Pantelis v Markinson
2021 NY Slip Op 33378(U)
April 28, 2021
Supreme Court, Westchester County
Docket Number: Index No.: 69380/2018
Judge: Charles D. Wood
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To commence the 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 WESTCHESTER
--x
STAVRO G. PANTELIS,

Plaintiff,

-against-

DECISION & ORDER
Index No.: 69380/2018
Sequence No. 1

BRETT A. MARKINSON,

Defendant.
--x
WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 32-88 were read in connection with the motion by defendant for summary judgment on the issue of Serious Injury under Insurance Law §§ 5102 and 5104.

This is an action arising from a motor vehicle accident that occurred on January 30, 2018, at approximately 1:50 p.m., when plaintiff was stopped at a red light on Westchester Avenue, at or near the intersection with the Hutchinson River Parkway, in Harrison, when defendant's vehicle rear ended his vehicle (the "2018 Accident"). Several hours after the 2018 Accident, plaintiff presented to Montefiore New Rochelle Hospital's Emergency Room, where x-rays of plaintiff's cervical and thoracic spine, came back "negative." Plaintiff underwent physical therapy to treat his neck and back. Two orthopedists Richard Weinstein, M.D. and Steven Struhl, M.D. have treated plaintiff. MRIs were taken of plaintiff's thoracic spine (March 8, 2018), his lumbar spine (March 8, 2018), his cervical spine (March 8, 2018), and his left shoulder (February 9, 2018). On May 10, 2018, plaintiff had surgery on his left shoulder.

Prior to the subject 2018 Accident, plaintiff had sustained injuries in another motor vehicle accident. About ten years before, on May 17, 2008, plaintiff had been driving on Interstate 95 in the Bronx. An 18-wheel tractor trailer struck plaintiff's vehicle on the rear driver's side, and plaintiff's vehicle ended up underneath the trailer. As a result of that 2008 Accident, plaintiff testified, he sustained a laceration to his face, a fractured cheek bone, and herniations in his neck and back.

Now, upon the foregoing papers, the motion is decided as follows:

A proponent of a summary judgment motion 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 issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Moreover, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof

submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

A plaintiff claiming personal injury as a result of a motor vehicle accident must first demonstrate a prima facie case that he or she sustained serious injury within the meaning of Insurance Law §5104(a); (Licari v Elliott, 57 NY2d 230 [1982]). Insurance Law §5104(a) provides: "notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state there shall be no right of recovery for non-economic loss, except in the case of serious injury." Pursuant to Insurance Law §5102(d), serious injury means: 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.

Whether a plaintiff has sustained a serious injury within the meaning of the statute is a threshold legal question within the sole province of the court (Hambsch v New York City Transit Authority, 101 AD2d 807 [2d Dept 1987]). Insurance Law §5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (Toure v Avis Rent-A-Car Systems, Inc., 98 NY2d 345, 350 [2002]).

Here, plaintiff asserts as a matter of law that he qualifies under the "serious injury" threshold of New York State Insurance Law §5102(d), from the categories of permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function, and the 90/180 day category. According to plaintiff's verified bill of particulars, he allegedly suffered serious injuries to his spine and left shoulder from the accident.

In support of his motion, defendant offers the IME conducted of plaintiff on March 13, 2020, by Ronald L. Mann, M.D. an orthopedic, (NYSCEF#55). Dr. Mann reports that plaintiff's prior medical history is significant for a motor vehicle accident in 2008. Plaintiff states he has had no symptoms or complaints to his neck or back since the prior accident. Plaintiff has no disability related to the subject accident. He is able to do activities of daily living and self-care as he did before. Previous MRI reports and current MRI and MRI reports are similar in nature and reveal diffuse disc disease throughout his cervical, thoracic, and lumbar spines-- a pre-existing condition.

John T. Rigney, M.D. radiologist had reviewed the radiology studies of plaintiff shortly after the accident, and found that MRI scans were reportedly performed of the cervical and lumbar spines revealing multilevel disc pathology at the level of both the cervical spine and the lumber spine prior to the accident in question. (NYSCEF##53,54). On the day of the accident, x-rays were obtained of the cervical and thoracic spine which according to Dr. Rigney, revealed no evidence of a recent injury. X-rays of the cervical and thoracic spine were repeated 3 days later. X-rays were also obtained of the lumbar spine and left shoulder. Dr. Rigney opines that all x-rays revealed no radiographic evidence of a recent injury. Additionally, eleven days after the accident in question, the patient underwent an MRI scan of the left shoulder which revealed no evidence of marrow edema from a bone contusion or a soft tissue injury at any level and are unrelated to the

accident in question. Also, An MRI scan of the lumbar spine and cervical spine no evidence that this patient has suffered any injury to the lumbar spine as a result of the accident in question.

Lisa Nason, M.D. performed the no fault independent examination of plaintiff on May 7, 2018 (NYSCEF#55). Range of motion measurements were taken with the aid of a standard hand-held goniometer. For the thoracic and cervical spine, and right shoulder, no appreciable decreased range of motion found. Flexion of the lumbar spine had a 30 degree decreased range of motion. There were significant decreased range of motion in left shoulder, ABDUCTION normal- 180° plaintiff-150°, FORWARD FLEXION- normal- 180°, plaintiff- 130°. The diagnosis was Cervical spine and lumbar spine sprain, Left shoulder strain, unresolved, Thoracic spine sprain, resolved.

Plaintiff offered the affirmation of Gerald Gaughan, As a preliminary matter, contrary to defendant's contentions, the court will consider this expert's affirmation. "A party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment" (Abreu v Metro. Transp. Auth., 117 AD3d 972, 974 [2d Dept 2014]). While Dr. Gaughan was only disclosed to defendant **after** the **note** of **issue** was filed, as there was no evidence that the plaintiff's delay in retaining the **expert** or in serving his **expert** information was intentional or willful and prejudicial to defendant, the court will hear it for the purposes of this motion.

Dr. Gaughan practices medicine at Doctors United, and examined plaintiff on November 10, 2020. Plaintiff had been a patient of Doctors United since February 2, 2018. At that time, be was treated at Doctors United by John Megarr, MD who is deceased. According to the certified medical records maintained by his office, plaintiff was first examined at Doctors United just

three days after the motor vehicle accident of January 30, 2018. Records indicate that at the time of the initial examination on February 2, 2018, plaintiff had limited range of motion and positive findings as follows: Cervical extension range of motion 0-10 degrees (normal is 60 degrees), bilateral rotation 0-60 degrees bilaterally (normal is 90 degrees, Left shoulder range of motion is 0-45 degrees in flexion and abduction (normal flexion is 180, normal abduction is 180 degrees), Lumbar extension range of motion 0-10 degrees (normal is 30 degrees), Tenderness of the bilateral C7 paraspinal, tenderness of the L5 paraspinal. Deep tendon reflexes were decreased. (NYSCEF#72). Plaintiff was also referred for MRIs of his left shoulder, cervical spine, lumbar spine, and thoracic spine at Stand-Up MRI of Yonkers. Dr. Gaughan personally reviewed the affirmed MRI reports of radiologist Mark J. Decker, M.D. of the left shoulder MRI taken on February 9, 2018, as well as the affirmed MRI reports of radiologist Mark J. Lodespoto, MD of the cervical spine, lumbar spine and thoracic MRIs taken on March 8, 2018.

Plaintiff, who was 38 at the time of this accident, informed Dr. Gaughan that he had no symptoms relating to his left shoulder, back or neck in the months prior to his motor vehicle accident of January 30, 2018. Dr. Gaughan opines that:

> Mr. Pantelis- who was 38 at the time of this accident- informed me that he had no symptoms relating to his left shoulder, back or neck in the months prior to his motor vehicle accident of January 30, 2018. Therefore, any pre-existing degenerative changes found in a scan review or otherwise, are irrelevant medically as Mr. Pantelis was asymptomatic prior to the trauma. Furthermore, even if there was any pre-existing degenerative condition (a point which is heatedly debated among many competent professionals) the January 30, 2018 accident aggravated or exacerbated any such degenerative medical condition which had not manifested itself to Mr. Pantelis prior to the January 30, 2018 trauma
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> Most recently, I examined Mr. Pantelis on November 10, 2020. The purpose of this examination was to verify the permanency of the patient's injuries to his left shoulder, back and neck. The ranges of motion in Mr. Pantelis' left shoulder, lumbar spine, thoracic spine and cervical spine continue to be restricted and show significantly decreased ranges of motion. All measurements were

> quantified objectively, range of motion testing performed utilizing a either a goniometer or inclinometer, and measured against AAOS standards, the American Medical Association, New York State Workers Compensation guidelines, among other various studies. It is my opinion that these range of motion restrictions demonstrate that Mr. Pantelis has sustained permanent and significant limitations in his left shoulder, thoracic spine, lumbar spine and cervical spine. This is demonstrated by the fact that Mr. Pantelis' ranges of motion remain restricted, in conjunction with his present complaints of pain, the certified records and his affirmed MRI reports (NYSCEF#72).

It is also Dr. Gaughan's opinion to a reasonable degree of medical certainty that the injuries sustained by Mr. Pantelis on January 30, 2018 "are permanent in nature and in my opinion, the deficits which he still exhibits in left shoulder, lumbar and cervical ranges of motion are medically significant restrictions and will impact Mr. Pantelis' daily functioning for the rest of his life" (NYSCEF#72).

Richard N. Weinstein, M.D an orthopedic surgeon states that:

> I conducted an initial physical examination of Mr. Pantelis on March 26, 2018. Physical examination of his left shoulder demonstrated a range of motion of 150 degrees of forward elevation (normal 180) and 150 degrees of abductica (normal 180); internal rotation to the L-S spine (normal to T4) and extemal rotation of 45 degrees (normal 60). Findings included positive impingement sign and weakness of the rotator cuff (NYSCEF#73).

> I also performed an examination of Mr. Pantells' cervical spine and lumber spine on March 26, 2018, and similarly found decreased range of motions. It is his opinion, that the injuries to plaintiff's left shoulder are not degenerative conditions. It is my opinion, with a reasonable degree of medical certainty, that based on my examination of Mr. Pantells, my observations during surgery, my review of the left shoulder MRI and Mr. Pantelis' lack of history of a previous left shoulder injury, the left shoulder tear was causally related to the accident and not the result of a degenerative or pre-existing condition (NYSCEF#73).

Turning to the 90/180 category for serious injuries, plaintiff claims he was incapacitated from working as a realtor for Houlihan Lawrence for approximately four (4) months, from January 30, 2018 to April 11, 2018, and then again for approximately two (2) months following his May

2018 surgery. However, within the 180 day period, on May 16, 2018, Dr. Lisa Nason, Orthopedic Surgeon found that there was no indication for diagnostic testing, household help, durable medical equipment, prescription medication, injections or special transportation. Dr. Nason noted that plaintiff was working his usual job with usual duties. Plaintiff is capable of performing all activities of daily living independently (NYSCEF#55).

Based on these contentions, without more, fail to prove a serious injury within the 90/180 day category, since an injury must be (1) medically-determined injury or impairment of a nonpermanent nature (2) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment and (3) there must be curtailment of usual activities to a great extent, rather than some slight curtailment (Damas v Valdes, 84 AD3d 87, 91 [2d Dept 2011]).

Plaintiff failed to submit the required admissible competent medical evidence to 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]). His papers are devoid of any contemporaneous medical evidence to support plaintiff's claim that he was unable to perform substantially all of his daily activities for not less than 90 of the 180 days immediately following the accident that was caused by said accident. Additionally, the doctors who treated him during the statutory period made no attempt to relate his alleged injuries to constraint of substantially all of his activities during said statutory period. Without medical confirmation of such limitations, self-serving allegations made by plaintiff are insufficient to raise triable issues of fact to defeat summary judgment. For these reasons, defendant's motion for summary judgment regarding the 90/180 day category is granted.

Turning next to the categories of the permanent consequential limitation category of use of a body organ or member or significant limitation of use of a body function or system, require a showing of a specific percentage of the loss of range of motion, or there must be a sufficient description of the qualitative nature of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function and purpose. For these two statutory categories, the Court of Appeals ruled that that "[w]hether a limitation of use or function is 'significant' or 'consequential' (i.e., important) 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" (Toure v Avis Rent A Car Sys., Inc., 98 NY2d 345, 353 [2002]).

Specifically, for the significant limitation of use of a body function, a plaintiff must substantiate his or her complaints with competent medical evidence of any range-of-motion limitations that were contemporaneous with the subject accident (Ferraro v Ridge Car Serv., 49 AD3d 498 [2d Dept 2008]). A minor, mild, or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott, 57 NY2d 230). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (Perl v Meher, 18 NY3d 208, 218 [2011]). The Court of Appeals noted that "in our view, any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well." Although Insurance Law §5102(d) does not expressly set forth any temporal requirement for a "significant limitation," there can be no doubt that if a bodily limitation is substantial in degree yet only fleeting in duration, it should not qualify as a "serious injury" (Thrall v City of Syracuse, 60 NY2d 950, *revg* 96 AD2d 715; Partlow v Meehan, 155 AD2d 647, 648 [2d Dept 1989]). Permanent consequential limitation

requires a greater degree of proof than a significant limitation, as only the former requires proof of permanence (Altman v Gassman, 202 AD2d 265, 265 [1st Dept. 1994]).

From these submissions, while defendant submitted competent medical evidence establishing, prima facie, that the alleged injuries to plaintiff's spine and left shoulder did not constitute serious injuries under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d), plaintiff raised triable issues of fact through the expert affirmations and the medical records. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (Yanchynska v Wertkin, 178 AD3d 1122, 1123 [2d Dept 2019]).

Accordingly, it is

ORDERED, that defendant's motion is **granted** to the extent that the 90/180 category is dismissed; and **denied** otherwise; and it is further

ORDERED, that the parties shall appear at the Settlement Confereence Part, at a date, time, place, and manner as so designated by that Part.

The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: April 28, 2021
White Plains, New York

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HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF