

**Fogerty v Fallacaro**

2020 NY Slip Op 34747(U)

December 22, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 624398/2018

Judge: Robert F. Quinlan

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SHORT FORM ORDER

INDEX No. 624398/2018  
CAL. No. 202000581MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 27 - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT F. QUINLAN  
Justice of the Supreme Court

MOTION DATE 8/13/20  
ADJ. DATE 10/8/20  
Mot. Seq. # 001 MD

-----X  
KENNETH FOGERTY and MARIA FOGERTY,  
  
Plaintiffs,  
  
- against -  
  
ROBERT FALLACARO and KAREN VICARI,  
  
Defendants.  
-----X

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Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendants, dated July 7, 2020 ; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers by plaintiff, dated September 29, 2020 ; Replying Affidavits and supporting papers by defendants, dated October 5, 2020 ; Other \_\_\_\_\_; it is

**ORDERED** that the motion by defendants Robert Fallacaro and Karen Vicari for summary judgment dismissing the complaint on the ground that plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102 (d) is denied.

Plaintiffs commenced this action to recover damages for personal injuries allegedly sustained by plaintiff Kenneth Fogerty in a motor vehicle accident that occurred on Wicks Road, near the intersection of Del Lane in Commack, New York on May 9, 2018. The accident allegedly occurred when a vehicle operated by defendant Robert Fallacaro and owned by defendant Karen Vicari struck the vehicle operated by plaintiff. Plaintiff Kenneth Fogerty's wife, Maria Fogerty, alleges a derivative cause of action. By the bill of particulars, plaintiffs allege that plaintiff Kenneth Fogerty suffered various injuries, including disc herniations at level C2/3, C3/4, C4/5, C5/6, C6/7, C7/T1, T6/7, T7/8, T8/9, T9/10, T10/11, T11/12, L5/S1, L4/5, and L3/4; cervical and lumbar sprain and strain; cervical and lumbar radiculopathy; disc bulges at levels T2/3, T3/4, T4/5, T5/6, T9/10, T10/11, and L2/3; and right hip labral tear.

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Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). Defendants’ submissions in support of the motion include, among other things, copies of the pleadings, a transcript of plaintiff’s deposition testimony, an affirmed medical report of Dr. Edward Toriello, and an affirmed magnetic resonance imaging (MRI) report of Dr. Marc Katzman. Plaintiffs oppose the motion on the ground that defendants failed to show that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d). Alternatively, plaintiffs argue that the evidence presented in opposition to the motion raises a triable issue of fact. In opposition, plaintiffs submit, among other things, plaintiff’s own affidavit, an affidavit of Dr. Gary Olson, a chiropractor, an affidavit of Dr. Jordan Sudberg, various MRI reports and medical records related to plaintiff’s treatment after the subject accident, and hospital records relating to plaintiff’s treatment in the emergency room of Huntington Hospital.

Insurance Law § 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.”

A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant’s own witnesses, “those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff’s deposition testimony and medical reports and records prepared by the plaintiff’s own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury*, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eyler*, *supra*; *Pagano v Kingsbury*, *supra*; *see generally Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Here, defendants’ evidence established prima facie that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject car accident (*see Gaddy v Eyler*, *supra*; *Laurent v McIntosh*, 49 AD3d 820, 854 NYS2d 228 [2d Dept 2008]; *Albano v Onolfo*, 36 AD3d 728, 830 NYS2d 205 [2d Dept 2007]). Dr. Toriello’s medical report states that an examination of plaintiff’s cervical spine reveals no evidence of paracervical muscle spasm or atrophy, and that cervical spine range of motion testing reveals full range of motion with complaints of pain at the extremes of rotation, bilateral bending of 45 degrees (normal 40 to 45 degrees), bilateral rotation to 80 degrees

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(normal 70 to 80 degrees), flexion to 50 degrees (normal 45 to 50 degrees), and extension to 60 degrees (normal 55 to 60 degrees). He states that range of motion testing of plaintiff's lumbar spine reveals pain-free range of motion with flexion to 60 degrees (normal 60 to 75 degrees), extension to 25 degrees (normal 25 to 30 degrees), bilateral lateral bending to 25 degrees (normal 25 to 35 degrees). It states range of motion testing of plaintiff's thoracic, shoulders, elbows, wrists and hands, and ankles reveals full range of motion. Dr. Toriello opines that the examination of plaintiff reveals no objective evidence of continued disability, and that plaintiff is able to return to work without restriction. He concludes that plaintiff is not disabled and is able to perform his normal daily living activities without restriction.

In addition, defendants submit the sworn report prepared by Dr. Katzman regarding the MRI examination of plaintiff's spine, which was performed in June 2018, and the MRI examinations of his right hip and shoulders, which were performed in July 2018. It states that the MRI examination of the cervical, thoracic, and lumbosacral spine reveals moderate chronic multilevel degenerative disc disease of the spinal regions without evidence of recent post-traumatic injury. It states that the degenerative changes are clearly chronic, pre-existing, and unrelated to the subject accident. Dr. Katzman concludes that there is no evidence of recent post-traumatic injury. With regard to the MRI examination of plaintiff's right hip, Dr. Katzman states that there is moderate pre-existing degenerative osteoarthritis involving the right hip joint with chronic degeneration of the acetabular labrum, and that there is no evidence of recent post-traumatic injury.

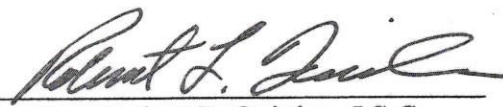
The burden, therefore, shifted to plaintiffs to raise a triable issue of fact (*see Gaddy v Eyer, supra*). Plaintiffs, in opposition to defendants' prima facie showing, have raised a triable issue of fact as to whether plaintiff Kenneth Fogerty sustained a serious injury within the meaning of the Insurance Law as a result of the subject collision (*see Ferrara v Middleton*, 116 AD3d 408, 983 NYS2d 232 [1st Dept 2014]; *Amaro v American Med. Response of N.Y., Inc.*, 99 AD3d 563, 952 NYS2d 184 [1st Dept 2012]; *Bernier v Torres*, 79 AD3d 776, 913 NYS2d 299 [2d Dept 2010]; *cf Palma v Rosa*, 78 AD3d 461, 910 NYS2d 74 [1st Dept 2010]). Plaintiff submits an affidavit of his treating chiropractor, Dr. Olson, which states that during an examination of plaintiff on July 2020, over two years after the accident, range of motion testing of his cervical spine revealed flexion to 40 degrees (50 degrees normal), extension to 40 degrees (60 degrees normal), right and left rotation to 60 degrees (80 degrees normal), and right and left lateral flexion to 35 degrees (45 degrees normal). The affidavit states that range of motion testing of plaintiff's lumbar spine revealed flexion to 45 degrees (60 degrees normal), extension to 15 degrees (25 degrees normal), right and left lateral flexion to 15 degrees (25 degrees normal), and right and left rotation to 15 degrees (25 degrees normal). Dr. Olson opines that plaintiff suffers from restriction of motion to his cervical, thoracic, and lumbar spines and will continue to do so in the future. He concludes that plaintiff sustained a permanent and consequential limitation of use of his cervical, thoracic, and lumbar spinal systems and was sustained as a result of the subject accident.

In addition, plaintiffs submit an affidavit of his treating physician, Dr. Sudberg, which states that during an examination of plaintiff on July 2020, range of motion testing of his cervical spine revealed flexion to 30 degrees (50 degrees normal), extension to 30 degrees (60 degrees normal), right and left flexion to 30 degrees (45 degrees normal), right rotation to 60 degrees (80 degrees normal), and left rotation to 55 degrees (80 degrees normal). The affidavit states that range of motion testing of plaintiff's lumbar spine revealed flexion to 70 degrees (90 degrees normal), extension to 15 degrees (25 degrees

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normal), right and left flexion to 15 degrees (25 degrees normal), right rotation to 30 degrees (45 degrees normal), and left rotation to 35 degrees (45 degrees normal). It states that range of motion of plaintiff's right hip revealed forward flexion to 110 degrees (125 degrees normal), extension to 20 degrees (30 degrees normal), abduction to 35 degrees (45 degrees normal), adduction to 20 degrees (30 degrees normal), internal rotation to 35 degrees (40 degrees normal), and external rotation to 35 degrees (45 degrees normal). Dr. Sudberg opines that plaintiff's injuries were sustained as a result of the subject accident. He states that plaintiff underwent a full course of chiropractic treatment and physical therapy, which only provided him relief of his symptoms on a temporary basis, and that plaintiff has a permanent partial disability. Here, "where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (*Noble v Ackerman*, 252 AD2d 392, 675 NYS2d 86 [1st Dept 1998]; see *Byun McCarthy*, 156 AD3d 677, 64 NYS3d 894 [2d Dept 2017]; *Williams v Perez*, 92 AD3d 528, 938 NYS2d 536 [1st Dept 2012]; *LaMasa v Bachman*, 56 AD3d 340, 869 NYS2d 17 [1st Dept 2008]). Accordingly, defendants' motion for summary judgment dismissing plaintiffs' complaint is denied.

Dated: December 22, 2020

  
Hon. Robert F. Quinlan, J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION