Pitruzello v Moses
2020 NY Slip Op 34701(U)
July 2, 2020
Supreme Court, Putnam County
Docket Number: Index No. 501563/2018
Judge: Victor G. Grossman

To commence the 30 day 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 PUTNAM

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MATTHEW PITRUZELLO,

Plaintiff,

-against -

JORDAN T. MOSES and COLIN J. MOSES,

Defendants.

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DECISION & ORDER

Index No. 501563/2018
Sequence No. 1
Motion Date: 6/17/2020

GROSSMAN, J.S.C.

The following papers, numbered 1 to 13, were considered in connection with Defendants' Notice of Motion, dated January 27, 2020, for an Order, granting summary judgment.

PAPERS[1]	**NUMBERED**
Notice of Motion/Affirmation in Support/Exhs. A-E	1-7
Affirmation in Opposition/Exhs. A-E	8-13

This is an action for personal injuries allegedly sustained by Plaintiff Matthew Pitruzello as a result of a motor vehicle accident that occurred on May 4, 2018 on Route 6N in the Town of Carmel, New York. At the time of the accident, a vehicle owned by Defendant Colin J. Moses and operated by Jordan T. Moses crossed over into Plaintiff's lane of traffic, and although Plaintiff swerved in an attempt to avoid contact, Defendants' vehicle struck Plaintiff's car in a

[1]The parties and counsel shall familiarize themselves with this Court's Part Rules, which can be found on the OCA website, as parts of this motion and the responsive papers fail to comply with those Rules, to the extent that Plaintiff shall designate exhibits by number, while Defendant shall designate exhibits by letter, and exhibit lettering or numbering shall not begin anew for subsequent papers submitted by the same party. Any future motions that do not comply with this Court's Part Rules may be rejected or dismissed.

"T-bone" fashion in Plaintiff's lane.

On December 12, 2018, Plaintiff commenced this action, alleging that he sustained a "serious injury" as defined by New York Insurance Law § 5102(d) (Notice of Motion; Exh. A, Complaint at ¶17).

In his Verified Bill of Particulars, dated March 7, 2019, Plaintiff stated (Notice of Motion; Exh. B, Verified Bill of Particulars at ¶9):

9. That the plaintiff sustained the following serious personal injuries:
   - PERONEAL NEUROPATHY LEFT FOOT;
   - PERONEAL NEURITIS CONFIRMED BY EMG;
   - CONTINUOUS AND UNRELENTING PINS AND NEEDLES AND ELECTRICAL SENSATION IN LEFT FOOT;
   - POSITIVE TINEL SIGN ANTERIOR TARSAL TUNNEL LEFT FOOT;
   - PAIN AND NUMBNESS LEFT FOOT;
   - DECREASED ABILITY TO AMBULATE;
   - BULGING CERVICAL DISCS AT C3-4 AND C4-5 INDENTING THECAL SAC;
   - CERVICAL RADICULOPATHY;
   - RIGHT-SIDED CERVICAL RADICULOPATHY;
   - NUMBNESS IN RIGHT HAND;
   - NUMBNESS IN FINGERS OF RIGHT HAND;
   - SEVERE PAIN AND RESTRICTION OF MOTION CERVICAL SPINE;
   - EXACERBATION AND AGGRAVATION OF PERVIOUS LUMBAR SPINE PAIN;

- LUMBAR RADICULOPATHY;
- ACUTE LUMBAR SPINE STRAIN AND SPRAIN;
- EXACERBATION OF PREVIOUS LUMBAR SPINE RADIATING INTO LOWER EXTREMITIES; and
- DIFFICULTY IN AMBULATION AND STANDING ON FEET AS REQUIRED BY PROFESSION.

Then on April 24, 2019, in his Supplemental Verified Bill of Particulars, Plaintiff stated (Affirmation in Opposition; Exh. A):

9.

- RIGHT CARPAL TUNNEL SYNDROME;
- NUMBNESS AND TINGLING IN FOURTH AND FIFTH FINGERS OF RIGHT HAND;
- DECREASED GRIP STRENGTH AND DEXTERITY DUE TO NUMBNESS RIGHT HAND; and
- PLAINTIFF MAY REQUIRE SURGICAL PROCEDURES FOR RELEASE OF CARPAL TUNNEL.

Plaintiff asserted that the injuries are "accompanied by severe pain, tenderness, swelling, stiffness, discomfort, distress, restriction or motion and with related injuries to the underlying soft tissues, blood vessels, nerves, tendons, ligaments and musculature and all of the natural consequences following therefrom," and that they "are permanent in nature and duration" (Notice of Motion; Exh. B, Verified Bill of Particulars at ¶9). Plaintiff asserted that he "had a previous complaint regarding his lumbar spine and did receive treatment prior to this accident," but that "the nature of the complaints were exacerbated by" this accident (Notice of Motion; Exh. B, Verified Bill of Particulars at ¶10). Plaintiff admitted that he was not confined to bed and was

confined to his home for about two (2) weeks subsequent to the accident (Notice of Motion; Exh. B, Verified Bill of Particulars at ¶11). Plaintiff also stated that he could not work for about two (2) weeks after the accident, and "on various occasions thereafter" (Notice of Motion; Exh. B, Verified Bill of Particulars at ¶15).

On August 21, 2019, Plaintiff was deposed (Notice of Motion; Exh. C, Deposition). Plaintiff stated that he missed two weeks of work after the accident, switched to an abbreviated schedule for two additional weeks, and then returned to his normal schedule of 2.5 weekdays, and alternating weekends (Exh. C at 10-12). Plaintiff is on feet "[o]ne hundred percent" of the time at work (Exh. C at 11). Plaintiff had a flare up in his back on August 2, 2019 and missed another week of work (Exh. C at 12-13). Plaintiff had pain in his lower back dating to December 2015 or 2016 (Exh. C at 13-14). Plaintiff did not lose consciousness as a result of the accident (Exh. C at 35). His body moved inside the car as a result of the impact, but "within the seat belt restraints" (Exh. C at 36). His head and shoulder collided with the driver's side air bag that deployed out of the door (Exh. C at 37-38). Immediately after the collision, he did not feel pain anywhere (Exh. C at 38). He felt light-headed when the ambulance arrived and needed to sit down (Exh. C at 46-47). At Putnam Hospital, he complained of light-headedness and dizziness, and he was concerned about a concussion (Exh. C at 48, 50). That night, he started getting sore (Exh. C at 52).

He went to his primary physician, Dr. Michael Daniels, the Monday after the accident and at the time, he was having neck, back, and shoulder pain (Exh. C at 54). Dr. Daniels prescribed him anti-inflammatories (Exh. C at 54). A week later, Plaintiff saw his chiropractor for complaints of neck, shoulder, and back pain. At some point, he complained of foot pain (Exh. C

at 55), which developed about 2-2.5 weeks after the accident (Exh. C at 55). Plaintiff saw his chiropractor three or four times a week for two or three weeks after the accident, but eventually reduced his sessions over the next few months (Exh. C at 55-57, 64). However, after the recent flare-up in August 2019, Plaintiff increased his chiropractic sessions to three times a week (Exh. C at 57, 64). At time of his deposition, Plaintiff was going twice a week (Exh. C at 57). His chiropractor recommended Plaintiff see an orthopedist for his foot (Exh. C at 58), and he saw Dr. Katherine Ma (Exh. C at 59).

After seeing the orthopedist, Plaintiff first saw Dr. Albert Szabo in September or October 2018 (Exh. C at 59, 61), for "[t]he pins and needles, numbness in the hands, the sharp shooting pain I described earlier in the foot" (Exh. C at 53). In 2019, Plaintiff was treated by his chiropractor, and Dr. Szabo for his symptoms related to this accident (Exh. C at 64). Plaintiff is being treated for depression since the accident diagnosed by Dr. Daniels (Exh. C at 65-66). Plaintiff and his physicians, including Dr. Szabo, have discussed surgery for Plaintiff's L5 lower disk in his back, but no one is in favor of it (Exh. C at 66-67). No doctor told Plaintiff that the symptomology he was experiencing in his foot was related to his back (Exh. C at 67).

Plaintiff can no longer play disc golf, for which he played on team in a league (Exh. C at 67-69). He recently tried, but it was too painful and he had lost range of motion (Exh. C at 69). He has not kayaked since the accident, and does his day-to-day chores, but they are "cumbersome" (Exh. C at 72). Plaintiff had to take 6 months off from going to the gym (Exh. C at 72-73), and he was unable to hike for some time (Exh. C at 72-73). He used to draw and paint for a few hours, but he no longer cannot sit for that amount of time (Exh. C at 74). He used to go to a lot of concerts, but he has not since the accident because it affects his foot and back due to

the standing (Exh. C at 75-76). When he does house and yard work, his neck, shoulders, back, head, and foot are affected (Exh. C at 76). Plaintiff discussed these limitations with Drs. Daniels, Szabo and Biffer (Exh. C at 76). The pain Plaintiff suffers in his foot and back affect his ability to travel to places like he used to (Exh. C at 77).

As result of accident, takes Lyrica CR for the neuropathy, Skelaxin for his back, and Ibuprofen (Exh. C at 77). Plaintiff was scheduled to start Lexapro the week of his deposition (Exh. C at 79).

On October 8, 2019, Dr. Ronald Mann, an orthopedic surgeon, performed an Independent Orthopedic Examination ("IOE") on Plaintiff (Exh. D at 1). Dr. Mann concluded: (1) Plaintiff's cervical spine sprain/strain had resolved; (2) Plaintiff's lumbar spine sprain/strain had resolved; (3) Plaintiff's right hand sprain/strain (negative carpal tunnel syndrome) had resolved; and (4) Plaintiff's left foot sprain/strain existed with mild neuropathy (Exh. D at 3). After his examination and review of the medical records, Dr Mann concluded within a reasonable degree of medical certainty, that from a medical standpoint, Plaintiff has no objective evidence of a disability and limitation, and from an objective standpoint, Plaintiff is able to perform his usual and customary activities (Exh. D at 4).

On November 20, 2019, Dr. Elliot G. Gross, a neurologist, performed an Independent Medical Examination on Plaintiff (Exh. E at 1). After examining Plaintiff and reviewing his medical records, Dr. Gross gave the following impression (Exh. E at 4):

> Cervical strain pain resolving, lumbar strain pain resolving, numbness and tingling in all 10 fingers resolved, left big toe numbness unresolved, shoulder pain deferred, depression and anxiety deferred.
>
> In addition, Dr. Gross stated in his professional opinion based upon the comprehensive

neurological and physical examination, case history, and review of Plaintiff's file and the history as provided by Plaintiff that the following are true (Exh. E at 4):

> Today's neurologic examination revealed some weakness of the right abductor pollicis brevis but was not confirmed to be a carpal tunnel syndrome on the basis of the EMG. Otherwise, his neurological examination showed diminution of sensation in the distribution of the distal superficial peroneal consistent with his complaint of numbness in the big toe. However, this is of no particular functional significance, but it does bother him because he stands for 12 hours in a workday.
>
> * * *
>
> As to his depression and anxiety, that should be deferred to the appropriate specialist as well as his shoulder pain. At this time, he is not disabled from continuing to work his usual workday. I do not think he requires carpal tunnel surgery. There are no subsequent injuries.
>
> * * *
>
> He can continue to do his daily activities.
>
> * * *
>
> As to the alleged injuries in the bill of particulars, there were no significant objective findings on the imaging, no evidence of a cervical radiculopathy, and other than the peroneal neuropathy and the cervical strain, I believe the rest is not plausible and not consistent with the examinations by the treating doctors as well as my examination.

Dr. Gross did not believe that Plaintiff's tinnitus was accident-related (Exh. E at 4).

Defendants move for summary judgment, asserting that Plaintiff has not suffered a serious physical injury as a matter of law, and summary judgment is required. In response, Plaintiff argues that he sustained "causally related 'serious injuries' as defined by Section 5102(d) of the Insurance Law," or at the very least, that triable issues of fact exist. Plaintiff also asserts that Defendants' failed to establish a *prima facie* of entitlement to summary judgment in the first instance.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57, 61 [1966]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Initially, "the proponent... must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." However, once a movant makes a sufficient showing, "the burden shifts to the party opposing the motion for summary judgment 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 v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers (*id.*; *see also Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2d Dept 1999]).

According to Insurance Law §5102(d), "serious injury" is defined as:

> "a personal injury which results in * * * a permanent loss of a body member and/or permanent consequential limitation of use of a body member; or 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."

"A 'permanent consequential limitation' requires a greater degree of proof than a 'significant limitation,' as only the former requires proof of permanency" (*Altman v Gassman*, 202 AD2d 265 [1st Dept 1994], quoting *Partlow v Meehan*, 155 AD2d 647 [2d Dept 1989]). "The statute requires a showing that the limitation is 'significant' or 'consequential' in the sense that it is not minor or trivial" (*Altman v Gassman*, 202 AD2d at 265, quoting *Kordana v*

Pomellito, 121 AD2d 783 [3d Dept 1986]).

"However, while such a 'significant limitation' need not be permanent in order to constitute a 'serious injury,' the Court of Appeals has cautioned that 'a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute'" (*Partlow v Meehan*, 155 AD2d at 647-648, quoting *Licari v Elliott*, 57 NY2d 230, 236 [1982]). "[A]ny assessment of the 'significance' of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well" (*Partlow v Meehan*, 155 AD2d at 648). "Although Insurance Law 5102(d) does not expressly set forth any temporal requirement for a 'significant limitation,' there can be no doubt that if a bodily limitation is substantial in degree yet only fleeting in duration, it should not qualify as a 'serious injury' under the statute" (*Partlow v Meehan*, 155 AD2d at 648).

"[A] defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]). These findings "must be in admissible form, i.e., affidavits or affirmations, and not unsworn reports, in order to make a 'prima facie showing of entitlement to judgment as a matter of law'" (*Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, "a moving defendant may rely on unsworn reports of the plaintiff's treating physician" (*Cody v Parker*, 263 AD2d 866, 867 [3d Dept 1999]).

"With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious

injury was sustained within the meaning of the Insurance Law" (*Grossman v Wright*, 268 AD2d at 84). "Similarly, a plaintiff's opposition, to the extent that it relies solely on the findings of plaintiff's own medical witnesses, must be in the form of affidavits or affirmations, unless an acceptable excuse for failure to comply with this requirement is furnished" (*Pagano v Kingsbury*, 182 AD2d at 270) . "Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment" (*Mobley v J. Foster Phillips Funeral Home, Inc.*, 47 Misc3d 1205[A] [Sup Ct, Queens County 2015], citing *Grasso v Angerami*, 79 NY2d 813 [1991]). And, "[u]nsworn MRI reports are not competent evidence unless both sides rely upon those reports" (*Mobley v J. Foster Phillips Funeral Home*, 47 Misc3d 1205[A], citing *Azyen v Melendez*, 299 AD2d 381 [2d Dept 2002]). However, once the movant relies upon unsworn medical reports in support of a motion for summary judgment, the door is open for the opposing party to rely on the same (*see Kearse v New York City Tr. Auth.*, 16 AD3d 45 n 1 (2d Dept 2005]). Finally, the serious injury threshold is a threshold imposed exclusively on the plaintiff (*Pagano v Kingsbury*, 182 AD2d at 270; *see also Licari v Elliott*, 57 NY2d 230 [1982]). Subjective complaints of pain, absent other proof, are insufficient to establish a "serious injury" (*Cody v Parker*, 263 AD2d at 867 [internal quotations and citations omitted]).

In order to support their position that Plaintiff did not suffer a serious physical injury, Defendants rely primarily upon the sworn IOE and IME reports to establish a *prima facie* case. After conducting their physical examinations of Plaintiff, over a year after the accident, both doctors concluded that Plaintiff did not suffer from a disability or limitation, and Plaintiff was able to perform his usual activities and work. Their reports reflect that three of the four complaints had resolved themselves and Plaintiff's complaint about the pain in his foot was

deemed mild. Complaints of mild or minor pain, as well as minor or slight limitation of use, are not sufficient to establish a serious physical injury under the statute (*see generally Grossman v Wright*, 268 AD2d 79 [2d Dept 2000]). Accordingly, their reports establish *prima facie* that Plaintiff's complaints are of a non-permanent nature, and are, at best, mild.

As Defendants established a *prima facie* case that Plaintiff's alleged injuries do not constitute a serious injury under either the permanent consequential limitation of use or significant limitation categories of use (*see Cortes v Donaldson*, 148 AD3d 771 [2d Dept 2017]), the burden shifts to Plaintiff.

In opposition, Plaintiff points to his own neurologist's report. Dr. Szabo stated that he saw Plaintiff for the first time in July 2018. After conducting nerve conduction and EMG studies on Plaintiff's left foot, Dr. Szabo confirmed that Plaintiff's left foot revealed an absent sensory nerve action potential (SNAP). That finding, according to Dr. Szabo, confirmed that Plaintiff suffered from "a superficial peroneal neuropathy as a result of damage to the nerve from the motor vehicle accident" (Szabo Affirmation at ¶4). At the time of Dr. Szabo's affirmation, Plaintiff "continues to remain symptomatic," and it is his "opinion to a reasonable degree of medical certainty that the left peroneal neuropathy caused by the motor vehicle accident is permanent in nature and will leave [Plaintiff] with physical limitations that are significant, permanent and only manageable through medication (Szabo Affirmation at ¶5). Dr. Szabo stated that Plaintiff is suffering from the typical symptoms ranging from searing pain to numbness, causing physical activity to be very painful and remaining on one's feet, as Plaintiff must do for work for 8 to 12 hours at a time, can be problematic (Szabo Affirmation at ¶5). Dr. Szabo opined that the nerve injury Plaintiff sustained has rendered him incapable of engaging in

physical activities that he used to enjoy, and the neuropathy involved "is unlike an injury to a joint or muscle where one can measure a decrease in a range of motion" (Szabo Affirmation at ¶¶6-7). He also stated that it is the nature of the pain itself that results in significant limitations, and he concluded that "[w]hile pain may be considered a subjective complaint, the positive finding of a peripheral neuropathy upon clinical examination and most importantly, the objective findings upon diagnostic testing, support all of the symptoms, complaints and limitations reported by" Plaintiff "which are classic textbook residuals of such an injury and which, as previously stated, will be permanent in nature and are casually related to the motor vehicle accident" (Szabo Affirmation at ¶7). As such, the Court finds that Plaintiff established a triable issue of fact with respect to whether she suffered a serious physical injury under the Insurance Law. Stated another way, this case is a classic "battle of the experts" that is properly left for the fact finder to resolve.

In light of the above, the Court declines to address any remaining arguments, and it is hereby

ORDERED that Defendants' motion is denied; and it is further

ORDERED that the parties are to appear before the undersigned on Wednesday, July 15, 2020 at 10:30 a.m. for a pre-trial Skype conference; counsel are advised to confirm the scheduling with the Court due to interruptions that may persist due to the COVID-19 pandemic. The Court will send out invitations for the Skype conference.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
July 2, 2020

HON. VICTOR G. GROSSMAN, J.S.C.

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