff had over 100 treatment visits with medical doctors, including a number of trigger point injections, chiropractors, and physical therapists.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Here, this Court finds that, at the very least, plaintiff raised triable issues of fact as to whether he sustained a serious injury by submitting the physician's affirmation, attesting to the fact that plaintiff sustained injuries as a result of the subject accident, finding that plaintiff had significant limitations in ranges of motion both contemporaneously to the accident and in a recent examination, and concluding that the limitations are causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD2d 367 [2d Dept. 2009]).

In addition, plaintiff adequately explained the gap in treatment by affirming that his benefits were cut (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

Accordingly, and for the reasons stated above, it is hereby ORDERED, that defendant's motion is denied.

Dated: December 22, 2022  
Long Island City, N.Y.

*Robert J. McDonald*

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**ROBERT J. MCDONALD**  
J.S.C.

