Paonessa v Allen
2019 NY Slip Op 34436(U)
November 26, 2019
Supreme Court, Erie County
Docket Number: Index No. 814186/2018
Judge: Emilio Colaiacovo
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SALVATORE PAONESSA, IV and JENNIFER PAONESSA,
Individually and as Husband and Wife,

Plaintiffs,

v.

JORDAN ALLEN and MARIE ALLEN,

Defendants.

Decision & Order
Index No. 814186/2018

BRIAN J. ALTERIO, ESQ.
Attorney for Plaintiffs

JONATHAN H. DOMINIK, ESQ.
Attorney for Defendant

Colaiacovo, J.:

This action arises from a rear-end motor vehicle accident that occurred on Sheridan Drive, in the Town of Amherst, New York on May 19, 2018. The Plaintiff claims he sustained a "serious physical injury" as a result of the accident.

Plaintiff Salvatore Paonessa has moved for an Order granting summary judgment pursuant to CPLR §3212 and §5102(d) of the New York State Insurance Law on the issue of serious injury threshold. Plaintiff argues that

his injuries qualify as a "serious injury" as defined by Insurance Law §5102. Defendants oppose Plaintiff's motion for summary judgment arguing, in part, that Plaintiff's injuries do not meet the serious injury threshold. The Court previously issued an Order granting partial summary judgment on the issue of negligence. As such, the only issue to be determined on the motion is whether the plaintiff sustained a "serious injury" pursuant to the Insurance Law.

The Court recognizes that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact. See Kelsey v. Degan, 266 A.D.2d 843 (4th Dept. 1999); Moskowitz v. Garlock, 23 A.D.2d 943 (3d Dept. 1965). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). On a motion for summary judgment, the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact. S.J. Capelin Assoc. v. Globe Manufacturing Corp., 34 N.Y.2d 338 (1974). To defeat a motion for summary judgment, the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact, and importantly mere conclusions, expressions of

hope or unsubstantiated allegations or assertions are insufficient. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

A "serious injury" is defined by the New York Insurance Law 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. Insurance Law § 5102(d).

The Plaintiff claims entitlement to summary arguing that he is able to demonstrate:

- Permanent consequential limitation of use of a body organ or member;
- Significant limitation of body organ or member; and
- 90/180-day period of disability.

In support of his summary judgment motion on "serious injury", the Plaintiff relies most prominently on the Affirmation of Dr. William N. Capicotto, a board-certified orthopedic surgeon who treated the Plaintiff for injuries he sustained after an accident in 2010, and who continues to treat the

Plaintiff's injuries to his thoracic and lumbar spine following his 2018 accident. The Plaintiff continues to treat with Dr. Capicotto.

It is Dr. Capicotto's opinion that "the motor vehicle collision of May 19th, 2018 resulted in serious injuries to Mr. Paonessa, requiring extensive treatment, surgery, pain medication, and lifetime restrictions concerning his cervical spine, thoracic spine and lumbar spine. These injuries constitute a serious injury, both permanent consequential as well as significant limitation regarding his cervical spine, thoracic spine and lumbar spine." Capicotto Affirmation at par. 36.

The Plaintiff testified "his sleep is limited to a couple of hours due to his injuries; that when he sleeps on his right side, his right arm goes number and if he sleeps on his left side, his left arm goes numb; his neck pain causes associated headaches; his low back pain radiates into his left leg; his pain is so intense at work that he will often throw up; prolonged sitting and standing increases his pain." Alterio Affirmation at par. 10.

Dr. Capicotto's findings from his examinations of the Plaintiff's cervical spine showed "Left rotation is limited to 50 degrees. Normal is 80 degrees, thereby resulting in a loss of 37% range of motion. Right rotation

was limited to 60 degrees. Normal is 80 degrees, thereby resulting in a loss of 25% range of motion." Capicotto Affirmation at par. 17. Furthermore, upon a review of the Plaintiff's MRIs, amongst other things, Dr. Capicotto noted "an annular tear and disc herniation at L3-4 that was extending approximately 2.5-3mm into the spinal canal with indentation concerning the thecal sac; disc herniation at C5-6 measuring approximately 2mm in dimension which encroached upon the anterior subarachnoid space; a 2mm disc protrusion at T8-9 with an annular tear; and a disc bulge at T9-10." See Capicotto Affirmation at par. 21-24.

Based on the foregoing, this Court is satisfied for the purpose of these motions that the Plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law. Specifically, this Court finds the Plaintiff met his burden under the "permanent consequential limitation" and "significant limitation of use" categories.

The Court, however, disagrees with Plaintiff that the Defendants have failed to meet their burden in opposition to Plaintiff's motion. "It is well established that "conflicting expert opinions may not be resolved on a motion for summary judgment," (citations omitted), Pittman v. Rickard, 295 A.D.2d 1003, 1004 (4th Dept. 2002). In the opinion of this Court, the reports

submitted in opposition to Plaintiff's motion are sufficient to raise material issues of fact. Counsel's Affirmation in Opposition refers to a number of different medical reports attached as exhibits. In particular, Dr. Edward L. Mills found that "there were no objective findings relative to Plaintiff's cervical and thoracic spines to warrant future medical treatment for same." Dominik Affirmation at par. 20.

Furthermore, Dr. Gregory Chiaramonte, after examining the Plaintiff on May 29, 2019, concluded that Plaintiff suffered "no orthopedic disability. Mr. Paonessa was employed full time in law enforcement at the time of the accident. Currently Mr. Paonessa is working full time. Mr. Paonessa is capable of working without restrictions. He may perform his activities of daily living as he was prior to the accident." Dominik Affirmation at par. 23. Defendant also noted that Dr. Chiaramonte noted that "there was no range of motion loss with respect to the lumbar spine." Id. at par. 21. Lastly, Dr. Chiaramonte concluded that "there were no objective clinical findings to warrant the need for continued orthopedic treatment for Plaintiff's subjective complaints of pain." Id. at par. 25. It should also be noted that Plaintiff admitted that he never missed any time from work after the 2018 accident.

Plaintiff takes issue with the fact the Defendant relies on no-fault

medical examinations in opposing Plaintiff's motion for summary judgment. Plaintiff relies on Rowe v. Wahnow, 26 Misc.3d 8 (1st Dept. 2009), to argue that "it would be unjust and improper to allow the defendants to utilize multiple reports from no-fault examining doctors as a substitute for a lack of defense medical examination that was available to the defendants as part of the litigation to oppose plaintiffs' motion for partial summary judgment on the issue of serious injury threshold." Alterio Reply Affirmation at par. 24. In making his argument, however, Plaintiff quotes only to the dissent. Furthermore, while quoting Justice McKeon several times, Plaintiff does not point out that Justice McKeon also noted when expressing his concern in using no-fault reports that his concerns "should not be taken as a judicial expression that such reports may not be used in conjunction with other medical reports to resolve the threshold serious injury question within the context of a summary judgment motion (citation omitted)." Rowe v. Wahnow, 26 Misc.3d at 13.

Based on the foregoing, this Court is satisfied for the purpose of these motions that the Defendant has provided proof sufficient to require a trial of material issues of fact. Specifically, this Court finds the Defendant raised an issue of fact under the "permanent consequential limitation" and "significant limitation of use" categories.

As such, the Plaintiff's motion seeking summary judgment pursuant to the "serious injury" threshold is DENIED in all respects.

Hon. Emilio Colaiacovo, J.S.C

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