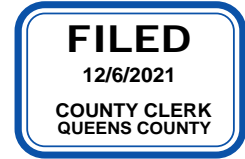


<b>Lisda v Garciaduarte</b>
2021 NY Slip Op 33163(U)
December 3, 2021
Supreme Court, Queens County
Docket Number: Index No. 721462/2019
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY



Present: **HONORABLE CHEREÉ A. BUGGS**  
**Justice**

IAS PART 30

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YUSA LISDA,

Index No. 721462/2019

Plaintiff,

Motion

Date: December 1, 2021

-against-

Motion Cal. No.: 15

ERICK GARCIADUARTE and MYRNA  
GUADALUPE BURGOS FRANCO,

Motion Sequence No.: 2

Defendants.  
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The following efile papers numbered EF 25-33 submitted and considered on this motion by defendants ERICK GARCIADUARTE and MYRNA GUADALUPE BURGOS FRANCO (collectively referred to as “Defendants”) seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as “CPLR”) 3212 finding that the plaintiff YUSA LISDA (hereinafter referred to as” Plaintiff”) did not sustain a “serious injury” as defined under New York Insurance Law § 5102 (d) thus plaintiff’s claims for non-economic loss are barred under § 5104(a) of the statute and for such other and further relief as this Court deems just and proper.

	Papers
	<u>Numbered</u>
Notice of Motion -Aff.-Exhibits.....	EF 25-32
Stipulation.....	EF 33

This is a negligence action arising out of a motor vehicle accident between the parties. The accident occurred on January 29, 2019 on the Southbound Cross Island Parkway at or near the Grand Central Parkway in the County of Queens. Plaintiff alleges he suffered injuries to his right elbow, both shoulders, right hand (5<sup>th</sup> digit) and Plaintiff also alleges he suffered a concussion.

Specifically Plaintiff claims the following injuries in his Bill of Particulars:

- Right elbow partial tear of the lateral collateral ligament;
- Right elbow 10 mm partial tear at the humeral origin;
- Right elbow partial tear of the extensor tendon;
- Right elbow joint space narrowing with thickened lateral and superior synovial fold;

- Right elbow impingement;
- Right elbow loose bodies;
- Right elbow collateral ligament sprain at the humerus;
- Right elbow tendinopathy;
- Right elbow effusion;
- Right elbow internal derangement;
- Right sided median entrapment neuropathy at the wrist;
- Right cubital tunnel syndrome;
- Left shoulder internal derangement;
- Right shoulder internal derangement;
- Right hand internal derangement of the fifth digit;
- Right fifth digit sprain;
- Concussion;
- Numbness;
- Decreased strength;
- Restricted function
- Restricted motion;
- Edema;
- Increased susceptibility to future injury and aggravation;
- Continuous pain and suffering;
- Sleeplessness;

According to Plaintiff, the aforesaid injuries were “caused, created, aggravated, exacerbated, precipitated and accelerated by the negligence of the [Defendants]”.

### **LAW AND APPLICATION**

The Court’s function on a motion for summary judgment is “to determine whether material factual issues exist, not to resolve such issues” (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, “it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is ‘arguable’” [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; see *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

Where there are no material and triable issues of fact, the motion for summary judgment should be granted....[t]he party making the motion for summary judgment must make a prima facie

showing of entitlement to judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issue of fact and the party must do so by tender of evidentiary proof in admissible form.” (See *Dougherty v Kinard*, 215 AD2d 521 [2d Dept 1995]; see also *Friends of Animals, Inc. v Assoc. Fur Mfrs.*, 46 NY2d 1065 [1979].) “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party.” (See *Adams v Bruno*, 124 AD3d 566 [2d Dept 2015].)

### Serious Injury

Defendants, assert that the Plaintiff did not incur a “serious injury” as defined under NY Insurance Law §5102 (d) (emphasis added) which reads as follows:

“ ‘Serious injury’ means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; **permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.**”

Plaintiff asserts he suffered a “permanent loss of use of a body organ or member”; “permanent consequential limitation of use of a body organ or member”; “significant limitation of use of a body function or system”; and/or “a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment”. NY Insurance Law §5102 (d).

Plaintiff underwent an independent medical examination with Dr. Regina O. Hillsman (hereinafter referred to as “Dr. Hillsman”) November 29, 2019. Dr. Hillsman noted that Plaintiff presented with complaints of right elbow pain. Dr. Hillsman performed a physical examination on Plaintiff using a goniometer. Normal values were based upon AMA Guidelines fifth edition and American Society for Surgery of the Hand Guidelines. Dr. Hillsman did not record any deficits in Plaintiff’s range of motion.

According to Dr. Hillsman, there is a causal relationship between the subject accident and the diagnosed injuries. However, according to Dr. Hillsman Plaintiff’s right elbow strain/ contusion, bilateral shoulder strain/contusion and right hand strain/ contusion are resolved. Dr. Hillsman opined, Plaintiff does not have any functional impairment, there is no permanency and the prognosis is good.

90/180

Plaintiff's Bill of Particulars alleges he suffered a serious injury under the 90/180 day category, that Plaintiff was incapacitated from work for approximately one week.

Plaintiff testified as follows:

Q: How much time did you lose from work?

A: About a week. One week.

Q: When you say one week, is that seven days or five days?

A: Five days.

(Page 18 lines 17-22)

Q: You started working there again after you missed five days; right?

A: Yeah, after I missed five days.

Q: So, after those five days when you came back to work, when you started working again, was it the same amount of hours, was it the same schedule, or was it something different?

A: Oh, same schedule.

Q: Did your duties and responsibilities change in any way after the accident at work?

A: No.

Q: Were you able to complete your job on a daily basis after the accident?

A: Yes

(Page 20 lines 1-11 and 16-22)


Plaintiff further testified that he experienced difficulties performing certain tasks at his job and at home. However, the evidence presented does not support a finding that Plaintiff suffered "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment". NY Insurance Law §5102 (d). Thus, Defendants have established prima facie entitlement to judgment as a matter of law. Opposition was not submitted. Therefore it is,

**ORDERED**, that the motion is granted; and it is further

**ORDERED**, that the Complaint is dismissed.

This constitutes the decision and Order of the Court.

Dated: December 3, 2021

  
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Hon. Chereé A. Buggs, JSC

