

**Baker v Espinoza**

2020 NY Slip Op 35013(U)

December 22, 2020

Supreme Court, Westchester County

Docket Number: Index No. 552807/2019

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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  
WESTCHESTER COUNTY  
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X  
KEATON P. BAKER,  
Plaintiff,  
  
-against-

**DECISION & ORDER**  
Index No. 552807/2019  
Seq. # 1

JOSE A. ESPINOZA,  
  
Defendant.

-----X  
The following papers were read and considered in deciding the present motion:

- Notice of Motion/Affirmation/Exhibits A-E
- Affirmation in Opposition/Exhibits A-I
- Reply Affirmation

Upon the foregoing papers it is ordered that the motion is DENIED in part and GRANTED in part.

**FACTUAL AND PROCEDURAL BACKGROUND**

The plaintiff, Keaton P. Baker ("Baker"), commenced this action by filing a summons and complaint on February 13, 2019, to recover monetary damages for alleged serious injuries sustained in a motor vehicle accident that occurred on August 2, 2018. The defendant, Jose A. Espinoza ("Espinoza"), filed an answer, the parties engaged in and completed discovery.

Baker alleges in his bill of particulars that he suffered a cervical spine injury with radiculopathy (left C7, right C5, C8-T1, bilateral C6 and right C5 sensory root involvement); lumbar spine injury with radiculopathy; disc bulging at L2/L3, L3/L4 and

L4/L5; left S1 sensory root involvement, narrowing; radiculopathy T4/T5; loss of normal lordotic curvature of the cervical spine; acute cervical and lumbar paraspinal muscle spasm; stenosis; and emotional, cognitive and behavioral problems, including severe anxiety, depression and auditory hallucinations. Baker asserts that the listed injuries are serious, as defined by Insurance Law § 5102(d).

Espinoza now timely files the instant motion for summary judgment pursuant to CPLR 3212, seeking dismissal of the complaint on the basis that the plaintiff did not sustain a serious injury as defined under New York Insurance Law §§ 5102(d) and 5104(a).

In support of the motion, Espinoza relies upon, *inter alia*, the plaintiff's deposition testimony, an independent medical examination ("IME") report, an attorney's affirmation and the bill of particulars and other pleadings. Espinoza argues that Baker's deposition testimony, as well as the objective medical evidence, establishes that none of the injuries claimed by Baker satisfy the serious injury threshold requirements of the No-Fault Law and that Baker did not sustain a serious injury as a result of the subject accident.

Baker opposed the motion, arguing that he suffered from a significant limitation within the meaning of Insurance Law § 5102(d), in that, he consistently exhibited limitations in his range of motion in his cervical and lumbar spine since the date of the accident and evidence of range of motion limitation is sufficient to defeat a summary judgment motion based on a claim that the plaintiff did not suffer a serious injury, as defined by Insurance Law § 5102(d). Baker further argues that, due to his injuries, he was forced to limit his daily working hours and curtail his normal activities, such as

running, jogging, hiking, push-ups, sit-ups and boxing.

In reply, Espinoza asserts that the independent examination found no objective evidence of Baker's alleged serious injuries, as it relates to the subject accident and therefore, the plaintiff is precluded from making any claims of a serious injury under the permanent loss of use category. Espinoza also contends that Baker's opposition is silent as to his alleged emotional and behavioral issues and therefore, he has clearly abandoned any psychological claims.

Espinoza further contends that a review of Baker's lumbar spine MRI, revealed evidence of pre-existing conditions. He also failed to offer a qualitative assessment of his condition, based upon a recent examination and based on his bill of particulars and testimony, Baker did not sustain a serious injury under the 90/180 day category of Insurance Law § 5102(d).

#### Discussion

"[T]he proponent of a summary judgment motion 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 issues of fact" (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers, (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

"Once this showing has been made, however, 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" (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324, citing to *Zuckerman v City*

of New York, 49 NY2d at 562). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion (see *Mgrditchian v Donato* , 141 AD2d 513 [2d Dept 1988]).

Insurance Law §5104(a) provides in pertinent part that:

Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(McKinney's Insurance Law §5104[a])

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. (McKinney's Insurance Law §5102[d])

"The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury." (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; see also, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). "[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law"

(*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition...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 (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (*see Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, Baker did not suffer death, dismemberment, significant disfigurement, a fracture, or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. Baker does allege that he sustained a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Espinoza, by his attorney, argues that Baker did not sustain any injuries corresponding to those categories and submits the affirmed report of Rene Elkin, M.D.,

who performed an independent neurological exam on Baker on June 8, 2020. Dr. Elkin performed range of motion testing using visual inspection, self-demonstration and the use of a goniometer and reported full range of motion for all testing of Baker's cervical spine, tenderness to palpation of the cervical spine and left cervical muscles, but no cervical muscle spasm and the cervical compression test was negative, with Baker removing his cervical collar for the purposes of that examination.. Dr. Elkin also reported that Baker had full range of motion for all testing of Baker's lumbar spine, with Baker reporting mild pain in the lower back with movement, she noted that he had subjective tenderness to palpation of the right lumbar musculature, no palpable lumbar spine tenderness, no lumbar muscle spasm and the straight leg rasing test was to 90 degrees and painless. Dr. Elkin also reported that Baker's thoracic spine was normal and he was wearing an elastic support brace in the thoracic spine area at the time of the examination.

Dr. Elkin reported no objective findings for any structural neurological injury that might be attributed to the accident and opined that Baker's accident related symptoms are most consistent with cervical and lumbar muscular skeletal sprain. Dr. Elkin opines that the findings documented in the emergency department record mitigates against any acute neurological injury to the cervical or lumbar spines resulting from the subject accident. Dr. Elkin opines that there is no evidence for the structural neurological injury that would prevent Baker from functioning at his pre-accident level without restrictions and there are no objective findings of accident related neurological permanency of disability. Dr. Elkin further opines that there are no objective findings of accident related neurological injury that would require further treatments or testing or that would be

indicative of a poor neurological outcome.

With regard to Baker's emotional and behavioral issues, Espinoza presented Baker's deposition testimony to show that he did not complain to his doctor of any accident related mental illness and had been taking Xanax for anxiety, prior to the accident. Espinoza also presented Baker's deposition testimony and bill of particulars to show that Baker was only confined for one week post accident and that he continued to work part time as a teacher as he did prior to the accident and he did not lose any business from his company due to the accident.

Upon review and viewing the facts in the light most favorable to Baker, this Court finds that Espinoza has failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiff suffering a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system.

In opposition, Baker, by his attorney, submits certified medical reports/treatment logs of his chiropractor, Dr. Tany R. Sutera DC, who treated Baker three days a week from August 22, 2018 through August 30, 2019 and then sporadically for twelve visits until June 10, 2020. Dr. Sutera diagnosed Baker with cervical, thoracic and lumbar sprain, with lumbar disc bulging at L2/3, L3/4, and L4/5 and decreased range of motion. The decreased range of motion was reported just two days after Dr. Elkin's examination.

Baker also submits the report of his neurologist, Stanley Holstein, M.D., who initially saw Baker on February 12, 2019, six months after the subject accident. Dr. Holstein's examination revealed decreased range of motion greater than 8%, in both the

cervical and lumbar spine, with tenderness and spasm of the paravertebral muscles. Dr. Holstein reported that Baker was partially disabled and continued to treat Baker, documenting his limitations with lifting and long-term standing and sitting. He referred Baker to a pain management specialist. Dr. Holstein also reported that when Baker saw him on November 15, 2019, Baker stated that he was doing excellent due to the decompression treatments performed and was able to work part-time and the tests performed on that date indicated normal ranges of motion in the cervical and thoracic regions and flexion extension in the lumbar region to 80 degrees, with normal of 90 degrees, but Dr. Holstein still noted that Baker was partially disabled.

Dr. Stanley M. Brown, DC, examined Baker on August 14 and August 15, 2020 and showed decreased range of motion in both the lumbar and the cervical spine and diagnosed Baker with segmental and somatic dysfunction of the lumbar, thoracic and cervical region. Dr. Brown reexamined him on September 15, 2020, and reported acute tenderness and reduced motion in the lumbosacral region, with posteria displacement at L5, with acute segmental fixation; an acute degree of aberrant motion with posterior displacement on the right affecting S1; acute restriction of function with posterior displacement bilaterally affecting T5.

Here, although the IME stated that Baker had full range of motion and suffers from no disabilities causally related to the motor vehicle accident, Baker submitted reports showing decreased range of motion to a significant degree. Baker's neurologist, Dr. Holstein, stated in his November 15, 2019 report that Baker stated that he was doing excellent and had normal range of motion for the cervical and thoracic spine with the lumbar region having 80 degrees flexion-extension, with normal being 90 degrees.

However, he also stated that Baker had possible post traumatic stress disorder, cervical spine injury with radiculopathy and opined that Baker is partially disabled and that such is causally related to the subject accident.

Further, although, Espinoza claims that Baker did not address the emotional and behavioral issues in his opposition, Espinoza did not fully address those issues in his motion. He did not address the auditory hallucinations and any increased anxiety as a result of the accident, when in fact, the attorney noted that Baker testified that he started going to psychotherapy regularly because of the accident. The attorney simply states this in passing, but does not address the issue. Espinoza also does not address the Baker's complaints about numbness and tingling in his left hand and the expert does not address these issues.

With regard to the degenerative issues referred to by Espinoza's counsel, such was not proffered in the underlying motion papers, but only in the reply papers. Therefore, it cannot be utilized to meet his prima facie burden. Also, Baker's doctors note his degenerative condition, but do not state that this is the sole cause of his injury.

However, with regard to any claims of alleged injuries that prevented Baker from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following his alleged injury, such is denied. Espinoza demonstrated through Baker's testimony and the bill of particulars that Baker did not sustain an injury in this category.

Further, to sustain impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his 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 plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature" (see *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 357 [2002]). Curtailment of recreational and household activities is insufficient to meet the burden (*Omar v Goodman*, 295 AD2d 413 [2d Dept 2002]). The plaintiff testified that he did not miss any work and was not confined to his home or bed. Further, he did not offer any medical evidence to support a claim that he was unable to perform substantially all of his usual and customary activities under this category.

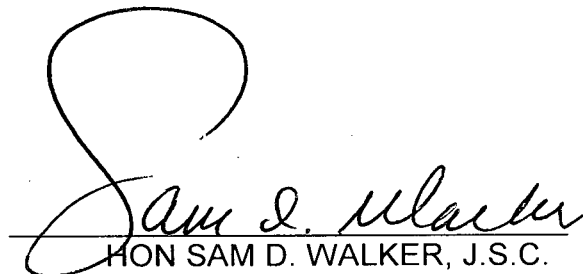
Accordingly, based upon the foregoing, it is

ORDERED that the defendant's motion for summary judgment is GRANTED in part and DENIED in part.

The parties are directed to appear before the Settlement Conference Part on a date to be scheduled in the future.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York  
December 22, 2020

  
HON SAM D. WALKER, J.S.C.