Kehoe v Lake
2021 NY Slip Op 33492(U)
February 3, 2021
Supreme Court, Ulster County
Docket Number: Index No. EF2019-558
Judge: James P. Gilpatric

STATE OF NEW YORK
SUPREME COURT **ULSTER COUNTY**

MATTHEW KEHOE,

Plaintiff,

- against -

DECISION and ORDER

Index No.: EF2019-558

JOSEPH VINCENT LAKE, MICHELE A. LAKE and PROGRESSIVE INSURANCE COMAPNY,

Defendants.

Supreme Court, Ulster County
R.J.I. No.: 55-19-00853

Present: James P. Gilpatric, J.S.C.

Appearances:

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Gilpatric, J.:

This action arises from a motor vehicle accident that occurred on September 21, 2018, while plaintiff was driving on a traffic circle, located in Kingston, New York, and plaintiff alleges that his vehicle was hit on the rear passenger side by a car driven by defendant Joseph Vincent Lake. The plaintiff alleges that he was injured while driving when said defendant failed to yield the right-of-way and proceeded onto the traffic circle, thereby causing the collision. The plaintiff alleges that the defendants were negligent, careless and reckless in the ownership, operation, management, maintenance, supervision, use and control of the aforesaid vehicle. Alleging that he suffered a serious injury as defined by the New York Insurance Law, plaintiff commenced the instant personal injury action on February 11, 2019 alleging: (1) a permanent loss of use of a body organ, member, function or system; (2) a permanent consequential limitation of use of a body function or system; (3) a significant limitation of use of a body function or system; and (4) a medically determined injury or impairment of a non-permanent nature which prevented his from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety (90) days during the one-hundred eighty (180) days immediately following the injury. Following joinder of issue, discovery, and the filing of issue, the defendants Joseph Vincent Lake and Michele A. Lake move, pursuant to CPLR §3212, for summary judgment to dismiss the complaint on the ground that plaintiff has not sustained a serious injury as defined by Insurance Law § 5102 (d). The plaintiff opposes the motion and cross-moves, pursuant to CPLR §3212, for summary judgment on the issue of liability. Said defendants oppose the cross-motion. Defendant Progressive Insurance Company moves for an Order severing the action against them from plaintiff's initial action. The plaintiff opposes the motion.

In New York State, a party alleging negligence in a motor vehicle accident may only recover damages for pain and suffering if they have suffered a "serious injury" pursuant to Insurance Law § 5102 (d) (*see* Insurance Law § 5104 [a]; Pommells v Perez, 4 NY3d 566, 570[2005]). As relevant here, a serious injury is defined by Insurance Law § 5102 (d) as:

> 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.

"As the proponent for the summary judgment motion, defendant ha[s] the initial burden of submitting evidence establishing that plaintiff did not suffer a causally related serious injury as a result of the subject accident" (Foley v Cunzio, 74 AD3d 1603, 1604 [3rd Dept 2010] *citing* Toure v Avis Rent A Car Sys., 98 NY2d 345, 352 [2002]; *see* Tubbs v Pallone, 45 AD3d 959, 960 [3rd Dept 2007], *lv denied* 10 NY3d 702 [2008]; Tuna v. Babendererde, 32 A.D.3d 574, 575 [3rd Dept 2006]). Upon a showing, "[t]he burden then shifts to the plaintiff to present competent medical proof to raise a triable issue of fact" (Tubbs. 45 AD3d at 960).

"Serious injury" is a threshold issue and a necessary element of the plaintiff's *prima facie* case (Licari v Elliott, 57 NY2d 230 [1982]. The intent of Insurance Law § 5102 (d) was to "weed out frivolous claims and to limit recovery to significant injuries" (Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345 [2002], *quoting* Dufel v Green, 84 NY2d 795 [1995]). On a motion for summary judgment based upon a failure to sustain a serious injury, the defendant bears the initial burden of establishing the absence of a serious injury by tendering evidentiary proof in admissible form eliminating any material issues of fact from the case (*see* (Toure v Avis Rent A Car Systems, Inc., *supra*; Licari v Elliott, *supra*).

To meet his initial burden, defendant may present plaintiff's statements, such as at an examination before trial (*see* Tuna v. Babendererde, 32 A.D.3d 574, 575 [3d Dept 2006]), medical records, if they are sufficiently complete and clear, of plaintiff's treating or consulting physicians showing that there is no serious injury (*see* Tuna v. Babendererde, *supra*; Seymour v. Roe, 301 A.D.2d 991 [3d Dept 2003]), or another doctor's affidavit establishing that there is no causal relationship between the accident and the alleged serious injuries (*see* Caron v. Moore, 301 A.D.2d 942, 944 [3d Dept 2003]; Seymour v. Roe, *supra* at 992, 995 [3d Dept 2003]), or that the alleged injuries do not qualify as a "serious injury" (*see* Tuna v. Babendererde, *supra*).

Here, the defendants argue, *inter alia*, that the injuries complained of by plaintiff of persistent pain in the cervical and lumbar regions; left foraminal disc protrusion at L4-L5; loss of range of motion throughout the cervical spine; loss of range of motion throughout the lumbar spine:; cervical sprain/strain; cervical paint that radiated into the bilateral shoulder ; cervicalgia;

axial neck pain; aggravation and exacerbation to the pre-existing asymptomatic degenerative changes to the spinal column, and permanent partial disability are neither of a permanent consequential nature nor significantly limiting. Rather, the defendants contend that plaintiff's complaints of pain, in and of themselves, are insufficient to meet the "serious injury" threshold since there is no competent objective medical evidence to sustain the plaintiff's burden establishing his limitations. In support of the motion and their arguments, the defendants have provided an attorney's affirmation, copies of the pleadings, a copy of the transcript of the plaintiff's deposition testimony and a copy of the affirmed report of the Independent Medical Examination (hereinafter "IME") of Adam Soyer, D.O., a physician duly licensed to practice medicine in the State of New York, dated July 17, 2020

As to Dr. Soyer's IME report, he took a history and examined the plaintiff and reviewed his prior medical records to date. Dr. Soyer's report detailed the plaintiff's medical records and test results (Defendants' Exhibit "D"). In his exam of the plaintiff, Dr. Soyer found, *inter alia*, that the plaintiff's cervical spine "range of motion is 50 degrees forward flexon where 50 degrees is normal, 60 degrees of extension where 60 degrees is considered normal, right lateral rotation of 60 degrees where 80 degrees is considered normal, left lateral rotation of 60 degrees where 80degrees is considered normal, right lateral flexon of 40 degrees where 45 degrees is considered normal and left lateral flexon of 35 degrees where normal is 45 degrees (Defendants' Exhibit "D"). Dr. Soyer also found that there a full range of motion in the plaintiff's lumbar spine (Defendants' Exhibit "D").

Upon his review and examination, Dr. Soyer opined:

> "Based on examination at this time, there is no objective evidence of a disability from a medical standpoint. This is also based upon the available medical documentation, which was reviewed. This individual is capable of working and performing his customary activities of daily living without limitations or restrictions.
>
> There is no objective evidence of permanent or residual effects in regard to the injuries sustained in 9/21/18." (Defendants' Exhibit "D").

Based on the above-discussed report and his other submission, the defendants established a *prima facie* showing that the plaintiff did not suffer a serious injury with regard to the permanent

consequential and significant limitation categories (*see* Houston v Hoffman, 75 AD3d 1046, 1047 [3rd Dept 2010]; Ketz v Harder, 16 AD3d 930, 932 [3rd Dept 2005]). The burden now shifts to plaintiff to rebut this showing (*see* Howard v Espinoza, 70 AD3d 1091, 1092 [3rd Dept 2010]). As for plaintiff's claim that he sustained a serious injury under either the permanent consequential limitation category or the significant limitation of the use category, "objective evidence must exist that establishes that, as a result of this accident, he experienced a diminished range of motion as shown by a 'qualitative assessment comparing [his] present limitations to the normal function, purpose and use of the affected body organ, member, function or system'" (Vargas v Tomorrow Travel & Tour, Inc., 74 AD3d 1626, 1627-1628 [3rd Dept 2010], *quoting* Dean v Brown, 67 AD3d 1097, 1098 [3rd Dept 2009]; *see* John v Engel, 2 AD3d 1027, 1029 [3rd Dept 2003}). "In addition, such evidence must include 'a quantitative or qualitative assessment to differentiate serious injuries from mild or moderate ones'" (Vargas 74 AD3d at 1628, *quoting* Palmeri v Zurn, 55 AD3d 1017, 1019 [3rd Dept 2008]).

To sustain such a burden, the plaintiff opposes the defendants' summary judgment motion dismissing the complaint as to the ground that plaintiff has not sustained a serious injury as defined by Insurance Law § 5102 (d). As to his injuries the plaintiff relies on his affidavit, a copy of the his medical records and the affirmed medical report from Sthish Modugu, M.D., dated June 4, 2020. The plaintiff avers that as a result of his injuries from the collision he treated with a chiropractor at DeCesare Chiropractic and Sathish Modugu, M.D., a pain management specialist (Plaintiff's Affidavit, ¶13). He also avers that at the time of the collision he had no pre-existing injuries or limitation with his back or neck and worked as an electrician in the motion picture industry (Plaintiff's Affidavit, ¶14). Mr. Kehoe avers that due to his injuries, he was unable to return to work for nearly one year (Plaintiff's Affidavit, ¶15). He also states that although he has returned to working in essentially the same capacity as he was prior to the accident, he now avoids lifting more than thirty pounds and experiences daily neck and back pain (Plaintiff's Affidavit, ¶20). He also averred that he was unable to actively play with his daughter and is now limited to what activities he can do that do not exacerbate his injuries (Plaintiff's Affidavit, ¶21).

Additionally, the plaintiff submits that the report of Dr. Modugu, the plaintiff's treating physician, indicated that the motor vehicle accident of September 21, 2018 was the cause of the

plaintiff's injuries of the cervical spine and lumbar spine (Plaintiff's Exhibit "G"). He also opines that the plaintiff has a diagnosis of cervical facet injury and lumbar facet injury, with a lumber disc protrusion (Plaintiff's Exhibit "G"). Dr. Modugu's physical exam of the plaintiff revealed cervical spine 45 degrees rotation to the right and 50 degrees rotation to the left, normal 60-90 degrees; lumbar spine range of motion 70 degrees flexion and 20 degrees extension, normal 60-90 degrees flexion and 20-30 degrees extension (Plaintiff's Exhibit "G"). He also noted that the plaintiff has pain with hand range of motion (Plaintiff's Exhibit "G"). Dr Modugu concluded:

> Based on the history, physical exam findings, and medical records reviewed, the claimant has a poor prognosis for full recovery given the duration of his symptoms. There is permanency as evidenced by his ongoing limitation of range of motion in the cervical spine and ongoing functional limitations.
>
> Based on the history, physical exam findings and medical records review, the claimant may require future including therapy and injections (Plaintiff's Exhibit "G").

Dr. Modugu opined that based on the history, physical exam findings and medical records reviewed, the injuries are causally related to the motor vehicle accident date September 21, 2018 (Plaintiff's Exhibit "G").

Thus, the plaintiff has rebutted defendants' *prima facie* showing by the aforementioned physician's examination that provide his observations as objective findings with regard to the permanent consequential and significant limitation categories of serious injury. As such, there are questions of fact regarding whether the plaintiff sustained a significant limitation and permanent consequential limitation (Coston v McGray, *supra; see also* Tompkins v Burtnick, 236 AD2d 708 [3rd Dept 1997]; Parker v Defontaine-Stratton, 231 AD2d 412, 413 [3rd Dept 1996]). Furthermore, a "court, on a summary judgment motion, should not make credibility determinations when competent competing expert opinions are proffered" (Rockefeller v Albany Welding Supply Co., 3 AD3d 753, 756 [3rd Dept 2004]).

Additionally, as to the 90/180 category of serious injury, the defendants have failed to present a *prima facie* showing of their entitlement to judgment as a matter of law (*see* D'Auria v Kent, 80 AD3d 956 [3rd Dept 2011]). Simply put, while Dr. Soyer found no evidence of disability or limitation upon his exam of the plaintiff that took place well after the first 180 days after the subject accident, he failed to address all of the objective findings in the plaintiff's medical records

that raise a question of fact whether he suffered a non-permanent injury that substantially prevented her from performing her usual and customary daily activities for at least 90 of the first 180 days following the accident (*see* Colavito v Steyer, 65 AD3d 735, 736 [3rd Dept 2009]; Haack v Kriss, 47 AD3d 1007, 1009 [3rd Dept 2008]; Ames v Paquin, 40 AD3d 1379, 1380 [3rd Dept 2007]). His findings are at best speculative and, are not based upon objective findings during the first 180 days after the accident.

As to the plaintiff's cross-motion on the issue of liability, the plaintiff alleges, *inter alia,* that the defendant driver was negligent in that he failed to yield the right of way to the plaintiff and his conduct was the sole proximate cause of the accident. Here, the plaintiff submits his affidavit, a copy of defendant Joseph Vincent Lake's deposition testimony, a copy of signage near the site of the accident and, a copy of the accident report. The plaintiff avers that on September 21, 2018, he was driving on the traffic circle in Kingston, New York (Plaintiff's Affidavit). Mr. Kehoe avers that the defendant had exited the New York State Thruway and approached the traffic circle, failing to yield the right-of-way and proceeded onto the traffic circle, causing a collision with Mr. Kehoe's vehicle on the rear passenger side of his car (Plaintiff's Affidavit). The plaintiff further submits pictures of a yield signs facing the defendant's direction on each side of the roadway immediately before entering the traffic circle (Plaintiff's Exhibit "A"). Additionally, the plaintiff submits that there are no yield signs or traffic control devices facing Mr. Kehoe's direction as he proceeded around the traffic circle (Plaintiff's Affidavit). Mr. Kehoe stated that he had activated his right turn signal and was in the process of exiting the circle when he was struck and he had entered Route 28 when the impact occurred (Plaintiff's Affidavit). He also avers that the defendant struck his car in the rear passenger side and there was nothing more that he could have done to avoid the collision (Plaintiff's Affidavit). The plaintiff also submits the deposition testimony of defendant Joseph Vincent Lake as evidence of the defendant's culpability. Mr. Lake testified that he saw Mr. Kehoe coming before entering the traffic circle (Plaintiff's Exhibit "H"). He also testified that the plaintiff was in the outer lane and going off of that exit but didn't see a blinker indicating that so he just went (Plaintiff's Exhibit "H"). Furthermore, the defendant was issued four vehicle and traffic law citations following the collision (Plaintiff's Exhibit "H"). As such, the plaintiff argues that the facts support that the plaintiff had the right of way and the defendant's

failure to yield to his vehicle was the sole proximate cause of the accident.

In opposition to the motion, the defendants argue that there are material issues of fact as to whether the plaintiff was negligent. Here, the defendants submit that the deposition testimony of the plaintiff raises questions of fact as to whether the plaintiff was comparatively at fault in the operation of his vehicle, and therefore in the happening of the accident.

Nonetheless, the defendant's argument against plaintiff's summary judgment on the issue of liability based upon the question of plaintiff's comparative negligence, must fail. On April 3, 2018, the New York State Court of Appeals ruled precisely on this issue. Previously, the Court of Appeals had held that before a plaintiff could establish liability in a summary judgment motion, it must be determined, as a matter of law, that he or she is free from comparative fault (*see* Thoma v Ronai, 62 NY2d 736). However, on April 3, 2018, in Rodriquez v City of New York, the Court held that to obtain partial summary judgment on defendant's liability the plaintiff does not have to demonstrate the absence of his own comparative fault. Here, as in Rodriquez, *supra,* the issue of contributory/comparative negligence shall not bar recovery, but the amount of damages recoverable shall be diminished in the proportion which if any culpable conduct by the plaintiff caused the damages (*see* CPLR 1411). CPLR 1412 further states that culpable conduct claimed in the diminution of damages, in accordance with CPLR 1411, shall be an affirmative defense to be pleaded and proved by the party asserting the defense (CPLR 1412). Therefore, while the plaintiff's comparative or contributory fault, if any, may diminish his recovery after trial, it shall not bar his ability to establish liability against the defendants.

As to defendant Progressive Insurance Company's motion to sever the action, the Court declines to do so. "Severance is usually not warranted where the claims involved present common questions of law and fact and where the proof against separate defendants is supplied by the same evidence, only the most cogent reasons will warrant a severance." 1 NY Jur.2d Actions § 74, Criteria and Grounds for Denying Severance. This Court determines that there are common issues of law and fact in this action between the defendants and that in the interest of judicial economy and consistency of verdicts will be served by having a single trial in this action (Herskovitz v Klein, 91 AD3d 598 [2nd Dept 2012]).

Consequently, in view of the Court's findings in the submissions set forth hereinabove, the

Court denies the Lake defendants' motion for summary judgment dismissing the complaint as a matter of law (*see generally* Linton v Nawaz, 14 NY3d 821, 822 [2010]) and grants the plaintiff's cross-motion, pursuant to CPLR § 3212, on the issue of liability. Additionally, the Court denies the defendant Progressive Insurance company's motion to sever the action. Otherwise, the Court has considered any remaining arguments and finds them either unavailing or unnecessary to reach.

Accordingly, it is

ORDERED that Lake Defendants' motion for summary judgement is denied, and it is further

ORDRED that the Plaintiff's cross-motion for summary judgment granting liability against the Lake defendants is granted, and it is further

ORDERED that the Defendant Progressive Insurance Company's motion to sever the action is denied.

This shall constitute the decision of the Court. The original decision and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this decision shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED!

Dated: February 3 **, 2021**
Kingston, New York

ENTER,

JAMES P. GILPATRIC, J.S.C.

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Papers considered:

1.) Notice of Motion dated August 25, 2020;
2.) Affirmation in Support of Dawn A. Munro, Esq., with exhibits, dated August 25, 2020;
3.) Cross-Motion of Derek J. Spada, Esq., dated November 5, 2020;
4.) Affirmation in Opposition and Support of Cross-Motion of Derek J. Spada, dated November 5, 2020;
5.) Plaintiff's Affidavit, with exhibits, dated November 3, 2020;
6.) Affirmation in Opposition of Keri A. Wehrheim, Esq., dated November 23, 2020.
7.) Reply Affirmation of Keri A. Wehrheim, Esq., dated December 2, 2020;
8.) Notice of Motion dated December 3, 2020;
9.) Affirmation of Christina A. Mazzarella, Esq., with exhibits, dated December 3, 2020;
10.) Affidavit in support of Julie A. Chappell, Esq., dated December 2, 2020;
(11.) Affirmation in Opposition of Derek J. Spada, Esq., with exhibits, dated December 16, 2020;
(12.) Affirmation in Reply of Christina A. Mazzarella, Esq., dated December 23, 2020.