

Hidalgo v Padilla-Toribio

2023 NY Slip Op 32040(U)

June 14, 2023

Supreme Court, New York County

Docket Number: Index No. 150085/2018

Judge: James G. Clynes

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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RAMON HIDALGO,

Plaintiff,

- v -

SELINES PADILLA - TORIBIO, WENCESLAO TORIBIO

Defendant.

-----X

INDEX NO. 150085/2018

MOTION DATE 05/26/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that the motion by defendants Selines Padilla-Toribio and Wenceslao Toribio (collectively, Defendants), for summary judgment and dismissal of the complaint against them pursuant to CPLR 3212 on the grounds that Plaintiff, Ramon Hidalgo, did not sustain a serious injury as defined by Insurance Law 5102 (d) is granted without opposition. Plaintiff did not file written opposition.

Plaintiff commenced this action alleging he sustained serious injuries to his left foot and Achilles' tendon as defined by Insurance Law 5102 (d) as a result of a motor accident that occurred on December 23, 2016 between Plaintiff pedestrian and a motor vehicle operated by defendant Wenceslao Toribio and owned by defendant Selines Padilla-Toribio.

Defendants submit their motion for summary judgment asserting that Plaintiff did not sustain serious injuries within Insurance Law 5102 (d). Defendants allege that the injuries for which Plaintiff is seeking relief are not causally related to the underlying accident. In support of their motion, Defendants proffer the affirmed medical report of podiatrist, Dr. David Z Shechter, who examined Plaintiff on March 18, 2020.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). In order to satisfy their burden under Insurance Law 5102 (d), plaintiffs must meet the

“serious injury” threshold (*Toure v Avis Rent a Car Systems Inc*, 98 NY2d 345, 352 [2002] [where the court found that in order to establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a “permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system”). Insurance Law 5102 (d) outlines the serious injury threshold:

a personal injury which results in ... permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Under the no-fault law, a plaintiff can maintain an action for non-economic loss, including pain and suffering, arising from a motor vehicle accident only if the accident caused a serious injury (*Licari v Elliott*, 57 NY2d 230 [1982]).

To establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident, or rely on a plaintiff's deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]).

The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Licari, supra*, and *Lopez v Senatore*, 65 NY2d 1017 [1985]). In instances where a defendant asserts that the evidence reveals a preexisting injury or a degenerative condition, the plaintiff must present evidence to the contrary (*Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]).

In this case, Defendants have established that Plaintiff did not sustain a serious injury under Insurance Law 5102 (d). Defendants' podiatrist, Dr. David Z Shechter reviewed relevant records prior to his examination of Plaintiff, including New York Presbyterian Emergency Room notes,

physical therapy evaluations and notes from various visits, and Plaintiff's medical records, including a July 27, 2017 CT scan. In examining Plaintiff, Dr. Shechter measured Plaintiff's range of motion with a handheld goniometer, pursuant to AMA Guidelines, and found Plaintiff's dorsiflexion 10 degrees (normal 20), plantar flexion 40 degrees (normal 40), inversion 20 degrees (normal 30), and eversion 10 degrees (normal 20). Dr. Shechter noted a sprain in Plaintiff's left foot and ankle, degenerative joint disease in left foot and ankle, and peripheral arterial disease in the left leg. In the addendum to his report dated July 12, 2020, Dr. Shechter explained that Plaintiff's decrease in range of motion is due to the preexisting degenerative joint disease of his left foot and concluded that Plaintiff has "no accident-related disability."

With respect to any claims under the 90/180 category of serious injury, Defendants have also met their burden of proof by relying on Plaintiff's deposition testimony in which he stated that he was confined to the apartment for "about a month and a half."

As Plaintiff did not submit an opposition to this motion, there is no triable issue of fact as to whether Plaintiff sustained a serious injury to his left foot that was causally related to the accident. Defendants have met their prima facie burden through the affirmation of Dr. Shechter, who found that the injuries were due to a degenerative disease (*see Pommells v Perez*, 4 NY3d 566 [2005] [Defendant presented evidence of a preexisting degenerative disc condition causing plaintiff's alleged injuries, and plaintiff failed to rebut that evidence sufficiently to raise an issue of fact]; *see also Amaro v Am. Med. Response of NY, Inc.*, 99 AD3d 563 [1st Dept 2012] [holding, in part, defendants met their prima facie burden by submitting radiologist report who opined MRI's of the plaintiff's lumbar spine were degenerative]). With regard to the sprain in Plaintiff's left foot and ankle, strains and sprains are not considered serious injuries within the meaning of Insurance Law 5102 (d) (*Gaddy v Eyley*, 79 NY2d 955 [1992]; *Nagbe v Minigreen Hacking Group*, 22 AD3d 326 [1st Dept 2005]). As such, summary judgment is granted in favor of Defendants and Plaintiff's complaint against them is dismissed.

Accordingly, it is

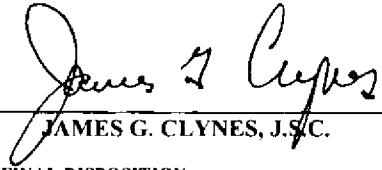
ORDERED that Defendants' motion for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5012 (d) is granted, and this action is dismissed.

ORDERED that the Clerk of the Court shall enter judgment in favor of Defendants dismissing the complaint against them in this action; and it is further

ORDERED that within 30 days of entry, movants shall serve a copy of this decision and order upon all parties with notice of entry.

This is the Decision and Order of the Court.

6/14/2023
DATE



JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE