

Peralta v Peralta
2022 NY Slip Op 35087(U)
July 13, 2022
Supreme Court, Bronx County
Docket Number: Index No. 30117/2019E
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
DANIEL A. PERALTA and DOMINGO ANTONIO VALERA MADE,

Plaintiffs,

-against -

DANIS A. PERALTA and MAHAMADOU SYLLA,
Defendants.

-----X

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

**Index No. 30117/2019e
DECISION AND ORDER
Motion Seqs. 2,3**

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 DANIS A. PERALTA (defendant Peralta) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff DOMINGO ANTONIO VARLERA MADE (plaintiff Made) has not sustained a “serious injury” as defined by Insurance Law 5102(d); the cross-motion of defendant MAHAMADOU SYLLA, made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff Made and plaintiff DANIEL A. PERALTA (plaintiff Peralta) have not sustained a serious injury; and the motion of defendant Peralta [Mot. Seq. 3], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff Peralta has not sustained a serious injury.

“CPLR § 3212(a) provides, *inter alia*, that the court may set a date after which no motion for summary judgment may be made.” *Bennett v. State Farm Fire and Cas. Co.*, 198 A.D.3d 861 (2d Dep’t 2021). Good cause in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion. *Brill v. City of New York*, 2 N.Y.3d 648 (2004). No excuse at all, or a perfunctory excuse, cannot be good cause. *Brill v. City of New York, supra*; *Baram v. Person*, 205 A.D.3d 470 (1st Dep’t 2022).

The Part 31 Rules (page 3) and the Preliminary Conference Order/Case Scheduling Order in this action mandate that motions for summary judgment must be filed within 60 days of the filing of the Note of Issue. The Note of Issue in this action was filed on June 29, 2021.

The motion by defendant Peralta [Mot. Seq. 2], directed against only plaintiff Made, was filed on August 26, 2021. This motion was therefore timely under the directives of the PC order and the Rules of Part 31.

In contrast, the cross-motion by defendant Sylla seeks relief against *both* plaintiffs and was not filed until September 28, 2021, well beyond sixty days from the filing of the Note of Issue. There is no application on record for permission to file a late summary judgment nor does movant defendant Sylla present any good cause justification for the late filing and the failure to seek leave to file the motion late. As such, the cross-motion is untimely and is denied. see CPLR 3212[a]; *Baram v Person, supra*. Of note, the cross-motion is also improper, without a showing of a lack of prejudice, as it is not directed against the original movant defendant and seeks relief against an additional plaintiff beyond the parties addressed in the original motion (see CPLR 2215; *Crawford v. 14 East 11th Street, LLC*, 191 A.D.3d 461 (1st Dep't 2021); *Kershaw v. Hospital for Special Surgery*, 114 A.D.3d 75 (1st Dep't 2013); *Terio v. Spodek*, 25 A.D.3d 781 (2d Dept 2006) (a cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party).

Similarly, the subsequent motion by defendant Peralta [mot. seq. 3], whereby defendant Peralta, for the first time, moves against plaintiff Peralta was filed well beyond the 60 day deadline, on October 13, 2021. Defendant Peralta does not dispute that the motion was untimely, no good cause for the delay is set forth, and no additional time to file was requested. As such, the motion is denied as untimely. *Baram v Person, supra*.

Accordingly, only the motion by defendant Peralta [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff Made has not sustained a “serious injury” as defined by Insurance Law 5102(d) is now before the court.

This is a negligence action to recover damages for personal injuries that plaintiff Made allegedly sustained as a result of a motor vehicle accident that occurred on November 25, 2018 (the Accident).

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 right knee, right shoulder, cervical spine, thoracic spine and lumbar spine that satisfy the following Insurance Law 5102(d) threshold categories: fracture, permanent consequential limitation, significant limitation, and 90/180 days. *Burns v Kroening*, 164 A.D.3d 1640 (4th Dep’t 2018). Of note plaintiff does not allege or prove a total loss of a body part. *Oberly v Bangs Ambulance, Inc.*, 96 N.Y.2d 29 (2001). Plaintiff discontinued treatment, including injections, after five months and testified that he missed 2 to 3 weeks of work after the Accident.

While plaintiff has the burden of establishing a *prima facie* case of “serious injury” at trial (*Licari v. Elliott*, 57 N.Y.2d 230 (1982)), defendant on a summary judgment motion must first present evidence establishing that plaintiff has not sustained a “serious injury” as a matter of law, and only after that burden has been met must plaintiff go forward and submit evidence to raise a question of fact. *Franchini v. Palmieri*, 1 N.Y.3d 536 (2003); *Brown v. Mat Enterprises of N.Y. Inc.*, 97 A.D.3d 401 (1st Dep’t 2012). Defendant bears the initial burden of establishing the absence of a serious injury as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. *McElroy v. Sivasubramaniam*, 305 A.D.2d 944 (3d Dep’t 2003). If defendant meets this burden, defendant has established *prima facie* entitlement to summary judgment.

It then becomes incumbent on the plaintiff to submit proof, in admissible form, of the existence of triable issues of fact with regard to the existence of a serious injury. *Franchini v. Palmieri, supra*; *Shinn v. Catanzaro*, 1 A.D.3d 195 (1st Dep't 2003); see *Cabrera v Ahmed*, 189 A.D.3d 403 (1st Dep't 2020). Specifically, plaintiff must demonstrate that there is a serious injury under the Insurance Law, that summary judgment is not warranted and that the action mandates resolution by trial. Additionally, and equally important, plaintiff must establish, through admissible medical evidence, that the injuries sustained are causally related to the accident claimed. see *Pommells v. Perez*, 4 N.Y.3d 566 (2005); *Tusu v. Leone*, 187 A.D.3d 655 (1st Dep't 2020).

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 an attorney affirmation, the pleadings, a statement of material facts, the bill of particulars, plaintiff's deposition transcript, and the expert affirmations/report of Dr. Semble (orthopedist).

Defendant's expert Dr. Semble (orthopedist) examined plaintiff on June 6, 2021. The expert reviewed the bill of particulars and plaintiff's medical records. Dr. Semble finds normal ranges of motion and negative objective tests for the cervical spine, thoracic spine, lumbar spine, right shoulder and right knee. Under diagnoses he finds all of these body parts are "sprain-resolved". He opines that plaintiff is not disabled.

The expert notes that the MRI report of the right knee, dated February 10, 2019, makes a finding of "increased T2 signal...consistent with bone contusion/nondisplaced fracture, CT of the right knee is recommended for further evaluation", but expresses no opinion as to the findings. As plaintiff alleges "fracture" as a category in the bill of particulars, the defendant's expert's failure to address this finding or to express any opinion as to the allegations of fracture, the defendant fails to set forth a *prima facie* showing that the "fracture" category is inapplicable.

Accordingly, the burden does not shift to plaintiff and the motion is denied as to the “fracture” category. Furthermore, even were it concluded that defendant set forth a *prima facie* showing in this category, plaintiff’s submissions generate an issue of fact as to the matter.

In contrast, based on the submissions, defendant sets forth a *prima facie* showing that plaintiff did not suffer a serious injury to the right knee, and cervical and lumbar spines under the permanent consequential limitation, significant limitation, or 90/180 days 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).

Plaintiff opposes the motion with an attorney affirmation, an affidavit from Dr. Mazza (chiropractor), the affirmed records of Dr. Khaimov (pain medicine), and the affirmed MRI report of Dr. Losik (radiologist- right knee).

In total, plaintiff’s evidence raises triable issues of fact as to plaintiff’s claims of “serious injury” as to the cervical and lumbar spines under the permanent consequential and significant limitation categories. *Morales v Cabral*, 177 A.D.3d 556 (1st Dep’t 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 relevant body parts after the Accident and at the recent examination by plaintiff’s expert in 2021. see *Perl v Meher*, 18 N.Y.3d 208 (2011). Plaintiff’s expert finds that, as a result of the Accident, as confirmed by MRIs, plaintiff suffered bulging and herniations of the spine. 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 injury. *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 as to the cervical 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 A.D.3d 548 (1st Dep't 2010).

In contrast, defendant establishes *prima facie* that there was no 90/180 day injury and plaintiff's submissions fail to generate a question of fact as to the issue. *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 DANIS A. PERALTA (defendant Peralta) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff DOMINGO ANTONIO VARLERA MADE (plaintiff Made) 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 defendant MAHAMADOU SYLLA, made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff Made and plaintiff DANIEL A. PERALTA (plaintiff Peralta) have not sustained a serious injury is denied; and it is further

ORDERED that the motion of defendant Peralta [Mot. Seq. 3], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff Peralta has not sustained a serious injury is denied; and it is further

ORDERED that the Clerk shall mark motion sequences 2 and 3 decided in all court records.

This constitutes the decision and order of the court.

Dated: July 13, , 2022

E N T E R,

s/Hon. Veronica G. Hummel/signed 07/13/2022
Hon. Veronica G. Hummel, A.J.S.C.

1. CHECK ONE.....

CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE

2. **MOTION number 2 and Motion
number 3 are
denied.....**

☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE

3. CHECK IF APPROPRIATE.....

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT