

**Rodriguez v Covena**

2024 NY Slip Op 32346(U)

March 22, 2024

Supreme Court, Bronx County

Docket Number: Index No. 26420/2017E

Judge: Patsy Gouldborne

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**E#002**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 13**

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**DIEGO A. RODRIGUEZ,**

Index No. 26420/2017E

Plaintiff,

**-against-**

**Hon. PATSY GOULDBORNE**

Justice Supreme Court

**OSCAR COVENA and AMERICAN UNITED  
TRANSPORTATION, INC,**

Defendant(s).

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The following papers were read on this motion (**Seq. No. 2**) for **Summary Judgment Threshold**, submitted on July 19, 2023.

Notice of Motion – Affirmation and Exhibits	NYSCEF Doc. # 32-39
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 43-54
Affirmation in Reply	NYSCEF Doc. # 55-56

Upon the foregoing papers, it is ordered that this motion (**Seq. No. 2**) by Defendants, pursuant to CPLR 3212, seeking an Order granting summary judgment and dismissing Plaintiff’s Complaint on the grounds that Plaintiff, Diego Rodriguez, has not sustained a “serious injury” pursuant to the provisions of Insurance Law § 5102 (d). Upon review of the moving papers together with opposition submitted hereto the motion is decided as follows.

Plaintiff alleges that as a result of a motor vehicle accident on June 1, 2016, he sustained injuries to, inter alia, his head, left shoulder, right shoulder, cervical spine, and lumbar spine. Plaintiff alleges that he sustained a “serious injury” under the "death," "dismemberment," “significant disfigurement,” “fracture,” “loss of fetus,” “permanent loss of use,” “permanent consequential limitation,” “significant limitation of use,” and/or “90/180-day” categories of injury as defined by the Insurance Law (bill of particulars ¶ 20). Plaintiff’s Bill of Particulars indicates that he was “was confined to bed for a period of one (4) months and intermittently thereafter as a result of the accident; Plaintiff was confined to home for a period of four (4) months and intermittently thereafter as a result of the accident” (Bill of particulars ¶ 12).

In support of the motion, Defendant submits, inter alia, counsel’s affirmation in support; Plaintiff’s deposition transcript; the affirmed report of Dr. Eric L. Cantos, M.D., dated October 6, 2018; and the affirmed orthopedic report of Dr. John H. Buckner, M.D., dated September 18, 2019.

Dr. Cantos reviewed the MRI of the brain performed at Lenox Hill Radiology on October 26, 2016. Dr. Cantos found both cerebral hemispheres appear to be symmetrically well developed. No ischemic changes or demyelinating foci are noted. No hemorrhagic lesion is identified. The ventricles and midline are normal in size. The brain stem and cerebellum are unremarkable. Dr. Cantos determined that the study was unremarkable, and there was no evidence of a hemorrhagic lesion or contusion that could be attributed to the accident of record.

Dr. Cantos reviewed the MRI of the cervical spine performed on July 14, 2016. Dr. Cantos observed “the cervical vertebral bodies appear to be normal in height.; no fracture is identified. Dr. Cantos’ impressions were “mild bulging of the disc annuli C5-6 and C-7 in conjunction with mild degeneration; No disc herniation or cord abnormality noted; No fracture suggested.” Dr. Cantos observed “multilevel disc desiccation. No cord abnormality is noted. There are artifacts from motion.” Dr Cantos opines that “the imaging study demonstrates mild changes of degenerative disc disease. [He does] not see imaging evidence of a fracture or disc herniation that could be attributed to the accident occurrence.”

Dr. Cantos reviewed the MRI of the lumbar spine performed on July 20, 2016. Dr. Cantos observed “mild changes of degenerative disc disease with scattered small bulges in the lower lumber region.” Dr. Cantos found no evidence of a fracture or acute disc herniation that could be attributed to the accident occurrence.

Dr. Cantos reviewed the MRI of the left shoulder performed on October 26, 2016, at Lenox Hill Radiology, wherein he observed “osseous structures appear to be intact. No fracture or bone contusion is noted. There is mild subacromial narrowing [...] mild degenerative changes of the AC joint with thickening.” Dr. Cantos indicates there are “changes of rotator cuff tendinosis. No rotator cuff tear or fracture [are] identified. There is a small amount of joint and bursal fluid. The glenoid labrum appears to be intact. There is also subscapularis tendinosis. The biceps tendon appears to be intact.” Dr. Cantos contends that the “imaging study fails to demonstrate evidence of a fracture or rotator cuff tear that could be attributed to the accident occurrence. There is underlying mild impingement, with mild inflammatory changes of the bursa. [That] suggests mild bursitis. The impingement is felt to be unrelated to the accident occurrence and is felt to reflect a preexistent condition.”

On September 18, 2019, Dr. Buckner conducted an orthopedic examination of Plaintiff’s cervical spine, lumbar spine, bilateral shoulders, upper and lower extremities and found normal range of motion. Dr. Buckner found that the Plaintiff did not sustain any injuries as a result of this accident. Dr. Buckner found that the Plaintiff has no causally related injuries or disabilities of the lumbar spine, cervical spine, or either shoulder. Dr. Buckner determined that there is no evidence of disability or permanent injury, and Plaintiff can perform activities of daily living and work duties without restriction.

Defendants’ submissions establish, *prima facie*, that Plaintiff did not sustain “permanent consequential limitation” or a “significant limitation” of his cervical spine, lumbar spine, and bilateral shoulders. Defendants’ submission establishes *prima facie* that any injury to Plaintiff’s head, cervical spine, lumbar spine, and left shoulder was not caused by the accident by submitting the affirmed reports of Dr. Cantos, shifting the burden of proof on the issue of causation as to these body parts (*see Feliz v Fragosa*, 85 AD3d 417 [1st Dept 2011]).

With respect to Plaintiff’s “90/180-day” injury claim, Plaintiff alleges that he was confined to bed for a period of four months. Plaintiff’s deposition testimony demonstrates that he returned to work within a week and a half. [Tr at 18, 22]. He testified that he missed three months of work after the surgery, but his surgery was not until September 26, 2016 (*id.* at 38). His own testimony demonstrates that his confinement did not occur

completely within the relevant 90/180 period. Further, Plaintiff's affidavit in opposition states that he was confined for a period of 45 days.

Defendant has demonstrated that Plaintiff's alleged head and cervical injuries, are unrelated to this accident, thus, shifting the burden to Plaintiff to adequately address the issue of causation as to those body parts (*Bianchi v Mason*, 179 A.D.3d 567 [1st Dept 2020]).

In opposition to the motion, Plaintiff submits MRI reports; the affirmed narrative report of Mark Kramer, M.D.; medical records; Plaintiff's affidavit, and Plaintiff's deposition transcript.

Plaintiff submits a radiology report of Dr. Alan B Greenfield, wherein Dr. Greenfield found; straightening of cervical lordosis; shallow central disc herniation suspected at C2-C3 near the midline; and bulging disc at C6-C7 where there is flattening of the dural sac.

Dr. Kramer initially evaluated Plaintiff on August 17, 2016, wherein the Plaintiff presented with right shoulder pain. Dr. Kramer performed Plaintiff's right shoulder surgery on September 26, 2016, during which it was determined that Plaintiff to have hemorrhagic synovitis, a torn labrum, and impingement. Dr. Kramer evaluated Plaintiff on January 4, 2023, at which time range of motion measurements were taken with the use of a goniometer in the right shoulder and found significant limitations. Dr. Kramer causally relates Plaintiff's right shoulder injuries to the subject accident.

Plaintiff testified that he began physical therapy four days after the accident for his legs, shoulder and back for almost six months. (Tr. 36-37). Plaintiff's affidavit, dated March 21, 2023, describes the accident, course of treatments, pain, restriction of motion and limitations. Plaintiff states he experiences pain on a daily basis and requires assistance with carrying heavy items and dressing himself. Plaintiff states, as a result of his injuries from the accident, he is only able to perform light duty at his job.

Plaintiff's submissions are sufficient to raise an issue of fact as to whether Plaintiff sustained causally related "significant" and "permanent consequential limitation" of his right shoulder by submitting Dr. Kramer's affirmed report which documented Plaintiff's continuing limitations in range of motion and objective indications of injury (*see Encarnacion v Castillo*, 146 D3d 600, 601 [1st Dept 2017]). However, Plaintiff's submissions are insufficient to raise an issue of fact as to whether Plaintiff sustained a "serious injury" injury to his head, left shoulder, cervical spine, and lumbar spine, as Plaintiff fails to submit objective evidence of limitations (*Moon v Some*, 189 AD3d 628 [1st Dept 2020]) and fails to raise an issue of fact as to causation as to these claimed injuries (*see Feliz v Fragosa*, 85 AD3d 417 [1st Dept 2011]). Since Plaintiff failed to raise an issue of fact as to whether his head, left shoulder, cervical spine, and lumbar spine injuries were caused by the accident, he cannot recover for such injuries (*see Rosario v Cablevision Sys.*, 160 AD3d 545, 546 [1st Dept 2018]).

With respect to Plaintiff's claim of "serious injury" under the "permanent loss of use" category, there is no evidence on this record that Plaintiff sustained a "total loss of use" of head, left shoulder, cervical spine, and lumbar spine, therefore, any claim that Plaintiff sustained a "permanent loss of use" is dismissed with respect to

the above mentioned body parts (*see Riollano v Leavey*, 173 AD3d 494 1st Dept 2019], citing *Oberly v Bangs Ambulance*, 96 NY2d 295, 299 [2001]). Similarly, as there is no evidence supporting a claim under the "significant disfigurement" category of injury, any claim under this category is dismissed (*see Fernandez v Hernandez*, 151 AD3d 581 [1st Dept 2017]). Finally, Plaintiff's submission of his own medical records demonstrates that he did not sustain an injury under the "death," "dismemberment," "significant disfigurement," "fracture," or "loss of fetus," categories of injury.

Accordingly, it is hereby

**ORDERED** that Defendant's motion (**Seq. No. 2**) seeking summary judgment **Granted to the extent** that Plaintiff's claims under the "death," "dismemberment," "significant disfigurement," "fracture," "loss of fetus," "permanent loss of use," and "90/180 day" categories of injury, and Plaintiff's claims related to the left shoulder, head, cervical spine, and lumbar spine are dismissed, and the motion is otherwise **DENIED**; and it is further

**ORDERED**, that Defendant shall serve a copy of this Order with Notice of Entry upon all parties within thirty days of the upload of this Order in NYSCEF.

This decision constitutes the Decision and Order of the Court.

**Dated: March 22, 2024**



**Hon. PATSY GOULDBORNE, 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