| **Allen v Garon** |
| --- |
| 2021 NY Slip Op 33449(U) |
| June 30, 2021 |
| Supreme Court, Westchester County |
| Docket Number: Index No. 50305/2019 |
| Judge: Sam D. Walker |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

**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 WESTCHESTER**
**PRESENT: HON. SAM D. WALKER, J.S.C.**

----------------------------------------------------------------------------x

DARRIN ALLEN,

Plaintiff,

-against-

CRAIG S. GARON,

Defendant.

**DECISION and ORDER**
Index No. 50305/2019
Seq # 2 & 3

----------------------------------------------------------------------------x

The following papers were read on a motion (Sequence# 2) and cross-motion (Sequence # 3) for an order, pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment:

Notice of Motion/Affirmation in Support/Exhibits A-G
Affirmation in Opposition/Exhibits A-G
Memorandum of Law in Support
Notice of Cross-Motion/Affirmation/Exhibits A-G
Reply Affirmation

Factual and Procedural Background

This action arises out of a motor vehicle accident that occurred on September 25, 2018, on Tanglewylde Avenue at or near the intersection of White Plains Road, in the Town of Bronxville, Westchester County, New York State. The plaintiff, Darrin Allen ("Allen/plaintiff") commenced the action on January 7, 2019, by filing a summons and verified complaint. The defendant served and filed a verified answer, joining issue. The plaintiff moved for partial summary judgment on the issue of liability, which this Court granted by Decision and Order dated December 19, 2019.

The plaintiff's bill of particulars alleges the following serious injuries:
Left shoulder - Chondromalacia involving the glenohumeral joint with inferior joint line bone spur; diffuse tendinosis/tendinopathy involving the distal surpraspinatus tendon with a partial thickness articular surface tear involving the central fibers of the distal supraspinatus tendon; tenosynovitis involving the long head of the biceps tendon; trace subacromial/subdeltoid bursitis; thickening of the anterior joint capsule; tendinosis/tendinopathy involving the distal subscapularis tendon; fraying/tearing of the

anterior genoid labrum; impingement to the left shoulder rotator cuff from the acromion and coracoacromial ligament; adhesions within the joint; impingement from the lateral clavicle including distal articular surface; hypertrophic synovium; inflamed bursal tissue; tearing of the rotator cuff; genoid labral tear; operative arthroscopy of the left shoulder; decompression of subacromial space; partial acromioplasty and release coracoacromial ligament; lysis and resection of adhesions; distal claviculectomy, including distal articular surface; partial synovectomy; extensive debridement; debridement of inflamed bursal tissue; debridement of rotator cuff tear which was found with partial-thickness; partial glenoid labral resection; sprain/strain; restricted range of motion.

Cervical spine - straightening and kyphotic reversal of the normal cervical lordosis; trace retrolisthesis at C6-C7; peripheral disc bulging atC4-C5 abutting the ventral cord with bilateral facet hypertrophy; broad posteriro disc bulge at C6-C7 abutting the ventral cord; diffuse disc bulge at C7-T1 approaching the ventral cord with bilateral foraminal disc herniations narrowing the neural foramina and impinging both exiting C8 nerve roots; sprain/strain; restricted range of motion.

The defendant nowt files for an order pursuant to CPLR 3212, granting summary judgment in his favor, dismissing the complaint on the grounds that the plaintiff's injuries do not satisfy the serious injury threshold requirement of Section 5102(d) of the New York Insurance Law, thereby barring the plaintiff's claim for non-economic loss under Section 5104(a) of the statute. The plaintiff also files for an order pursuant to Section 5102(d) of the New York State Insurance Law, finding that he has sustained a serious injury.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If a sufficient prima facie showing is made, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); *see also, Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept 1990]).

Insurance Law §5104(a) provides in pertinent part that:

> 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 of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(NY Insurance Law §5104[a])

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. (NY Insurance Law §5102[d])

"The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury." (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; *see also*, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). "[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law" (*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (*see Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, the plaintiff did not suffer death, dismemberment, significant disfigurement, fracture or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. The other categories are a 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 prevented them from performing substantially all of the material acts which constitute their 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 defendants argue that the plaintiffs had pre-existing injuries not causally related to the incident.

In support of the motion, the defendant submits the report Richard N. Weinstein, M.D., a board certified orthopedic surgeon, who conducted an independent orthopedic examination of the plaintiff on September 16, 2020. Dr. Weinstein states that Allen reports that he still has pain in his left mid back and left shoulder and had surgery on his left shoulder. Dr. Weinstein performed range of motion testing with the use of a goniometer, with the following readings for the cervical spine: 30 degrees of flexion (normal 45); 30 degrees of extension (normal 45); 60 degrees of right and left rotation (normal 80); 30 degrees of right lateral rotation and 30 degrees of left lateral rotation (normal 45). He further found positive trapezial tenderness on the left. Dr. Weinstein further reported normal range of motion for the plaintiff's thoracolumbar spine and lower extremities and his right shoulder. For the plaintiff's left shoulder, Dr. Weinstein's examination revealed range of motion of 150 degrees of forward elevation (normal 180); and 150 degrees of abduction (normal 180); internal rotation to L3 and mildly positive impingement.

Dr. Weinstein's impression is a cervical sprain, superimposed on pre-existing degenerative changes and left shoulder status post arthroscopy, superimposed on pre-existing degenerative changes. Dr. Weinstein opines to a reasonable degree of medical certainty, that he is unable to determine if the left shoulder procedure was performed as a result of the subject accident. He states that the MRI imaging study of the left shoulder, which demonstrated significant glenohumeral osteoarthritis with subchondral cyst of the humeral head and spurring of the humeral head consistent with chronic arthritis of the shoulder, can be related to pre-existing significant degeneration. Dr. Weinstein states that the decreased range of motion in the left shoulder and cervical spine can be considered a subjective finding, since the testing is actively performed by the claimant at their own volition. Dr. Weinstein also opines that the disc herniation in the plaintiff's cervical spine is most likely preexisting in nature and the plaintiff had complaints of mid back pain at the examination, however, such is not an allegation listed in the bill of particulars and the medical reports do not support ongoing treatment for the mid back. Dr. Weinstein opines that the plaintiff may perform all normal activities of daily living and there is no need for any further orthopedic treatment, physical therapy, or surgery.

The defendant also submits a report of Thomas P. Nipper, M.D., FACS, a board certified orthopedic surgeon, who examined the plaintiff on December 28, 2018 and found normal range of motion for the plaintiff's right shoulder, cervical and lumbar spine and recorded flexion of 160 degrees (normal 180) in the left shoulder. Dr. Nipper's impression is that the plaintiff has a resolved cervical sprain, status post left shoulder sprain, resolved, and status post left shoulder arthroscopy resolving, unrelated to the motor vehicle accident. Dr. Nipper states that, if the history, as given by the claimant, is true, there is a cause and effect relationship between the claimant's original complaints and the subject accident.

Dr. Nipper also performed a peer review to determine the medical necessity of the arthroscopy of the left shoulder and the necessity of the facility and medical equipment provided. Dr. Nipper opines that the left shoulder arthroscopic interventioanl services were not medically necessary following the accident, since the plaintiff had no risk factors

documented for which the medical supplies for DVT prevention were medically indicated or necessary.

In opposition, the plaintiff's attorney argues for the denial of the defendant's summary judgment motion because the defendant failed to make out a prima facie case due to conflicting expert reports, positive findings and vague and conclusory opinions. The attorney further argues that the plaintiff's clinical record, diagnostic testing, surgical intervention, recent examinations and negative health history, reveal that he suffered severe and permanent injuries to his left shoulder and cervical spine resulting in a permanent partial loss of use of those body parts. The plaintiff's attorney asserts that the defendant's proof fails because Dr. Nipper makes positive findings and does not attribute the injuries to degenerative processes, contradicting the other orthopedist for the defense. The attorney further argues that Dr. Nipper does not give any explanation as to why the surgery is not related to the trauma of the accident, except that further physical therapy is sometimes efficacious. The plaintiff's attorney also argues that Dr. Nipper's discrediting of the surgery's necessity is conclusory and he fails to explain the significant loss of range of motion and the MRI of the left shoulder, which clearly shows a tear of the supraspinatus tendon, one of the anatomical parts of the rotator cuff.

The plaintiff's attorney next states that the defendant's other orthopedist, Dr. Weinstein, contradicts Dr. Nipper's opinion with regard to the plaintiff's left shoulder and while he opines that the limitations of motion in the left shoulder were subjective, he also found mild impingement. The attorney also contends that the plaintiff testified that he had no prior symptoms or treatment for his left shoulder. The plaintiff's attorney also argues that both the defendant's orthopedists failed to address the 90/180 claims, in that, they did not compare activities before and after the accident. The attorney additionally argues that the plaintiff's medical evidence raises a question of fact.

The plaintiff also files a cross-motion for an order finding that the plaintiff has met the requirements for a serious injury under New York Insurance Law §§ 5102(d) and 5103(d). In opposition to the motion and in support of the cross-motion, the plaintiff offers the affirmation of John Mitamura M.D., Ph.D., an orthopedic surgeon, licensed to practice medicine in New York State, and the affirmation of Felix Almentero, M.D., a physician licensed to practice medicine in New York State, who specializes in physical medicine and rehabilitation. Both Dr. Mitamura and Dr. Almentero state that they began treating Allen for injuries to his cervical spine and left shoulder shortly after a motor vehicle accident that occurred on September 25, 2018. They state that Dr. Nipper and Dr. Weinstein reports contradict each other and that the motor vehicle accident was the competent producing cause of the rotator cuff tear and the other injuries sustained by Allen. The doctors further state that degenerative changes that were asymptomatic prior to the incident, could not have caused the sudden onset of the symptoms described.

Upon review and viewing the facts in the light most favorable to the plaintiffs, this Court finds that both the plaintiff and the defendant have failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiffs suffering a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system.

Dr. Weinstein performed the range of motion testing using a goniometer, but still opined in a conclusory manner that the decreased range of motion in the left shoulder and cervical spine can be considered a subjective finding, since the testing is actively performed by the claimant at their own volition. . If such is the case, then no range of motion limitations should be taken into account. He also stated that the disc herniation in the plaintiff's cervical spine is most likely preexisting in nature, but he does not state with a reasonable degree of certainty. His opinions as to degeneration are not definite and there is an issue of fact as to the issue of the plaintiff's prior condition. Further, Dr. Nipper's examination also showed limited range of motion findings in the plaintiff's left shoulder and he stated that there is a cause and effect relationship between the original complaints and the subject accident.

The Court finds that the issues presented are to be decided by the trier of fact and are not questions of law. What we have here is an evaluation of competing evidence (the battle of the experts) which falls within the province of the trier of fact at trial, and it is not appropriate for the Court to dismiss the complaint on a motion for summary judgment, nor to grant summary judgment to the plaintiff, *Dietrich v Puff Cab Corp*. 63 AD 3d 778 [2d Dept 2009]; *Duffel v Green*, 84 NY2d 795 [1995]; *Lopez v Sanatore*, 65 NY2d 1017 [1985]; *Mercafe Clearing, Inc. v Chemical Bank*, 216 AD 2d 231 [1st Dept 199]; *Kaiser v Edwards*, 98 AD 2d 825 [3d Dept 1983]; *Slack v Crossetta*, 75 AD 2d 809 [2d Dept 1980]).

However, with regard to any claims of alleged injuries that prevented the plaintiff from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following his alleged injuries, such is denied.

To sustain impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his 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 plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature" (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 357 [2002]). Curtailment of recreational and household activities is insufficient to meet the burden (*Omar v Goodman*, 295 AD2d 413 [2d Dept 2002]). The plaintiff did not offer any medical evidence to support a claim that he was unable to perform substantially all of his usual and customary activities under this category and his bill of particulars states that he was confined to bed as a result of the accident. The plaintiff had not worked from 2014 to 2018

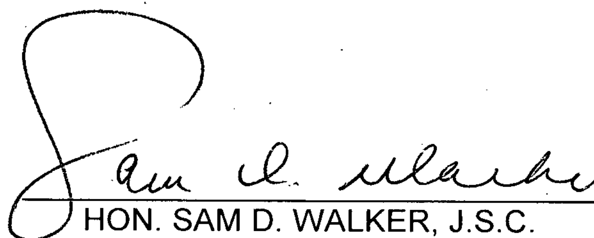
and in 2018, he worked for six months, but had stopped working two weeks prior to the accident. After the accident he worked as a delivery driver. The plaintiff's bill of particulars states that he was confined to bed for approximately two weeks after the accident and to his home, intermittently, in excess of five months following the accident. Such does not meet the requirement for this category. Therefore, there is no evidence to show that the plaintiffs sustained an injury in this category.

Accordingly, based on the foregoing, it is hereby;

ORDERED that the defendant's motions for summary judgment is denied in part and granted in part; and the plaintiff's motion for summary judgment is denied.

The parties are directed to appear before the Settlement Conference Part on a date to be determined. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
June 30, 2021



HON. SAM D. WALKER, J.S.C.