

Camacho v Ryan-Smith
2021 NY Slip Op 33395(U)
June 25, 2021
Supreme Court, Orange County
Docket Number: Index No. EF005027-2019
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

-----X
FERNANDO CAMACHO,

Plaintiff,

-against-

DECISION AND ORDER
Index No.:EF005027-2019

Motion Date: 5/5/21
Sequence No. 1

MARION RYAN-SMITH and JARED SMITH,

Defendants.

-----X
SCIORTINO, J.

The following papers numbered 1 to 16 were considered in plaintiff's motion seeking summary judgment on the issue of liability and a determination that the plaintiff suffered a serious personal injury as required by Insurance Law §5102:

PAPERS

NUMBERED

Notice of Motion /Affirmation (Awad)/Exhibits A - N

1 - 16

This personal injury action arises out of a motor vehicle accident that took place on February 25, 2019 on Route 84 in the Town of Newburgh, County of Orange. Plaintiff commenced this action by filing a Summons and Complaint on June 27, 2019. Issue was joined by Verified Answer filed on August 19, 2019.

Plaintiff's Examination Before Trial was held on April 23, 2020. Defendant Jared Smith's Examination Before Trial was held on September 17, 2020. Non-party witness Patrick Burnett's Examination Before Trial was held on October 27, 2020. Note of Issue was filed on February 2, 2021.

Plaintiff alleges that he suffered multiple disc herniations; left small finger fracture; and left 10th rib fracture.

The plaintiff specifically claims that he sustained a serious injury as defined in the Insurance Law §5102(d): (1) fracture (left small finger and left 10th rib); (2) permanent loss of use of a body organ, member, function or system (left small finger and lumbar spine); (3) permanent consequential limitation to a body organ, member or system (left small finger and lumbar spine); (4) significant limitation of use (left small finger and lumbar spine); and (5) a medically-determined injury or impairment of a non-permanent nature that prevented plaintiff from performing substantially all of the material acts which constitute his 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, the movant has the threshold burden to establish, by competent medical evidence, whether a serious injury was suffered and whether it was causally related to the subject accident (*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 defendant (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept. 2005]).

A party 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 examining physicians (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept. 1992]). The movant'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]). A fracture constitutes a serious injury pursuant to Insurance Law § 5102(d).

Plaintiff Fernando Camacho Deposition

On February 25, 2019 at approximately 9:00 a.m. plaintiff was traveling eastbound in the left lane on Route 84. Traffic conditions were “normal.” Plaintiff observed the defendant’s vehicle come down the Route 52 exit ramp and quickly move from the exit ramp through the right lane and attempt to merge into the passing lane; it then struck his vehicle. Plaintiff was unable to avoid the impact. Defendant’s back fender made contact with plaintiff’s right fender. Plaintiff’s vehicle struck the guardrail and flipped over twice before coming to rest on its side. The air bags deployed. He was not wearing a seatbelt.

After the accident, Patrick Burnett, a witness to the accident, helped plaintiff out of his

vehicle. The police arrived and plaintiff's wife transported him to the Orange Regional Medical Center emergency room. Plaintiff was experiencing pain in his lower back and neck. MRIs revealed a fractured rib. At some point plaintiff experienced pain in his finger, although he testified that he did not break his finger. Plaintiff was given pain medication and released the same day. He continued taking the pain medication for approximately one month after the accident.

Plaintiff was unable to give an exact time-line of his treatment. He received treatment from Cornerstone Chiropractic for approximately three to four days a week for approximately three months beginning on March 25, 2019. Imaging of the cervical spine was taken on March 27, 2019. He received physical therapy at Total Body Orthopedics beginning on April 8, 2019 and at Access Physical Therapy and Wellness thereafter.

Plaintiff is the sole owner of a concrete business. Before the accident, he occasionally assisted his employees with performing concrete work and would run a mile two to three times per week. As a result of the accident, he works in a supervisory role and he is unable to perform physical labor alongside his employees. For the first three months after the accident he could not go to the movies or pick up his grandchildren. At the time of deposition he could only run up to a quarter mile twice a week and was unable to lift anything over five pounds without experiencing pain the next day. At the time of deposition he wore a back belt from approximately 7:00 a.m. until he went to sleep "most of the time." He slept wearing the belt "sometimes" when he experienced pain. Plaintiff has not received injections or surgery.

Patrick Burnett Deposition

Immediately before the accident, Patrick Burnett was traveling in the right lane of Route 84 alongside plaintiff's vehicle. Once Burnett observed the defendant's vehicle coming down the ramp,

Burnett slowed down to allow the defendant's vehicle to merge into the right lane. Defendant's vehicle traveled from the ramp, across Burnett's lane of travel, and sideswiped the plaintiff's vehicle as defendant attempted to quickly merge into the left lane. Burnett observed everything leading up to the moment of impact, but was checking his mirrors at the moment the vehicles came into contact.

Defendant Jared Smith Deposition

Defendant testified that he came down the ramp onto Route 84 and entered the right lane. Although there were no vehicles ahead in the right lane, he decided to change lanes into the passing lane because he "chose to be in that lane." He looked into the left lane and observed a vehicle in the left lane approximately two to three car lengths away. He determined it was safe to enter the left lane. Smith testified that he fully entered the left lane, and after approximately eight to ten seconds he saw the truck approaching in his rearview mirror quickly. The truck rear-ended him, and his vehicle "spun out and went near to the guardrail..." Smith offered no explanation as to how plaintiff's vehicle struck the guardrail.

Summary Judgment on Liability

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]). Vehicle and Traffic Law §1128(a) provides, "A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety" (McKinney's Veh. & Traffic Law §1128[a]). Defendant "had a duty not to enter a lane of moving traffic until it was safe to do so," and his failure to do so constitutes negligence *per se* (*Sanchez v. Oxcin*, 157 AD3d 561, 564 [1st Dept 2018]; *see* Vehicle and Traffic law §1128[a]).

Plaintiff has established entitlement to summary judgment on the issue of liability. The submitted deposition testimony demonstrates that defendant attempted to quickly switch lanes from the exit ramp to the left lane and sideswiped plaintiff's vehicle. Defendant's testimony in which he indicates the plaintiff rear-ended his vehicle is unsupported by the evidence. Defendant had a "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid colliding with another vehicle" (*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]).

Summary Judgment on Serious Injury

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 defendant, plaintiff has failed to meet his *prima facie* burden with respect to his 90/180 claim.

Dr. Ronald Mann, defendant's examining orthopedic surgeon, examined the plaintiff on July 8, 2020. On the date of examination, plaintiff complained of lower back pain.

Dr. Mann 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.

Ranges of motion testing of the cervical spine was performed, measured by goniometer and

compared to normal.¹ Range of motion revealed: flexion 60/50; extension 45/60; right lateral flexion 45/45; left lateral flexion 45/45; right rotation 80/80; left rotation 80/80.

Range of motion testing of the thoracic and lumbar spine revealed full range of motion.

Dr. Mann opines that, at the time of the accident, the plaintiff sustained cervical and lumbar sprains which have resolved. Plaintiff suffered a left small finger metacarpal fracture and left 10th rib fracture, both of which have clinically healed. Dr. Mann found no objective findings to support plaintiff's subjective complaints of pain. There is no objective evidence of permanency.

Plaintiff submits the narrative report of Dr. Angel Macagno. Dr. Macagno examined the plaintiff on November 17, 2020. On the date of examination, plaintiff complained of back pain and neck pain.

Range of motion testing of the cervical spine was performed, measured by goniometer and compared to normal. Range of motion revealed: flexion 30/50; extension 20/60; right rotation 20/80; left rotation 15/80; left lateral flexion 15/45; right lateral flexion 20/45.

Range of motion testing of the lumbar spine was performed. Range of motion revealed: flexion 30/60; extension 20/45; left lateral flexion 20/45; right lateral flexion 20/45.

Dr. Macagno opines that plaintiff suffered a herniation of cervical and lumbar discs. Dr. Macagno finds the plaintiff's "current problem is causally related to this a motor vehicle accident on February 25, 2019."

By his reliance on the affirmed reports of Dr. Mann and Dr. Macagno, plaintiff made a *prima facie* showing that the he sustained a serious injury within the meaning of Insurance Law §5102(d)

¹Using the standards of the American Medical Association Guidelines for the Evaluation of Permanent Impairment

as a result of the accident under the “fracture” category (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002]; *Gaddy v. Eyler*, 79 NY 2d 955 [1992]).

Plaintiff’s motion must be denied as to his sustaining a “permanent loss of use,” “permanent consequential limitation,” and “significant limitation of use” under Insurance Law §5102(d) (*Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept. 2003]). The conflicting medical reports submitted by the plaintiff raise triable issues of fact precluding summary judgment.

However, defendant, by failing to oppose the instant motion, has failed to raise a triable issue of fact with respect to the “fracture” category (*Farozes v. Kamran*, 22 AD3d 458 [2d Dept. 2005]).

Conclusion

On the basis of the foregoing, it is hereby

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

ORDERED that plaintiff’s application for a determination on the issue of whether plaintiff suffered a “serious injury” is granted with respect to the “fracture” category, and denied with respect to “permanent loss of use,” “permanent consequential limitation,” and “significant limitation of use” categories.

Any matter not addressed herein is denied.

This decision shall constitute the order of the Court.

Virtual conference shall be held on August 13, 2021 at 1:30 p.m.

Dated: June 25, 2021
Goshen, New York

ENTER


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

To: *Counsel of Record Via NYSCEF*