

Cordero v Dos Reis
2023 NY Slip Op 35145(U)
February 2, 2023
Supreme Court, Bronx County
Docket Number: Index No. 23974/2017E
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**

-----X
JOSE CORDERO,

Plaintiff,

-against -

EDUARDO SANTANA DOS REIS and ABC LIMOUSINE, INC.,
Defendants.

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

**Index No. 23974/2017E
DECISION/ORDER
Motion Seq. 3**

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 EDUARDO SANTANA DOS REIS and ABC LIMOUSINE, INC. [Mot. Seq. 3], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff JOSE CORDERO 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 two-motor vehicle accident that occurred on December 8, 2015. Plaintiff alleges that he suffered injuries to his cervical spine and lumbar spine as a result of the Accident. Plaintiff testified that he returned to work approximately two days after the Accident.

In the bill of particulars, in relevant part, plaintiff alleges that, as the result of the Accident, plaintiff suffered injuries to the cervical spine and lumbar spine that qualify as serious

injuries under the permanent consequential, significant limitation, permanent loss¹ and 90/180 day categories.

Defendants move for 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 bills of particulars, a statement of material facts, plaintiff’s deposition transcript, plaintiff’s medical records, and the expert affirmations of Dr. Manspeizer (orthopedic), Dr. Carciente (neurology), and Dr. Fisher (radiologist).

Dr. Manspeizer bases his opinion on the details of a physical examination conducted on August 22, 2019, approximately four years post-Accident, and the bill of particulars. The expert reviewed the bills of particulars, the MRI reports, the Emergency Room records (12/08/2015), and the medical records of Dr. Fitzgerald, Dr. Rose, Dr. Nelson, and Dr. Wagner. In terms of the cervical spine, he finds normal ranges of motion and negative objective tests. In terms of the lumbar spine, the expert finds some restricted motion and negative tests. He findings plaintiff has resolved soft tissue sprains of neck and lower back.

Dr. Carciente bases his opinion on the details of a physical examination conducted on September 11, 2019, approximately four years post-Accident, and the bill of particulars. The expert reviewed the bills of particulars, the MRI reports, the EMG reports, the Emergency Room records (12/08/2015), the Family Chiropractic Care records, the records of the New York State Workers Compensation Board, the records of the City of New York Police Department, and the medical records of Dr. Fitzgerald, Dr. Rose, Dr. Nelson, and Dr. Wagner.

¹ It is obvious that plaintiff did not sustain a permanent loss of use (*see Riollano v Leavey*, 115 AD3d 494 [1st Dept 2019]). Such loss must be total (*Swift v N.Y. Transit Authority* 115 AD3d 507 [1st Dept 2014]), and evidence of mere limitations of use is insufficient (*see Melo v Grullon*, 1010 AD3d 452 [1st Dept 2021]).

He finds that plaintiff had a completely normal neurological examination. Plaintiff's MRIs reveal degenerative findings and there are no physical findings of disability. There is no evidence of an ongoing neurological injury, disability, or permanency.

Dr. Fisher reviews the September 8, 2016, and the May 2019 MRIs of the cervical spine and lumbar spine. The MRIs reveal minimal disc bulges and herniations and degenerative changes. He finds no evidence of posttraumatic injury or casually related injuries connected to the Accident.

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 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, plaintiff's medical records, plaintiff's affidavit, and the medical report of Dr. McMahon (orthopedist).

In total, plaintiff's evidence raises triable issues of fact as to the lumbar spine and cervical spine only under the significant limitation threshold category (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). The records submitted concerning course of treatment indicate persistent significant limitations in the spine, which the treating physicians casually related to the Accident and to objective MRI evidence, thus raising an issue of fact as to whether plaintiff sustained a significant limitation of the use of the cervical and lumbar spines (*Licari v Elliott*, 57 NY2d 230 [1982]). The report of plaintiff's expert of 2022, issued years after the last treatment, however, lacks sufficient details, such an explanation of the significant gaps in meaningful treatment, and is too far removed from the date of the Accident to establish causation and permanency (*Acevedo v Grayline N.Y. Tours, Inc.*, 2022 N.Y. Slip Op 02860 [1st Dept 2022]). As such, without a more medical proof, plaintiff fails to raise an issue as to a permanent consequential limitation of the cervical and lumbar spines (see *Lee v Lippman*, 136

AD3d 411 [1st Dept 2016]). Nevertheless, if it is found by the trier of fact that plaintiff sustained any injury that constitutes a “serious injury”, plaintiff is entitled to recover damages for any other injury causally related to the Accident (see *Gordon v Hernandez*, 181 AD3d 424 [1st Dept 2020]; *Morales v Cabral*, *supra*; *Pakeman v Karekezia*, 98 AD3d 840 [1st Dept 2012]; see *Licari v Elliott*, *supra*). To the extent that plaintiff relies on uncertified records, said records were also relied upon by defendants’ medical experts (*Cortez v. Bray*, 192 AD3d 451 [1st Dept 2021]).

In addition, defendants make a *prima facie* showing that plaintiff’s injuries do not satisfy the 90/180 category, and plaintiff’s submissions fail to generate an issue of a fact as to the category.

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

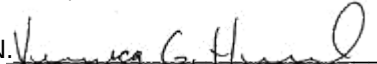
ORDERED that the motion of defendants EDUARDO SANTANA DOS REIS and ABC LIMOUSINE, INC. [Mot. Seq. 3], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff JOSE CORDERO has not sustained a “serious injury” as defined by Insurance Law 5102(d) is denied; and 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: February 2, 2023

ENTER,

HON. 

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 |