

Smalls v Vasquez-Clanton
2022 NY Slip Op 35119(U)
August 24, 2022
Supreme Court, Bronx County
Docket Number: Index No. 35169/2019e
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**

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JESSE SMALLS,

Plaintiff,

-against -

**Index No. 35169/2019e
DECISION/ORDER
Motion Seq. 2**

GLORIA INEZ VASQUEZ-CLANTON, STEVEN MICHAEL SIMKIN,
and BOUBA ADULA,

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 papers filed by the parties in NYSCEF in support of and in opposition to the motion of defendants GLORIA INEZ VASQUEZ-CLANTON, STEVEN MICHAEL SIMKIN and BOUBA ADULA [Mot. Seq. 2], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff JESSE SMALLS 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 June 27, 2019 (the Accident).

In the bill of particulars and opposition papers, in relevant part, plaintiff allege that as the result of the Accident, plaintiff suffered injuries that satisfy the following Insurance Law 5102(d) threshold categories: permanent loss, permanent consequential limitation, significant limitation, and 90/180 days. In the opposition, plaintiff does not claim or address the grounds of permanent loss of use or 90/180 days and the grounds are therefore deemed waived. *Burns*

v Kroening, 164 A.D.3d 1640 (4th Dep't 2018). In any event, as plaintiff does not allege or prove a total loss of a body part, the claims are dismissed (*Oberly v Bangs Ambulance, Inc.*, 96 N.Y.2d 29 (2001)).

Defendants seek summary judgment dismissing the complaint on the ground that plaintiffs 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, an attorney affirmation, a statement of material facts, the bill of particulars, plaintiff's medical records, and the expert affirmation/report of Dr. Hillsman (orthopedist) and Dr. Pomerantz (radiologist). Defendants also submit a reply affirmation.

Dr. Hillsman (orthopedist) examined plaintiff approximately two years post-Accident, on October 14, 2021. The expert reviewed the bill of particulars, plaintiff's treatment records from 2014-2015, plaintiff's treatment records from 2019, MRIs, and operative reports (left knee September 9, 2019 and spine August 2019).

Dr. Hillsman finds normal ranges of motion and negative objective tests as to the lumbar spine, cervical spine, thoracic spine, left shoulder, left hip, and left knee. In the "diagnoses/impression" section, the expert finds the cervical spine, thoracic spine, lumbar spine are "sprain/strain-resolved". The left shoulder, left hip, and left knee are "strain, contusion- resolved". Based on the history provided by the claimant and the medical records available for review, the doctor opines that a causal relationship has been established for the diagnosed injuries to the Accident.

Dr. Pomerantz finds that the MRI of the left knee (taken one month post-Accident on July 15, 2019) showed:

Examination demonstrates a knee effusion. The patellar cartilage is unremarkable. A complex tear of the posterior horn of the lateral meniscus is noted. The remaining menisci fail to demonstrate any evidence of acute pathology. Degenerative osteoarthritic changes of the knee are noted. The cruciate ligaments, collateral ligaments as well the quadriceps and patellar tendons are intact. The osseous structures demonstrate normal signal. There is no evidence of fracture, dislocation or bone destruction. The muscular of the knee is unremarkable. There is no evidence of a tear, hematoma or mass.

As an impression he finds a “complex tear of the posterior horn of the lateral meniscus”, degenerative osteoarthritic changes of the knee and knee effusion.

Based on the submissions, defendants fail to set forth a set forth a *prima facie* showing that plaintiff Parker did not suffer a serious injury to the left knee under the permanent consequential limitation and significant limitation categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; see *Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]). Defendants’ own expert finds causation and the MRI reading by Dr. Pomerantz includes a tear to the left knee. Furthermore, the report appears to contradict its own finding of a tear.

In any event, even assuming that defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury under the two relevant categories, plaintiff’s submissions generate an issue of fact. Plaintiff opposes the motion, submitting an attorney affirmation, a response to statement of material facts, plaintiff’s deposition transcript, plaintiff’s¹ medical records, and the report of Dr. Guttman (knee surgeon), Dr. Haftel (Pain Management) and Dr. Distasio (Pain Management).

In total, plaintiff’s evidence raises triable issues of fact as to plaintiff’s claims of “serious injury” under permanent consequential limitation and significant limitation categories as to the cervical spine, lumbar spine, left knee, and left shoulder. *Morales v Cabral*, 177 A.D.3d 556

¹ To the extent that plaintiff submits unaffirmed medical reports, said evidence can be considered together with plaintiffs’ 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 Yiyan*, 119 AD3d 424, 425 [1st Dept 2014]).

(1st Dep't 2019); *Francis v Nelson*, 140 A.D.3d 467 (1st Dep't 2016). Plaintiff's medical submissions, relied on by defendants' expert, demonstrate that plaintiff received medical treatment for the claimed injuries immediately after the Accident, and that plaintiff had substantial limitations in motion in the relevant body parts after the Accident. At the recent examination by plaintiff's expert in 2022, the experts found significant limitations as to the cervical spine, lumbar spine, left knee and left shoulder (see *Perl v Meher*, 18 N.Y.3d 208 (2011)) and defendants' expert found a causal link between plaintiff's injuries and the Accident. Plaintiff's experts find that, as a result of the Accident, plaintiff suffered bulges and herniations to the cervical and lumbar spines and tears to the left knee, confirmed by the MRIs. The experts find past and future restrictions as to the relevant body parts and opine that these injuries: are significant and causally related to the Accident; permanent in nature; and the Accident was the cause of the injuries. *Morales v Cabral*, *supra*; see *Aquino v Alvarez*, 162 A.D.3d 451, 452 (1st Dep't 2018); *Licari v Elliott*, 57 N.Y.2d 230 (1982); see *Lee v Lippman*, 136 A.D.3d 411 (1st Dept 2016).

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 GLORIA INEZ VASQUEZ-CLANTON, STEVEN MICHAEL SIMKIN and BOUBA ADULA [Mot. Seq. 2], made pursuant to CPLR 3212, that seeks an order dismissing the complaint on the ground that plaintiff JESSE SMALLS 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 2 decided in all court records.

The foregoing constitutes the decision and order of the court.

Dated: August 24, 2022

E N T E R,

Hon. Veronica G. Hummel
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 |