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| Peretto v Son |
| 2020 NY Slip Op 34569(U) |
| May 5, 2020 |
| Supreme Court, Rockland County |
| Docket Number: 035434/2016 |
| Judge: Robert M. Berliner |
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To commence the statutory time period 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 ROCKLAND

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DANIEL R. PERETTO AND NINA PERETTO,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 035434/2016
Order Date May 5, 2020
Motion Seq. 2

MIDAEJA SON,

Defendant.

-----X
BERLINER, J.

The following papers were read on: (1) this Notice of Motion by defendant for an Order pursuant to CPLR 3212 dismissing this action on grounds that plaintiff Daniel R. Peretto suffered no serious injury within the meaning of Insurance Law section 5102(d):

- Notice of Motion, Aff. in Support, Exhs. A-D
- Aff. in Opposition, Exhs. 1-10
- Aff. in Reply
- NYSCEF File

Upon the foregoing papers, and all prior papers and proceedings in this action, the motion is determined as follows:

This action arises from an alleged motor vehicle accident in this venue on October 30, 2015. As relevant here, plaintiff Daniel R. Peretto (hereinafter "plaintiff")¹ through his papers alleges that defendant's vehicle struck plaintiff's vehicle, causing plaintiff Daniel R. Peretto's injuries. After defendant joined issue and the parties completed discovery, plaintiff filed a Note of Issue and Certificate of Readiness, and defendant brought a motion to vacate the Note of Issue and Certificate of Readiness, but defendant subsequently withdrew that motion. Defendant now

¹ The parties stipulated to the discontinuance of the action by plaintiff Nina Peretto with prejudice (NYSCEF Doc. 24).

moves to dismiss on grounds that plaintiff suffered no serious injury within the meaning of Insurance Law section 5102(d). The parties twice stipulated to adjourn this motion, and then the covid-19 pandemic required the issuance of emergency orders that delayed the determination of this motion. The motion now comes forward for decision.

Party Contentions

In support of her motion, defendant relies on, among other things, the independent medical evaluation of orthopedic surgeon Dr. Joseph P. Laico. His report, upon his examination of patient and review of plaintiff's medical file, concluded that plaintiff's cervical strain and sprain have resolved, plaintiff's lumbosacral strain and sprain have resolved, and plaintiff's thoracic strain and sprain have not resolved, and plaintiff's prognosis is good. Dr. Laico further concluded that plaintiff has preexisting degenerative disc disease and osteoarthritis of the cervical spine, which may be prolonging plaintiff's symptoms of upper thoracic pain and spasm. Dr. Laico reported, upon examination of plaintiff's neck, that plaintiff had mild limitation of range of motion in the cervical spine (extension 50 degrees/60 degrees, left lateral bending 40 degrees/45 degrees, right lateral bending 40/45 degrees, left rotation 70 degrees/80 degrees, right rotation 70 degrees/80 degrees) compatible with plaintiff's MRI findings of degenerative disc disease and osteoarthritis and is of no clinical significance. Examination of plaintiff's thoracic spine revealed mild spasm palpated in the supraspinatus and levator scapula on the right, and several trigger points in these areas. There were no trigger points elicited on palpation or compression of the thoracic musculature. There was no evidence of kyphosis or scoliosis. Examination of plaintiff's lumbosacral spine revealed that plaintiff walked with a normal heel-toe gait and was able to stand heel to toe with no signs of difficulty. Based on the foregoing, defendant argues that plaintiff did not suffer a "serious injury" as defined by Insurance Law section 5102(d).

Defendant also points to plaintiff's own deposition testimony stating that plaintiff did not miss any time from his employment (as an opera singer) as a result of the accident, that he did not immediately feel any pain, that he called his father after the accident and made no complaints about how he felt, and that he worked the night of the accident (in a performance at the Metropolitan Opera). Plaintiff further testified that when he went to the hospital several hours after the accident,

he was not prescribed any braces, wraps or bandages and that there is nothing that he is unable to do since the accident that he was able to do prior to the accident.

In opposition, plaintiff argues that defendant failed to make her prima facie case that plaintiff's injuries were not serious injuries within the meaning of Insurance Law section 5102(d). Plaintiff argues that defendant's medical expert found quantifiable restrictions in plaintiff's range of motion of his cervical spine, unresolved thoracic strain and sprain, spasm in the supraspinatus and levator scapula area on the right of the thoracic spine, as well as several trigger points in the same area. Plaintiff further argues that defendant's medical expert gave a conclusory opinion that the limitations of range of motion in the cervical spine were compatible with preexisting degenerative disc disease and osteoarthritis, but did not specifically address the cervical herniations in the MRI, nor did he address the issue of aggravation of a preexisting non-symptomatic condition of the cervical spine given the plaintiff's history of no prior complaints or treatment, and that his statement that the unresolved thoracic strain and sprain, which defendant's medical expert diagnosed himself, "may" be prolonged by a preexisting degenerative cervical disc disease is speculative and insufficient to refute that the objective findings of thoracic injury were caused by the accident.

Plaintiff also submits his affidavit setting forth medical treatment he received since the day of the accident, Verified Bill of Particulars and Supplemental Verified Bill of Particulars explaining the functional limitations his injuries have caused and the qualitative impact his injuries have had on his life, and medical records from seven health care providers and facilities describing plaintiff's course of treatment since the night of the accident. Plaintiff argues that on the night of the accident, he could not complete his performance and left during intermission to seek medical treatment at Mount Sinai West for pain and stiffness in his back, as well as feeling disoriented, nauseous, and dizzy. A few days later, plaintiff sought treatment with Dr. Patrick Murray of Clarkstown Orthopedics (Northeast Orthopedics and Sports Medicine) complaining of pain in the mid-low back, right side of the upper back, as well as pain radiating into the right upper arm and was sent for MRI of lumbar and thoracic spine and given a prescription for physical therapy. Thoracic MRI of January 20, 2016 was positive for right posterior paracentral disc herniation at T2-3 narrowing the ventral margin of the thoracic canal. Lumbar MRI of January 11, 2016 was

positive for annular disc bulges at L4-5 and L5-6/S1. Plaintiff continued treatment with Dr. Murray through January 13, 2016. From February 1, 2016 to June 24, 2016, plaintiff received treatment from Dr. Evan Queler of Advanced Orthopedics (Northeast Orthopedics and Sports Medicine) who diagnosed plaintiff with thoracic sprain, neck strain, cervical spondylosis, cervical neuritis, myalgia, and myositis, and administered a series of trigger point injections. A cervical MRI of February 10, 2016 was positive for C2-3 posterior central disc herniation, C4-5 broad based posterior central disc herniation, and C5-6 broad based posterior central disc herniation. Plaintiff also sought physical therapy treatment and chiropractic treatment. Physical therapy records contain positive findings of injury including limited range of motion of plaintiff's cervical spine and chiropractic records indicating that plaintiff exhibited positive objective signs of injury such as spasm and tenderness in his cervical and thoracic spine.

According to the affirmed narrative report of Dr. Scott Gottlieb of Gramercy Pain Management, plaintiff has been a patient of Dr. Gottlieb since August 25, 2016 and was last seen by Dr. Gottlieb on January 14, 2019. Dr. Gottlieb states that an initial examination of plaintiff revealed tenderness along both the cervical and thoracic paravertebral areas along with a positive Spurling sign and trigger points in both the cervical and thoracic paravertebral musculature. Dr. Gottlieb also noted a radiating component along the T2-3 dermatomes with deep palpation of the right thoracic paravertbral area. Subsequent to plaintiff's initial visit and over the course of a two-year period, plaintiff has been treated with a series of three thoracic epidural steroid injections and one cervical epidural steroid injection. At his last visit, examination of plaintiff revealed bilateral cervical and lumbar paravertebral tenderness with trigger points along with a continued positive Spurling sign and a radiating component along the T2-3 dermatomes with deep palpation of the right thoracic paravertbral area. Dr. Gottlieb reports that plaintiff has a diagnosis of C2-3, C4-5, C5-6, and T2-3 disc herniations and evidence of both a cervical and thoracic radiculopathy. Dr. Gottlieb further reports that plaintiff's condition has caused paraspinal muscle spasm and trigger points, which have limited his ability to turn his neck to the right and have caused weakness in the his right extremity. Dr. Gottlieb opines that, based on his physical examination of plaintiff, diagnostic imaging, and history, his diagnosis of cervical disc herniation, cervical radiculopathy, thoracic disc herniation and thoracic radiculopathy are related to the accident.

In reply, defendant refers to the examination of Dr. Liaco and argues that Dr. Liaco found plaintiff to have full range of motion, no tenderness, and objective evidence of “preexisting degenerative disc and osteoarthritis of the cervical spine.” Defendant further argues that any causally related injury allegedly sustained by plaintiff was at best “mild” and is now resolved, and therefore insignificant within the meaning of the statute, that there is no evidence of permanency, and that plaintiff’s medical records show that he made a full recovery.

Analysis

Insurance Law section 5102(d) defines serious injury 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.”

On a defense dismissal motion sounding under this statute, the movant bears the prima facie burden to establish that the plaintiff did not sustain a serious injury within the meaning of Insurance Law section 5102(d) as a result of the accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]). If the movant makes that prima facie showing, the burden then shifts “to plaintiff to come forward with sufficient evidence to overcome defendant’s motion by demonstrating that she sustained a serious injury within the meaning of the No-Fault Insurance Law” (*Gaddy v Eycler*, 79 NY2d 955, 957 [1992] [internal quotations omitted]).

“Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact. Issue finding, rather than issue determination constitutes the key to the procedure” (*Anyanwu v Johnson*, 276 AD2d 572, 572-73 [2d Dept 2000] [internal citations omitted]). In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party (*see Kutkiewicz v Horton*, 83 AD3d

904, 904-905 [2d Dept 2011]). Summary judgment is not appropriate where conflicting medical reports of the parties' respective experts raise a triable issue of fact as to whether the plaintiff sustained a serious injury within the meaning of Insurance Law section 5102(d) (*see Garcia v Long Island MTA*, 2 AD3d 675, 675 [2d Dept 2003]; *see also Wilcoxon v Palladino*, 122 AD3d 727, 728 [2d Dept 2014]). "However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact" (*Lowe v Japal*, 170 AD3d 701, 702 [2d Dept 2019] [internal citations omitted]).

In preparing his report, defendant's medical expert, Dr. Laico, reviewed plaintiff's medical records spanning a period from the day of the accident, October 30, 2015 (Emergency Department Evaluation from Mount Sinai West) to November 13, 2017 (MRI study) including medical records for five office visits to Dr. Gottlieb by plaintiff and three procedure reports from Dr. Gottlieb describing thoracic epidural steroid injection, intraoperative fluoroscopy performed on plaintiff. During his physical examination of plaintiff, Dr. Laico found mild limitations of range of motion in the cervical spine, which he determined were consistent with plaintiff's MRI findings of degenerative disc disease and osteoarthritis. Dr. Laico also found mild spasm in the supraspinatus and levator scapula on the right, and several trigger points in these areas, and determined that plaintiff's thoracic strain and sprain has not resolved, but concluded that plaintiff's prognosis is "good."

Plaintiff's medical expert, Dr. Gottlieb, treated plaintiff from August 25, 2016 until January 14, 2019. Consistent with plaintiff's first visit, at plaintiff's last visit, Dr. Gottlieb observed cervical paravertebral tenderness with trigger points and positive Spurling sign and radiating component along the right T2-3 dermatomes with deep palpation of the right thoracic paravertebral area. Dr. Gottlieb concluded that his diagnosis of cervical disc herniation, cervical radiculopathy, thoracic disc herniation and thoracic radiculopathy are related to the accident, and that given plaintiff's lack of prior history concerning complaints or treatment for his neck and back, the continued symptoms he exhibits in his cervical spine and thoracic spine are related to the accident and not to any previously non-symptomatic preexisting degenerative condition of the cervical spine.

The parties have medical experts with diverging opinions based on physical examinations of plaintiff and reviews of plaintiff's diagnostic studies and medical history. Adding to this contrast, this Court notes that plaintiff has undergone a series of trigger point injections by Dr. Queler, and three thoracic epidural steroid injections and one cervical epidural steroid injection by Dr. Gottlieb. As such, this Court cannot conclude as a matter of law that plaintiff sustained no serious injury as a result of the 2015 motor vehicle accident.

This Court has considered defendant's other arguments not explicitly addressed herein, and finds them to lack merit or to be moot in light of the foregoing.

Accordingly, it is hereby

ORDERED that this motion is denied; and it is further

ORDERED that within 10 days hereof, counsel for moving defendant shall serve this Decision and Order, with Notice of Entry hereof, on all parties via NYSCEF; and it is further

ORDERED that counsel for all parties will appear for a conference at 9:30 a.m. on June 17, 2020, for further proceedings.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
May 5, 2020


HON. ROBERT M. BERLINER, J.S.C.

To: All counsel via NYSCEF