

Muren v Nevins

2020 NY Slip Op 35033(U)

August 4, 2020

Supreme Court, Orange County

Docket Number: Index No. EF001331-2019

Judge: Catherine M. Bartlett

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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

MARC MUREN,

Plaintiff,

-against-

DUSTIN NEVINS and DANIELLE NEVINS,

Defendants.

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.

Index No. EF001331-2019
Motion Date: July 22, 2020

The following papers numbered 1 to 7 were read on Defendants' motion for summary judgment based upon the alleged absence of a serious injury per Insurance Law §5102(d):

Table listing documents: Notice of Motion - Affirmation / Exhibits - Physician Affirmations (2) 1-4, Affirmation in Opposition / Exhibits - Physician Affirmations (2) 5-6, Reply Affirmation 7

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action for personal injuries arising out of a motor vehicle accident which occurred on July 21, 2018 when Defendants' vehicle crossed into Plaintiff's lane of travel and struck his vehicle head on. Defendants Dustin and Danielle Nevins move for summary judgment, asserting that Plaintiff Marc Muren did not sustain a causally related "serious injury" within the meaning of Insurance Law §5102(d). Mr. Muren acknowledges that he sustained no permanent

loss of use of any major body function, system, organ or member, and no “90 / 180 day” non-permanent injury. He contends, however, that he sustained *inter alia* a permanent consequential limitation / significant limitation of the lumbar spine resulting from a causally related L4-L5 disc bulge with annular tear and exacerbation of an asymptomatic pre-existing condition of the lumbar spine.

A. Dr. Siegel’s Report

Defendants move for summary judgment on “serious injury” threshold grounds based on the February 14, 2020 independent medical examination (“IME”) of Mr. Muren by orthopaedist Harvey L. Siegel, M.D. So far as is relevant to the issue of his lumbar spine, Dr. Siegel’s IME report gives a history as follows:

- On July 23, 2018, two days after the accident, Plaintiff was seen for a chiropractic evaluation and had severe thoracic and lumbar spine pain radiating into the lower extremities. Thoracic and lumbar range of motion was limited. Sensory revealed right hypoesthesias in L4, L5 and S1. Palpation of the thoracic and lumbar spine revealed spasm and tenderness to palpation. Trigger points were noted in the parathoracic musculature. X-rays revealed pre-existing degenerative conditions of the spine.
- Plaintiff had regular chiropractic treatment from July 25 to September 4, 2018. At a chiropractic re-evaluation on October 3, 2018, it was noted that his lumbar pain had become progressively worse since the accident, and that he was unable to return to his work as a loader at a warehouse. The pain was radiating into the lower extremities. Thoracic and lumbar range of motion was limited. Palpation revealed spasms and tenderness and hyperirritable taut bands in the parathoracic and lumbar paraspinal muscles, and misalignment, asymmetry and taut and tender fibers in T7 and T8 as well as L4 and L5.
- There were two additional documented chiropractic session in February 2019, at the last of which Plaintiff complained of frequent moderate pain of the low back. Plaintiff then ceased treatment for several months.
- At an orthopaedic consultation on November 15, 2019, Plaintiff complained of low back pain with numbness and tingling into his right thigh to his knee, which

had started a few months before. There was mild tenderness to palpation of the lumbar spine over the paraspinal musculature bilaterally.

- On November 22, 2019, Plaintiff was seen for a physical exam. He was still having a lot of back pain and numbness in his legs. Past history was positive for back surgery secondary to a gunshot wound. Plaintiff stated that he had done well after the back surgery. His medication - Gabapentin – was increased. On December 20, 2019, he was given a return to work note for eight hours per day and no lifting. The assessment was of back pain with radiculopathy down the right posterior leg.
- A January 10, 2020 MRI revealed an L4-5 disc bulge and annular tear resulting in stenosis.

At the February 14, 2020 IME, Plaintiff complained of daily throbbing and/or aching low back pain, worse with activity, pointing from the left SI joint to the buttock, with numbness and tingling going down the posterior thigh to the posterior lower leg and out foot. He denied having had any problems with his low back for many years prior to his July 21, 2018 accident, as he had completely recovered from the spine surgery. He had tried to return to his work at the warehouse but could not keep up and was fired after a month. He began another job, limiting his time to eight hours per day, but missed a considerable amount of time. He was still taking Gabapentin.

Dr. Siegal's examination of Plaintiff's thoracolumbar spine revealed a "voluntarily diminished range of motion" including 100 degrees flexion (110 normal) and 10 degrees extension (25 degrees normal). Palpation failed to reveal tenderness or muscle spasm. There was subjective tenderness without muscle spasm in the right paraspinal musculature of the lower lumbosacral spine.

Dr. Siegal diagnosed "[l]umbar spine sprain / strain with aggravation of a pre-existing low back condition, with residual radicular symptomatology."

B. Dr. Dassa's Report

Dr. Gabriel Dassa examined Plaintiff on April 9, 2020. Dr. Dassa noted Plaintiff's pre-existing lumbar spine condition, with a history of surgery for gunshot wound and lumbar spine surgery, and noted that Plaintiff had aggravated back pain which had been controlled prior to the accident of July 21, 2018. On objective testing via handheld goniometer, Dr. Dassa found limited range of motion of the thoracolumbar spine as follows: flexion 40 degrees (normal 90 degrees); extension 20 degrees (normal 30 degrees); lateral bending 25 degrees right and left (normal 40 degrees); lateral rotation 10 degrees right and left (normal 30 degrees). He found myospasm from L1 through L5, and stated that the straight leg raise (SLR) test was positive on the right side at 10 degrees and revealed persistent lumbar nerve root compression.

Dr. Dassa diagnosed "[l]umbar sprain / strain superimposed on a prior lumbar spine condition with disc bulge at L4-L5", and opined that the symptoms and clinical findings constituted objective evidence of persistent orthopaedic impairment which, he opined, was directly caused by the July 21, 2018 accident.

C. Dr. Dassa's Affirmation Re Pre-Existing Condition and Causation

Plaintiff also proffered Dr. Dassa's affirmation concerning Plaintiff's pre-existing lower back condition and causation of his current injury. It states in pertinent part as follows:

4. Marc Muren testified that he had been enlisted in the U.S. Marines from about 1989 to 1991. He informed Dr. Kim that he had lumbar surgery in 1990... He informed Dr. Siegel that he had promptly recovered from the surgery... He had informed me of the same history. He had a recent MRI on January 10, 2020 which reported a prior laminectomy at the L5-S1 level. Apparently, while a Marine, he sustained an injury which was addressed surgically and he had an uncomplicated recovery in 1990.

5. Marc Muren testified that he had work-related injury on March 9, 2011... The X-ray of the lumbar spine dated March 9, 2011, found the L5-S1 disc was affected by

'a vacuum phenomena' and some degenerative process at that level. This comports with the surgery in 1990. There is straightening of the lordosis, but no other levels were found to be adverse. Marc Muren also testified he also had chiropractic treatment in Goshen 'about twelve years' before his deposition on November 22, 2019... There was no intervening treatment from March 2011 to July 21, 2018.

6. Marc Muren's treatment records after the accident on July 21, 2018 demonstrate that he had new complaints of numbness and weakness in his lower right extremity. The recent MRI on January 10, 2020 which found, "At the L4-L5 level there is disc dessication, disc bulging with an annular tear, and mild arthrosis."

7. Based upon a reasonable degree of medical certainty, the accident on July 21, 2018 activated or exacerbated the L4-L5 disc. This is based upon there being no pre-accident treatment records for the last several years as shown by Dr. Siegel's report and Marc Muren's testimony. The recent January 10, 2020 MRI reports the L4-L5 discs sustained an annular tear which would be trauma related. The medical treatment records from Chiro-Care reported new radicular symptoms. Dr. Siegel concurred when he diagnosed, "Lumbar spine sprain / strain with aggravation of pre-existing low back condition, with residual radicular symptomatology."...

8. My impression is that the head-on motor vehicle accident activated the prior degenerative and weakened lumbar spine and caused the annular tear and bulging disc at the L4-L5 level with resultant radicular symptoms, pain and the significant limitations I found upon my recent examination.

9. Marc Muren also testified about his ADLs... He had been a body builder and an avid golfer and that he is no longer able to enjoy these activities. He refrains from cutting his lawn and shoveling snow at his residence. He is limited in work around the house or walking for long periods of time. He lost the prior employment as a 'loader' because he could no longer perform his duties... He has continued pain and right leg numbness and is prescribed Gabapentin...

10. It is my opinion within a reasonable degree of medical certainty that the above discussed qualitative limitations which Marc Muren testified to would have been causally related to his bulging disc and annular tear at the L4-5 level and exacerbation of the pre-conditions which had affected the L5-S1 levels. The motor vehicle accident on July 21, 2018 was the substantial cause of these previously diagnosed changes or injuries.

11. Upon my review of the reports by Dr. Siegel and Kim and the 2011 ex-ray report, I do not believe that the limitations found upon examination, or reduced activities discussed herein, were the result of degenerative conditions. Any alleged degenerative conditions had been untreated for several years and were presumably dormant or asymptomatic prior to the head-on motor vehicle accident on July 21, 2018. Accordingly, my opinions as to causation remain the same as in the [April 9, 2020] report.

D. “Serious Injury”

The No-Fault Law precludes recovery by Plaintiff from Defendants for pain and suffering and other non-monetary detriment unless Plaintiff sustained a “serious injury” causally related to the motor vehicle accident at issue. Insurance Law §5104(a). “Serious injury” is, among other things, “a personal injury which results in ... permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system....” Insurance Law §5102(d). Serious injury must be demonstrated by objective medical evidence. *Pommells v. Perez*, 4 NY3d 566 (2005); *Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 (2002). Where as here the plaintiff claims serious injury arising from a “permanent consequential limitation of use” or “significant limitation of use”, the determination whether the limitation is “significant” or “consequential” relates to medical significance, and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. *Id.* Thus, to establish a claim under either of these categories, the plaintiff must submit medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing the plaintiff’s present limitation to the normal function, purpose and use of the affected body organ, member, function or system. *Perl v. Meher*, 18 NY3d 208 (2011); *Toure v. Avis Rent A Car Systems, Inc.*, *supra*.

E. Summary Judgment Standard

While Plaintiff ultimately bears the burden of proof of serious injury, Defendants, as the proponents of a summary judgment motion, “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985).

Here, then, Defendants were required to establish through evidence in admissible form that Plaintiff sustained no causally related “serious injury” within the meaning of Insurance Law §5102(d). *See, Baez v. Rahamatali*, 6 NY3d 868 (2006); *Perez v. Ali*, 23 AD3d 363 (2d Dept. 2005); *Dillon v. Thomas*, 266 AD2d 183 (2d Dept. 1999). The movants’ failure to meet this burden of proof “requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Winegrad v New York University Medical Center, supra*. If, on the other hand, the movant establishes *prima facie* entitlement to summary judgment, the opponent to defeat the motion “must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

F. Legal Analysis

There are three essential issues: (1) Is there objective medical evidence of injury ? (2) Is the injury causally related to the motor vehicle accident ? (3) Has the injury resulted in a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system ?

1. Objective Medical Evidence Of Injury

There is ample objective medical evidence of a significant limitation and/or permanent consequential limitation of Plaintiff’s lumbar spine. This consists *inter alia* of:

- (a) The January 2020 MRI of Plaintiff’s lumbar spine revealing a bulging disc with annular tear. *See, McKeon v. McLane Company, Inc.*, 145 AD3d 1459, 1460 (4th Dept. 2016); *Kmiotek v. Chaba*, 60 AD3d 1295, 1296 (4th Dept. 2009); *LaForte v. Tiedemann*, 41 AD3d 1191, 1192 (4th Dept. 2007).

- (b) Qualitative evidence contemporaneous with the accident of Plaintiff's pain and inability to pursue his employment, coupled with Dr. Dassa's subsequent findings upon objective testing of significant limitations in range of motion of the thoracolumbar spine. *See, Perl v. Meher*, 18 NY3d 208 (2011). *See also, Assael v. Marth*, 300 AD2ed 329 (2d Dept. 2002).
- (c) The positive straight leg raise (SLR) test performed by Dr. Dassa. *See, Carroll v. Jennings*, 264 AD2d 494 (2d Dept. 1999); *Risbrook v. Coronamos Cab Corp.*, 244 AD2d 397 (2d Dept. 1997); *Kim v. Cohen*, 208 AD2d 807 (2d Dept. 1994).

2. Causation

Defendants do not seriously contest the existence of objective medical evidence of serious injury. The key argument advanced on the present motion is that (1) Dr. Siegel has demonstrated *prima facie* that Plaintiff's injury is not causally related to the July 21, 2018 motor vehicle and accident, and (2) Plaintiff has not accounted for a gap in treatment in 2019, which renders Dr. Dassa's opinion on causation speculative and insufficient to withstand summary judgment. *See, Pommells v. Perez*, 4 NY3d 566, 574 (2005).

To demonstrate *prima facie* entitlement to summary judgment on the issue of causation, the defendant is required to demonstrate by evidentiary proof in admissible form that the plaintiff's injury was not causally related to the accident. *See, e.g., Rodgers v. Duffy*, 95 AD3d 864, 866 (2d Dept. 2012); *Catania v. Hussain*, 78 AD3d 639 (2d Dept. 2010); *McKenzie v. Redl*, 47 AD3d 775, 776-777 (2d Dept. 2008). Medical opinion that is speculative or conclusory is insufficient to establish *prima facie* a lack of causation. *See, Pupko v Hassan*, 149 AD3d 988,

989 (2d Dept. 2017); *Rivera v. Ramos*, 132 AD3d 655 (2d Dept. 2015); *Hines v. Swift Transportation Co., Inc.*, 291 AD2d 480 (2d Dept. 2002).

Dr. Siegel has simply not demonstrated the lack of a causal link between the July 2018 motor vehicle accident and Plaintiff's injury. To the contrary:

- (1) Dr. Siegel acknowledges and does not dispute Plaintiff's medical history, to wit, that his pre-existing back problems were asymptomatic prior to the accident, and that he experienced significant pain and was unable to perform his job as a "loader" after the accident; and
- (2) Dr. Siegel specifically diagnosed "[l]umbar spine sprain / strain with aggravation of a pre-existing low back condition, with residual radicular symptomatology."

Hence, Defendants failed to establish *prima facie* entitlement to judgment on the issue of causation.

Absent sufficient proof, the burden does not shift to the plaintiff to demonstrate the existence of a triable issue of fact on causation. *See, Senior v. Mikhailov*, 71 AD3d 864, 865 (2d Dept. 2010); *Madatova v. Madatov*, 27 AD3d 531 (2d Dept. 2006). More particularly, where "the defendants fail[] to establish, *prima facie*, a lack of causation..., the burden [does] not shift to the plaintiff to raise a triable issue of fact regarding causation or to explain any gap in treatment." *Nolasco-Ochoa v. Kollanethu*, 181 AD3d 689, 690 (2d Dept. 2020); *Lambropoulos v. Gomez*, 166 AD3d 952 (2d Dept. 2018).

3. Significant Limitation / Permanent Consequential Limitation

Dr. Siegel, upon examination of Plaintiff's thoracolumbar spine, found a "voluntarily diminished range of motion" but no objective evidence of limitation. However, Dr. Dassa's

findings, based upon objective testing, that Plaintiff had substantial limitations in range of motion of the thoracolumbar spine demonstrate the existence of triable issues of fact whether Plaintiff's limitations were significant, consequential and permanent.

G. Conclusion

In view of the foregoing, the Court holds that Defendants failed to establish *prima facie* entitlement to summary judgment on the issue whether Plaintiff sustained a "serious injury" to his lumbar spine as a result of the July 21, 2018 automobile accident, and further, that Plaintiff's evidence demonstrates the existence of triable issues of fact on that score. Since a showing of any "serious injury" entitles the Plaintiff to recover for all injuries sustained as a result of the accident (*see, Rubin v. SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept. 2010]; *Marte v. NYCTA*, 59 AD3d 398, 399 [2d Dept. 2009]), the Court declines to address the remaining issues raised on Defendants' motion.

It is therefore

ORDERED, that Defendants' motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

Dated: August 4, 2020 ENTER
Goshen, New York



HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE