

Alvarado v Vargas-Kelley
2021 NY Slip Op 33039(U)
December 8, 2021
Supreme Court, Bronx County
Docket Number: Index No. 23984-2019EE
Judge: Veronica G. Hummel
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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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ELSA ALVARADO,

Plaintiff,

-against -

**Index No. 23984-2019EE
DECISION/ORDER
Motion Seq. 1**

A. VARGAS-KELLEY, HOMMY PEREZCIRINO and WENDOLY
ROSAN JACKSON SAMBULA,
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 defendant A.VARGAS-KELLEY [Mot. Seq. 1] and the cross-motion of defendants HOMMY PEREZCIRINO and WENDOLY ROSAN JACKSON SAMBULA, made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff ELSA ALVARADO(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 at the intersection of Bruckner Boulevard and Wheeler Avenue in Bronx County, on October 9, 2016 (the Accident).

In the bill of particulars and opposition papers, in relevant part, plaintiff alleges that, as the result of the Accident, she suffered injuries to the cervical, thoracic, and lumbar spine that satisfy the following Insurance Law 5102(d) threshold categories: permanent consequential limitation; significant limitation and 90/180 days.

Defendants seeks 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 and cross-motions are supported by the pleadings, the bill of particulars, deposition transcripts, and the expert affirmations of Dr. Katz (orthopedist) and Dr. Fitzpatrick (radiologist).

Dr. Katz (orthopedist) examined plaintiff five years post-Accident, on January 27, 2021. The expert reviewed the bill of particulars. Dr. Katz finds limited flexion and range of motion between 15 to 20 degrees in the cervical spine with negative objective tests. As for the thoracic spine, the results are all normal. In terms of the lumbar spine, there is a significant loss of range of motion in flexion and lateral bending, with negative objective tests.

In the “diagnoses/impression” section, the expert finds the cervical spine, thoracic spine and lumbar spine are “spine sprain/strain-resolved”. The doctor opines that plaintiff does not suffer from an orthopedic disability, permanency or residuals and is able to seek gainful employment with no limitations. Plaintiff is able to perform all activities of daily living.

Dr. Fitzpatrick submits his evaluation, dated June 9, 2020, of the MRIs of plaintiff’s cervical, thoracic and lumbar spine taken two months post-Accident. As for the cervical spine, the expert finds normal marrow signal, diffuse loss of disc signal and mild disc osteophyte. His impression is “ mild to moderate, multilevel cervical degenerative disc disease, mild canal stenosis at C-4-C-5 and C5-C6. As a conclusion, he finds no traumatic injury with disc degeneration that is age-related, and drying out and loss of the disc substance which occurs over a protracted time course of at least 6-months, with no traumatic basis. 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 lumbar spine, he makes similar findings. There is a mild diffuse disc bulge. His impression is moderate degenerative disc disease, and that the findings are the result of degenerative disc disease and are not casually related to acute lumbar spine injury. The condition is the result of chronic disc degeneration as the type of new bone formation requires at least six months to develop.

In terms of the thoracic spine, the expert finds multilevel disc bulges and the presence of mild diffuse thoracic degenerative disc disease. There is no traumatic injury and as was the case with the other MRIs, the findings require at least six months to develop.

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 and cross-motion, submitting an attorney affirmation, the affirmation of Dr. Schwartz (orthopedic surgeon), and the affirmation/report of Dr. Tubman (radiologist).

In total, plaintiff's evidence raises triable issues of fact as to her 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 she received medical treatment for the claimed injuries after the Accident, and that she had substantial limitations in motion in the relevant body parts after the Accident and at the recent examination by plaintiff's expert in 2021 (see *Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's experts find that, as a result of the Accident, and not degeneration, plaintiff suffered a bulging discs in the 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 the 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 plaintiff did not qualify under the 90/180 day category based on plaintiff's testimony that she returned to work within two weeks, 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 defendant A.VARGAS-KELLEY [Mot. Seq. 1] and the cross-motion of defendants HOMMY PEREZCIRINO and WENDOLY ROSAN JACKSON SAMBULA, made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff ELSA ALVARADO has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied.

The foregoing constitutes the decision and order of the court.

Dated: December 8, 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 12/08/2021
Hon. Veronica G. Hummel, A.J.S.C.

