

Carter v Port Imperial Ferry Corp.
2022 NY Slip Op 35168(U)
November 1, 2022
Supreme Court, Bronx County
Docket Number: Index No. 21142-2019E
Judge: Veronica G. Hummel
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This opinion is uncorrected and not selected for official publication.

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
DARRELL CARTER,

Plaintiff,

-against -

Index No. 21142-2019E
DECISION/ORDER
Motion Seq. 3

PORT IMPERIAL FERRY CORP. and FELIX CEBALLO,
Defendants.

-----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, relevant to the motion of defendants PORT IMPERIAL FERRY CORP. and FELIX CEBALLO (defendants) [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff DARRELL CARTER (plaintiff) has not sustained a “serious injury” as defined by Insurance Law 5102(d).

Plaintiff commenced this action to recover damages for personal injuries that plaintiff allegedly sustained as a result of an October 12, 2016, bus-pedestrian accident. Plaintiff claims to have suffered injuries to the lower back, right arm, right wrist, and right pointer finger and alleges that those injuries satisfy one or more of the following Insurance Law § 5102(d) threshold categories: permanent consequential limitation, significant limitation, and 90/180 days. Plaintiff returned to work within two weeks of the Accident.

Defendants seek summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under Insurance Law 5102(d) as a result of the accident. 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 an attorney affirmation, a statement of material facts, a

memorandum of law, deposition transcripts, the pleadings, and the affirmation/report of Dr. Wiener. Defendants also submit a reply.

Dr. Wiener examined plaintiff on August 9, 2021, approximately five years after the Accident. The expert reviewed the bill of particulars, plaintiff's medical records, including MRIs, and other reports. The doctor took range-of-motion measurements of the lumbar spine, cervical spine, right wrist, and right finger finding that plaintiff had full range of motion or insignificant loss of range of motion and negative objective tests.

The expert opines that the right wrist and right index finger are "sprain/strain". The cervical spine has radiographic evidence of pre-existing multilevel degenerative disc disease, and the lumbar spine has a strain, superimposed on pre-existing mechanical axial dysfunction, and pre-existing chronic low back pain. The expert finds no orthopedic disability and the findings do not "suggest, however, that [plaintiff's] subjective complaints would be considered causally related specifically to the [Accident]."

Based on the submissions, defendants sets forth a *prima facie* showing that plaintiff did not suffer a serious injury under the permanent consequential limitation, significant limitation, or 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 statement of material facts, deposition transcripts, and the report of Dr. Goldenberg (physical medicine).

In total, plaintiff's evidence raises triable issues of fact as to plaintiff's claims of "serious injury" to the cervical spine, lumbar spine, and right wrist under the threshold categories of permanent consequential limitation and significant limitation. Plaintiff's evidence demonstrates that plaintiff received medical treatment for the claimed injuries shortly after the Accident, and had substantial limitations in motion at the recent 2022 examination (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 bulging disc in the spine, and this finding is confirmed by the submitted MRI. As for the right wrist, the expert recommends arthroscopic surgery. 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 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 the 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]).

In contrast, defendants establish *prima facie* that there was no 90/180 day injury, and plaintiff fails to generate 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 PORT IMPERIAL FERRY CORP. and FELIX CEBALLO (defendants) [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff DARRELL CARTER (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied; and it is further

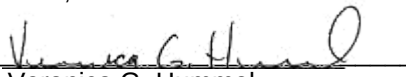
ORDERED that the Clerk shall mark motion sequence 3 decided in all court records.

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The foregoing constitutes the decision and order of the court.

Dated: November 1, 2022

ENTER,

Hon. 

Hon. Veronica G. Hummel

1. CHECK ONE.....

2. MOTION IS.....

3. CHECK IF APPROPRIATE.....

CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE

☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT