

Acevedo v Singh

2021 NY Slip Op 33029(U)

November 10, 2021

Supreme Court, Bronx County

Docket Number: Index No. 21410/2019E

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
ELAZIA ACEVEDO

Plaintiff,

-against -

**Index No. 21410/2019E
DECISION/ORDER
Motion Seq. 2**

DALJIT SINGH and BALWINDER JASWAL,
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 in support of and in opposition to: the motion of defendants DALJIT SINGH and BALWINDER JASWAL [Mot. Seq. 2], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff ELAZIA ACEVEDO has not sustained a "serious injury" as defined by Insurance Law 5102(d); and the cross-motion by plaintiff, made pursuant to CPLR 3212, seeking an order denying defendants' motion and granting costs and sanctions against defendants for making a frivolous motion pursuant to 22 NYCRR 130-1.1.

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained when, as a pedestrian, she was struck by defendants' vehicle on December 16,2018.

In the bill of particulars, in relevant part, plaintiff alleges that, as the result of the Accident, plaintiff suffered personal injuries as a result of the subject accident, including but not limited to injuries to the right foot and right shoulder. Plaintiff alleges that these injuries qualify as serious injuries under the fracture, permanent consequential, significant limitation,

permanent loss,¹ and 90/180 day categories. Plaintiff underwent surgery on the right ankle and foot on February 1, 2019. Plaintiff testified that she returned to work one month after the accident.

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, plaintiff’s deposition transcript, plaintiff’s medical records, and the expert affirmations of Dr. Corso (orthopedic) and Dr. Cantos (radiologist).

Dr. Corso bases his opinion on the details of a physical examination conducted on October 15, 2020, approximately one year post-Accident, the bills of particulars and the police report. The examination of the right ankle and right foot revealed no decreases in range of motion and no instability was noted. In the “impression section”, the expert finds that the right ankle sprain was resolved. As for the right foot, he notes “resolved status post right foot surgery”.

In the discussion, the expert finds that the injured body parts alleged in the bill of particulars have fully resolved. Plaintiff did not sustain any significant or permanent injury as a result of the motor vehicle accident. There are no objective clinical findings indicative of a present disability or functional impairment which prevents plaintiff from engaging in the activities of daily living and usual activities including work, school, and hobbies.

In his report in support of defendant’s motion (dated June 11, 2019), Dr. Cantos reviews the MRI of the right foot. The MRI was taken on January 13, 2019, one month post-Accident.

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]).

The expert finds no acute fracture, there is intertarsal fluid in the metatarsal tarsal joints and states that a “Mid foot sprain is to be considered”. No tendon disruption is noted. Under the impression section, the physician states that “findings suggestive of a mild mid foot sprain and/or Lisfranc injury” and “ no fracture identified”. These findings are repeated in the commentary section of the report. The expert does not review the January 13, 2019 MRI of plaintiff’s right ankle.

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury under the fracture, permanent consequential limitation or significant limitation 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, supplemental bill of particulars, a narrative report and surgical records of Dr. Sharma (orthopaedics), and the report of Dr. Prakash (radiologist).

In total, plaintiff’s evidence raises triable issues of fact as to the right ankle under the fracture, permanent consequential, and significant limitation threshold categories and, as to the right foot, under the permanent consequential and significant limitation threshold categories (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff’s submissions demonstrate that plaintiff received medical treatment for the claimed injuries promptly after the Accident, and that plaintiff had substantial limitations in motion in the relevant body parts at the examinations immediately after the Accident, and more recently at the recent examination in February 2021 (see *Perl v Meher*, 18 NY3d 208 [2011]). The experts opine that the plaintiff suffers from a decreased in range of motion that is significant, and that plaintiff suffered permanent injuries to the relevant body parts. Plaintiff’s experts reviewed the records and opines that the injuries to the relevant body parts were caused by the Accident, and are permanent (see *Morales v Cabral*, *supra*; see *Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Upon a review of the MRI and x-rays, plaintiff’s expert finds a fracture of the right ankle,

although no fracture in the right foot is diagnosed. Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under the threshold categories of fracture, permanent consequential limitation, and significant limitation (see *Smith v Green*, 188 AD3d 473 [1st Dept 2020]; see *Bonilla v Vargas–Nunez*, 147 AD3d 461 [1st Dept 2017]; *Morales v Cabral*, *supra*). 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 by submitting plaintiff's own testimony that she returned to work on month after the Accident and plaintiff's submissions fail to raise an issue of fact (*Morales v Cabral*, *supra*; see *Pakeman v Karekezia*, 98 AD3d 840 [1st Dept 2012]; see *Licari v Elliott*, *supra*).

Furthermore, in light of the conflicting medical evidence, the court finds that defendants' motion was not frivolous within the meaning of 22 NYCRR 130-1.1 and plaintiff's cross-motion is denied.

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 DALJIT SINGH and BALWINDER JASWAL [Mot. Seq. 2], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff ELAZIA ACEVEDO has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied; and it is further

ORDERED that the cross-motion by plaintiff, made pursuant to CPLR 3212, seeking an order denying defendants' motion and granting costs and sanctions against defendants for making a frivolous motion pursuant to 22 NYCRR 130-1.1 is denied.

The foregoing constitutes the decision and order of the court.

Dated: November 10, 2021

ENTER,

s/Hon. Veronica G. Hummel/signed 11/10/2021

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