

Pichardo-Garcia v Ianniello
2020 NY Slip Op 33174(U)
August 25, 2020
Supreme Court, Bronx County
Docket Number: 20454/2019E
Judge: Veronica G. Hummel
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31**

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SAUL PICHARDO-GARCIA,

Plaintiff,

-against -

**Index No. 20454/2019E
DECISION/ORDER**

Motion Seq. 2

MICHAEL IANNIELLO,

Defendants.

-----X

VERONICA G. HUMMEL, A.S.C.J.

This is action for alleged serious personal injuries arises from an auto accident that occurred on July 20, 2018 (the Accident). At the time of the Accident, plaintiff worked at Manhattan Beer Distributor as an Assistant Manager. Plaintiff was operating a vehicle on Jarvis Avenue at its intersection with Bruckner Blvd. and stopped at a red light. Plaintiff alleges that his vehicle was struck in the rear by the motor vehicle being driven by defendant. Plaintiff claims that he suffered a serious injury, as defined under the Insurance Law, as the result of the Accident.

Defendant now moves for summary judgment dismissing the complaint as against plaintiff on the ground that, as a matter of law, plaintiff has not demonstrated, by competent medical evidence, that he sustained a serious injury as defined in Insurance Law 5102. Plaintiff cross-moves for summary judgment on liability. In support of their respective positions on the motions, the parties have submitted copies of the pleadings, the bills of particular, deposition transcripts, attorney affirmations, medical records, and medical expert reports and affirmations. Plaintiff also submits a personal affidavit.

Defendant submits the IME report of Dr. Arnold T. Berman, M.D., a Fellow, American Academy of Orthopedic Surgeons, dated September 12, 2019. Dr. Berman avers that he reviewed the pleadings and plaintiff's medical records from: AFC Doctors Express Bronx (Urgent Care);

CitiMedical (Chiropractic); Dr. Anam Azeem (Physical Medicine and Rehabilitation), Optimum Health Acupuncture, Dr. Barbara C. Steele (Orthopaedic Surgery); Dr. Louis Cornacchia (Neurological Surgery); Hudson Regional Hospital (Operative Report-Cornacchia), X-ray Report (Cervical Spine); X-ray Report (Lumbar Spine); MRI Report (Cervical Spine); MRI Report (Lumbar Spine); EMG Report; MRI Report (Right Knee); CAT Scan Report (Lumbosacral Spine); CitiMedical (Physical Therapy); Citi Medical-(FCE); and the submitted photographs.

Dr. Berman states that the examination of plaintiff's cervical spine found all flexion was within the normal range and reflexes to be normal and equal. There was mild pain on range of motion, but the arm and hand muscles were normal. The test for nerve root compression was negative, sensory testing was normal and Waddell testing was normal.

The thoracolumbar spine exam showed a scar and normal flexion, although there was moderate pain on range of motion. The neurologic exam of lower extremities revealed normal reflexes, muscles and sensation. Moderate back pain occurred with the straight leg raising and squatting. The heel and toe walk were normal. The upper arms measured within normal range with no atrophy. Handgrip and strength were normal. No atrophy in the legs or arms was detected.

Under "Diagnoses" Dr. Berman finds "cervical strain/sprain, resolved with no residuals". He also avers:

" Lumbar strain/sprain, resolved with no residuals with lumbar fusion done for pre-existing disc disease and not this injury; post-op marked improvement with resolution of pre-op radiculopathy on exam; no functional loss and no significant permanency or disability with ability to work active duty, full time, with use of corset and continued home exercises, water walking standard for post-operative lumbar spine fusion procedure. The lumbar surgery done on 2/4/19 was done for pre-existing conditions and not related to this accident".

He opines within a reasonable degree of medical certainty that plaintiff has no disability related to the Accident and can do all activities of daily living, including working full time with the use of a lumbar corset. There is no aggravation of any pre-existing conditions, and plaintiff has no functional loss, permanency or disability as the result of the Accident.¹

In opposition, plaintiff relies on the records and submits the affirmations of Dr. B.V. Reddy (certifying the MRI Report of July 30,2018), Dr. Louis Cornacchia (Neurosurgeon), Dr. Anan Azeem (CitiMed physician),and plaintiff. Dr. Reddy certified that the MRI Report showed a L5-S1 broad based subligamentous herniation and nerve root impingement.

In his affirmation, Dr. Cornacchia reiterated plaintiff's medical history, noting that plaintiff had not returned to work since the Accident. He found limitation of range of motion of the cervical spine on November 20, 2018. A Cat Scan in December 2018 revealed a disrupted L-5-S1 disc with herniations and range of motion continued to be limited. Surgery was discussed and the physician found plaintiff 100% impaired and unable to return to work.

On February 4, 2019, Dr. Cornacchia performed a decompressive laminectomy at L5, partial L4 and partial S1, bilateral foraminotomies at L5-S1 and left discectomy and implantation of expanse cage. Following surgery, the patient continued to experience lower back pain and was unable to work. At visits in November and December 2019, plaintiff continued to suffer from lower back pain, decreased range of motion, and difficulty lifting weight.

¹ In addition, defendant submits the biomechanical report and opinion of Dr. Wordeman, biomedical engineer. In reply, defendant argues that the purpose of the exhibit is solely to introduce the attached photographs of the accident, to which plaintiff did not object. The admissibility of the opinion of the biomedical engineer's testimony is therefore not at issue on this motion and is appropriately determined by the trial judge.

In his affirmation, Dr. Cornacchia averred that:

Based upon my clinical examinations, surgery, lumber epidural injections as well as the objective tests, including MRI of the lumbar spine, EMG and lumbar steroidal injections, and lumbar epidural injections, as well as range of motion testing, it is my medical opinion that [plaintiff's] condition and resulting surgery is directly related to [the Accident], inasmuch as the patient never had a prior injury or condition involving his lower back. The mechanism of injuries are entirely consistent with the clinical presentation. Wherefore, the subject accident is the directly producing cause of [plaintiff's] injuries and pathology to his lower back. As a result of the trauma of [the Accident plaintiff] sustained the following injuries to his lower back: lumbar disc herniation per MRI and lumbar radiculopathy requiring surgical intervention. [Plaintiff] also sustained injury to his neck and right knee. Said injuries affect his every day activities including, lifting, carrying, bending and twisting, walking or sitting for any long period of time and performing any strenuous activities due to his lower back pain. The patient is likely to suffer from a partial permanent disability to his lower back.

He further found that the symptoms may be exacerbated during periods of inclement weather, plaintiff may have periods of disability secondary to chronic pain and muscle stiffness, and the symptoms may prevent the patient from performing gainful activities such as work. Based upon the history given by the patient, the fact that he had never injured his lower back, with a reasonably degree of medical certainty, Dr. Cornacchia opined that in his medical opinion plaintiff suffered a permanent partial disability with regards to his lower back, and that this trauma is casually related to the Accident.

Plaintiff also submits the affirmation of Dr. Anan Azeem, M.D., who reached, in sum and substance, the same conclusions as to plaintiff's injuries as did Dr. Cornacchia. Dr. Azeem performed range of motion tests and found reductions in flexion in the cervical and lumbar spines, and right knee. He also reviewed MRIs of plaintiff's cervical spine, lumbar spine, left shoulder, and right knee. He found herniated and bungling discs the cervical and lumbar spines, and joint effusion and low-grade patellar chondrosis in the right knee. The doctor performed lumbar spine injections, which failed to provide relief.

In December 2018, plaintiff reported continuing pain and Dr. Azeem's range of motion testing revealed limited range of motion as to the cervical spine, low back, and right knee.² Dr. Azeem reported that as of December 2019, plaintiff continued to have difficulties in daily activities and to suffer from back and knee pain. Dr. Azeem opined:

Based upon the clinical examinations, as well as the objective tests performed (MRIs of the cervical spine, lumbar spine, and right knee, lumbar spinal injections and steroid injection to the right knee, EMGs, as well as range of motion testing using an inclinometer), it is my medical opinion that [plaintiff's] condition is directly related to [the Accident], inasmuch as the patient did not experience any of the symptoms set forth above prior to the date of the accident. ... Therefore, the subject accident is the direct producing cause of [plaintiff's] injuries and pathology. As a result of the trauma of [the Accident] plaintiff sustained the following injuries: LS-SI herniation with regional nerve root impingement per MRI requiring lumbar spine discectomy and fusion, right knee chondromalacia, contusion and effusion per MRI requiring steroidal injection, C3-6 cervical bulges per MRI, and lumbar radiculopathy per EMG.

Dr. Azeem agreed that the injuries affect plaintiff's everyday activities and cause him to be disabled from work to date. Based upon the history given by the patient, the fact that he had no prior accidents or trauma to his lower back and neck, with a reasonable degree of medical certainty, Dr. Azeem opined that plaintiff suffered a permanent partial disability with regard to his cervical and lumbar spine, as well as his right knee, and that this trauma was causally related to the Accident.

Defendant's motion for summary judgment based on lack of serious injury.

A party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the nine categories of "serious injury" as set forth in Insurance Law 5102(d) (*see Licari v Elliott*, 57 NY2d 230 [1982]). Turning to this action, plaintiff contends that his injuries were serious within the meaning of the statute in that he suffered: a permanent consequential limitation of use of a body organ or member [permanent consequential limitation]; a significant limitation of use of a body function or system [significant limitation]; and 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

² After the surgery, plaintiff ceased physical therapy until November 2019.
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customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment [90/180]. The Court must determine whether, as a matter of law, plaintiff has sustained a "serious injury" under at least one of the claimed categories. "Serious injury" is a threshold issue, and thus, a necessary element of a plaintiff's *prima facie* case (*Licari v Elliott, supra; Marj v Fletcher*, 180 AD3d 621 [1st Dept 2020]); Insurance Law 5104[a]).

On a motion for summary judgment it is the obligation of the court to determine whether or not there are issues of fact that militate against granting that relief to either plaintiff or defendant. It is not the court's function on a motion for summary judgment to assess credibility (*Varela v Rohif*, 176 AD3d 651 [1st Dept 2019]; *Rawls v Simon*, 157 AD3d 418 [1st Dept 2018]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014].).

Applying these governing legal principles here, the court finds that defendant met the *prima facie* burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) as a result of the subject accident by submitting the medical findings and the opinion of the expert, (*Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car, Inc.*, 98 NY2d 345 [2002]; *DeJesus v Pauino*, 61 AD3d 605 [1st Dept 2009]).

In opposition, plaintiff raises an issue of fact as to his claimed injuries through the medical expert affirmations and submitted medical records. Plaintiff's medical experts made objective findings detecting muscle spasms, loss of range of motion in both the lumbar and cervical spine and right knee, and lumbar disc herniation per MRI and lumbar radiculopathy requiring surgical intervention. These conclusions were based on personal review of numerous objective tests performed (MRIs of the cervical spine, lumbar spine, and right knee, lumbar spinal injections and steroid injection to the right

knee, EMGs, and range of motion testing using an inclinometer), and the experts opined that plaintiff's condition was directly related to the Accident, and not the result of a pre-existing condition (see, *Hayes v Gaceur*, 162 AD3d 437 [1st Dept 2018]; *Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). In addition, plaintiff's testimony, affidavit, and medical evidence generate triable questions of fact as to plaintiff's 90/180-day claim (See *Pannell-Thomas v Bath*, 99 AD3d 485 [1st Dept 2012]; *Williams v Tatham*, 92 AD3d 472 [1st Dept 2012]). Hence, plaintiff submits competent medical expert evidence that generates triable issue of facts as to the same relevant serious injury issues addressed by defendant³(*Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]; see *Mulhern v Gregory*, 161 AD3d 881 [2d Dept 2018]). To the extent that the experts conflict in their opinions, conflicting expert opinions may not be resolved on a motion for summary judgment (see *Dacosta v Gibbs*, 139 AD3d 487 [1st Dept 2016]; *Pantojas v Lajara Auto Corp.*, *supra*; *Honsby v Cathedral Parkway Apartments Corp.*, 179 AD3d 584 [1st Dept 2020]). As such, defendant's motion for summary judgment dismissing the complaint is denied.

Plaintiff's Cross-Motion for Summary Judgment

Plaintiff's cross-motion seeks an order, pursuant to CPLR 3212, granting plaintiff summary judgment on the issue of liability. The Note of Issue in this action was filed on NYSCEF on October 28, 2019. According to the part rules of Hon. Justice Brigantti (the assigned justice) the deadline for summary judgment motions is sixty days after the filing of the Notice of Issue. Thus, the deadline for plaintiff to file a motion for summary judgment expired by December 28, 2019. Plaintiff's cross-motion was filed after the deadline, on January 7, 2020, and is therefore untimely.

Of import, the untimely cross-motion for summary judgment is not based on the same issues raised by defendant's motion as the cross-motion concerns liability and does

³ Defendant argues that certain medical reports submitted by plaintiff on opposition are unaffirmed and unsworn and are therefore inadmissible on this motion. As defendant's expert reviewed and referenced the documentation in his medical affirmation, however, the records constitute admissible evidence (see *Pommells v Perez*, 4 N.Y.3d 566, 577, n 5 [2005]; *Navedo v Jaime*, 32 A.D.3d 788 [1st Dept 2004]). In any event, the affirmations by plaintiff's experts and other medical reports provide sufficient basis for defeating the motion (*Schifano v Golden*, 268 A.D.2d 335 [1st Dept 2000]).

not address the issues raised in the original motion concerning serious injury (see *Maggio v 24 West 57 APE, LLC*, 134 AD3d 621 [1st Dept 2015]). Furthermore, plaintiff makes no showing in his motion papers of good cause for failing to move timely. Under the circumstances, plaintiff's cross-motion is denied as untimely made without any explanation for its untimeliness, let alone good cause (see CPLR 3212[a]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]; *Paloma v 175 Street Realty Corp*, 101 AD3d 579 [1st Dept 2012]; *Filannio v Through Bridge and Tunnel Authority*, 34 AD3d 280 [1st Dept 2006]).

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 MICHAEL IANNIELLO (defendant), made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff SAUL PICHARDO-GARCIA (plaintiff) has not sustained a serious injury as defined by Insurance Law 5102(d) is denied; and it is further

ORDERED that the cross-motion by plaintiff, pursuant to CPLR 3212, for an order granting plaintiff summary judgment on liability against defendant [jointly referred to as Mot. Seq. 2] is denied.

The parties are reminded that a compliance conference is scheduled in this matter on October 13, 2020 at 9:30 A.M.

Dated: August 25, 2020

ENTER,


Hon. Veronica Hummel. A.J.S.C.

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