

Plazas v Sherlock

2021 NY Slip Op 33209(U)

March 29, 2021

Supreme Court, Putnam County

Docket Number: Index No. 501384/2019

Judge: Victor G. Grossman

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To commence the 30 day 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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM**

-----X
MAURICIO A. MOSSOS PLAZAS,

Plaintiffs,

-against -

BRENNA MARIE SHERLOCK AND KEVIN G. SHERLOCK,

Defendants.
-----X

GROSSMAN, J.S.C.

DECISION & ORDER

Index No. 501384/2019

Sequence Nos 1 & 2
Motion Date: 1/20/2021

The following papers, numbered 1 to 48, were considered in connection with Defendants’ Notice of Motion, dated December 7, 2020, seeking an Order, granting summary judgment, based on the alleged failure of Plaintiff to meet the “serious injury” threshold as set forth in Insurance Law §§ 5102 and 5014, and Plaintiff’s Notice of Cross Motion, dated January 4, 2021, seeking an Order, granting partial summary judgment on the issue of liability.

PAPERS.¹

NUMBERED

Notice of Motion/Affirmation in Support/Exs. A - R	1 - 20
Notice of Cross Motion/Affirmation/Exs. A - X	21- 46
Affirmation in Reply and in Opposition	47
Reply Affirmation	48

¹The parties and counsel shall familiarize themselves with this Court’s Part Rules, which can be found on the OCA website, as parts of this motion and the responsive papers fail to comply with those Rules, to the extent that Plaintiff shall designate exhibits by number, while Defendant shall designate exhibits by letter, and exhibit lettering or numbering shall not begin anew for subsequent papers submitted by the same party. Any future motions that do not comply with this Court’s Part Rules will be rejected or dismissed.

Upon consideration of the foregoing and for the following reasons, both motions are denied.

This action arises out of an automobile accident that occurred on June 14, 2018, at approximately 8:50 AM, when the vehicle operated by Defendant Brenna Marie Sherlock made contact with a vehicle driven by Plaintiff Mauricio A. Mossos Plazas. Defendant Sherlock was driving the vehicle owned by, and with the permission of, Defendant Kevin G. Sherlock. The contact occurred at the intersection of Route 6 and Mahopac Avenue in the Town of Carmel. Plaintiff was stopped at a red light in the left turn lane of Route 6, intending to turn onto Mahopac Avenue. Defendant was traveling south on Mahopac Avenue when she attempted to make a left turn and saw Plaintiff's stopped car for the first time. There is no indication that weather or road conditions were a factor, and according to Plaintiff, the traffic was light.

As Plaintiff approached the intersection, he saw the traffic light change from yellow to red. He stopped behind the stop line, approximately 15 meters from the light itself. While the light in his turning lane was red, he believed the lane to his right had a green light. He did not see Defendant's vehicle approach from the right prior to contact on the right front passenger side. Defendant was attempting a left turn onto Route 6. Plaintiff testified he had his foot on the brake when the impact occurred, and he was looking to his left (Pl. Ex. H at 32). The cars "were right inside the intersection, blocking traffic," and the parties moved their cars to a parking area off the road (Pl. Ex. H at 32).

The police were called and each driver spoke to the officer, who prepared a report (Def. Ex. A). Notably, according to the certified police report, Defendant stated that she was making a left turn onto Route 6 from Mahopac Avenue and failed to observe Plaintiff's vehicle and struck

Plaintiff's vehicle (Def. Ex. A, Def. Ex. B, pp. 28-32).

On the day of the accident, Plaintiff was driving to his employment at Lincoln Hall Boys Home, a shelter for children ages 12 - 17, where he was the Performance and Quality Assurance Coordinator. His position entailed the review and presentation of individual cases as well as maintaining records and communicating with government offices. Plaintiff advised his employer of the morning's events, and he continued to work, stating that he would wait and see how he felt. A little later that morning, he began feeling pain in his wrist, neck, and lower back, and went to the Putnam Hospital Emergency Room. He was examined by a physician, and x-rays were taken. The x-rays did not reveal any fractures but showed some inflammation, and he was given a prescription for pain medication.

At his deposition on February 28, 2020, Plaintiff testified he followed up with his physician, Dr. Gary Middleton, who prescribed a course of physical therapy, as well as a muscle relaxant and pain medication (Pl. Ex. H at 41-43). According to Plaintiff, an MRI done by Dr. Middleton showed an affected area in the neck (Pl. Ex. H at 43-45). The wrist pain dissipated in approximately two weeks, and Plaintiff continued with the physical therapy three times a week for his neck and back from July 2018, with the exception of brief periods for business-related travel and a planned trip to at least February 2, 2020 (Pl. Ex. H at 47-48). In August 2018, Plaintiff also saw Dr. Liu in connection with pain management (Pl. Ex. H at 49-51). He received a total of eight injections in his neck and back, the last occurring in 2019. Plaintiff saw Dr. Lattuga who recommended and performed a cervical fusion in June 2019. Plaintiff testified that following the surgery, there "are good days and there are bad days" (Pl. Ex. H at 54).

Plaintiff stopped working in December 2018 because "the pain. I couldn't deal with the

pain. I couldn't continue doing what I was normally doing" (Pl. Ex. H at 55). The pain has prevented him from sleeping well, sitting for long periods during long distances. During the six months since the accident, the pain was "noticeably increasing," as his job responsibilities were increasing. Since he left his job in December 2018, Plaintiff's lifestyle has changed; he has become more passive. The level of pain has remained the same. He cannot sleep as well as before, nor can he be seated for extended periods of time, due to the neck pain. He cannot drive long distances due to the back pain, nor can he sit at a computer for lengthy periods of time without pain in his neck. His inability to work led to a reduction in family income. He can no longer participate with his son's travel soccer program, and he does not go to the gym or the park. He cannot sit through a movie in a theater.

On August 20, 2019, Plaintiff commenced this action, alleging that he sustained a "serious injury" as defined by New York Insurance Law Section 5102(d) (Pl. Ex. A, Complaint at ¶18). Specifically, Plaintiff alleged that as a result of Defendant's, *inter alia*, negligent operation of the vehicle, he "suffered severe and serious personal injuries to mind and body" and was otherwise damaged (Pl. Ex. A, Complaint at ¶17).

In their Verified Answer served on or about September 6, 2019, Defendants raised six (6) affirmative defenses, including that Plaintiff failed to sustain a serious personal injury thereby barring the cause of action (Pl. Ex. B, Verified Answer at ¶9).

In his Bill of Particulars, dated May 31, 2016, Plaintiff stated (Pl. Ex. E, Bill of Particulars at ¶¶10,11,13):

Plaintiff Mauricio A. Mossos Plazas suffered the following serious personal injuries:

-C5/6 and C6/7 disc herniation which impress upon the thecal sac;

- Straightening of the cervical spine;
- L4/5 and L5-S1 disc bulges which extend into the venral epidural fat;
- Straightening of the thoracic spine;
- L5 radiculopathy;
- Left wrist pain;
- Left wrist swelling.

Surgeries:

On October 10, 2018, plaintiff Mauricio A. Mossos Plazas underwent a cervical trigger point injection.

On November 12, 2018, plaintiff Mauricio A. Mossos Plazas underwent a lumbar trigger point injection.

On December 12, 2018, plaintiff Mauricio A. Mossos Plazas underwent a lumbar epidural steroid injection.

On January 9, 2019, plaintiff Mauricio A. Mossos Plazas underwent a lumbar epidural steroid injection.

On February 6, 2019, plaintiff Mauricio A. Mossos Plazas underwent a lumbar epidural steroid injection.

On March 6, 2019, plaintiff Mauricio A. Mossos Plazas underwent a lumbar trigger point injection.

On April 10, 2019, plaintiff Mauricio A. Mossos Plazas underwent a cervical epidural steroid injection.

On April 29, 2019, plaintiff Mauricio A. Mossos Plazas underwent a cervical epidural steroid injection.

On May 20, 2019, plaintiff Mauricio A. Mossos Plazas underwent a cervical epidural steroid injection.

On June 19, 2017, plaintiff Mauricio A. Mossos Plazas underwent the following surgery at New York Presbyterian, Lower Manhattan Hospital, 170

William Street, New York, NY 10038:

- Hemivertebrectomy C5;
- Hemivertebrectomy C6;
- Hemivertebrectomy C7;
- Anterior discectomy 5/6, additional levels 6/7;
- Intervertebral implant x2;
- Arthrodesis C5/6;
- Arthrodesis C5/6;
- Additional levels C6/7;
- Bone graft;
- Anterior instrumentation 5/6/7;
- Flouroscopy >than 1 hour;
- Complex closure.

On July 17, 2019, plaintiff Mauricio A. Mossos Plazas underwent a cervical trigger point injection.

On August 14, 2019, plaintiff Mauricio A. Mossos Plazas underwent a cervical trigger point injection.

All of the injuries mentioned herein, manifestations, resulting disabilities and involvements, may, if they progress or fail to heal, require surgery, and are associated with further soft tissue injury to the areas traumatically affected, including tearing, derangement, involvement of and damage to the surrounding muscles and muscle groups, ligaments, tendons, blood vessels, and blood supply, nerves and nerve tissue, epithelial tissue, body tissues and bone structure, all concomitant to the specific injuries and related to the various portions mentioned herein, with resultant pain, deformity, disability, stiffness, weakness, swelling, tenderness, edema, atrophy, ecchymosis, impairment of use, restriction and limitation of motion, pain on motion, possible loss of use, atrophy, disfigurement and have all prevented and will continue to prevent plaintiff from participating in

daily activities (including but not limited to physical, social, education, recreational, and economic). The above injury will require surgery in the future.

Upon information and belief, these injuries aggravated, activated, exacerbated and/or precipitated any underlying hypertrophic, degenerative, arthritic, circulatory, arterial, venous, and/or systemic condition or conditions which was or were asymptomatic prior to the accident complained of.

Upon information and belief, all of the above injuries, together with their residuals and sequelae, except those of a superficial nature, are permanent, progressive and continuing in nature. The Plaintiff reserves the right to supplement this Bill of Particulars when further medical information becomes available, and relies also on any and all injuries that are mentioned in the medical reports and/or hospital records submitted herewith, or that will be submitted in the future or if and when counsel for Plaintiff is provided with further medical records indicating further injuries not included in this bill of particulars. In addition, it is claimed that said injuries have directly adversely affected the nerves, tissues, blood vessels, muscles, ligaments, cartilages, tendons, bones, and soft parts in and about the sites of the above mentioned areas of the injury, including the central nervous system, muscular system and skeletal system. Also, with advancing years there will be naturally and medially related complications and exacerbations. The aforesaid have and will continue in the future to affect every facet of the Plaintiff's pre-accident way of life with resultant damages. The Plaintiff will introduce upon the trial herein testimony and proof in conjunction with all of the injuries, conditions, manifestations, and sequelae which will be permanent, and reserves the right to adduce proof with respect thereto at the time of the trial.

11.a) Plaintiff was treated at Putnam Hospital Center, 670 Stoneleigh Avenue, Carmel, NY 10512 and released on the same day.

b) It is impossible to state with reasonable certainty and exact division of time he was actually confined to bed alone, except to state that there were periods of bed confinement, except for visits for necessary medical aid, treatment and attention.

c) He was confined to home since December 21, 2018.

According to the unsworn MRI report of Dr. Stephen Hershowitz (Def. Ex. P), the July 24, 2018 MRI revealed , there was “no evidence of a posterior disc bulging or herniation at the L1-2 through the L3-4 levels,” but “[p]osterior disc bulges are noted at the L4-5 and L5-S1 levels which extend into the ventral epidural fat” (Def. Ex. P at 4). The spinal canal was within normal

limits with no evidence of spinal stenosis. There were no lesions involving the cauda equina or conus medullaris, and “[n]eural foraminal narrowing is not identified” (Def. Ex. P at 4). In addition, there was no evidence of disc bulging at C2/3-C4/5 and C7/T1, but posterior disc herniations were noted at C5/6 and C6/7 which impress on the thecal sac (Def. Ex. P at 6).

Plaintiff filed the Note of Issue and Certificate of Readiness on November 6, 2020 indicating, *inter alia*, that the physical examinations were completed and medical reports were exchanged (Notice of Motion, Ex. J).

Defendants now move for summary judgment, asserting that Plaintiff has not suffered a serious physical injury as a matter of law. In response, Plaintiff argues that based on the testimony and medical records, which he submitted in response to the motion, he has raised a triable issue of fact as to whether he sustained a permanent consequential use of a body organ or member.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57, 61 [1966]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Initially, “the proponent... 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 issue of fact.” However, once a movant makes a sufficient showing, “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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Where the moving papers are insufficient, the court need not consider the sufficiency of

the opposing papers (*id.*; see also *Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2d Dept 1999]).

According to Insurance Law § 5102(d), “serious injury” is defined as:

“a personal injury which results in * * * a permanent loss of a body member and/or permanent consequential limitation of use of a body member; or 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.”

“[A] defendant can establish that the plaintiff’s injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]). These findings “must be in admissible form, i.e., affidavits or affirmations, and not unsworn reports, in order to make a ‘prima facie showing of entitlement to judgment as a matter of law’” (*Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, “a moving defendant may rely on unsworn reports of the plaintiff’s treating physician” (*Cody v Parker*, 263 AD2d 866, 867 [3d Dept 1999]).

“With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant’s submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law” (*Grossman v Wright*, 268 AD2d at 84). “Similarly, a plaintiff’s opposition, to the extent that it relies solely on the findings of plaintiff’s own medical witnesses, must be in the form of affidavits or affirmations, unless an acceptable excuse for failure to comply with this requirement is furnished” (*Pagano v Kingsbury*,

182 AD2d at 270). “Unsworn reports of plaintiff’s examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment” (*Mobley v J. Foster Phillips Funeral Home, Inc.*, 47 Misc3d 1205[A] [Sup Ct, Queens County 2015], citing *Grasso v Angerami*, 79 NY2d 813 [1991]). And, “[u]nsworn MRI reports are not competent evidence unless both sides rely upon those reports” (*Mobley v J. Foster Phillips Funeral Home*, 47 Misc3d 1205[A], citing *Ayzen v Melendez*, 299 AD2d 381 [2d Dept 2002]). However, once the movant relies upon unsworn medical reports in support of a motion for summary judgment, the door is open for the opposing party to rely on the same (*see Kearse v New York City Tr. Auth.*, 16 AD3d 45 n. 1 [2d Dept 2005]). Finally, the serious injury threshold is a threshold imposed exclusively on the plaintiff (*Pagano v Kingsbury*, 182 AD2d at 270; *see also Licari v Elliott*, 57 NY2d 230 [1982]). Subjective complaints of pain, absent other proof, are insufficient to establish a “serious injury” (*Cody v Parker*, 263 AD2d at 867 [internal quotations and citations omitted]).

In support of their motion, Defendants proffer: Dr. John Buckner’s affirmed IME report, dated June 23, 2020 (Def. Ex. R); Plaintiff’s unsworn MRI reports (Def. Ex. J); and Plaintiff’s own deposition testimony (Def. Ex. H).

The MRI, according to Dr. Buckner, showed no signs of recent trauma to the spine and Dr. Buckner’s minimized complaints of decreased ranges of motion or subjective complaints of pain were not supported by any positive, objective, correlative findings. As Defendants established a prima facie case, the burden shifts to Plaintiff.

In response, Plaintiff points to: the report of the MRI (Pl. Ex. J); evaluation and medical records from Access Physical Therapy (Pl. Exs. K-M); report and Affidavit from Dr. Liu (Pl. Ex. Q); affidavit from the physical therapist (Pl. Ex. N); affirmation of Dr. Lattuga (Pl. Ex. U); and

medical and hospital records (Pl. Exs. H, O, P, R, S, T).

Dr. Liu concluded Plaintiff's injuries and disabilities are causally related to the June 14, 2018 accident. He concluded that Plaintiff's injuries prevented him from performing his usual and customary daily activities from not less than 90 days during the 180 days immediately following the June 14, 2018 accident. Dr. Lattuga opined that Plaintiff sustained a permanent limitation of use of his cervical spine with limited range of motion as well as a significant limitation of use of both his cervical and lumbar spine. These reports, based on on-going care, in conjunction with Plaintiff's deposition testimony that describes his limitations and persistent discomfort he has been subjected to since the accident, are sufficient to raise a triable issue of fact as to whether Plaintiff sustained a serious physical injury (*see Fillete v Luneburg*, 150 AD3d 1574 [3d Dept 2017]).

With respect to Plaintiff's motion for partial summary judgment on the issue of liability, the Court finds there are issues of fact which necessitate the denial of the motion. Plaintiff strongly urges Defendant's liability on the basis of her admission that Plaintiff's car was stopped when it was struck by Defendant's (Pl. Ex. F at 30-31, 66-7), and that Defendant noticed the stopped car as she was hitting it (Pl. Ex. F). To be sure, such testimony could support a finding of liability, but Plaintiff's testimony also raises a question of fact. He testified that he stopped his car behind the stop line approximately 15 meters from the light. The light controlling the left turn lane he was in was red, and the light in the adjacent lane was green. The collision occurred when the cars were "right inside the intersection blocking traffic" (Pl. Ex. H at 32). How his automobile went from behind the stop line to "inside the intersection blocking traffic" at the time Defendant's automobile was entering the intersection to make a left turn cannot be resolved on

the submissions. In addition, Plaintiff testified that he looked to the left where he intended to turn and straight ahead, but did not testify that he looked to the right, and he did not see Defendant's vehicle approach from the right prior to contact. The testimony leaves open several crucial facts which require the determination of a jury.

As such, it is hereby

ORDERED that Defendants' motion is denied; and it is further

ORDERED that Plaintiff's motion is denied; and it is further

ORDERED that the parties and counsel are to appear before the undersigned, via Microsoft Teams, on April 14, 2021 at 11:00 AM, 2021 at 9:30 a.m. for a pre-trial conference.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
March 29, 2021



HON. VICTOR G. GROSSMAN, J.S.C.