

**Dimarco v Patrick**

2018 NY Slip Op 31749(U)

July 24, 2018

Supreme Court, New York County

Docket Number: 159621/13

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 47

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JOSEPH S. DIMARCO,

Plaintiff,

Index No.: 159621/13  
DECISION/ORDER

-against-

MITCHELL PATRICK and ELAINE McDONALD,

Defendants.

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**HON. PAUL A. GOETZ, J.S.C.:**

In this personal injury/negligence action, defendants Mitchell Patrick (Patrick) and Elaine McDonald (McDonald; together, defendants) move for summary judgment to dismiss the complaint on the ground that plaintiff Joseph S. DiMarco (DiMarco) did not suffer a statutorily recognized “serious injury” (motion sequence number 002). The motion is decided as follows:

**BACKGROUND**

This action arose on May 1, 2013 when DiMarco’s car was struck by a second car, owned by McDonald and operated by Patrick, in the intersection of West Houston Street and Varick Street in the County, City and State of New York. *See* notice of motion, exhibit A (complaint), ¶¶ 4, 18, 20. At his deposition on August 24, 2015, DiMarco stated that the collision took place shortly after 8 pm as he was driving westbound on West Houston Street, through the intersection with Varick Street, just after the traffic light in front of him had turned green and he had pulled into the intersection. *Id.*, exhibit D at 7, 12-14. DiMarco stated that defendants’ car struck his on the right passenger side at very high speed, quite violently, and resulted in his car flipping upside down on the pavement. *Id.* at 14-18. DiMarco also stated that the Fire Department arrived shortly thereafter, cut him out of his car and placed him in an ambulance. *Id.* at 18-20. DiMarco

indicated that he was taken to the Bellvue Hospital trauma center, where he was treated for his injuries and discharged at approximately 3 am the next morning. *Id.* at 26-27. DiMarco alleges that as result of the accident he suffered injuries to his cervical and lumbar spine, right knee and that he sustained a cerebral concussion with post concussion syndrome. Bill of particulars, ¶ 4. DiMarco stated that he undertook ongoing treatment for his injuries with several doctors and physical therapists, and that he missed approximately two months of work. Complaint at 30-36.

DiMarco has presented experts affidavits from radiologist A. Andrew Ortiz, MD (Dr. Ortiz) and physicians Alexandre B. DeMoura, MD (Dr. Demoura) and Jason Seifferman, MD (Dr. Seifferman). *See* affirmation in opposition, exhibits A, B, C, D. Dr. Ortiz states that he performed two MRIs on DiMarco; the first, on May 9, 2013 of DiMarco's cervical spine, and the second, on May 24, 2013 of DiMarco's lumbar spine. *Id.*, exhibits A, B. The report of the former MRI contained findings of: 1) C4/5 disc protrusion; 2) C5/6 disc ridge complex with spinal cord encroachment; and 3) C7/T1 disc protrusion. *Id.*, exhibit B. The latter MRI report contained findings of: 1) L1/2 disc protrusion; and 2) L5/S1 disc protrusion. *Id.*, exhibit A. Dr. DeMoura's report states that he examined DiMarco on eight occasions between May 9, 2013 and March 16, 2017, and notes that it was he who had referred DiMarco for both MRIs and physical therapy (which DiMarco undertook during the time that Dr. Demoura treated him). *Id.*, exhibit C. Dr. DeMoura's report also states that he performed range of motion tests on DiMarco on March 16, 2017 and found that DiMarco had a below normal range of motion in numerous areas of both his cervical and lumbar spine. *Id.* Dr. DeMoura's report further states that, as a result of the May 1, 2013 automobile collision, DiMarco suffered permanent injuries consisting of spinal disc herniations at C4/5, C7/T1, L1/2 and L5/S1, and discounts degenerative changes as a cause

of these injuries. *Id.* Dr. DeMoura's report concludes that DiMarco suffered: 1) a "significant limitation of use" of both his cervical and lumbar spine; and 2) a "permanent consequential limitation of use" of both his cervical and lumbar spine. *Id.* Dr. Seifferman's report states that he saw DiMarco on eight occasions between February 1, 2017 and April 11, 2017 for pain treatment, which consisted of ultrasound-guided trigger-point steroid injections into areas of DiMarco's cervical and lumbar spine. *Id.*, exhibit D. Dr. Seifferman's report also states that, as a result of his physical examinations, he diagnosed DiMarco with cervical disc herniations, cervical spondylosis, lumbar radiculopathy and myofascial pain, and concluded that DiMarco's prognosis is "guarded." *Id.*

For their part, defendants have presented an experts affidavit from orthopedist Isaac Cohen, MD (Dr. Cohen), who examined DiMarco on November 3, 2015. *See* notice of motion, exhibit E. Dr. Cohen states that he reviewed the May 9, 2013, MRI report of DiMarco's cervical spine, the May 24, 2013, MRI report of his lumbar spine and a July 15, 2013, MRI report of DiMarco's right knee. Additional documents reviewed by Dr. Cohen include one of Dr. DeMoura's examination evaluations and several of DiMarco's physical therapy progress notes. Dr. Cohen conducted a physical examination of DiMarco and found normal ranges of motion and negative objective tests for his cervical and lumbosacral spine and his right knee. *Id.* Dr. Cohen's report concludes that DiMarco's "cervical and lumbosacral spine strains" are "resolved," as is "preexisting degenerative disc disease" in these areas. *Id.* According to Dr. Cohen the C5/6 disc ridge complex "was chronic and degenerative in nature and not related to the accident . . ." *Id.* Dr. Cohen acknowledges that DiMarco has two small disc herniations at L1/2 and L5/S1 but opines that there is "no clinical evidence of any neurological compromise."

*Id.* Regarding DiMarco's right knee Dr. Cohen concludes that he has "[p]reexistent patellofemoral joint degenerative arthritis.. ." with "no evidence of any posttraumatic pathology present." *Id.*

DiMarco commenced this action on October 18, 2013 by filing a summons and complaint that sets forth one cause of action for negligence, with the allegation that he sustained statutorily defined "serious injuries" in the instant automobile collision. *See* notice of motion, exhibit A. Defendants filed an answer with affirmative defenses on December 2, 2013. *Id.*, exhibit B. Defendants then filed a motion to dismiss (motion sequence number 001) which was resolved via a stipulation between the parties on September 13, 2016. Defendants subsequently filed the instant motion for summary judgment (motion sequence number 002) on January 13, 2017, which is now before the court.

#### DISCUSSION

"To prevail on a [threshold] motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a serious injury." *Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 (1<sup>st</sup> Dept 2011) (internal quotation marks and citations omitted). Once defendant meets its initial burden plaintiff must then demonstrate a triable issue of fact as to whether s/he sustained a serious injury within the meaning of Insurance Law § 5102 (d). *Shinn v Catanzaro*, 1 AD3d 195, 197 (1<sup>st</sup> Dept 2003).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact. *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 (2007). "Where different conclusions can

reasonably be drawn from the evidence, the motion should be denied.” *Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 (1992). “[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment.” *Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 (1st Dept 2002); *see also Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 (1st Dept 2013).

Here, as was previously mentioned, DiMarco’s complaint sets forth one cause of action for negligence which includes the allegation that he suffered “serious injuries” as a result of the collision. In their motion, defendants seek summary judgment to dismiss DiMarco’s negligence claim on the ground that he did not suffer any “serious injury,” pursuant to Insurance Law § 5102, which provides as follows:

“‘Serious injury’ means 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.”

In his bill of particulars, DiMarco alleged that he had sustained five types of “serious injury,” as defined by the statute: 1) “fracture”; 2) “permanent loss of use”; 3) “permanent consequential limitation”; 4) “significant limitation”; and 5) a “medically determined 90/180 day injury.” *See* notice of motion, exhibit C. In their motion, defendants argue that DiMarco has failed to present sufficient evidence of any of these types of “serious injury.” *See* notice of motion, Condello affirmation, ¶¶ 31-37. In his opposition papers, DiMarco only raises argument as to the “permanent consequential limitation” and “significant limitation” classes of “serious

injuries.” See Campisi affirmation in opposition, ¶¶ 28-50. Therefore, Dimarco has abandoned his reliance on the other three classes of “serious injury,” and the balance of this decision will address the “permanent consequential limitation: and “significant limitation” categories of “serious injury.”

“[A]ffirmed reports of medical experts who, upon examination, found that plaintiff had full range of motion in [his cervical and lumbrosacral spine and right knee] and that the MRIs . . . showed degenerative changes” meet defendants’ burden of establishing a prima facie case that plaintiff did not suffer a serious injury under the No-Fault Law. *Williams v Perez*, 92 AD3d 528, 528 (1st Dept 2012); see also *Santana v Centeno*, 140 AD3d 230, 231 (1st Dept 2016); *Jallow v Siri*, 133 AD3d 1391, 1391 (1st Dept 2015). Here, defendants have meet their prima facie burden of through Dr. Cohen’s report. Dr. Cohen found normal ranges of motion for DiMarco’s cervical and lumbrosacral spine and his right knee and degenerative changes in those body parts. *Id.*

In opposition, Dr. DeMoura’s report presents “objective evidence” of below normal ranges of motion for DiMarco’s cervical and lumbar spine and constitutes “contrary evidence . . . [and is] sufficient to raise an issue of fact.” *Perl v Meher*, 18 NY3d 208, 218-219 (2011). The conflict between the findings of DiMarco’s expert witness and defendants’ expert witness as to the degree of limitation of DiMarco’s range of motion “is one of credibility.” *Id.* at 219; see also *Williams*, 92 AD3d at 529. Put another way, DiMarco’s doctor contests the findings of defendants’ doctor and he asserts that DiMarco has suffered a serious injury to his cervical and lumbrosacral spine attributable to the collision. These findings are “entitled to the same weight as defendants’ expert[s’] opinion and are sufficient to raise an issue of fact.” *Mulligan v City of*

*New York*, 120 AD3d 1155, 1156 (1st Dept 2014); *see also Windham v New York City Tr. Auth.*, 115 AD3d 597, 598 (1st Dept 2014); *Vaughan v Leon*, 94 AD3d 646, 648 (1st Dept 2012).

Defendants also argue that DiMarco's negligence claim should be dismissed because the so-called "gap in treatment" rule renders Dr. DeMoura's opinion on the causal relation between the May 1, 2013 automobile accident and DiMarco's injuries "speculative." *See* notice of motion, Condello affirmation, ¶¶ 36-37. Defendants cite the Court of Appeals' decision in *Pommells v Perez* (4 NY3d 566 [2005]) for the proposition that, in situations where a "gap in treatment was, in reality, a cessation of all treatment," the law requires "a plaintiff who terminates therapeutic measures following the accident . . . [must] offer some reasonable explanation for having done so." 4 NY3d at 574. Defendants assert that DiMarco "has not presented any evidence to explain this cessation in treatment [i.e., his termination of physical therapy in March 2015], despite having and utilizing both his own and his wife's private health insurance." *See* notice of motion, Condello affirmation, ¶ 37. DiMarco responds that Dr. DeMoura's report specifically noted that "he stopped [physical therapy] when he reached maximum medical improvement of treatment." *See* Campisi affirmation in opposition, ¶ 24; exhibit C. Dr. DeMoura's statement constitutes a "reasonable explanation" for DiMarco's decision to discontinue physical therapy sessions. *See e.g. Weneleme v Harriott*, 157 AD3d 412, 412-413 (1st Dept 2018) ("Plaintiff's gap in treatment is not dispositive, as she explained that, after 11 months of therapy, her physician told her any further treatment would be palliative in nature. Moreover, her physician stated that her condition remained persistent throughout treatment."). The court also notes that DiMarco has not engaged in a complete "cessation of all treatment" as described in *Pommells v Perez*, since he began seeing Dr. Seifferman for pain

management purposes after he ceased physical therapy (and, indeed, was referred to Dr. Seifferman by his former physical therapist). *Id.*, exhibit D. Therefore, defendants’ “gap in treatment” argument is unsupported by the evidence.

Accordingly, for the foregoing reasons, it is hereby

**ORDERED** that the defendants’ summary judgment motion is GRANTED to the extent of dismissing Plaintiff’s claims under the fracture, permanent loss of use, and 90/180-day categories of Insurance Law § 5102(d) and as to his claims of serious injury to his right knee; and it is further

**ORDERED** that the remainder of Defendants’ summary judgment motion is DENIED.

Dated: New York, New York

July 24, 2018

ENTER:



Hon. Paul A. Goetz, J.S.C.