

Tejeda v Carbuccia
2022 NY Slip Op 35088(U)
July 5, 2022
Supreme Court, Bronx County
Docket Number: Index No. 30490/2018E
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
SERGIO TEJEDA,

Plaintiff,

-against -

**Index No. 30490/2018E
DECISION/ORDER
Motion Seq. 5**

ALVIN CARBUCCIA,

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 ALVIN CARBUCCIA [Mot. Seq. 5], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff SERGIO TEJEDA (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 February 12, 2017 (the Accident). Plaintiff testified that he missed two weeks of work as the result of the Accident. Plaintiff received treatment one week after the Accident, and underwent a physical therapy course of treatment for seven months. Plaintiff’s last treatment was in September 2017. Four years later, on November 15, 2021, plaintiff was examined again.

In the bill of particulars and opposition papers, in relevant part, plaintiff at first alleges that, as the result of the Accident, plaintiff suffered injuries to the lumbar spine that satisfy the Insurance Law 5102(d) threshold categories of “permanent partial loss use”, “permanent partial disability” and permanent consequential limitation. [NYSCEF No. 101, paragraph 8].

Thereafter, plaintiff discusses the additional ground of “significant limitation”. [NYSCEF No.101, paragraph 63]. As there are no categories of “permanent partial disability” and “permanent partial loss of use” under the Insurance Law, those alleged grounds lack merit as a matter of law (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 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 the pleadings, the bill of particulars, a notice to admit with social media content, an attorney affirmation, a statement of material facts, deposition transcripts, and the expert affirmation of Dr. Katz (orthopedist).

Dr. Katz (orthopedist) examined plaintiff five years post-Accident, on February 24, 2021. The expert reviewed the bill of particulars, the MRI report of the lumbar spine (Dr. Kolb), the Hospital ER records, Central Park Physical Medicine Records, and Dr. Goldenberg’s report. Dr. Katz finds, in relevant part, limited lateral bending in the lumbar spine with negative objective tests. In the “diagnoses/impression” section, the expert finds the lumbar spine is “spine sprain/strain-resolved”.

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body part under the permanent consequential limitation and significant limitation category (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; see *Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]). P

Plaintiff opposes the motion submitting an attorney affirmation, a personal affirmation, plaintiff's ER records, and the affirmation/reports of Dr. Goldenberg (orthopedic surgeon), and Dr. Kolb (radiologist)¹.

In total, plaintiff's evidence raises triable issues of fact as to plaintiff's claims of "serious injury" to the lumbar spine under the categories of significant limitation and permanent consequential (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's medical 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 NY3d 208 [2011]). Plaintiff's expert finds that, as a result of the Accident, and not degeneration, plaintiff suffered a herniated disc in the lumbar spine. The MRI report contains findings of a herniated disc one month post-Accident and the expert opines that the injury is 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 AD3d 451, 452 [1st Dept 2018]). The expert also opines that the gap in treatment was the result of the patient's improvement plateauing. 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 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

¹ Though unaffirmed, the hospital and treatment records can be considered together with plaintiff's affirmed medical evidence, since they were relied on defendants' expert, and considered in reaching his conclusion (see *Sutliff v Qadar*, 122 AD3d 452 [1st Dep't 2014]; *Boateng v Ye Yiyen*, 119 AD3d 424, 425 [1st Dept 2014]). Further, the Court may consider the records because they are not the only evidence submitted by plaintiff in opposition to the motion, and thus may be considered to deny a motion for summary judgment (*Rivera v. Super Star Leasing, Inc.*, 57 AD3d 288, 288 [1st Dept 2008]).

that do not meet the threshold (*Morales v Cabral, supra; Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 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

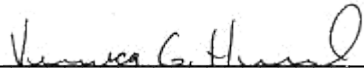
ORDERED that the motion of defendant ALVIN CARBUCCIA [Mot. Seq. 5], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff SERGIO TEJEDA (plaintiff) has not sustained a “serious injury” as defined by Insurance Law 5102(d) is denied; and it is further

ORDERED that the Clerk shall mark motion seq. 5 denied in all court records.

The foregoing constitutes the decision and order of the court.

Dated: July 5, 2022

E N T E R,

Hon. 
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