

Gironza v Macedonio

2024 NY Slip Op 34024(U)

June 6, 2024

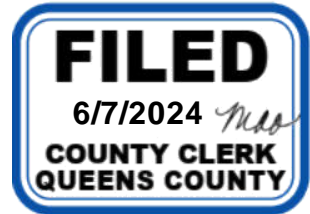
Supreme Court, Queens County

Docket Number: Index No. 717779/2018

Judge: Lumarie Maldonado-Cruz

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 32

-----X
FREDDY GIRONZA and LEONARDO GIRONZA,

Plaintiffs,

-against-

SECUNDINO MACEDONIO, JULIAN CRUZ ARCE, FREDY
R. JARA MEJIA, UBER TECHNOLOGIES INC., UBER U.S.A,
LLC, GRUN LLC and PHURBU TSERING,

Defendants.
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Index No.: 717779/2018

Decision and Order

Seq. 6, 7 & 8

The following papers numbered E108-E118 read on this motion (Seq. 7) by Defendants, SECUNDINO MACEDONIO and JULIAN CRUZ ARCE (hereinafter “Defendant Macedonio” and “Defendant Cruz Arce” respectively), for an order pursuant to CPLR § 3212 granting summary judgment in favor of Defendants Macedonio and Cruz Arce and dismissing the Complaint of the Plaintiff for the Plaintiff’s failure to meet the no-fault statute’s threshold for tort recovery pursuant Insurance Law §§ 5104(a) and 5012(d). The following papers numbered E119-E121 have been read on this motion (Seq. 6) by Defendant, FREDY R. JARA MEJIA (hereinafter “Defendant Jara Mejia”), seeking an order 1) granting Defendant Jara Mejia summary judgment pursuant to CPLR §3212, dismissing the complaint and any and all cross claims against him on the basis that Plaintiffs did not sustain a “serious injury” under Insurance Law §5102(d) and 2) for such other and further relief as this Court deems necessary and proper. The following papers numbered E125-E126 have been read on this motion (Seq. 8) by Defendant, PHURBU TSERING (hereinafter “Defendant Tsering”), seeking an order 1) granting Defendant Tsering summary judgment pursuant to CPLR §3212 on the basis that Plaintiffs did not sustain a “serious injury” under Insurance Law §5102(d) and 2) for such other and further relief as this Court deems necessary and proper. Sequences 6, 7 and 8 are consolidated for the purpose of this decision.

PAPERS
NUMBERED

Defendants MACEDONIO and CRUZ ARCE’s Notice of Motion-Affirmation-Statement of Material Facts-Exhibits	E108-E118
Defendant JARA MEJIA’s Notice of Motion-Affirmation	E 119-E121
Defendant TSERING’s Notice of Motion-Affirmation	E125-E126
Stipulation of Adjournment for Seq. 6 & 7.....	E127-E128
Stipulation of Adjournment for Seq. 6, 7, & 8	E130-E132

Upon the foregoing papers, it is ordered that Defendants Cruz Arce’s, Macedonio’s, Jara Mejia’s, and Tsering’s motions for summary judgement are each DENIED and GRANTED in part for the following reasons:

This case arises out of an incident where the Plaintiffs, FREDDY GIRONZA and LEONARDO GIRONZA (hereinafter “Plaintiff”) were allegedly injured on June 23, 2018. Plaintiffs allege that they were in an Uber, being driven by Defendant Tsering, at the intersection of Hampton Street and Whitney Avenue, when the vehicle they were being driven in was struck by another vehicle operated by Defendant Cruz Arce and owned by Defendant Macedonio. Plaintiffs further allege that a vehicle owned and operated by

Defendant Jara Mejia was involved in the accident as well. Plaintiff Freddy Gironza alleges that, as a result of the accident, he sought medical treatment and suffered bleeding lacerations to his head that required staples to close, a concussion, and pain to his head, neck, and spine, requiring injections and ointments for treatment.¹ Plaintiff Leonardo Gironza alleges that, as a result of the accident, he sought medical treatment and suffered headaches and pain to his neck, spine, and back, requiring chiropractic treatment and physical therapy.²

As a preliminary matter, Plaintiffs' oppositions for sequences 6, 7 and 8 will not be considered as they were untimely. Pursuant to CPLR § 2214(b), "[a]nswering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least sixteen days before such time so demands." Here, Plaintiffs' oppositions for each of the aforementioned sequences were filed via NYSCEF at 4:53 P.M. on April 2, 2024, the evening before the motions' return date of April 3, 2024, despite the statutory requirements pursuant to CPLR § 2214(b) and two (2) fully executed stipulations of adjournment in which all parties to this matter agreed, in writing, that any opposition papers were "due 7 days before the return date of the motion."³

Moreover, Plaintiff failed to appear for the court's calendar call on April 3, 2024, and provide a reason for the untimely filings. The Court may, in its discretion, refuse to consider a party's opposition papers, despite no showing of prejudice to the movant, when the opposing party fails to provide a valid excuse for the late service. *Risucci v. Zeal Management Corp.*, 258 A.D.2d 512, 512 [2nd Dept. 1999].

Defendants Cruz Arce, Macedonio, Jara Mejia, and Tsering (hereinafter collectively "Defendants") now move for summary judgment seeking dismissal of the Plaintiffs' complaint on the issue of threshold, arguing that Plaintiff's injuries do not meet the "serious injury" requirement under Insurance Law §§ 5012(d) and 5104(a). Defendants Cruz Arce and Macedonio provided legal arguments, case law, and exhibits to support their contentions. Defendants Tsering and Jara Mejia adopted Defendants Cruz Arce and Macedonio's arguments. In support of their arguments, Defendants Cruz Arce and Macedonio's submitted medical reports from an orthopedic surgeon who conducted independent medical exams (IMEs) on the Plaintiffs after the incident on September 25, 2021, and a radiologist who reviewed Plaintiff Leonardo Gironza's MRI results on November 5, 2021.

When deciding a summary judgment motion, the Court must "determine whether material factual issues exist, not to resolve such issues." *Lopez v Beltre*, 59 A.D.3d 683, 685 [2nd Dept. 2009]; *Santiago v Joyce*, 127 A.D.3d 954 [2d Dept 2015]. As such, to succeed on a summary judgment motion, "it must clearly appear that no material and triable issue of fact is presented" *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Andre v. Pomeroy*, 35 N.Y.2d 361 [1974]; *Stukas v. Streiter*, 83 A.D.3d 18 [2nd Dept. 2011]; *Dykeman v. Heht*, 52 A.D.3d 767 [2nd Dept. 2008]. Further, summary judgment should not be granted where there is an "arguable" issue of fact. *Id.* A court should not grant a summary judgment motion where "facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Collado v Jiacono*, 126 A.D.3d 927, 928 [2nd Dept. 2015] (quoting *Scott v Long Is. Power Auth.*, 294 A.D.2d 348, 348 [2nd Dept. 2002]); see *Chimbo v Bolivar*, 142 A.D.3d 944 [2nd Dept. 2016]; *Bravo v Vargas*, 113 A.D.3d 579 [2nd Dept. 2014]). Should the moving party fail to show the absence of a triable issue of material fact, the motion for summary judgment must be denied. See *Gilbert*

¹ See Plaintiff Freddy Gironza's EBT (E 111).

² See Plaintiff Leonardo Gironza's EBT (E 112).

³ See Stipulations of Adjournment dated January 3, 2024 (E 127-E128) and February 26, 2024 (E 130 -E 132).

Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 [1988]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985].

To successfully argue for summary judgement, the proponent of said motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 [1993], (quoting *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Once the proponent has made prima facie showing, the burden then shifts to the party opposing the motion to produce evidence sufficient to establish the existence of a triable issue of material fact. *See Zuckerman v City of New York*, 49 N.Y.2d 557 [1980].

As the proponent on the summary judgment motion, Defendants have the burden of making a *prima facie* showing that Plaintiff did not suffer a serious injury pursuant to Insurance Law § 5102(d). Insurance Law § 5102(d) defines serious injury as

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.

To support their contentions that the Plaintiffs did not suffer a serious injury, Defendants attached, as exhibits to their motion, the IME reports of Dr. Thomas P. Nipper, an orthopedic surgeon, and Dr. Scott A. Springer, a radiologist. In his report, Dr. Nipper concludes that Plaintiff Freddy Gironza does not suffer from any orthopedic limitations, has normal ranges of motion, can perform normal activities of daily living, does not suffer from a disability or permanency, and that there is no objective evidence that Freddy Gironza's alleged injuries are causally related to the motor vehicle accident on June 23, 2018.⁴ Dr. Nipper further concludes that Plaintiff Leonardo Gironza does not suffer from any orthopedic limitations, has normal ranges of motion, can perform normal activities of daily living, does not suffer from a disability or permanency, and that there is no objective evidence that Leonardo Gironza alleged injuries are causally related to the motor vehicle accident on June 23, 2018.⁵ Similarly, after reviewing the Plaintiff Leonardo Gironza's MRI films, Dr. Springer concludes that there is no evidence that the Plaintiff Leonardo Gironza suffered disc bulge or herniations to his C2-C3, C3-C4, C4-C5, C6-C7, or C7-T1 cervical spine, T12-L1, L1-L2, L2-L3 or L3-L4 lumbar spine, or thoracic spine.⁶ Dr. Springer, does, however, note that Plaintiff Leonardo Gironza suffers from a disc herniation, disc osteophyte complex, and central canal narrowing in his C5-C6 cervical spine and straightening of the normal lumbar lordosis and disc bulges of the L4-L5 and L5-S1 lumbar spine.⁷ Ultimately, Dr. Springer concludes that there is no causal connection between the accident on June 23, 2018, and Plaintiff Leonardo Gironza's MRI findings.⁸

⁴ Defendants' Ex. D (E 113).

⁵ Defendants' Ex. F (E 115)

⁶ Defendants' Ex. E (E 114).

⁷ *Id.*

⁸ *Id.*

PLAINTIFF FREDDY GIRONZA

Defendants have not met their *prima facie* burden of showing that the Plaintiff Freddy Gironza did not sustain a serious injury within the meaning of Insurance Law § 5102(d) because they failed to have a neurologist examine Plaintiff Freddy Gironza for his alleged brain injuries. It is well settled, that summary judgment on threshold must be denied and it is unnecessary to consider whether the papers submitted by Plaintiff are sufficient, when Defendant utterly fails to address an area of injury in their motion which has been set forth in the pleadings. *Rahman v. Sarpaz*, 62 A.D.3d 979, 979 [2nd Dept. 2009] [Finding "[t]he defendants' motion papers did not adequately address the plaintiff's claim, clearly set forth in his bill of particulars, that he sustained a medically-determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident"]; *See also Udochi v. H & S Car Rental Inc.*, 76 A.D.3d 1011 [2nd Dept. 2010]; *Strilcic v. Paroly*, 75 A.D.3d 542 [2nd Dept. 2010]; *Smith v. Rodriguez*, 69 A.D.3d 605, 606 [2nd Dept. 2010]; *Faun Thai v. Butt*, 34 A.D.3d 447, 448 [2nd Dept. 2006].

Here, Defendants, in their motion papers, fail to address Plaintiff Freddy Gironza's allegations in Plaintiffs' Bill of Particulars and his deposition of a concussion which resulted from the subject incident. Moreover, Dr. Nipper and Dr. Springer each failed to address these allegations entirely. Neither physician discussed the Plaintiff Freddy Gironza's alleged neurological injuries and this Court finds that only a neurologist could properly provide a sufficient opinion regarding the Plaintiff's alleged brain injuries to support Defendants' motions for summary judgment.

As Defendants failed to address the Plaintiff Freddy Gironza's alleged neurological injuries, there is no need to consider Defendants' argument that Plaintiff Freddy Gironza's injuries are not serious under the 90/180 rule.

Therefore, Defendant's motions seeking summary judgement based on injury threshold against Plaintiff Freddy Gironza is DENIED.

PLAINTIFF LEONARDO GIRONZA

Defendants have established their *prima facie* burden of showing that the Plaintiff Leonardo Gironza did not sustain a serious injury within the meaning of Insurance Law § 5102(d). While under certain circumstances herniated and or bulging discs may constitute a serious injury within the meaning of Insurance Law § 5102(d), when there is no objective evidence of the extent or degree of the alleged physical limitations resulting from these disc injuries and their duration, the existence of the herniation or bulge alone does not meet the serious injury requirement of said statute. *Mora v. Riddick*, 69 A.D.3d 591, 591-591 [2nd Dept. 2010]; *Ciancio v. Nolan*, 65 A.D.3d 1273, 1273 [2nd Dept. 2009]; *Sainte-Aime v. Ho*, 274 A.D.2d 569, 570 [2nd Dept. 2000]; *Guzman v. Michael Mgt.*, 266 A.D.2d 508, 509 [2nd Dept. 1999]; *Noble v. Akerman*, 252 A.D. 392, 394 [2nd Dept. 1998].

Here, Defendants' IMEs of Plaintiff Leonardo Gironza establish that he does not suffer from any injuries that have caused a complete loss of use of a body organ or member or significant limitation of use of a bodily function or system as required by Insurance Law § 5102(d). While Dr. Springer, does note that Plaintiff Leonardo Gironza suffers from a disc herniation, disc osteophyte complex, and central canal narrowing in his C5-C6 cervical spine and straightening of the normal lumbar lordosis and disc bulges of the L4-L5 and L5-S1 lumbar spine, he also observed that the MRIs that he reviewed, which were taken one month and two days after the accident, showed that Plaintiff Leonardo Gironza's spinal cord, spinal

canal, paraspinal musculature, cauda equina, posterior fossa, and cervical cord were “unremarkable.”⁹ Similarly, Dr. Nipper observed that any injuries Plaintiff Leonardo Gironza may have sustained have fully resolved and that said injuries were neither significant, nor permanent and were not the result of a motor vehicle accident.¹⁰

Moreover, there is no evidence that Plaintiff Leonardo Gironza was unable to perform substantially all of his daily activities for 90 or more days of the first 180 days following the subject accident. In his own deposition testimony, Plaintiff Leonard Gironza admitted that he only missed one day of work due to the accident on June 23, 2018, and returned to work the following day.¹¹ Plaintiff Leonardo Gironza further testified that there are no activities that he can no longer participate in due to his alleged injuries from the car accident and that he was never confined to his home due to said injuries.¹²

Notwithstanding Plaintiffs’ failure to timely submit oppositions raising triable issues of fact, Defendants’ motions for summary judgment on the basis of injury threshold against Plaintiff Leonardo Gironza are GRANTED.

Therefore, Defendants’ motion are DENIED in part and GRANTED in part.

Accordingly, it is hereby

ORDERED, that Defendants’ motions for summary judgment on the basis of threshold against Plaintiff Leonardo Gironza is GRANTED; and it is further

ORDERED, that Defendants’ motions for summary judgment on the basis of threshold against Plaintiff Freddy Gironza is DENIED; and it is further

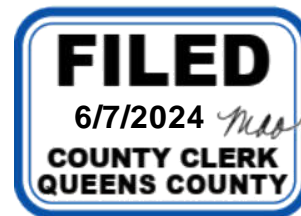
ORDERED, that any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied; and it is further

ORDERED, that Defendants’ shall serve a copy of this Order with Notice of Entry upon the clerk of this court and upon all parties on or before June 20, 2024.

This constitutes the Decision and Order of the Court.

Dated: June 6, 2024
Long Island City, N.Y.

ENTER



Hon. Lumarie Maldonado-Cruz, A.J.S.C.

⁹ Defendants’ Ex. E (E 114).

¹⁰ Defendants’ Ex. F (E 115)

¹¹ See Plaintiff Leonardo Gironza’s EBT (E 112).

¹² *Id.*