

Loring v Fifth Ave. Provisions, Inc.
2021 NY Slip Op 33347(U)
August 31, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 612530/19
Judge: Carmen Victoria St. George
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**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

JOSEPH T. LORING,

**Index No.
612530/19**

Plaintiff,

**Motion Seq:
002 MG**

-against-

Decision/Order

**FIFTH AVENUE PROVISIONS, INC. and KEVIN T.
PODMORE,**

Defendants.

x

The following electronically-filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	33-42
Answering Papers.....	45-65
Reply.....	66

Plaintiff’s motion for partial summary judgment on the issue of liability for this rear-end motor vehicle accident was granted by Decision and Order entered on June 25, 2020. Defendants now move this Court for an Order dismissing the complaint on the ground that the plaintiff has failed to sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposes the requested relief.

Plaintiff’s Bill of Particulars alleges injuries to his cervical spine and right shoulder resulting in, among other things, pain, limitations of motion, epidural and trigger point injections, and surgery. Plaintiff specifically claims injuries under the following categories of Insurance Law § 5102 (d): 1) significant disfigurement; 2) permanent loss of use of a body organ, member, function or system; 3) permanent consequential limitation of a body organ or member; 4) significant limitation of use of a body function or system, and 5) a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (90/180 claim).

As a proponent of the summary judgment motion, the defendants herein have the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the categories of injury claimed in the Bill of Particulars (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (*Cauthers v. Brite Ideas, LLC*, 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein 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 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, 270 [2d Dept 1992]). A defendant can demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the alleged injuries were not, in any event, causally related to the accident (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]). 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, 748 [2d Dept 2006]).

The Court notes that, a tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*Little v. Locoh*, 71 AD3d 837 [2d Dept 2010]; *Furrs v. Griffith*, 43 AD3d 389 [2d Dept 2007]; *Mejia v. DeRose*, 35 AD3d 407 [2d Dept 2006]). Thus, regardless, of an interpretation of an MRI study, or even when surgery is performed, for example, a plaintiff must still exhibit physical limitations to sustain a claim of serious injury within the meaning of the Insurance Law (*see Byrd v. J.R.R. Limo*, 61 AD3d 801 [2d Dept 2009]). Furthermore, to qualify as a serious injury within the meaning of the statute, "permanent loss of use" must be total (*Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295, 299 [2001]).

In support of their motion, the defendants submit, *inter alia*, the pleadings, plaintiff's deposition transcript, photographs, and the reports of their examining physician and biomechanical expert.¹

Marc Chernoff, M.D., defendants' examining orthopedic surgeon examined the plaintiff on February 19, 2020, approximately two years and two months after the December 15, 2017 motor vehicle accident giving rise to this action. At the time of the independent medical examination (IME), plaintiff was forty-three (43) years old. Upon examination, Dr. Chernoff found normal ranges of motion in various planes of plaintiff's right shoulder, a negative impingement sign, negative drop arm sign, and no joint tenderness. Insofar as plaintiff's cervical

¹ Although the Court could consider a biomechanical expert's report (*see Guerra v. Ditta*, 1855 AD3d 667 [2d Dept 2020] [Kevin K. Toosi permitted to testify at trial without a Frye hearing]; *Shah v. Rahman*, 167 AD3d 671 [2d Dept 2019] [expert permitted to testify regarding biomechanics and causation without first holding hearing to determine admissibility]), the Court will not consider the biomechanical expert's report submitted in this case because it is neither affirmed (expert is a medical doctor), nor sworn to in affidavit form.

spine, Dr. Chernoff attributes the limitations noted therein to a pre-existing degenerative condition of plaintiff's cervical spine, and he further states that the June 19, 2019 surgery performed on plaintiff's cervical spine "was performed for a degenerative condition to the cervical spine and is unrelated to the accident of record on December 15, 2017, which occurred one-and-a-half years prior to the surgery performed." As to the three-centimeter (approximately 1.18 inches) surgical scar on the right side of plaintiff's neck, Dr. Chernoff describes that it is "well healed;" however, since Dr. Chernoff does not attribute the surgery that resulted in the scar to the subject accident, its appearance is not germane to plaintiff's claim of significant disfigurement.

Dr. Chernoff also requested and received the MRI studies of plaintiff's cervical and lumbar spine areas and right shoulder, and x-ray images of plaintiff's cervical spine. In an addendum to his IME report, Dr. Chernoff opines that his impression noted in his IME report remains unchanged. He continues to find "that the cervical spine surgery performed on June 19, 2019 was performed for a degenerative condition to the cervical spine, unrelated to the accident of record on December 15, 2017."

Based upon Dr. Chernoff's affirmed report, the defendants have established their *prima facie* entitlement to summary judgment as a matter of law as to the significant disfigurement, permanent loss of use, permanent consequential, and significant limitation categories of injury by demonstrating that the plaintiff does not have any permanent injury, limitation, or restriction as a result of the subject accident.

The defendants have not sustained their *prima facie* burden concerning plaintiff's 90/180 claim advanced in his Bill of Particulars. Although Dr. Chernoff did not find the plaintiff to be orthopedically disabled on the date of the examination more than two years after the accident, Dr. Chernoff did not relate any of his findings to the specific period of time immediately following the accident. Furthermore, plaintiff's deposition testimony indicates that the last day that he was able to work for the automotive windshield company was the day of the accident. Plaintiff testified that he tried to return to work performing light duty; however, he was only able to perform light duty work for approximately one-and-one-half weeks. Plaintiff testified that, as a result of the subject accident, he could no longer do his job that entailed loading and unloading the windshields and glass products, making deliveries, and putting inventory away (*see Augour v. Singh*, 90 AD3d 686 [2d Dept 2011]). Plaintiff had been employed at his job with an automotive windshield company for eight years prior to the accident, and was in the course of his employment when the accident occurred. According to plaintiff, his employer held his job open for one year after the accident, but when he could not return after one year, he was terminated. As of the date of his deposition in January 2020, plaintiff testified that he was still receiving workers' compensation benefits, and that he had received those benefits since the subject accident.

Since the defendants have failed to establish their *prima facie* entitlement concerning the 90/180 claim, the Court will consider the opposition papers only with respect to the significant disfigurement, permanent loss of use, permanent consequential, and significant limitation categories of injury in order to determine if plaintiff has raised a triable issue of fact.

In opposition, the plaintiff submits a number of exhibits, including but not limited to the affirmations of Dr. Angel Macagno, Dr. Dov Berkowitz, Dr. Nizarali Visram, Dr. Sanjeev Agarwal, and the plaintiff's own affidavit.

As an initial matter, plaintiff does not address the defendants having established their *prima facie* entitlement to summary judgment as to the category of permanent loss of use of a body organ, member, function, or system; therefore, no triable issue of fact has been raised as to this category, and defendants' motion is granted as to the permanent loss of use category of injury.

In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law §5102(d) (*see Toure, supra; Scheer v Koubek*, 70 NY2d 678, 679 [1987]; *Munoz v Hollingsworth*, 18 AD3d 278, 279 [1st Dept 2005]). Furthermore, a plaintiff cannot defeat a motion for summary judgment, and successfully rebut a *prima facie* showing that he did not sustain a serious injury, merely by relying on documented subjective complaints of pain (*Uddin v Cooper*, 32 AD3d 270, 271 [1st Dept 2006] *lv to appeal denied* 8 NY3d 808 [2001]).

With respect to plaintiff's claims made under the permanent consequential and significant limitation categories of injury, the Court notes that there is no affirmation of a recent examination of the plaintiff by any of his treating physicians. The last examination of the plaintiff by any of his treating physicians occurred more than one year before the defendants moved for summary judgment. According to their respective affirmations submitted in opposition, it appears that the last time that plaintiff was seen by Dr. Agarwal was on November 5, 2018; by Dr. Berkowitz on November 13, 2018; by Dr. Visram on June 6, 2019, and by Dr. Macagno on July 11, 2019. Plaintiff has not submitted any examination by any physician at or about, or after, the time when Dr. Chernoff examined the plaintiff on February 19, 2020. Accordingly, the plaintiff has failed to come forward with objective medical evidence of loss/limitation of movement (*Tudisco v. James*, 28 AD3d 536 [2d Dept 2006]; *Hernandez v. DIVA Cab Corp.*, 22 AD3d 722 [2d Dept 2005]). As noted herein, regardless of an interpretation of an MRI study, or even the fact that surgery is performed, a plaintiff must still exhibit physical limitations to sustain a claim of serious injury within the meaning of the Insurance Law.

Plaintiff's physicians also failed to address the degenerative findings in plaintiff's cervical spine discussed in depth by Dr. Chernoff in his IME report and documented in the x-ray, CT scan and MRI reports interpreting the studies of plaintiff's cervical spine (*see Devito v. Anatra*, 189 AD3d 1175 [2d Dept 2020]; *Singh v. City of New York*, 71 AD3d 1121 [2d Dept 2010]).

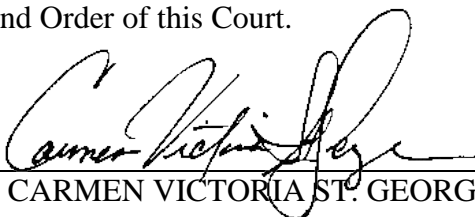
Plaintiff claims injury under the significant disfigurement category of injury; however, aside from its description as being three centimeters (approximately 1.18 inches) in length, this scar is not described in terms of width, texture, density, or any other characteristic, except Dr. Chernoff's description of it in February 2020 as being "well-healed." Even in his affidavit submitted in opposition to the instant motion, plaintiff describes this surgical scar only as "a

small, but visible scar on the right side of my neck.” Plaintiff has not even submitted a photograph of the scar he claims constitutes significant disfigurement; accordingly, there is no evidence to support a claim of significant disfigurement (*Estrella v. Marano*, 255 AD2d 358 [2d Dept 1998]; *Jordan v. Baine*, 241 AD2d 894 [2d Dept 1997]).

Defendants’ motion is granted as to the significant disfigurement, permanent loss of use, permanent consequential, and significant limitation categories of injury, but the motion is denied as to the 90/180 category of injury claimed by plaintiff.

The foregoing constitutes the Decision and Order of this Court.

Dated: August 31, 2021
Riverhead, NY


CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [] NON-FINAL DISPOSITION [X]