Gulino v Poganik
2021 NY Slip Op 32920(U)
July 17, 2021
Supreme Court, Orange County
Docket Number: Index No. EF009693-2018
Judge: Sandra B. Sciortino
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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

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JOSEPH GULINO,

Plaintiffs,

-against-

MICHAEL J. POGANIK and DAWN M. POGANIK,

Defendants.

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DECISION AND ORDER
Index No.: EF009693-2018

Motion Date: 4-16-2021
Sequence Nos. 1 - 2

SCIORTINO, J.

The following papers numbered 1 to 29 were considered in plaintiff's motion (Sequence #1) seeking an order granting plaintiff's summary judgment on the issue of liability and the defendants' motion (Sequence #2) for summary judgment on the ground that plaintiff failed to establish a serious personal injury as required by Insurance Law §5102:

PAPERS	NUMBERED
Notice of Motion (Sequence #1) /Affirmation (Ianuzzi)/ Exhibits 1 - 6	1 - 8
Notice of Cross-Motion (Sequence #2)/Affirmation(Shuter)/ Exhibits A - P	9 - 27
Affirmation in Opposition to Cross-Motion (Cambareri)/	28
Reply to Cross-Motion(Shuter)[1]	29

This personal injury action arises out of a motor vehicle accident that took place on September 20, 2015 at the intersection of Route 94 and Ahern Boulevard in the Town of Washingtonville, County of Orange. Plaintiff commenced this action by filing a Summons and

[1] Neither the CPLR nor the rules of this Court permit a reply to cross-motion without express permission. As permission was not given, this submission was not considered.

Complaint on September 20, 2018. Issue was joined with the filing of the defendants' answer on January 18, 2019. Plaintiff served a Bill of Particulars dated January 27, 2020.

Plaintiff's Examination Before Trial was taken on April 7, 2020. Defendant Dawn Poganik's Examination Before Trial was taken on April 14, 2020. Note of Issue was filed on January 12, 2021.

Plaintiff Joseph Gulino Deposition

On September 20, 2015, plaintiff was traveling on Route 94, a two way road with one lane in each direction. Plaintiff was traveling approximately 40 miles per hour, where there was no other traffic. Plaintiff approached Route 94's intersection with Ahern Boulevard. There was no traffic control device. Plaintiff first observed defendant's vehicle approach her from the opposite direction. Defendant attempted to make a left turn in front of plaintiff's vehicle. Plaintiff "jammed" on the brakes. The left front end of plaintiff's vehicle struck defendant's vehicle. Approximately two seconds passed between plaintiff first observing defendant's vehicle and the impact. Plaintiff's air bags deployed.

As a result of the impact, plaintiff's head struck the air bag, then the steering wheel, and his knee struck the dash. Once his vehicle came to rest, plaintiff pushed the driver's side door open and sat on the ground. Plaintiff heard defendant apologize and say the accident was her fault. Plaintiff's face and mouth were bleeding. He was carried into an ambulance and taken to Saint Luke's Cornwall Hospital complaining of head, neck, back and knee pain.

Plaintiff, while being deposed, was unable to provide an exact time line of his treatment for the claimed injuries. At Saint Luke's Cornwall Hospital, an x-ray of his neck and back were performed. He sought treatment approximately a week later with Dr. Rose, who scheduled an MRI and prescribed physical therapy and anti-inflammatories. Dr. Rose also performed EMG testing.

Plaintiff received physical therapy for his back, shoulder, and knee until March or April of 2016. MRIs were performed of the left knee, neck and back at Distinguished Diagnostic Imaging. Plaintiff was treated by a chiropractor at Columbia Miller "a couple of months later" for approximately six months. Plaintiff's last treatment was a follow-up appointment with Dr. Rose in April of 2018.

Plaintiff was out of work for approximately ten days following the accident. The first week he "primarily" stayed at home. At the time of deposition, plaintiff experienced pain in his neck. He was using a heating pad and ibuprofen to alleviate the pain. Prior to the accident, he performed repairs and maintenance on his house, including sheetrock work and lawn maintenance, and used to jog every other week. Since the accident, he has to hire people to maintain the lawn and perform repairs on his home and is unable to jog.

Plaintiff indicated he was involved in a prior rear end motor vehicle accident in 2010, in which he injured his neck and back. X-rays were taken and an MRI was performed at Crystal Run. A chiropractor treated him for "a few months" following the 2010 accident providing immediate improvement. No further treatment was received.

Defendant Dawn Poganik Deposition

On September 20, 2015, defendant had come to a stop on Route 94 behind a vehicle waiting to make a left turn onto Ahern Boulevard. Defendant remained stopped for approximately one minute. Once the other vehicle completed its left turn, defendant pulled forward into the intersection and waited for "a few seconds." She did not see any traffic coming from the opposite direction. She was looking at Ahern Boulevard and attempted to make the left turn. She completed between one quarter and one half of the turn before her vehicle came into contact with plaintiff's vehicle. The passenger side front quarter panel of her vehicle came into contact with the front of plaintiff's

vehicle. She did not see plaintiff's vehicle until seconds before the impact. When the impact occurred, defendant was in the plaintiff's lane of travel.

Plaintiff's Motion for Partial Summary Judgment (Sequence #1)

By Notice of Motion filed on February 5, 2021, plaintiff moves for summary judgment on the issue of liability. Plaintiff claims entitlement to summary judgment on liability as plaintiff's vehicle was within his lane of travel when defendant suddenly attempted a left hand turn into oncoming traffic and attempted to cross the opposing lane of travel. As such, defendant's action violated Vehicle & Traffic Law §1141. (McKinney's Veh. & Traffic Law §1141) Such actions, plaintiff argues, constitutes negligence *per se*. Defendant testified that, at the time of the collision, she was in the opposite lane of travel. Defendant's testimony indicates that she did not see plaintiff's vehicle until just before the moment of impact. Plaintiff argues that he has demonstrated entitlement to summary judgment on the issue of liability, and defendant is unable to offer any a non-negligent explanation for the accident.

Defendant's cross-motion does not address the issue of liability.

Summary Judgment on Liability (Sequence #1)

Summary judgment is a drastic remedy and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996]) The Court

is obliged to draw all reasonable inferences in favor of the non-moving party. (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995])

A driver has a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid colliding with another vehicle. (*Filippazzo v. Santiago*, 277 AD2d 419 [2d Dept 2000]) A driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield. (*Beres v. Terranera*, 153 Ad3d 483, 485 [2d Dept 2017]) Vehicle and Traffic Law §1141 provides, "The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." (McKinney's Veh. & Traffic Law §1141) Plaintiff may establish entitlement to summary judgment on the issue of liability by establishing that the defendant violated Vehicle and Traffic Law § 1141 in making a left turn when it was not reasonably safe to do so, directly into the path of plaintiff's oncoming vehicle. (*Ahern v. Lanaia*, 85 AD3d 696 [2d Dept 2011])

Plaintiff established entitlement to summary judgment on liability. The parties' deposition testimony demonstrates that defendant attempted to make a left turn and collided with plaintiff's vehicle head-on. Defendant had a "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid colliding with another vehicle," and a duty to yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard. (*Filippazzo*, 277 AD2d 419; Vehicle and Traffic Law §1141) Defendant's failure to do so constitutes negligence *per se*. (*Ciatto v. Lieberman*, 266 AD2d 494, 495 [2d Dept. 1999])

Threshold Cross-Motion (Sequence #2)

Plaintiff alleges that she suffered, *inter alia*, cervical disc bulges; lumbar disc bulges; left knee medial meniscus tear; severe sprain of the right shoulder; and traumatic brain injury.

The plaintiff specifically claims that she sustained a serious injury as defined in the Insurance Law §5102(d): (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation to a body organ, member or system; or, in the alternative, (3) significant limitation of use; and (4) a medically-determined injury or impairment of a non-permanent nature that prevented plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 of the 180 days immediately following the accident.

As the proponent of the summary judgment motion, defendants have the threshold burden to establish, by competent medical evidence, that plaintiff did not suffer a causally related serious injury under the categories claimed in the Bill of Particulars. (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]; *Peterson v Cellery*, 93 AD3d 911, 912 [3d Dept. 2012] The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, in this case, the plaintiff. (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept. 2005])

A defendant can satisfy the initial burden by relying on the sworn statements of a defendant's examining physician and plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians. (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept. 1992]) Defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. (*Browdame v. Candura*, 25 AD3d

747 [2d Dept. 2006])

It is well-established that proof under the significant limitation of use category requires "comparative determination of the degree or qualitative nature of the injury based on the normal function, purpose and use of the body part and must be supported by objective medical evidence." (*Toure,* 98 NY 2d at 350-351) "[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well." (*Estrella v. GEICO Ins. Co.*, 102 AD3d 730 [2d Dept. 2013]) A "significant limitation" need not be permanent in order to constitute a serious injury. (*Toure,* 98 NY 2d at 351) A "permanent consequential limitation" requires a greater degree of proof than a "significant limitation" as only the former requires proof of permanency. (*Vasquez v. Almanzar*, 107 AD3d at 539]) To qualify as a serious injury, a "permanent loss of use" must be total. (*Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295, 298 [2001])

In order to establish serious injury under the 90/180 category of the insurance law, plaintiff must establish that he "has been curtailed from performing [his] usual activities to a great extent." (*Lanzarone v. Goldman*, 80 AD3d 667, 669 [2d Dept. 2011]; *citing, Licari v. Elliott*, 57 NY2d 230 [1982]) Viewing the evidence in the light most favorable to the plaintiff, plaintiff's deposition testimony establishes that his 90/180 claim must fail.

Defendants append the report of Dr. Hal Rosenfeld, D.C., dated April 18, 2012. On April 14, 2012 Dr. Rosenfeld examined the plaintiff following an April 10, 2012 motor vehicle accident. Range of motion testing was performed. The range of motion testing of the cervical spine showed: flexion 20/50; extension 30/60; right lateral flexion 25/45; left lateral flexion 25/45. Range of motion testing of the lumbar spine showed: flexion 32/60; extension 11/25; right lateral flexion 12/25; left

lateral flexion 12/25.

After review of plaintiff's May 9, 2012 cervical spine MRI, Dr. Rosenfeld's impressions were: multilevel stenosis from C3-C4 through C6-C7; right foraminal C4-C5 spinal stenosis due to bulging disc extending into the right neural foramen; right foraminal C5-C6 disc protrusion and bulging disc resulting in mild central and right foraminal stenosis; right foraminal C6-C7 disc herniation and bulging disc resulting in mild to moderate right foraminal stenosis.

After review of plaintiff's May 9, 2012 lumbar spine MRI, Dr. Rosenfeld's impressions were: right paracentral/right foraminal L4-L5 disc herniation; central L3-L4 disc herniation and bulge; left paracentral/left lateral recess L1-L2 disc herniation; degenerative changes of the T11-T12 through L5-S1 discs.

Defendants append the report of Dr. Marc Berenzin, defendants' examining orthopedist. Dr. Berenzin examined the plaintiff on October 6, 2020. On the date of examination, plaintiff complained of moderate neck and right upper back pain. In addition to the medical records in connection with this accident, Dr. Berenzin reviewed the records in connection with a motor vehicle accident which occurred on April 10, 2012.

Dr. Berenzin conducted a physical examination. Ranges of motion testing of the cervical spine was performed, measured by goniometer and compared to normal.[2] Range of motion testing of the cervical spine showed the following: forward flexion 30/45; extension 10/45; rotation right 30/80; rotation left 10/80; lateral rotation 10/45.

Range of motion testing of the right shoulder showed: abduction 110/180; forward flexion

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[2] Using the standards of the American Medical Association Guidelines for the Evaluation of Permanent Impairment

160/180; internal rotation 70/70; external rotation 90/90; adduction 30/30; extension 60/60. Left shoulder: abduction 110/180; forward flexion 160/180; internal rotation 70/70; external rotation 90/90; adduction 30/30; extension 60/60.

Range of motion testing of the back showed: forward flexion 50/75-90; rotation right 20/45; rotation left 30/45; lateral rotation 20/45.

Dr. Berenzin's findings were: cervical strain; lumbar strain; and left knee contusion/strain. He found subjective loss of motion to the cervical and lumbar spine without evidence of objective changes. Plaintiff's preexisting degenerative changes to the cervical and lumbar spine explain the reduced range of motion.

Defendants also append the report of Dr. Ira Neustadt, board certified neurologist, examined the plaintiff on August 27, 2020. On the date of examination, plaintiff complained of moderate neck and right upper back pain. Dr. Neustadt also reviewed the records in connection with this accident and those relating to the motor vehicle accident which occurred on April 10, 2012.

Dr. Neustadt conducted a physical examination. Neurologically, plaintiff was entirely within normal limits and non-focal. Motor systems were 5+/5+ in upper and lower extremities. Hand grip was within normal limits. There were no sensory deficits. Reflexes were equal and normal. Cerebellar functions were intact. Gait was normal. There was no sign on external head trauma.

Ranges of motion testing of the cervical and lumbar spine was performed, measured by goniometer and compared to normal.[3] Range of motion testing of the cervical and lumbar spine showed full range of motion. On lateral rotation to the left and on extension, plaintiff had subjective

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[3] Using the standards of the American Medical Association Guidelines for the Evaluation of Permanent Impairment

complaints of localized neck discomfort. Range of motion testing of plaintiff's knees showed normal range of motion, with no complaints of pain with the left knee.

Dr. Neustadt noted the MRI of plaintiff's cervical and lumbosacral spine showed evidence of degenerative disc disease, likely preexisting, which was consistent with the prior MRIs taken on May 9, 2012. Dr. Neustadt concludes, based on review of the medical records, that "[he] cannot with any degree of medical certainty causally relate these findings to the motor vehicle accident in question." There is nothing in the medical records to support the complaint of traumatic brain injury or headaches, nor were there findings to support such a complaint. While plaintiff had subjective symptoms of residual cervical and shoulder girdle strain, his lumbar strain patterns of pain are essentially resolved.

By their reliance on the affirmed reports of Dr. Neustadt and Dr. Berenzin, the appended medical records, and plaintiff's deposition testimony, defendants initially met their *prima facie* burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the accident under the "permanent loss of use," "permanent consequential limitation of use," "significant limitation of use," or 90/180 categories with respect to any of the injuries claimed in her Bill of Particulars. (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002]; *Gaddy v. Eyler*. 79 NY 2d 955 [1992])

Defendants having submitted persuasive evidence that plaintiff's alleged pain and injuries "were related to a preexisting condition, plaintiff has the burden to come forward with evidence addressing the defendant's claimed lack of causation." (*Pommells v. Perez*, 4 NY3d 566 [2005])

In opposition, plaintiff submits the report of Dr. Matthew Wert, an orthopedic surgeon, dated July 15, 2020. Dr. Wert's report indicates he reviewed plaintiff's lumbar spine MRI dated 11/4/2015;

cervical spine MRI dated 5/9/2012; cervical spine x-ray dated 10/19/2015; and lower extremity EMG dated 10/27/2015. Dr. Wert conducted range of motion testing, which revealed limited range of motion in the cervical and lumbar spine. Dr. Wert concludes that the September 20, 2015 accident was "the direct component producing cause" of plaintiff's injuries. Despite the report's reference to review of the 2012 MRI of plaintiff's cervical spine, Dr. Wert concludes "Absence of any prior injury or treatment to the cervical spine and lumbar spine explains that this injury did not pre-exist the above-noted accident."

Plaintiff's expert fails to adequately rebut the findings of defendants' experts that the conditions in the cervical and lumbar regions were preexisting degenerative conditions unrelated to the accident or explain how he concluded the injury was causally related to the 2015 accident. "In the absence of an explanation of the basis for concluding that the injury was caused by the subject accident, and not by other possible causes evidenced in the record, an expert's 'conclusion that plaintiff's condition is causally related to the subject accident is mere speculation' insufficient to support a finding that such a causal link exists." (*Carter v. Full Service, Inc.*, 29 AD3d 342 [1st Dept. 2006]) Dr. Wert's opinion that plaintiff's injuries were a direct result of the accident is conclusory, unsupported by objective evidence and insufficient to raise a triable issue of fact. (*Tour v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002])

Plaintiff does not dispute that there was a nearly two year gap in treatment. While a cessation of treatment is not dispositive, a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so. (*Pommells*, 4 NY3d 566 at 574) Here, neither plaintiff nor his treating physicians provided an explanation as to why plaintiff ceased treatment in April of 2018.

Accordingly, defendant's cross-motion for summary judgment is granted.

Conclusion

On the basis of the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment on the issue of liability is granted; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted, and the complaint is dismissed.

This decision shall constitute the order of the Court.

Dated: June 17, 2021
Goshen, New York

ENTER

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

To: *Counsel of Record Via NYSCEF*