

Melendez v Metropolitan Transp. Auth.
2016 NY Slip Op 31202(U)
June 24, 2016
Supreme Court, New York County
Docket Number: 155386/2012
Judge: Michael D. Stallman
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

RICHARD DANIEL MELENDEZ and LAURA MELENDEZ,

INDEX NO. 155386/2012

Plaintiffs,

MOTION DATE 2/9/16

- v -

MOTION SEQ. NO. 001

**METROPOLITAN TRANSPORTATION AUTHORITY,
NEW YORK CITY TRANSIT AUTHORITY, and
MOHAMMED D. HOSSAIN,**

Defendants.

The following papers, numbered 16-26, 32-41, were read on this motion for summary judgment

Notice of Motion — Affirmation — Exhibits — Affidavit of Service

No(s). 16-26

Affirmation in Opposition — Exhibits — Affidavit of Service

No(s). 32-41

Upon the foregoing papers, it is ordered that defendants' motion for summary judgment is granted in part, and so much of the complaint that alleges a serious injury within the meaning of Insurance Law § 5102 (d) based on the 90/180 day category is dismissed, and so much of the complaint that alleges a serious injury as to plaintiff Richard Melendez's thoracic spine and left knee under the categories significant or permanent consequential limitation of use is also dismissed, and the motion is otherwise denied.

On April 21, 2012, a vehicle owned by plaintiff Laura Melendez and operated by plaintiff Richard Melendez, then 24 years old, allegedly made contact with a vehicle bearing New York State registration number L55000, operated by defendant Mohammed D. Hossain, on West 155th Street and St. Nicholas Avenue in Manhattan. Defendants did not deny that defendant New York City Transit Authority was the owner of the vehicle operated by Hossain. (See Coffey Affirm., Ex B [Complaint ¶ 6] and Ex C [Verified Answer].)

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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According to the bill of particulars, plaintiff Richard Melendez sustained, among other injuries, left knee strain, traumatic chondromalacia patella, tendinosis of patellar tendon; mid and low back sprain and strain with pain, decreased range of motion; L5-S1 radiculopathy; thoracic disc protrusion; cervical spine strain and pain; cervical disc bulges with radiculopathy. (Coffey Affirm., Ex D [Bill of Particulars] ¶ 10.)

Plaintiff Laura Melendez asserts a cause of action for property damage to her vehicle. According to defendants, she has discontinued her cause of action, but the Court notes that such stipulation of discontinuance has not been efiled on NYSCEF.

Defendants now move for summary judgment on the ground that plaintiff Richard Melendez did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiffs oppose the motion.

Defendants met their prima facie burden that plaintiff Richard Melendez did not suffer a serious injury based on the 90/180 day category. Although the bill of particulars states that plaintiff was “confined to his bed intermittently and to his home from the date of the accident until September 1, 2012” it also states that plaintiff Richard Melendez “was a junior at Baruch College, who missed on or two classes.” (Bill of Particulars ¶¶ 11A, 11B.) Plaintiff Richard Melendez testified at statutory hearing, “One or two classes I missed, because of the accident”, but “I finished the semester, yes.” (Coffey Affirm., Ex E [Melendez Tr.], at 8.)

Plaintiff Richard Melendez’s return to classes during the 180 days following the accident establishes a prima facie lack of serious injury based on the 90/180 day category. (*See Antonio v Gear Trans Corp.*, 65

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AD3d 869 [1st Dept 2009] [plaintiff returned to school a week after the accident]; *Ayala v Douglas*, 57 AD3d 266 [1st Dept 2008] [plaintiff returned to school after three weeks and that he was unable to participate in gym and sports for some time]; *Zamore v Peralta*, 50 AD3d 423 [1st Dept 2008] [although her attendance may have been irregular, plaintiff was able to return to school within 10 days of the accident].)

Plaintiffs failed to raise a triable issue of fact warranting denial of summary judgment dismissing serious injury based on the 90/180 day category.

Defendants made a prima facie showing of the absence of a significant or permanent consequential limitation of use of Richard Melendez's cervical spine, left knee, and thoracic spine based on the affirmed reports of their experts. (*Michels v Marton*, 130 AD3d 476 [1st Dept 2015]; *Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012].) Dr. Apazidis, an orthopedist, found normal ranges of motion in Melendez's cervical spine and left knee, and Dr. Desrouleaux found no neurological deficits. (Coffey Affirm., Exs G, H.)

Plaintiffs raise triable issues of fact as to limitations of use in Richard Melendez's cervical spine. At an examination on December 28, 2015, Dr. Goldstein found limited range of motion in Richard Melendez's cervical spine in 3 planes. (Friedman Opp. Affirm., Ex 8.)

However, plaintiffs' submissions fail to raise a triable issue of fact as to Richard Melendez's thoracic spine or left knee. "[A] minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute." (*Licari v Elliott*, 57 NY2d 230, 236 [1982].) Here, a report of an MRI of Richard Melendez's left knee taken of May 12, 2012 states, "mild patellofemoral arthritic changes with mild diffuse thinning of the patellar cartilage and patellar tilt." (Friedman Opp.

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Affirm., Ex 7.) Although Dr. Goldstein detected crepitus in the patellofemoral joint on range of motion testing, and found weakness and atrophy in the left quadriceps (i.e., the circumference of the left thigh measured 1 cm less the right thigh), Dr. Goldstein found full range of motion in Richard Melendez's left knee. (See *Ferrieri v Cascio*, 12 Misc 3d 1165(A) [Sup Ct, Suffolk County 2006] [1.5 cm of atrophy of the left quadriceps and plaintiff displayed signs and symptoms consistent with post-traumatic patella chondromalacia].)

Defendants did not make a prima facie showing of the absence of a significant or permanent consequential limitation of use of Richard Melendez's lumbar spine. Although defendants' neurologist measured normal range of motion in plaintiff Richard Melendez's lumbar spine, defendants' orthopedist purportedly measured limited range of motion, i.e., 50 degrees in flexion (60 degrees normal). (Coffey Affirm., Exs G, H.) Even if defendants met their prima facie burden as to the lumbar spine, plaintiffs' orthopedist, Dr. Goldstein, found limited range of motion in his lumbar spine in 2 planes. (Friedman Opp. Affirm., Ex 8.)

Therefore, defendants are also granted summary judgment dismissing so much of the complaint as alleges a serious injury under the categories significant or permanent consequential limitation of use, as to alleged injuries to plaintiff Richard Melendez's thoracic spine and left knee, and the motion is otherwise denied.


Although the Court has ruled that alleged injuries to Richard Melendez's left knee and thoracic spine do not constitute a serious injury, "if the trier of fact determines that plaintiff sustained a serious injury [on any statutory ground], it may award damages for all injuries causally

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related to the accident, even those that do not meet the threshold.”
(*Angeles v American United Transp., Inc.*, 110 AD3d 639, 640 [1st Dept
2013].)

Dated: 6/24/18
New York, New York


_____, J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

HON. MICHAEL D. STALLMAN