

Kim v Galatas

2021 NY Slip Op 33037(U)

November 15, 2021

Supreme Court, Bronx County

Docket Number: Index No. 23345/2019E

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
ANTHONY KIM

Plaintiff,

-against -

**Index No. 23345/2019E
DECISION/ORDER
Motion Seq. 1**

DIMITRA T. GALATAS

Defendant.

-----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 defendant DIMITRA T. GALATAS [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff ANTHONY KIM (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 September 26, 2016 (the Accident).

In the bill of particulars and opposition papers, in relevant part, plaintiff alleges that as the result of the Accident, plaintiff suffered injuries to the cervical spine that satisfy the following Insurance Law 5102(d) threshold categories: permanent loss, 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]). Plaintiff testified that he missed one week of employment due to the Accident.

Defendant seeks summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under Insurance Law 5102(d). Defendant argues 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 affirmation of Dr. Hillsman (orthopedist). The action was commenced on March 20, 2019.

Dr. Hillsman (orthopedist) examined plaintiff on November 19, 2020. The expert reviewed the bill of particulars, photographs of the car, PT records (dated 10/06/2016), a medical note (dated 09/27/2016), Orthopaedic Associates of Manhasset notes (09/28/2016-05/112/2017) and a cervical MRI (dated 09/28/2016). Dr. Hillsman finds normal ranges of motion and negative objective tests as to the cervical spine, thoracic spine, lumbar spine, and for both shoulders, wrists, hands, knees, hips, ankles and feet.

In the “Causal Statement” section, the expert finds that there is a causal relationship between the diagnosed injuries to the Accident. He finds that there are no current objective findings consistent and proportional to the subjective complaints reported. There is evidence that plaintiff responded to treatment with objective functional gain. Treatment would not be appropriate or medically necessary currently, as there is no need for further treatment

Under the “Disability” section, the expert finds that based on orthopedic clinical evaluation, the plaintiff does not demonstrate any disability and may perform normal daily living activities without restrictions, including work.

Based on the submissions, defendant 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 personal affidavit, the expert affirmation of Dr. Rothenberg (orthopaedics) and plaintiff's medical records.

In total, plaintiff's evidence raises triable issues of fact as to plaintiff's claims of "serious injury" as to the cervical spine only (*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 part after the Accident and at the recent examination by plaintiff's expert in 2021 (see *Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's expert finds that, as a result of the Accident, plaintiff suffered a bulging disc and herniated discs in the cervical spine. The expert finds corresponding decreased range of motion. 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. 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]).

As for plaintiff's 90/180-day claim, defendants establish entitlement to summary judgment by submitting plaintiff's deposition testimony stating that plaintiff returned to work soon after the Accident (*Pakeman v Karekezia*, 98 AD3d 840 [1st Dept 2012]; see *Licari v Elliott*, 57 NY2d 230 [1982]), and plaintiff's submissions in opposition fail to generate a question of fact as to the issue (*Tarjavaara v Considine*, 188 AD3d 509 [1st Dept 2020]).

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 defendant DIMITRA T. GALATAS [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff ANTHONY KIM (plaintiff) 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. A stipulation signed by all parties stating the discovery is completed must be uploaded to NYSCEF before the Note of Issue may be filed.

The foregoing constitutes the decision and order of the court.

Dated: November 15, 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 11/15/2021
Hon. Veronica G. Hummel, A.J.S.C.

CHECK ONE.....	CASE DISPOSED IN ITS ENTIRETY <input checked="" type="checkbox"/> CASE STILL ACTIVE
2. MOTION IS.....	<input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
3. CHECK IF APPROPRIATE.....	<input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> SCHEDULE APPEARANCE
	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFEREE APPOINTMENT