# Gironza v Macedonio

2024 NY Slip Op 34024(U) (2024) | Cited 0 times | New York Supreme Court | June 6, 2024

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 Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. This opinion is uncorrected and not selected for official publication. SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF QUEENS: PART 32
----------x FREDDY GIRONZA and LEONARDO GIRONZA, Index No.: 717779/2018 Plaintiffs, -against- Decision and Order

SECUNDINO MACEDONIO, JULIAN CRUZ ARCE, FREDY Seq. 6, 7 & 8 JARA MEJIA, UBER TECHNOLOGIES INC., UBER U.S.A, LLC, GRUN LLC and PHURBU TSERING,

Defendants. ----------x

The following papers numbered E108-E118 read on this motion (Seq. 7) by Defendants, SECUNDINO MACEDONIO and JULIAN CRUZ ARCE Defendant Macedonio and , 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 no- Insurance Law §§ 5104(a) and 5012(d). The following papers numbered E119-E121 have been read on this motion (Seq. 6) by Defendant, , seeking an order 1) granting Defendant Jara Mejia summary judgment pursuant to CPLR §3212, dismissing the complaint and any and

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 judgment pursuant to CPLR §3212 on the basis that Plaintiffs did not sus 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 Notice of Motion-Affirmation-Statement of Material Facts-Exhibits . E108-E118 Defendant Notice of Motion-Affirmation E 119-E121 Defendant Notice of Motion-Affirmation . E125-E126 Stipulation of Adjournment for Seq. 6 & 7. E127-E128 E130-E132

Upon the foregoing papers, it is ordered that Defendants motions for summary judgement are each

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DENIED and GRANTED in part for the following

reasons: This case arises out of an incident where the Plaintiffs, FREDDY GIRONZA and LEONARDO GIRONZA ere 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 6/7/2024

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[* 1] 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 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 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 § 2214(b) and two (2) fully executed stipulations of adjournment in which all parties to this matter agreed, in writing, that 3 reason for the untimely filings. 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].

now move for summary judgment seeking dismissal of the Plaintiffs complaint on the issue of threshold, arguing that do not 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 In support of their arguments, 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 . When deciding a summary judgment motion, the Court must determine whether material factual Lopez v Beltre, 59 A.D.3d 683, 685 [2nd Dept. 2009]; Santiago v Joyce, 127 A.D.3d 954 [2d Dept 2015] 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 Id. A court should not grant a summary judgment mot 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 2 See Plaintiff Leonardo 3 See Stipulations of Adjournment dated January 3, 2024 (E 127-E128) and February 26, 2024 (E 130 -E 132). FILED: QUEENS COUNTY CLERK 06/07/2024 10:55 AM INDEX NO. 717779/2018 NYSCEF DOC. NO. 156 RECEIVED NYSCEF: 06/07/2024

2 of 5 [* 2] 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 Leonardo 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-C-5, 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 Pla 8

4 Ex. D (E 113). 5 Ex. F (E 115) 6 Ex. E (E 114). 7 Id. 8 Id. FILED: QUEENS COUNTY CLERK 06/07/2024 10:55 AM INDEX NO. 717779/2018 NYSCEF DOC. NO. 156 RECEIVED NYSCEF: 06/07/2024

3 of 5 [* 3] 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 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 and this Court finds that only a 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 Freddy Gironza the 90/180 rule.

Therefore, 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]. 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 FILED: QUEENS COUNTY CLERK 06/07/2024 10:55 AM INDEX NO. 717779/2018 NYSCEF DOC. NO. 156 RECEIVED NYSCEF: 06/07/2024

4 of 5 [* 4] canal, paraspinal musculature, c . 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 ure to timely submit oppositions raising triable issues of fact, Gironza are GRANTED.

Therefore, Defendants are DENIED in part and GRANTED in part. Accordingly, it is hereby ORDERED, that Defendant motions for summary judgment on the basis of threshold against Plaintiff Leonardo Gironza is GRANTED; and it is further 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 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 E N T E R Long Island City, N.Y.

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

9 Ex. E (E 114). 10 Ex. F (E 115) 11 See Plaintiff Leonardo 12 Id. 6/7/2024 FILED: QUEENS COUNTY