

Sares v Ortiz
2021 NY Slip Op 33716(U)
September 30, 2021
Supreme Court, Rockland County
Docket Number: Index No. 036534/2019
Judge: Robert M. Berliner
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SUPREME COURT : STATE OF NEW YORK
 COUNTY OF ROCKLAND
 HON. ROBERT M. BERLINER, J.S.C.

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.

-----X
 FABRIZIO E. SARES,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 036534/2019

PEDRO ANGMARCA ORTIZ and MARIA
 ORDONEZ PAREDES,

Defendant.

Motion Sequence # 1

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The following papers, filed on NYSCEF, were read on Defendants' motion for summary judgment dismissing Plaintiff's Complaint:

Notice of Motion/Affirmation in Support/Exhibits(A-E).....NYSCEF Doc. Nos. 11-17
 Affirmation in Opposition/Exhibits(1-4) 23-27

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

Plaintiff Fabrizio Sares commenced this action against Defendants for his alleged injuries sustained as a result of a motor vehicle accident with Defendant Pedro Angmarca Ortiz on December 8, 2017. The Complaint alleges that Plaintiff was traveling southbound on Route 9W, in Nyack, New York when he was struck by Defendant's vehicle traveling southbound. In his Verified Bill of Particulars, Plaintiff alleges injuries to his cervical spine and lumbar spine, as well as post traumatic functional impairment thereof and inability to participate in normal physical and recreational activities for a prolonged period of time. Now before the Court is Defendants' motion for summary judgment dismissing Plaintiff's Complaint on the ground that he did not sustain a serious injury within the meaning of the New York Insurance Law § 5102(d).

In support of their motion, Defendants submit, *inter alia*, their IME report by Barry S. Kraushaar, M.D., Plaintiff's examination before trial ("EBT") transcript, and Plaintiff's medical records. Dr. Kraushaar physically examined Plaintiff on November 28, 2020 and reviewed the

police report, Plaintiff's medical records, and the Verified Bill of Particulars. Based upon the examination and the documents he reviewed, Dr. Kraushaar opined that Plaintiff's cervical spine

"is primarily resolved with reported residual dull, achy discomfort that cannot be explained by the diagnosis of radiculopathy or herniated disc related symptoms. The symptoms are considered muscular in nature, with no consistent radicular pattern, absent of brachial plexopathy or thoracic outlet syndrome. The imaging results are not confirmatory of any traumatic pathology and would easily be the same had he never had the accident. The pins and needles in his left hand are not consistent with a cervical radiculopathy, and his nerve testing confirms bilateral carpal tunnel syndrome, not a diagnosis supported by the mechanism of the accident or by the medical records that follow. . . His cervical sprain is considered static and there is no need for further treatment. He did not sustain a permanent injury to his cervical spine." Affirmation in Support, Exhibit E, IME Report by Dr. Barry Kraushaar at 6.

As for Plaintiff's left shoulder, Dr. Kraushaar explained that:

"The fact that he did not complain early about the shoulder, and that his imaging does not reflect traumatic or permanent injury supports the conclusion that this is a mildly persistent complaint that does not meet the standard of severe injury. There is no documented tear of the rotator cuff or labrum. . . His treatment was not directed at the left shoulder primarily, and he has not complained of the left shoulder enough to raise the need for future treatment. No permanent structural damage to the left shoulder is established in this case. I did not find evidence of an internal derangement or impingement of this shoulder." Id. at 6-7.

Meanwhile, he found that Plaintiff's sprain of his lower back was resolved and did not require any future treatment. Based upon his evaluation, Dr. Kraushaar opined that Plaintiff "is able to work and perform his usual and customary activities without restrictions." Id. at 7. Based upon the foregoing, Defendants argue that Plaintiff has not suffered a serious injury within any of the nine categories under Insurance Law § 5102(d). Additionally, Defendants argue that because Plaintiff testified that he only missed at most 1-2 days per week of work following the accident, he was not prevented from performing his usual and customary daily activities for 90 out of the first 180 days immediately following the accident.

In opposition, Plaintiff argues that Defendants failed to establish their prima facie burden. They also submit a medical evaluation of Gabriel L. Dassa, D.O., F.A.A.O.S., a board-certified orthopedic surgeon. On May 10, 2021, Dr. Dassa evaluated Plaintiff by performing a musculoskeletal examination, which included measuring Plaintiff's range of motion using a

handheld goniometer for his cervical spine, left shoulder, and lumbosacral spine. He found that Plaintiff had limited ranges of motion as compared to the normal ranges in his cervical spine, left shoulder, and lumbosacral spine. Additionally, as part of his examination, he reviewed 3 MRI reports. He opined that:

“The symptoms and clinical findings are consistent with the above diagnosis and were directly caused by the accident. The patient presents today for evaluation with complaints of radiating neck and back pain as well as pain in his left shoulder. . . Today’s exam revealed findings of persistent cervical and lumbar nerve root compression as evidenced by positive straight leg raise test and positive Spurling test. Today’s exam revealed adhesive capsulitis to left shoulder. It is my professional opinion, with a reasonable degree of medical certainty, that today’s evaluation and findings represent objective evidence of persistent orthopedic impairment to the patient’s neck, back, and left shoulder. It is also my opinion, if the history provided in the medical record is true and accurate that the accident as outlined above is a competent cause of the patient’s injuries and orthopedic impairments. It is also my opinion, given the nature of the patient’s injuries with continued subjective pain and abnormal physical findings the patient’s impairments remain to be significant and have a significant permanent component. The patient would benefit from additional treatment in the form of pain management with epidural injection after which time he should be seen by a spine surgeon . . . The patient’s impairments are permanent as his subjective pain and abnormal physical findings have exceeded timeframe in which they should have long resolved.” Affirmation in Opposition, Exhibit 1, Medical Evaluation Report by Dr. Gabriel L. Dassa at 3-4.

Based upon the foregoing, Plaintiff argues that this report and Plaintiff’s subjective complaints of his injuries are sufficient to raise a triable issue of fact as to whether Plaintiff suffered a serious injury. Furthermore, Plaintiff argues that even if the Court finds that Plaintiff did not suffer a serious injury, this action cannot be dismissed under summary judgment because his Complaint alleges economic loss exceeding basic economic loss, in addition to non-economic loss. Plaintiff argues that Defendants failed to meet their burden that Plaintiff did not suffer such economic loss.

“Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact. Issue finding, not issue determination, is the key to summary judgment.” *Anyanwu v Johnson*, 276 AD2d 572, 572-73 [2d Dept 2000][internal citations omitted]. In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Kutkiewicz v Horton*, 83 AD3d 904, 904-905 [2d Dept 2011]. 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.”

On a motion for summary judgment, the defendant bears the prima facie burden of establishing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. *See Toure v Avis Rent A Car System.*, 98 NY2d 345, 352 [2002]. The burden then shifts “to plaintiff to come forward with sufficient evidence to overcome defendant's motion by demonstrating that she sustained a serious injury within the meaning of the No-Fault Insurance Law.” *Gaddy v Eyler*, 79 NY2d 955, 957 [1992][internal quotations omitted]. Summary judgment is not appropriate where conflicting medical reports of the parties' respective experts raise triable issues of fact as to whether the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d). *Garcia v Long Island MTA*, 2 AD3d 675, 675 [2d Dept 2003]; *see also Wilcoxon v Palladino*, 122 AD3d 727, 728 [2d Dept 2014]. “However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact.” *Lowe v Japal*, 170 AD3d 701, 702 [2d Dept 2019][internal citations omitted].

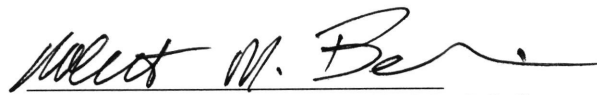
Here, Plaintiff and Defendants rely on conflicting medical reports reaching divergent conclusions regarding Plaintiff's injuries. The Court finds that neither Dr. Kraushaar's nor Dr. Dassa's reports are conclusory, speculative, or unsupported by the record. Therefore, their conflicting expert opinions raise triable issues of fact as to whether Plaintiff sustained a “serious injury” as a result of the December 8, 2017 accident. Additionally, as pointed out by Plaintiff, Defendants failed to establish that Plaintiff did not suffer economic loss exceeding the basic economic loss under Insurance Law § 5104(a). Accordingly, Defendants' motion seeking summary judgment is denied in its entirety.

The parties are hereby advised of the **virtual pre-trial conference scheduled for October 14, 2021 at 2:50 pm.**

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
September 30, 2021

ENTER

A handwritten signature in black ink, appearing to read "Robert M. Berliner", written over a horizontal line.

HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of record via NYSCEF

Index No. 036534/2019, Motion Sequence #1