

Novac v Munoz

2021 NY Slip Op 33035(U)

November 19, 2021

Supreme Court, Bronx County

Docket Number: Index No. 22609/2019E

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**

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FLORINA NOVAC,

Plaintiff,

-against -

**Index No. 22609/2019E
DECISION/ORDER
Motion Seq. 1**

ALBERT MUNOZ and HAMBONE MANAGEMENT CORP,
Defendants.

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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 ALBERT MUNOZ and HAMBONE MANAGEMENT CORP. (defendants) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff FLORINA NOVAC (plaintiff) 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 motor vehicle accident that occurred on October 22,2018 (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, lumbar spine, and left shoulder that satisfy the following Insurance Law 5102(d) threshold categories of: permanent loss of use; permanent consequential limitation, significant limitation, and 90/180 days. In the opposition, plaintiff does not claim or address the ground of permanent loss of use and the ground is therefore deemed waived (*Burns v Kroening*, 164 AD3d 1640 [4th Dept 2018]). In any event,

as plaintiff does not allege or prove a total loss of a body part, the claim is dismissed (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 29 [2001]).

Defendants seek 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 bill of particulars, plaintiff’s deposition transcript, and the expert affirmations of Dr. Corso (orthopedics) and Dr. Fitzpatrick (radiologist).

Dr. Corso bases his opinion on the details of a physical examination conducted on August 25, 2020, approximately two years post-Accident, the bills of particulars, and the police report. The examination of the cervical spine, lumbar spine, thoracic spine, and left shoulder reveals no decreases in range of motion and negative objective tests. In the “impression section”, the expert finds cervical, lumbar, thoracic, and left shoulder sprains are “resolved”

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 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.

Dr. Fitzpatrick submits his evaluation, dated September 30, 2019, of the MRIs performed on plaintiff’s cervical spine and lumbar spine (taken on 10/20/2018 one week post-Accident). As for the lumbar spine, he finds mild disc bulges and mild to moderate multilevel degenerative disc disease, which occurs over a protracted time of at least six months. The MRI findings are within the spectrum of degenerative disc disease and are not causally related to acute traumatic lumbar spine injury.

In terms of the cervical spine, the expert finds loss of disc height and small broad-based disc osteophytes. The impression is of multilevel degenerative disc disease. The physician finds no traumatic injury, and degenerative changes that require six months to form. The MRI findings are within the spectrum of degenerative disc disease and are not causally related to acute traumatic cervical spine injury.

As for the left shoulder MRI (performed two months following the Accident) the expert finds the rotator cuff is intact with moderate tendinosis of the tendon. There is bursitis, and no joint effusion. As an impression, the expert opines that rotator cuff tendinosis with findings of subacromial impingement is present. He finds no traumatic injury, and opines that the tendinosis is the result of chronic overuse causing degeneration over the course of months to years. The subacromial impingement is an acquired degenerative condition with no traumatic basis.

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body parts under the 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, a copy of defendants' motion papers and the affirmation Dr. Guy (pain management).

Dr. Guy, in his report dated April 13, 2021, states that he only examined plaintiff on February 16, 2021. He reviewed the MRIs and plaintiff's medical records. In sum and substance, Dr. Guy measured significant decreases in range in motion of the cervical and lumbar spine. He does not set forth measurements for any decrease range in motion of the left shoulder. Based on the 2018 MRIs, he diagnoses disc herniations in the lumbar and cervical spine and a tear and bursitis in the left shoulder. Although Dr. Guy finds a tear in the left shoulder in the 2018 MRI, in light of the lack of any recent objective measurement of significant

loss of range in motion of the shoulder, this conclusory finding, without more, is insufficient to rebut defendants' showing that the alleged injuries to plaintiff's left shoulder do not satisfy any category of serious injury.

In total, however, plaintiff's evidence raises triable issues of fact as to plaintiff's claims of "serious injury" as to the cervical spine and lumbar spine (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that plaintiff received medical treatment for the claimed injuries after the Accident, and that plaintiff had substantial limitations in motion in the relevant body parts after the Accident, and at the recent examination by plaintiff's expert in February 2021 (see *Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's expert finds that, as a result of the Accident, and not degeneration, plaintiff, suffered loss of range of motion and bulging discs and herniated discs in the cervical spine and lumbar spine. The expert opines that these injuries are significant and causally related to the Accident and permanent in nature and the Accident was the primary competent cause of the injuries (*Morales v Cabral, supra*; see *Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under threshold categories of permanent consequential limitation and significant limitation as to the cervical spine and lumbar spine. 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 plaintiff returned to work shortly after the Accident and plaintiff's submissions fail to raise an issue of fact (*Morales v Cabral, supra*).

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 ALBERT MUNOZ and HAMBONE MANAGEMENT CORP. [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff FLORINA NOVAC has not sustained a “serious injury” as defined by Insurance Law 5102(d) is denied.

The attorneys are reminded of the Chief Justice’s mandate and the companion court rules requiring that all attorneys make numerous good faith efforts (via letter, email and telephone) to resolve any discovery issue before seeking court intervention. The note of issue may not be filed until a stipulation signed by all parties stating that discovery is completed is uploaded to NYSCEF.

The foregoing constitutes the decision and order of the court.

Dated: November 19, 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 11/19/2021

Hon. Veronica G. Hummel, A.J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY x CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED x DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT