

**O'Gara v Keane**

2020 NY Slip Op 35118(U)

July 30, 2020

Supreme Court, Orange County

Docket Number: Index No. EF002745/2019

Judge: Sandra B. Sciortino

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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  
COUNTY OF ORANGE

-----X  
**KEITH G. O’GARA,**

Plaintiff,

-against-

**ALFRED G. KEENE,**

Defendant.  
-----X

**SCIORTINO, J.**

**DECISION AND ORDER**

Index No.:EF002745/2019

**Motion Date: 7/17/20**

Sequence No. 1

The following papers numbered 1 to 7 were considered in the threshold motion dismissing the complaint submitted by defendant:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Nosowitz)Exhibits A-O;	
Memorandum of Law	1 - 4
Affirmation in Opposition (DeIDuco)/ Exhibits 1-3	5 - 6
Reply Affirmation (Nosowitz)	7

This personal injury action arises out of a motor vehicle accident that took place on January 13, 2018 on Route 211 approximately 20 feet east of Stoneridge Road, in the Town of Wallkill, Orange County, New York. Plaintiff commenced this action by filing a Summons and Complaint on April 9, 2019. Plaintiff alleges he sustained serious injuries as defined in Insurance Law §5102(d). Specifically, plaintiff relies - in large measure - upon the following injuries/conditions: central serous chorioretinopathy requiring laser surgery of the left eye; C4-5, C5-6 disc herniations; L3-4, L4-5, 5-S1 bulges; impingement of both shoulders and left elbow sprain/strain. Plaintiff further claims the aforementioned conditions were either caused or exacerbated by the subject accident.

Defendants argue that plaintiffs have failed to establish a “serious injury” as that term is defined in Insurance Law §5102(d). The plaintiff, in his bill of particulars, claims to have suffered the following serious injuries as defined in §5102(d):

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; or, in the alternative, 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. (Exhibit C, page 7)

Plaintiff concedes that a permanent loss of use of a body organ, member, function or system cannot be demonstrated. With respect to the 90/180 category, plaintiff's own deposition testimony establishes that he did not sustain a medically determined injury or impairment of a non-permanent nature which prevented him 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 the occurrence of the injury or impairment. He returned to work without any restrictions 11 days following the accident (*Anderson v Foley*, 162 AD3d 965 [2d Dept 2018]).

However, the plaintiff contends that the injuries to his left eye, cervical spine, lumbar spine and left shoulder qualify as permanent consequential limitations of use of a body organ or member and significant limitations of use of a body function or system. If so, he has sustained a serious injury as defined in the Insurance Law.

As a counter, the defendant asserts that plaintiff's injuries were not causally related to the alleged accident. Where the evidence demonstrates plaintiff had pre-existing

conditions and/or that there were no objective limitations or disability, defendant has made his *prima facie* showing that there was no serious injury. Here, defendant asserts his experts found that there was no orthopedic disability, and none of the injuries were causally related to the accident except a possible impingement of the left shoulder.

As the proponent of the summary judgment motion, defendant has the threshold burden to establish, by competent medical evidence, that plaintiff did not suffer a serious injury casually related to the subject accident (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]; *Peterson v Cellery*, 93 AD3d 911, 912 [3d Dept. 2012]). To that end, defendant submitted plaintiff's deposition testimony, medical records and the affirmed reports of examining orthopedist, Charles W. Episalla, M.D.; diagnostic radiologist, Dr. Scott A. Springer, and examining ophthalmologist, Dr. Jay Fleischman. The medical records document plaintiff's complaints of chronic lower back pain that predate the subject motor vehicle accident by more than three years. Plaintiff had three MRI's performed of his lumbar spine, (July 20, 2014, August 3, 2016 and June 14, 2017) and an X-Ray on July 19, 2017, all pre-dating this accident, which indicated degenerative disc disease, annular tear at L4-5, and disc bulges at L3-4, 5-S1.

Dr. Episalla, the orthopedist who examined the plaintiff on February 6, 2020, reviewed plaintiff's pre- and post accident emergency room records, pre and post MRI reports of plaintiff's lumbar spine and cervical spine, and a pre-accident bone scan report. Upon physical examination of the plaintiff, Dr. Episalla determined plaintiff's range of

motion of his lumbar and cervical spine<sup>1</sup> to be within normal limits and all tests negative. Regarding his left shoulder, Dr. Episalla did indicate a decreased range of motion in forward flexion and abduction but notes that these movements are a subjective parameter and further that these decreased ranges have no effect on his ability to perform all activities of daily living as he was doing prior to the subject accident. Also, plaintiff's bone scan report, dated November 5, 2014, more than three years prior to the subject accident, indicates degenerative joint disease, most marked in both shoulders. Dr. Episalla opines that there are no objective findings regarding plaintiff's alleged injuries to the cervical and lumbar spine and there is no need for continued orthopedic treatment, including physical therapy or massage therapy.

Dr. Springer, the radiologist, after examination plaintiff's cervical spine MRI scans, opined that there is no evidence of any traumatic injury having been suffered as a result of the subject accident. Dr. Springer found that the appearance of his cervical spine is that of a chronic multilevel degenerative condition and not the result of a single recent traumatic event. Upon examination of the MRI scan of plaintiff's left shoulder, Dr. Springer found no posttraumatic changes related to the subject accident.

Dr. Fleischman, the ophthalmologist who examined the plaintiff on February 19, 2020, explains that central serous retinopathy is a well-known disorder and usually happens spontaneously and resolves on its own over a three month period, without therapy and with minimal or no consequence. He opines that it is impossible for him to causally relate, within a reasonable degree of medical certainty, that the subject accident was the proximate cause

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<sup>1</sup>Dr. Episalla did note evidence of spasm in the cervical spine, greater on the left than the right.

of plaintiff's eye injury. He further notes the plaintiff's treating ophthalmologist, Dr. Sean C. Lalin, did not indicate any exacerbation on this preexisting condition nor any relation to the subject accident in his January 2018 records.

The submissions of defendant are generally sufficient to demonstrate a lack of serious injury, by reason of pre-existing conditions. On such a showing, the "plaintiff must provide objective medical evidence distinguishing [the identified] preexisting condition from the injuries claimed to have been caused by the instant accident" (*She v Ives*, 137 AD3d 1404 [3d Dept 2016]) [internal quotation marks, brackets and citations omitted]; see *Dudley v Imbesi*, 121 AD3d 1461, 1462 [3d Dept 2014]).

Plaintiff contends that there are triable issues of fact concerning exacerbation of the plaintiff's lumbar spine injury. Plaintiff's submissions in opposition included the opinion of his treating physician, Dr. Steven Jacobs, a neurosurgeon, who provided no opinion, objective medical evidence or any factual explanation distinguishing plaintiff's preexisting condition of low back pain or eye injury. (see *Thomas v. Ku*, 112 A.D.3d 1200, 1201 [3d Dept 2013]; *Falkner v. Hand*, 61 A.D.3d 1153, 1155 [3d Dept 2009]). Counsel points out that an examination of the plaintiff six months before the accident indicated he had full range of motion of the flexion and extension of the lumbar spine. Five days after the accident, plaintiff was examined and found to have a decreased range of motion and concludes that his current injury was caused by the subject accident. Such reasoning is speculative on the part of plaintiff's counsel and is not supported by objective evidence. Further, it fails to distinguish his prior condition from the injuries claimed to have been caused by the subject accident.

However, Dr. Jacob opined that the accident caused the cervical herniations and, upon examination of the plaintiff on June 29, 2020, he found plaintiff to have 25% loss of range of motion of the cervical spine on extension by goniometer measurement and believes the loss is permanent in nature. Dr. Jacobs opined that if plaintiff's symptoms persist or worsen, he could be a candidate for anterior cervical discectomy and fusion (ACDF). Dr. Jacob went on to note that there are two components to plaintiff's cervical pathology: one is pre-existing degenerative disc disease, which was asymptomatic prior to the accident. After the accident, plaintiff developed herniations at C4-C5 which led to persistent neck pain and signs of cervical radiculopathy, including sensory loss over the left lateral forearm and weakness of fingers. Dr. Jacob found no diagnostic studies showing herniations at those levels prior to the date of the accident; and opines that the herniations at C4-C5 are causally related to the accident.

Conflicting expert opinions generally raise triable issues of fact. (*Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2003]) With respect to the issue of the cervical injury only, there remains a question of fact whether the injuries to plaintiff qualify as permanent consequential limitations of use of a body organ or member or significant limitations of use of a body function or system.

Accordingly, it is hereby

**ORDERED** that the summary judgment motion is granted in part and denied in part; and it is further

**ORDERED** that plaintiff's claims for permanent loss of use of a body organ, member, function or system with respect to lumbar spine, eye and shoulder injuries and the

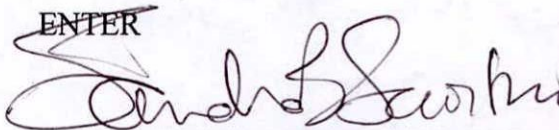
90/180 category are dismissed; and it is further

**ORDERED** that the motion is denied as to plaintiff's claim for damages for permanent consequential limitations of use of a body organ or member or significant limitations of use of a body function or system with respect to the cervical injuries only; and it is further

**ORDERED** that this matter shall be scheduled for virtual conference on September 11, 2020 at 1:30 p.m. A link will be provided during the week prior to the conference date.

This decision shall constitute the order of the Court.

Dated: July 30, 2020  
Goshen, New York

ENTER  
  
HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record Via NYSCEF*