Lamarre v Sullivan
2019 NY Slip Op 34538(U)
December 16, 2019
Supreme Court, Rockland County
Docket Number: Index No. 030618/2018
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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HERBIE LAMARRE,

Plaintiff,

-against -

BRIAN SULLIVAN, NANCI S. SULLIVAN, and EDMONDE S. DELVA,

Defendants.
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DECISION/ORDER

Index No. 030618/2018

(Motions #2, #3 and #4)

HON. SHERRI L. EISENPRESS, A.J.S.C.

The following papers, numbered 1- 12, were read in connection with Defendant Edmonde S. Delva's Notice of Motion for summary judgment and dismissal of the Complaint against him, pursuant to CPLR Sec. 3212, on the ground that he bears no liability for the automobile accident at issue (Motion #2); Defendants Brian Sullivan and Nanci S. Sullivan's (collectively "Sullivan") Notice of Motion for summary judgment and dismissal of the action, on the ground that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d) (Motion #3); and Defendant Edmonde S. Delva's Notice of Cross-Motion for summary judgment and dismissal of the action because the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d) (Motion #4):

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Liability

Plaintiff commenced the instant matter on February 2, 2018, to recover damages for personal injuries arising out of an automobile accident on April 29, 2015, at the intersection of Route 9W and Westside Avenue, in the Village of Haverstraw, County of Rockland. Plaintiff was a passenger in the vehicle owned and operated by Defendant Edmond Delva, which was struck in the rear by a vehicle operated by Defendant Brian Sullivan and owned by Defendant Nanci S. Sullivan. At his examination before trial, Plaintiff Lamarre testified that the accident occurred when Delva was driving and the light became yellow, at which point she stepped on her brakes to stop for the red light and the car behind her rear-ended her. Defendant Brian Sullivan testified that he was traveling north on 9W behind co-defendant's vehicle. As they came to the subject intersection, the light turned yellow and Sullivan assumed the Delva vehicle was going to go through the light but it did not. Defendant Delva testified that when she saw the light turn red, she "stopped in front of the light like normal." Defendant Sullivan struck the rear of her vehicle when she was stopped and described the impact as heavy.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v Gonzalez, 306 A.D.2d 250 (2d Dept 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial.

Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

It is well-settled that a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the moving vehicle, unless the operator of the moving vehicle can come forward with an adequate, non-negligent explanation for the accident. *See Smith v. Seskin,* 49 A.D.3d 628, 854 N.Y.S.2d 420 (2d Dept. 2008); *Harris v. Ryder*, 292 A.D.2d 499, 739 N.Y.S.2d 195 (2d Dept. 2002)]. Further, when the driver of an automobile approaches another from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle. *VTL* § 1129(a) ("The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon the condition of the highway."); *Taing v. Drewery*, 100 A.D.3d 740, 954 N.Y.S.2d 175 (2d Dept. 2012). Drivers must maintain safe distances between their cars and cars in front of them and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages. *Johnson v. Phillips*, 261 A.D.2d 269, 271, 690 N.Y.S.2d 545 (1st Dept. 1999).

In the matter at bar, the Defendant Delva has established his *prima facie* entitlement to summary judgment as his vehicle was stopped at a red light when it was struck in the rear by the Sullivan vehicle. It is then incumbent upon co-defendant Sullivan to come forward with a non-negligent explanation for the rear end collision. "A claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence." Robayo v. Aghaabdul, 109 A.D.3d 892, 893, 971 N.Y.S.2d 317 (2d Dept. 2013). Here, Defendant Sullivan acknowledged that he saw the traffic control light turn yellow but thought that Delva would run through the light before it turned red. This does not constitute

a non-negligent excuse, as it is entirely foreseeable that a driver would come to a stop in response to a yellow traffic control signal before entering an intersection. Accordingly, Defendant Delva has established her entitlement to summary judgment and dismissal of the Complaint and cross-claims against her.

No-Fault Threshold

Plaintiff alleges that as a result of the accident, he sustained an acute tear in the left rotator cuff supraspinatus; exacerbation and paresthesia of the left shoulder and upper arm; bicep tendinitis impingement and sprain of cuff, undersurface tear; acute lumbar spine strain with aggravation, exacerbation of prior lumbar herniation of L4-5 and prior lumbar disc bulge at L3-4; acute cervical sprain and strain with aggravation and exacerbation of pre-existing cervical sprain/strain and intermittent headaches. Plaintiff underwent extensive treatment to his left shoulder and underwent surgery on January 20, 2016.

The Sullivan Defendants timely move to dismiss the complaint for failure to meet the serious injury no-fault threshold. Defendant Delva cr0ss-moves for summary judgment with respect to the no-fault threshold, however, that motion was filed approximately 15 days after the Court ordered deadline, and is not actually a cross-motion, as Plaintiff has not moved against Delva. As Defendant Delva offers no explanation for the late filing, particularly since it managed to timely file a summary judgment motion with respect to liability, her untimely summary judgment motion will not be considered and is denied.

In support of the Sullivan Defendants' motion, they submit several affirmed medical reports of radiological film reviews of Dr. F. Traflet, M.D. With respect to a review of Plaintiff's cervical MRI taken on June 3, 2015, Dr. Traflet finds no evidence of a herniated disc and concludes that there are no cervical MRI finds causally related to the traumatic event of April 29, 2015. Dr. Traflet also reviewed Plaintiff's March 8, 2012 lumbar MRI and notes an "old-appearing disc herniation" at L4-5 and a mild chronic-appearing annular bulging at L3-4 and L5-S1. He then states that these 2012 lumbar MRI findings precede the subsequent

traumatic event of April 29, 2015. Dr. Traflet also reviewed Plaintiff's April 14, 2016 MRI. Defendant asserts that Dr. Traflet conducted a direct side-by side comparison of Plaintiff's lumbar spine MRIs from March 8, 2012 and April 14, 2016 and found that the latest image did not reveal any new herniated discs or bulging annulus" there is no review of the April 14, 2016 MRI annexed to the moving papers and no sworn statement made by Dr. Traflet regarding a comparison.

Lastly, Dr. Traflet reviewed Plaintiff's June 3, 2015 MRI of his left shoulder. He opines that there are chronic degenerative changes in the left shoulder of long-standing duration. Dr. Traflet goes on to state that "such finding typically produce chronic degenerative tendinosis of the supraspinatus and mild adjacent bursitis, which are seen in this case." He finds no post-traumatic abnormalities in any of the images or causally related MRI findings to the traumatic event of April 29, 2015. His review of a January 26, 2015 x-ray stated that there were mild chronic degenerative changes in the left shoulder which precede the traumatic event of April 29, 2015. Additionally, defendants point out that Plaintiff had at least two prior accidents in which he injured the same parts of his body. They argue that based upon the MRI reviews of Dr. Traflet, and Plaintiff's examination before testimony, he has not sustained a "serious injury" under the no-fault threshold.

In opposition thereto, Plaintiff submits some medical records which are certified including the Nyack Hospital emergency room records and records from Allonce Family Chiropractic P.C. Other records are submitted are not certified, including the records from Northeast Orthopedics (which contain the operative report), Rockland Recovery Physical Therapy PLLC, and Lee Fleischer, MD. Plaintiff also submits the affirmed medical report of Dr. Scott Gottlieb M.D., dated March 21, 2019. Dr. Gottlieb reviewed various medical records and examined Plaintiff, however, many of the records relied upon were not in admissible form and were not relied upon by moving defendants. Dr. Gottlieb finds significant range of motion limitations in Plaintiff's left shoulder, and opines that Mr. Lamarre's shoulder pain is causally

related to the accident which occurred on April 29, 2015. His report, however, does not address Plaintiff's prior accidents and/or injuries to his left shoulder.

In reply, the Sullivan Defendants contend that Plaintiff fails to oppose that portion of the motion which was to dismiss the 90/180 day no-fault category. Additionally, they contend that those records not certified and not in admissible form must be disregarded by this Court and cannot form the basis of the expert's opinion. Lastly, Defendants contend that because Dr. Gottlieb's medical report does not address Plaintiff's prior injuries to his left shoulder, Dr. Gottlieb's opinion as to causation is speculative and fails to set forth a triable issue of fact.

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance Law §5102(d) as a serious injury. Healea v Andriani, 158 A.D.2d 587, 551 N.Y.S.2d 554 (2d Dept 1990). A defendant can meet his burden on summary judgment by relying upon an affirmed medical report of a radiologist who has reviewed the plaintiff's magnetic resonance imaging films relevant to the subject accident and opines that they show preexisting degenerative changes, with no abnormalities causally related to the accident. Jilani v. Palmer, 83 A.D.3d 786, 787, 920 N.Y.S.2d 424 (2d Dept. 2011). In the instant matter, the submission of Dr. Traflet's medical reports based upon his review of Plaintiff's radiological studies are sufficient to sustain Defendants' burden on summary judgment. The reports find no injuries causally related to the subject accident in Plaintiff's cervical and lumbar spine or in his left shoulder, and finds any abnormalities to be pre-existing.

Once the moving party's burden is met, plaintiff must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether the plaintiff, suffered a "serious injury" within the meaning of the Insurance Law. Zoldas v St. Louis Cab Corp., 108 A.D.2d 378, 489 N.Y.S.2d 468 (1st Dept 1985); Dwyer v Tracey, 105 AD2d 476, 480 N.Y.S.2d 781 (3d Dept. 1984). One way to substantiate a claim of serious injury is

through an expert's designation of a numeric percentage of a plaintiff's loss of range of motion, i.e., quantitatively. McEachin v. City of New York, 137 A.D.3d 753, 756, 25 N.Y.S.3d 672 (2d Dept. 2016). However, an expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Id.

While the Court of Appeals held in Perl v. Meher, 28 N.Y.3d 208, 216, 936 N.Y.S.2d 655 (2011), that a plaintiff is not required to demonstrate contemporaneous numerical measurements of range of motion, the Court nonetheless noted that a contemporaneous doctor's report is important to proof of causation since an examination by a doctor years later cannot reliably connect the symptoms with the accident. Id. See also Rosa v. Mejia, 95 A.D.3d 402, 943 N.Y.S.2d 470 (1st Dept. 2012)(Court of Appeals decision in Perl v. Meher did not abrogate the need for at least a qualitative assessment of injuries soon after an accident.) Certified medical records may be considered for the purpose of demonstrating that plaintiff sought medical treatment for his claimed injuries contemporaneously with the accident and continuing for a significant period of time thereafter. Vishevnik v. Bouna, 147 A.D.3d 657, 659, 48 N.Y.S.3d 93 (1st Dept. 2017). In the instant matter, the records from Allonce Family Chiropractic, which are certified, sufficiently demonstrate contemporaneous medical findings with respect to the subject accident.

However, Plaintiff has nonetheless failed to establish a triable issue of fact as to causation. While Dr. Gottlieb opines that Plaintiff's limited mobility and pain in his left shoulder is causally related to the subject accident, he fails to address Plaintiff's prior accident and injury to the same left shoulder. Where a physician's report makes no mention of a plaintiff's pre-existing injuries to the same part of the body, it lacks probative value and is speculative. Laurent v. McIntosh, 49 A.D.3d 820, 854 N.Y.S.2d 228 (2d Dept. 2008); Shelly v. McCutcheon, 121 A.D.3d 1243, 995 N.Y.S.2d 247 (2d Dept. 2014); Varveris v. Franco, 71 A.D.3d 1128; 898

N.Y.S.2d 213 (2d Dept. 2010).

In Cornelius v. Cintas Corp., 50 A.D.3d 1085, 1087, 857 N.Y.S.2d 637 (2d Dept. 2008), the Court held that the physician's conclusions that Plaintiff sustained "significant limitations" in the cervical and lumbar regions of his spine and his left knee as a result of the subject accident, were speculative, in light of the fact that the doctor never acknowledged plaintiff's prior accident, and never addressed the findings of the defendants' examining radiologist who concluded that plaintiff suffered from degenerative conditions in those body parts that predated the accident. Likewise, in the matter at bar, Dr. Gottlieb fails to address the prior accidents or the findings of defendants' radiologist of pre-existing conditions in Plaintiff's lumbar and cervical spine and left shoulder. Accordingly, Plaintiff has failed to demonstrate triable issues of fact as to the categories of "permanent consequential limitation" and "significant limitation."

Lastly, plaintiff has failed to allege that he was disabled for the minimum duration necessary to state a claim for serious injury under the 90/180 day category. His allegation that he missed several months of work after the surgery is insufficient, as the surgery took place outside the 180 days window, coupled with his failure to submit medical evidence which documents that he was prevented from performing "substantially all" of his usual and customary activities for the requisite period, See Rubin v. SMS Taxi Corp., 71 A.D.3d 548, 898 N.Y.S.2d 110 (1st Dept. 2010), is insufficient to sustain his burden upon summary judgment.

Accordingly, it is hereby

ORDERED that Defendant Edmonde S. Delva's Notice of Motion (#2) for summary judgment and dismissal of the complaint liability is GRANTED in its entirety and the action is hereby dismissed against her; and it is further

ORDERED that Defendants Brian Sullivan and Nanci S. Sullivan's Notice of Motion (#3) for summary judgment, for failure to meet the serious injury threshold, is GRANTED, and the action is dismissed; and it is further and it is further

ORDERED that Defendant Edmonde S. Delva's Notice of Motion (#4) for summary judgment, for failure to meet the serious injury threshold, is DENIED.

The foregoing constitutes the Opinion, Decision & Order of the Court on Motions #2-4

Dated: New City, New York
December 16, 2019

HON.SHERRI L. EISENPRESS, A.J.S.C.

TO:
All Parties (by e-file)