

Gonzalez v Habib
2022 NY Slip Op 35113(U)
August 30, 2022
Supreme Court, Bronx County
Docket Number: Index No. 30518/2017E
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**

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NANAY GONZALEZ,

Plaintiff,

-against -

**Index No.30518/2017E
DECISION/ORDER
Motion Seq. 3**

SANDRA K. HABIB and AMIRA L. HANNA,
Defendants

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

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 support of and in opposition to the motion of defendants SANDRA K. HABIB and AMIRA L. HANNA (defendants) [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff NANAY GONZALEZ (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 August 5, 2017, in Bronx, N.Y. (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 cervical spine, left shoulder, left hand, and head/jaw that satisfy the following Insurance Law 5102(d) threshold categories: permanent loss of use; permanent consequential limitation; significant limitation; and 90/180 days. As

plaintiff fails to address the ground of permanent loss of use on this motion, however, the ground is deemed waived. *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 permanent loss of use claim is dismissed. *Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 29 (2001).

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)), defendants 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). Defendants bear 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 defendants fail to meet this burden, the motion is denied without consideration of the opposition papers. If defendants meet this burden, defendants have 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).

Here, 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, an attorney affirmation, a statement of material facts, plaintiff’s deposition transcript, and the expert affirmation of Dr. Hillsman (orthopedist), Dr. Peyser (radiologist), and Dr. Elkin (neurologist). Defendants also submit a reply affirmation.

Plaintiff testified that she was confined to home for five to six months after this Accident. Plaintiff also stated that she had injured her right or left shoulder in a motor vehicle accident in 2010 and had left shoulder surgery sometime before this Accident, but she could not remember the date. Plaintiff had a previous personal injury lawsuit in which she alleged injuries to a shoulder, left wrist, and left ankle.

Dr. Hillsman (orthopedist) examined plaintiff approximately three years post-Accident, on August 6, 2020. The expert reviewed the bill of particulars, MRIs, and plaintiff’s treatment records (the last treatment was January 2018). Dr. Hillsman finds, in relevant part, normal ranges of motion and negative objective tests as to the cervical spine, left shoulder, and left wrist/hand.

In the “diagnoses/impression” section, the expert finds the cervical spine, left shoulder, and left hand to be “sprain/strain-resolved” and “strain resolved”. The doctor opines that plaintiff does not suffer from any disability. She may work without restrictions. There is no permanency. Prognosis is good.

The expert also opines that, based on the history provided by plaintiff and the medical records available for his review, a “causal relationship has been established for the diagnosed injuries” to the Accident provided the information is true and correct. Within reasonable probability, based on the information provided, the proximate cause of the injuries diagnosed

is a motor vehicle accident. Based on the information provided, the mechanism of injury supports the diagnosis. Based on the information provided the treatment is related to the accident of record. Plaintiff does not recall any history of pre-existing conditions that impact the current injury and does not recall any psychological or comorbid conditions contributing to her subjective complaints. The diagnosis is correct and is supported by objective findings in the medical records. There are no current objective findings consistent and proportional to the subjective complaints reported.

Dr. Peyser submits his evaluation, dated April 10, 2019, of the MRIs of plaintiff's cervical spine (dated 9/11/2017 and 8/18/2018) and left hand (11/04/2017). As for the cervical spine, he identifies no herniation. There is no post traumatic type etiology related to the Accident. Both MRIs reveal conditions that are consistent with degenerative disc disease.

In terms of the left hand, the expert finds it to be "unremarkable". No post traumatic-type etiology related to the Accident can be determined.

Dr. Elkin (neurological) examined plaintiff on August 7, 2020. He reviewed the bill of particulars, and plaintiff's medical records. He finds normal or near normal ranges of motion in the neck, lower back, and left hand. Plaintiff would not permit a full examination of the cervical spine. There are no objective findings on the neurologic physical examination. There are no objective findings for any structural neurological injury incurred as a result of the Accident. He finds no objective findings for any neurological injury that would explain her reported symptoms and limitations. The expert notes that the Emergency Department record at New York Presbyterian/Lawrence Hospital, eleven days after the subject accident, did not refer to the Accident and refers to prior right knee and right shoulder surgery. Plaintiff was diagnosed with post-concussion syndrome but was discharged from the Emergency Department and there is no explanation for her ongoing symptoms and reported limitations. The doctor was unable to make the diagnosis of a post-concussion syndrome based on his review of the records and treatments. The doctor opines that Dr. Kwan documents a normal

mental status, and this would not support the alleged concussion. The MRI of the cervical spine reveals nonspecific disc bulges for which there is no causal relationship to the Accident. The NeuroQuant and diffusion tensor imaging results are, in his opinion, of no clinical significance with reference to the Accident as these studies are of questionable significance in evaluation of traumatic brain injury and cannot be construed as being supportive of a traumatic brain injury.

The expert opines that there are no objective findings for any structural neurological injury that would explain the alleged ongoing symptoms and the diagnoses of posttraumatic stress disorder and anxiety are not caused by any objective neurological injury and should be addressed by the appropriate specialist. Similarly, the expert differs in opinion regarding temporomandibular joint dysfunction to the appropriate specialist. Plaintiff is working in her usual capacity and there are no objective findings for neurological injury that would prevent her from doing so. There are no objective findings for accident-related neurological permanency or disability. She may continue to work without any restrictions. Her accident-related symptoms are most consistent with cervical muscle sprain and possible cervicogenic headaches. There are no objective findings for accident related neurological permanency or disability.

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury under the permanent consequential limitation, significant limitation and 90/180 day 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, an affidavit of merit, a statement of material facts, plaintiff's medical records, the affirmation/reports of Dr. Abramov (treating), Dr. Katzman (radiologist), Dr. Kwan (neurology), Dr. Brown (neurology), Dr. Robins (psychologist), Dr. Olson (family doctor), and Dr. Springs (dentist).

In total, plaintiff's evidence raises triable issues of fact as to her claims of "serious injury" as to the cervical spine, left hand, and head/jaw. *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 and other symptoms in the relevant body parts after the Accident and at the recent examination by plaintiff's experts in 2022. see *Perl v. Meher*, 18 N.Y.3d 208 (2011). Plaintiff's experts find that, as a result of the Accident, plaintiff suffered injuries and aggravation to injuries to the spine, jaw and left hand, resulting in a decreased range of motion and failed objective tests. Plaintiff is also found to have suffered a head injury. The experts opine 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 A.D.3d 451, 452 (1st Dep't 2018). Furthermore, the MRI reviews by the plaintiff's expert confirm the injuries in the cervical spine. 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. 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).

Furthermore, defendants establish *prima facie* that there was no 90/180 day injury and plaintiff's submissions 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 defendants SANDRA K. HABIB and AMIRA L. HANNA (defendants) [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the

complaint on the ground that plaintiff NANAY GONZALEZ (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 3 decided in all court records.

The foregoing constitutes the decision and order of the court.

Dated: August 30, 2022

E N T E R,

s/Hon. Veronica G. Hummel/signed 08/30/2022
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