

<b>Cullinan v Lambert</b>
2017 NY Slip Op 33504(U)
December 21, 2017
Supreme Court, Westchester County
Docket Number: Index No. 59184/2015
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
PATRICK CULLINAN AND GERALDINE CULLINAN,

Plaintiffs,

-against-

DECISION AND ORDER  
Sequence No. 1  
Index No. 59184/2015

DOUGLAS R. LAMBERT AND LORRAINE V. LAMBERT,

Defendants.

-----X  
RUDERMAN, J.

The following papers were considered in connection with defendants' motion for summary judgment dismissing the complaint pursuant to CPLR 3212:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support and Exhibits A – O	1
Affirmation in Opposition and Exhibits A – I	2
Reply Affirmation	3

The plaintiffs Patrick and Geraldine Cullinan<sup>1</sup> commenced this action on June 26, 2014 to recover damages for personal injuries plaintiff allegedly sustained in a motor vehicle accident that occurred on December 1, 2012 at the intersection of the Harlem River Parkway and the Cross Bronx Expressway in Bronx, New York. Plaintiff's bill of particulars alleges that he suffered the significant disfigurement, fracture, permanent loss, permanent consequential limitation, significant limitation and 90/180 categories of serious injury defined by New York Insurance Law § 5102(d) (Plaintiff's Exhibit C, ¶ 9). More specifically, plaintiff claims that he sustained, *inter alia*, a central subligamentous disc herniation impinging on the thecal sac at lumbar spine levels L4-L5 and an L5-S1 right posterior and foraminal disc protrusion-herniation with impingement of the exiting nerve root (*Id.*).

In support of their motion, defendants argue that plaintiff's lumbar injuries, for which he had back surgery in 2015, are not causally related to the 2012 subject accident. Rather, plaintiff's

<sup>1</sup> Patrick Cullinan is the only plaintiff with an alleged serious physical injury, and thus, all references to "plaintiff" are to him, unless other noted.

injuries are the result of chronic disc degeneration precipitated by two unrelated accidents – a 2007 work-related injury (the “2007 accident”) and a 2013 incident in which plaintiff was struck by a vehicle while crossing the street (the “2013 accident”). To support this contention, defendants submit plaintiff’s bill of particulars, deposition testimony transcript, ambulance and emergency room reports, along with various medical evaluations and reports from plaintiff’s treating physicians (Defendants’ Exhibits C – F; K – N).

Defendants also submit the results of x-rays and MRIs taken between 2008 and 2013, which span the course of all three accidents. The first x-ray report, dated August 11, 2008, notes the existence of a disc herniation at plaintiff’s lumbar spine level L4-L5, and degenerative changes at both levels L4-L5 and L5-S1 (Plaintiff’s Exhibit H). The report from the second x-ray, taken three months after the subject accident on March 11, 2013, specifically states there are no significant changes to plaintiff’s lumbar spine from 2008 (Plaintiff’s Exhibit I). The results of an MRI, taken five months after the subject accident on May 4, 2013, show a right posterior and foraminal disc protrusion at L5-S1 and note a slight *decrease* in the size of the L4-L5 disc herniation but no other interval change from 2008 (Plaintiff’s Exhibit G). Another MRI, taken on December 12, 2013, shortly after the 2013 accident, also shows disc degeneration at L4-L5 and partial disc degeneration with right anterolateral osteophyte formation at L5-S1 (Plaintiff’s Exhibit O). However, the MRI report states that there is no disc herniation, fracture or canal stenosis.

The defendants also present the independent medical examination report of Dr. Alok D. Sharan, who opined that, based on a physical examination of the plaintiff and a review of plaintiff’s medical documentation, plaintiff has long standing degenerative disc disease originating from the 2007 work accident, and that the subject accident of December 1, 2012, may have at most temporarily aggravated plaintiff’s lower back condition which was present from 2007 until 2011 (Defendants’ Exhibit M). Dr. Sharan further stated that, in his medical opinion, plaintiff’s 2015 back surgery and present disability status is unrelated to the 2012 accident and is likely related to plaintiff’s 2007 accident, which resulted in a herniated disc, as well as plaintiff’s underlying degenerative disc disease and subsequent 2013 accident.

In opposition, plaintiff submits an affidavit, corrections to the transcript of his deposition and the affirmation of his treating physician Sathish Modugu, M.D., along with his radiologist’s and orthopedic surgeon’s reports, hospital records, and the results of plaintiff’s independent Worker’s Compensation Board medical examination (Plaintiff’s Exhibits A – I). According to the

Modugu affirmation, plaintiff first presented to Dr. Modugu five months after the subject accident on May 1, 2013. A clinical examination of plaintiff revealed reduced flexion and extension of the lumbar spine with severe pain and an asymmetric and abnormal gait, which continued through early November 2013 when Dr. Modugu referred plaintiff for surgical evaluation just prior to the 2013 accident. In his affirmation, Dr. Modugu states that, based on his review of plaintiff's medical history, physical exam findings, medical records and lumbar spine MRI films from 2008 through the present, and contrary to defendants' expert, it is Modugu's medical opinion that the subject accident aggravated the L4-L5 disc herniation and caused a new disc herniation at L5-S1, which was significant enough to warrant the need for plaintiff's 2015 back surgery.

#### Analysis

A party moving for summary judgment pursuant to CPLR 3212 must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate that there is no genuine dispute as to any material fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In assessing the record to determine whether there are material issues of fact for trial, the court must view the facts in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]).

To prevail on a motion for summary judgment on the basis that plaintiff cannot recover for non-economic loss in connection with a motor vehicle accident under New York's No-Fault Law, a defendant must establish prima facie that the plaintiff did not sustain a serious injury within the meaning of New York Insurance Law § 5102(d). In support of its motion, a defendant may rely on the unsworn reports of plaintiff's physicians (*McGovern v Walls*, 201 AD2d 628 [2d Dept 1994]) or on the sworn affidavits or affirmations of the defendant's own retained physicians (*Marsh v Wolfson*, 186 AD2d 115 [2d Dept 1992]).

Here, defendants' contention that plaintiff's injuries were the result of the 2007 and 2013 accidents, does not disprove plaintiff's serious injury claim as a matter of law. When a defendant moves for summary judgment on the theory that plaintiff's injuries or conditions predated the subject accident, the submissions on the motion must show both that the injuries or conditions

were attributable to prior accidents or pre-existing conditions, and that they were not exacerbated by the subject accident (*see McKenzie v Redl*, 47 AD3d 775, 776 [2d Dept 2008]; *Cebularz v Diorio*, 32 AD3d 975, 976 [2d Dept 2006]). Defendants' submissions fail to show, as a matter of law, that plaintiff's injuries were solely attributable to the 2007 or 2013 accident, or to a pre-existing degenerative disease, and not exacerbated by the 2012 accident.

Even assuming defendants' submissions establish, prima facie, that plaintiff did not sustain a serious injury under Insurance Law § 5102 (d), plaintiff's evidence in opposition creates a question of fact on the issue, which precludes the granting of summary judgment.

Based upon the foregoing, it is hereby,

ORDERED that defendants' motion for summary judgment dismissing the complaint pursuant to CPLR 3212 is denied; and it is further

ORDERED that the parties appear on January 23, 2018, at 9:15 a.m., in the Settlement Conference Part of the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York

December 21, 2017

  
HON. TERRY JANE RUDERMAN, J.S.C.