

Duncan v Lopez
2022 NY Slip Op 35157(U)
April 14, 2022
Supreme Court, Bronx County
Docket Number: Index No. 27641/2020E
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
REGINA DUNCAN,

Plaintiff,

-against -

**Index No.27641/2020E
DECISION/ORDER
Motion Seq. 2**

NAIDA LOPEZ,

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 NAIDA LOPEZ [Mot. Seq. 2], for an order dismissing the complaint on the ground that plaintiff REGINA DUNCAN (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 April 9, 2017 (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 and wrists 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 ground of permanent loss of use and the ground is therefore deemed waived (*Burns v Kroening*, 164 AD3d 1640 [4th Dept 2018]). In any event, as plaintiff does not

allege or prove a total loss of a body part, the claim is dismissed (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 29 [2001]).

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 the pleadings, the bill of particulars, plaintiff’s deposition transcript, and the expert affirmations of Dr. Hillsman (orthopedist) and Dr. Peyser (radiologist).

Dr. Hillsman (orthopedist) examined plaintiff approximately two years post-Accident, on April 22, 2021. The expert reviewed the bill of particulars, MRIs (dated 1/2020 and 3/2020), and plaintiff’s treatment records. Dr. Hillsman finds normal ranges of motion and negative objective tests as to the spine, wrists and hands.

In the “diagnoses/impression” section, the expert finds the cervical spine and bilateral wrists to be “spine sprain/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.

Dr. Peyser submits his evaluation, dated May 18, 2021, of the MRIs of plaintiff’s cervical spine and left and right wrists (one to three months post-Accident). As for the cervical spine, he identifies no herniation. He finds straightening of the normal cervical lordosis and an otherwise unremarkable MRI. There is no post traumatic type etiology related to the Accident. The bulging disc described by Dr. Carlin cannot be appreciated on this review.

In terms of the left wrist, the expert finds no fracture or tear. On impression he finds limited examination and cystic change of the capitate. Otherwise, it is an unremarkable MRI of the left wrist. He finds, based on the technically limited MRI of the left wrist, cystic change of the capitate. This is an incidental finding unrelated to trauma. No post traumatic-type etiology

related to the Accident can be determined. The cystic change concurs with Dr. Carlin and the described possible intrasubstance tear of the scapholunate ligament is not appreciated on this review.

As for the right wrist the expert finds cystic change is noted within the capitate. There is a focal linear tear but no evidence of fracture or osseous contusion. The scapholunate ligament is intact and there are no joint effusions. The extensor and flexor tendons reveal no evidence of a tear. The region of the carpal tunnel is intact and there are no soft tissue hematoma or fluid collections. There was a limited examination with cystic change within the capitate and a linear tear triangular fibrocartilage. Review of technically limited MRI of the right wrist reveals cystic change within the capitate. This is an incidental finding unrelated to trauma. The linear tear of the triangular fibrocartilage is of indeterminate age and etiology. No definitive post traumatic-type etiology related to the Accident .

Finally, defendant submits plaintiff's testimony wherein plaintiff testified that she only missed three days of work post-Accident. Defendant also submits a reply affirmation.

Based on the submissions, defendant sets 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 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, a memorandum of law, treating records, plaintiff's medical records, and the affirmations/reports of Dr. Haftel, Dr. Carlin, Dr. Schwartz, Dr. Canty, and Dr. Horowitz.

In total, plaintiff's evidence raises triable issues of fact as to plaintiff's claims of "serious injury" as to the cervical spine and both wrists (*Morales v Cabral*, 177 AD3d 556 [1st Dept 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 experts in 2020 and 2021 (see *Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's experts find that, as a result of the Accident, plaintiff suffered a bulging disc in the cervical spine, tears in the wrist and traumatic injury to the relevant body parts. The experts find corresponding decreased range of motion. 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 AD3d 451, 452 [1st Dept 2018]). 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 AD3d 548 [1st Dept 2010]).

As for plaintiff's 90/180-day claim, defendant establishes entitlement to summary judgment by submitting plaintiff's deposition testimony stating that plaintiff was home in bed for two weeks after the Accident (*Pakeman v Karekezia*, 98 AD3d 840 [1st Dept 2012]; see *Licari v Elliott*, 57 NY2d 230 [1982]), and plaintiff's submissions in opposition fail to generate a question of fact as to the issue (*Tarjavaara v Considine*, 188 AD3d 509 [1st Dept 2020]).

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 NAIDA LOPEZ [Mot. Seq. 2], for an order dismissing the complaint on the ground that plaintiff REGINA DUNCAN (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 2 decided in all court records.

The attorneys are reminded of the Chief Justice's mandate and the companion court rules requiring that all attorneys make numerous good faith efforts (via letter, email, and telephone) to resolve any discovery issue before seeking court intervention. A stipulation signed by all parties stating the discovery is completed must be uploaded to NYSCEF before the Note of Issue may be filed.

The foregoing constitutes the decision and order of the court.

Dated: April 14, 2022

E N T E R,

Hon. 
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