

Hidalgo v Dia
2024 NY Slip Op 35189(U)
February 15, 2024
Supreme Court, Bronx County
Docket Number: Index No. 25047/2020E
Judge: Patsy Gouldborne
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 13**

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MOISES HIDALGO and ALEXIS ASTACIO, GOVERNMENT EMPLOYEES INSURANCE COMPANY AS SUBROGEE OF MOISES HIDALGO Plaintiff(s) -against- FADHILOU DIA Defendant(s)	Index №. 25047/2020E Hon. <u>PATSY GOULDBORNE</u> Justice Supreme Court
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The following papers were read on this motion (Seq. No. 2) for **summary judgment** noticed for August 24, 2022, and submitted on May 8, 2023

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 33-43
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 51-57

Motion by Defendant, for an order pursuant to CPLR 3212 for summary judgment dismissing the complaint, on the ground that Plaintiffs, Moises Hidalgo (“Hidalgo”) and Alexis Astacio (“Astacio”) fail to satisfy the “serious injury” threshold as defined by New York Insurance Law § 5102 (d), is decided as follows:

I. Hidalgo

In support of the motion, Defendant submitted, inter alia: counsel’s affirmation in support; Hidalgo’s examination before trial transcript; and the orthopedic narrative of Dr. John Buckner.

Dr. Buckner determined with a reasonable degree of medical certainty that Hidalgo’s alleged lumbar spine and right knee injuries showed no evidence of injury. Although Dr. Buckner did not compare Hidalgo’s lumbar spine, hips, and right knee range of motion values to normal, he nevertheless examined Hidalgo and opined that there was no objective evidence of injury after administering diagnostic tests throughout those body parts (*Monahan v Reyes*, 184 A.D.3d 460 [1st Dept 2020], citing *Rodriguez v Konate*, 161 A.D.3d 565, 566 [1st Dept 2018]). With respect to Hidalgo’s alleged right ankle injury, however, Dr. Buckner stated “[m]annual muscle testing is symmetric in all major muscle groups of his lower extremities except for his right ankle... in spite of his normal Faber and calf muscle girth.” Further, Dr. Buckner did not claim that Hidalgo’s right ankle diagnostic test results were subjective (*compare Morales v Cabral*, 177 A.D.3d 556, 556 [1st Dept 2019]; *Alston v Elliott*, 159 A.D.3d 575 [1st Dept 2018], citing *Swift v New York Tr. Auth.*, 115 A.D.3d 507 [1st Dept 2014]). On the issue of causation, Dr. Buckner concluded that there is no causally related pathology in Hidalgo’s lumbar spine, right knee, and right ankle (*Moore v Almanzar*, 103 A.D.3d 415, 416 [1st Dept 2013] [orthopedist opining as to causation]). The Court notes that Dr. Buckner did not perform an examination on Hidalgo’s shoulders or hips, and therefore, Defendant failed to establish his prima facie entitlement to summary judgment with respect to those

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body parts.

Accordingly, Defendant has established that Hidalgo sustained no “permanent consequential” or “significant limitation” category of injury to his lumbar spine or right knee as a result of the subject accident (*see Tejada v LKQ Hunts Point Parts*, 166 A.D.3d 436 [1st Dept 2018]; N.Y. Ins. Law § 5102 [d]). In addition, Defendant has demonstrated that Hidalgo’s alleged lumbar spine, right knee, and right ankle injuries, are unrelated to this accident, thus, shifting the burden to Hidalgo to adequately address the issue of causation as to those body parts (*Bianchi v Mason*, 179 A.D.3d 567 [1st Dept 2020]; *Baez v Rahamatali*, 24 A.D.3d 256 [1st Dept 2005], *affd* 6 N.Y.3d 868 [2006]).

In opposition to the motion, Hidalgo submitted, inter alia: counsel’s affirmation in opposition; unsworn and uncertified medical records; and the affirmation of Dr. Siddhartha Sharma.

Dr. Sharma conducted an initial evaluation of Hidalgo on February 24, 2020, and documented, among other things, pain and range of motion limitations in Hidalgo’s right ankle. Thereafter, Dr. Sharma performed a surgery on Hidalgo’s right ankle on March 20, 2020. At the most recent examination on August 22, 2022, Dr. Sharma again found, among other things, pain and range of motion limitations in Hidalgo’s right ankle. In addition, Dr. Sharma causally related Hidalgo’s right ankle injury to the subject accident (*Holloman v Am. United Transportation Inc.*, 162 A.D.3d 423, 424 [1st Dept 2018]).

However, Dr. Sharma did not examine Hidalgo’s lumbar spine or right knee for range of motion. Nor did Dr. Sharma opine on the issue of causation as to Hidalgo’s lumbar spine or right knee. With regard to the lumbar spine and right knee, since there is no documented range of motion as to those body parts in opposition, they do not meet the “serious injury” threshold (*Lopez v Morel-Ulla*, 144 A.D.3d 504, 505 [1st Dept 2016] [“Absent limitations, there is no serious injury”] [citation omitted]). Moreover, as Hidalgo has failed to raise a triable issue of fact as to the issue of causation relating to his alleged lumbar spine and right knee injuries, those body parts are dismissed (*compare Oputa v New York City Tr. Auth.*, 216 A.D.3d 461 [1st Dept 2023] [“[t]o the extent causation was placed in issue, [the doctor] also explained the basis for his opinion that plaintiff’s knee injury was causally related to the accident]).

As to the alleged gap in treatment, Hidalgo testified that during the year 2021, he did not receive any treatment (Hidalgo EBT at 93). Nevertheless, Dr. Sharma’s surgical affirmation and surgical report demonstrates that Dr. Sharma performed a right ankle surgery on March 20, 2020. Thereafter, Dr. Sharma stated that Hidalgo treated for “several months after his surgery” (NYSCEF Doc No. 52, ¶25) until treatment was considered palliative (*Ortiz v Boamah*, 169 A.D.3d 486, 489 [1st Dept 2019]). Upon review of the evidence submitted, the Court finds that any gap in treatment argument is not dispositive.

With respect to Hidalgo’s “90/180-day” injury claim, Defendant sufficiently established his entitlement to dismissal of this claim by submitting Hidalgo’s deposition transcript. Hidalgo testified that following the

subject accident he missed only a few days of work (Hidalgo EBT at 20-21; 30-32). This demonstrates that Hidalgo has no viable “90/180 day” injury claim (*Rivera v Lopez-Reyes*, 203 A.D.3d 554, 555 [1st Dept 2022]).

Finally, there is no evidence on this record that Hidalgo sustained a “total loss of use” of any body part, and therefore, any claim that Hidalgo sustained a “permanent loss of use” of any body part is dismissed (*see Riollano v Leavey*, 173 A.D.3d 494 [1st Dept 2019], citing *Oberly v Bangs Ambulance*, 96 N.Y.2d 295, 299 [2001]).

II. Astacio

In support of the motion, Defendants submitted, inter alia: counsel’s affirmation in support; Astacio’s examination before trial transcript; and the orthopedic narrative of Dr. John Buckner.

Dr. Buckner determined with a reasonable degree of medical certainty that Astacio’s alleged cervical spine, lumbar spine, and left knee injuries showed no evidence of injury. Although Dr. Buckner did not compare Astacio’s cervical spine, lumbar spine, and left knee range of motion values to normal, he nevertheless examined Astacio and opined that there was no objective evidence of injury after administering diagnostic tests throughout those body parts (*Monahan*, 184 A.D.3d 460, citing *Rodriguez*, 161 A.D.3d at 566). On the issue of causation, Dr. Buckner concluded that there is no causally related pathology in Astacio’s cervical spine, lumbar spine, and left knee (*Moore*, 103 A.D.3d at 416 [orthopedist opining as to causation]). The Court notes that Dr. Buckner did not perform an examination on Astacio’s shoulders or hips, and therefore, Defendant failed to establish his prima facie entitlement to summary judgement with respect to those body parts.

Accordingly, Defendant has established that Astacio sustained no “permanent consequential” or “significant limitation” category of injury to his cervical spine, lumbar spine, or left knee as a result of the subject accident (*see Tejada v LKQ Hunts Point Parts*, 166 A.D.3d 436 [1st Dept 2018]; N.Y. Ins. Law § 5102 [d]). In addition, Defendant has demonstrated that Astacio’s alleged cervical spine, lumbar spine, and left knee injuries, are unrelated to this accident, thus, shifting the burden to Astacio to adequately address the issue of causation as to those body parts (*Bianchi*, 179 A.D.3d 567; *Baez*, 24 A.D.3d 256, *affd* 6 N.Y.3d 868).

In opposition to the motion, Astacio submitted, inter alia: counsel’s affirmation in opposition; unsworn and uncertified medical records; and the affidavit of chiropractor Dr. Kris Rusek.

Dr. Rusek conducted an initial evaluation of Astacio “via Zoom teleconference” on September 14, 2022. Dr. Rusek conducted this teleconference, in part, pursuant to teleconference goniometry, and provided a medical source for such practice. Dr. Rusek documented, among other things, pain and range of motion limitations in Astacio’s cervical spine, lumbar spine and left knee. In addition, Dr. Rusek causally related Astacio’s cervical spine, lumbar spine and left knee injuries to the subject accident (*Holloman v Am. United Transportation Inc.*, 162 A.D.3d 423, 424 [1st Dept 2018]).

As to the alleged gap in treatment, Astacio testified that he initially stopped treating due to the COVID-19 pandemic (Astacio EBT at 51-52). In addition, Dr. Rusek stated that Astacio reached maximum medical improvement (*Ortiz v Boamah*, 169 A.D.3d 486, 489 [1st Dept 2019]). Upon review of the evidence submitted, the Court finds that any gap in treatment argument is not dispositive.

Defendant failed to affirmatively disprove Astacio's claim that he sustained a "90/180 day" category of serious injury since Astacio testified that he was not employed at the time of this accident (Astacio EBT at 17-18) – nor was Astacio asked about her confinement (*see Seepersaud v L & M Bus Corp.*, 140 A.D.3d 579 [1st Dept 2016]). Defendant failed to set forth any other argument relating to a "90/180 day" category of injury in the moving papers.

Finally, there is no evidence on this record that Astacio sustained a "total loss of use" of any body part, and therefore, any claim that Astacio sustained a "permanent loss of use" of any body part is dismissed (*see Riollano v Leavey*, 173 A.D.3d 494 [1st Dept 2019], citing *Oberly v Bangs Ambulance*, 96 N.Y.2d 295, 299 [2001]).

III. Conclusion

Accordingly, it is hereby,

ORDERED, that Defendant's motion for summary judgment is granted to the extent that Hidalgo's claim that he sustained any injury to his lumbar spine and right knee is dismissed; and it is further

ORDERED, that Defendant's motion for summary judgment is granted to the extent that Hidalgo's claim that he sustained a "90/180-day" injury is dismissed; and it is further

ORDERED, that Defendant's motion for summary judgment is granted to the extent that Hidalgo's claim that he sustained a "permanent loss of use" of any body part is dismissed; and it is further

ORDERED, that Defendant's motion for summary judgment as Astacio's claim that he sustained a "90/180-day" injury is denied; and it is further

ORDERED, that Defendant's motion for summary judgment is granted to the extent that Astacio's claim that he sustained a "permanent loss of use" of any body part is dismissed; and it is further


ORDERED, that Defendant's motion for summary judgment is otherwise denied, and it is further,

ORDERED, that Defendant shall serve a copy of this Order with Notice of Entry upon all parties within thirty days of the upload of this Order in NYSCEF.

This constitutes the Decision and Order of this Court.

Dated: February 15, 2024

Hon.


PATSY GOULDBORNE, J.S.C.