

De La Rosa v Northwell Health Labs.
2022 NY Slip Op 35064(U)
September 13, 2022
Supreme Court, Bronx County
Docket Number: Index No. 27143/2020e
Judge: Veronica G. Hummel
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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
JOSE A. GARCIA DE LA ROSA.

Plaintiff ,

-against -

**Index No. 27143/2020e
DECISION/ORDER
Motion Seq. 1**

NORTHWELL HEALTH LABORATORIES and REGAN
RUSHWORTH LUCKIE JR.,
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 of the papers filed by the parties in NYSCEF in regard to the motion of NORTHWELL HEALTH LABORATORIES and REGAN RUSHWORTH LUCKIE JR. [Mot. Seq. 1] (defendants) for an order dismissing the complaint on the ground that plaintiff JOSE A. GARCIA DE LA ROSA (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 December 10, 2019 (the Accident). Plaintiff testified that he missed 4-5 days from work as an Uber driver post-Accident. On June 17, 2020, plaintiff had surgery on his left knee.

In the bill of particulars and opposition papers, in relevant part, plaintiff alleges that plaintiff suffered injuries to the lumbar spine and left knee and these injuries fall within the serious injury categories of: permanent loss of use; permanent consequential limitation; significant limitation; and 90/180 days. As plaintiff fails to address the grounds of permanent

loss of use on this motion, however, those grounds are deemed waived. see *Burns v. Kroening*, 164 A.D.3d 1640 (4th Dep't 2018). In any event, as plaintiff does not allege a total loss of a body part, the claim is dismissed. *Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 29 (2001).

Defendants seek 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 an attorney affirmation, a statement of material facts, deposition transcripts, the bill of particulars, a memorandum of law, plaintiff's medical records and the expert affirmations/reports of Dr. Gushue (Biomechanical), Dr. Russ (physical medicine), Dr. Wolin (D.C.), Dr. Faierman (orthopedic), Dr. Cohen (neurological), and Dr. Hyman (radiologist). Defendants also submit an affirmation in reply.

Dr. Wolin bases his opinion on the details of a no-fault physical examination of plaintiff conducted on September 15, 2020, approximately one year post-Accident. He reviewed plaintiff's medical records. The doctor performed range of motion and objective tests on the lumbar spine with normal results. The expert found the lumbar spine was a "sprain". He deferred "complaints referable to the left knee at the appropriate specialty". Plaintiff reached pre-Accident status, can return to work and can perform his normal activities of daily living without restrictions or limitations.

Dr. Russ (physical medicine) bases his opinion on the examination of plaintiff on March 12, 2020. The expert also reviewed plaintiff medical records from 2019 and 2020 and the police report. In sum and substance, he found normal ranges of motion and negative objective tests on the lumbar spine and left knee. The diagnoses is "Status post lumbar sprain/strain, resolved", " Status post left knee sprain, resolved". "Acupuncture Channels Evaluation: Stagnation Qi and blood in UB and DU channels of the lumbar spine have been resolved. Stagnation Qi and blood in ST and GB channels of the left knee have been resolved". The

expert opines that there was no objective evidence of any disability from a physical medicine and rehabilitation and acupuncture point of view. Plaintiff is capable of working and performing activities of daily living without any limitations. From an acupuncture viewpoint, there is no need for further physical therapy or any type of further formal treatment. Although there was tenderness in the left knee, there were no clinical objective findings that correlate to this subjective finding. All objective examination findings on examination were normal. The doctor opines that that there is no need for diagnostic testing, household help, medical supplies or special transportation.

Dr. Faierman examined plaintiff on November 15, 2021. He reviewed plaintiff's medical records, including MRI reports. The examination and objective tests on the lumbar spine produced normal results. He finds that the lumbar spine complaints to be subjectively and objectively resolved. The left knee complaint status post-surgery are objectively resolved. There are no objective findings of any traumatic pathology on the examination of the lumbar spine or knee. Plaintiff does not require any further treatment as it relates to the Accident.

The MRI report of the left knee documents "the medial meniscal posterior horn is effaced by irregular confluent hyperintensity". Findings are "compatible" with tear. The assessment documents "evidence" for medial meniscal tear and additional ACL injuries "suggested". The doctor opines that the report does not clearly see a full thickness meniscal tear and his review of the operative photographs confirms that there is no traumatic meniscal tear noted medially. There is minimal fraying at the edge of the meniscus but no traumatic meniscal tears. Despite this mild fraying of the medial and lateral meniscus the MRI only revealed a possible medial meniscal tear which was not confirmed intraoperatively. Finally, there was no traumatic ACL tear noted on the operative photographs. The expert does not see any osteochondral defects and finds degenerative findings, but no osteochondral defects were noted. After review of the MRI report and operative photographs the expert sees no traumatic pathology in the left knee related to the Accident. The operative photographs do reveal mild pre-existing degenerative

changes but no traumatic pathology. Plaintiff does not require any further treatment as related to the left knee.

As for the lumbar spine, the MRI documents L4-5 and L5-S1 central herniations. Whether these are degenerative or traumatic cannot be ascertained without reviewing the MRI films. There are no objective findings of any traumatic pathology examination of the lumbar spine. Plaintiff does not require any further treatment as relates to the lumbar spine.

Dr. Cohen examined plaintiff on November 8, 2021. He reviewed the pleadings and plaintiff's medical records. The examination of the lumbar spine was normal. His diagnosis is lumbar spine "sprain, resolved". There is a normal neurologic examination with no objective clinical evidence of radiculopathy. The exam demonstrates no impairment of neurologic function that would impair the ability of plaintiff to participate in activities of daily living and all usual activities. From a neurologic perspective, the plaintiff not disabled, is working and from a neurologic perspective, has no impairment of neurologic function that would impair his ability to participate in usual work activities. There is no permanent impairment of neurologic function.

Finally, defendants submit the alleged expert opinion of Dr. Gushue. He opines in sum and substance that plaintiff's alleged injuries could not have been caused by the impact that occurred as the result of the Accident.¹

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, significant limitation, and 90/180 categories. *Stovall v N.Y.C. Transit Auth.*, 181 A.D.3d 486 (1st Dep't 2020); see *Olivare v. Tomlin*, 187 A.D.3d 642 (1st Dep't 2020).

¹ While there may be an issue as to the evidentiary competency of a biomechanical report, this issue need not be resolved on this motion as, even without said report, defendants set forth a *prima facie* showing.

Plaintiff opposes the motion, submitting an attorney affirmation, a statement of material facts, plaintiff's medical records, and the affirmations/reports/record of Dr. Glyptis (neurologist), Dr. Haar (surgeon), Dr. Ciechorska, and Dr. Lodespold (radiologist).

In total, plaintiff's evidence raises triable issues of fact as to his claims of "serious injury" under only the permanent consequential limitation and significant limitation categories and only as to the left knee. *Morales v. Cabral*, 177 A.D.3d 556 (1st Dep't 2019). Plaintiff's submissions demonstrate that plaintiff received medical treatment for the claimed injury after the Accident, and that plaintiff had substantial limitations in the knee with positive objective test results after the Accident and at the recent examination by plaintiff's expert in 2022. *Diaz v. Vivar-Martinez*, 192 A.D.3d 578 (1st Dep't 2021); see *Perl v. Meher*, 18 N.Y.3d 208 (2011). Plaintiff's expert finds that, as a result of the Accident, and not degeneration, plaintiff suffered injuries to the left knee, as shown in the MRI, requiring surgery and states that the injury was caused by the Accident trauma. The plaintiff's expert opines that this injury is significant and causally related to the Accident and permanent in nature and the Accident was the primary competent cause of the injury. *Diaz v Vivar-Martinez, supra*; see generally, *Morales v Cabral, supra*; see *Aquino v. Alvarez*, 162 A.D.3d 451, 452 (1st Dep't 2018). Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under the threshold categories of permanent consequential limitation and significant limitation. 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 A.D.3d 548 (1st Dep't 2010).

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

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ORDERED that the motion of defendants NORTHWELL HEALTH LABORATORIES and REGAN RUSHWORTH LUCKIE JR., (defendants) for an order dismissing the complaint on the ground that JOSE A. GARCIA DE LA ROSA (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied; and it is further

ORDERED that the Clerk shall mark motion sequence 1 decided in all court records.

The foregoing constitutes the decision and order of the court.

Dated: September 13, 2022

E N T E R,

Hon. Veronica G. Hummel

Hon. Veronica G. Hummel, A.J.S.C.

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