Coan v New Era Iron Work Corp.
2021 NY Slip Op 32994(U)
July 7, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 620343/2018
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX No. 620343/2018
CAL. No. ______

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

P R E S E N T:

HON. LINDA KEVINS
Justice of the Supreme Court

MOTION SUBMIT DATE: 04/20/21
MOT. SEQ. # 003 - MD

--X

ROSEMARY COAN, KEVIN COAN,
VICTORIA COAN,

Plaintiffs,

- against -

NEW ERA IRON WORK CORP., WILFREDO M. ACUNA, JANE M. DEGIROLAMO.

Defendants.

--X

Upon the following papers e-filed and read on this motion for summary judgment: Notice of Motion and supporting papers by defendants New Era Iron Work Corp. and Wilfredo M. Acuna, dated January 24, 2021 ; Answering Affidavits and supporting papers by plaintiff, dated April 12, 2021 ; Replying Affidavits and supporting papers by defendants, dated April 16, 2021 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants New Era Iron Work Corp. and Wilfredo M. Acuna for an order dismissing the complaint as against them is denied; and it is further

ORDERED that if this Order has not already been entered, the movants are directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk who is directed to hereby enter such order; and it is further

ORDERED that upon Entry of this Order, the movants are directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a multi-vehicle accident that occurred on November 3, 2015 on Sunrise Highway in

the Town of Babylon, New York. Plaintiff's vehicle was rear-ended by another vehicle that was pushed into it after being struck in the rear by the rear-most vehicle.

Defendants New Era Iron Work Corp. and Wilfredo M. Acuna now move for summary judgment dismissing the complaint against them on the ground that plaintiff Kevin Coan, the driver of the vehicle, is precluded under Insurance Law § 5104 from recovering for non-economic loss, as he did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In support of the motion, defendants submit copies of the pleadings, bills of particulars, the transcript of plaintiff's deposition testimony, and sworn medical reports prepared by Dr. David Weissberg, Dr. Mark Zuckerman and Dr. Jonathan Luchs.

To recover for non-economic loss resulting from an automobile accident, Insurance Law § 5104 requires that a plaintiff establish, as a threshold matter, that the injury he or she suffered was a "serious injury" within the meaning of the statute. 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. The court determines, in the first instance, whether a plaintiff has sustained a serious injury and may maintain an action under the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Ammonds v Rodriguez***, 126 AD2d 504, 510 NYS2d 480 [2d Dept 1987]).

The bill of particulars alleges that the accident caused a disc herniation to plaintiff's spine at L4/L5, L5/S1, disc bulging at L1/L2, L3/L4, that plaintiff sustained an aggravation of a spinal fusion at C4 through T1, cervical and lumbar radiculopathy, and that plaintiff's injuries are serious under the "permanent consequential limitation" and "significant limitation of use" categories. To qualify as a permanent consequential limitation of use of a body organ or member, the limitation must be permanent, and important or significant (***Countermine v Galka***, 189 AD2d 1043, 593 NYS2d 113 [3d Dept 1993]). To qualify as a significant limitation of use, permanence need not be established nor is a total loss required. The determination of whether a loss is significant or consequential, for both categories, 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. Either objective evidence of the extent, percentage or degree of plaintiff's limitation or loss of range of motion must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc***., 98 NY2d 345,

746 NYS2d 865 [2002]). Strictly subjective complaints of a plaintiff unsupported by credible medical evidence do not suffice to establish a serious injury (***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]). Further, proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury (***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]).

In a personal injury action, a defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Here, defendant submits the affirmed reports of Dr. David Weissberg, Dr. Mark Zuckerman and Dr. Jonathan Luchs. In his report, Dr. Weissberg, an orthopedist, states that he conducted a physical examination of plaintiff at defendants' request on August 25, 2020. He states that he reviewed the bill of particulars, plaintiff's medical records, including Magnetic Resonance Imaging examinations (MRI) reports, x-ray reports, plaintiff's medical records from treating physicians, physical therapists, hospital records and other sources, which he specifically designates. He states that he performed range of motion tests using a goniometer, and he provides the numerical values of the range of motion measurements for both shoulders, cervical spine and thoracolumbar spine with corresponding normal values. Dr. Weissberg opines that the decreased range of motion at the cervical area is caused by pre-existing issues and a prior fusion, and that "examination of the lumbar spine revealed full range of motion."

The report is insufficient, as Dr. Weissberg's opinion regarding the lumbar spine is conclusory, as he does not state that he tested plaintiff's range of motion in his lumbar area at L4/L5, L5/S1, which are alleged to have suffered herniations caused by the subject accident. . Furthermore, Dr. Weissberg does not provide a foundation for his conclusion that the prior fusion at plaintiff's cervical spine, and not the accident, were the cause of plaintiff's limitation of range of motion (see ***Balducci v Velasquez***, 92 AD3d 626, 938 NYSS2d 178 [2d Dept 2012]).

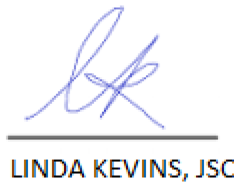
Dr. Mark Zuckerman, a neurologist, submits an affirmation, and states that he examined plaintiff at defendants' request on June 29, 2020, and he reviewed the bill of particulars, plaintiff's medical records, including Magnetic Resonance Imaging examinations (MRI) reports, x-ray reports, plaintiff's medical records from treating physicians, physical therapists, hospital records and other sources, which he specifically designates. Dr. Zuckerman concludes that cervical sprains are resolved, that reduced motion is due to degenerative changes and prior surgery, that lumbar sprain is resolved, and there is no evidence of cervical or lumbosacral radiculopathy. He states that he conducted a spinal examination with a goniometer and found that "lumbar flexion to 80 degrees of forward flexion (normal 60 degrees). Right lateral flexion is 20 degrees and left is 25 degrees (normal 25 degrees). He extends 25 degrees (normal 25 degrees). I cannot palpate his paraspinal muscles due to body habitus (obesity)." No explanation is given for the difference in values between normal degrees and his findings. The

report, is, therefore, insufficient to establish that plaintiff did not sustain a serious injury from the accident.

Finally, the report of Dr. Luchs, a radiologist, is submitted. In his report, Dr. Luchs states that he performed a radiology review of a cervical MRI taken on November 17, 2015. However, Dr. Luchs did not mention a review of any MRIs taken of the lumbar spine, and plaintiff alleges that he suffered disc herniations in the lumbar area. Consequently, this report, is also insufficient. Accordingly, defendants' motion for an order dismissing the complaint against them is denied.

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the decision and **Order** of the Court.



Dated: 7/7/21

LINDA KEVINS, JSC

_____ **FINAL DISPOSITION** __X___ **NON-FINAL DISPOSITION**