

Sefcik v Passanisi

2021 NY Slip Op 33722(U)

April 28, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 601858/2020

Judge: Linda Kevins

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SHORT FORM ORDER

INDEX No. 601858/2020

CAL. No. _____

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY**

P R E S E N T:

HON. LINDA KEVINS
Justice of the Supreme Court

MOTION DATE: 01/07/21

ADJ. DATE: 02/16/21

MOT. SEQ. # 001 - MD

-----X

MICHELLE SEFCIK,
Plaintiff,

- against -

SALVATORE PASSANISI.
Defendant.

-----X

Upon the following papers e-filed and read on this motion for summary judgment : Notice of Motion and supporting papers by defendant, dated December 15, 2020; Answering Affidavits and supporting papers by plaintiff, dated February 4, 2021; Replying Affidavits and supporting papers by defendant, dated February 5, 2021; Other ____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that defendant’s motion (seq. # 001) for summary judgment dismissing the complaint against him on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) from the subject accident is denied; and it is further

ORDERED that if this Order has not already been entered, defendant is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk who is directed to hereby enter such order; and it is further

ORDERED that upon Entry of this Order, defendant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on March 29, 2019. The accident allegedly happened when a vehicle owned and operated by defendant struck the rear of plaintiff’s vehicle pushing it into the rear of another vehicle.

Defendant now moves for summary judgment dismissing the complaint against him on the ground that plaintiff is precluded under Insurance Law § 5104 from recovering for non-economic loss, as she did

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not suffer “serious injury” within the meaning of Insurance Law § 5102 (d). In support of the motion, defendant submits copies of the pleadings, bills of particulars, the transcript of plaintiff’s deposition testimony, and sworn medical reports prepared by Dr. Craig Orgway, Dr. Mathew Chacko and Dr. Melissa Sapan Cohn.

Plaintiff testified that on the date of the accident she was traveling eastbound on the Northern State Parkway in the Town of Hempstead, it was drizzling outside, and the traffic was stop and go, as it was 5:15 p.m. on a weekday. She testified that she was traveling at a rate of speed of 15 m.p.h., when without warning, the rear of her vehicle was struck by a vehicle driven by defendant. She testified that the impact was heavy, and her vehicle was pushed into a vehicle in front of her, but that the second impact was light.

Plaintiff testified that her mother picked her up, and that she went home and took a shower and went to bed. She testified that immediately after the accident she had trouble breathing due to the pressure from the seat belt restraint, and that a few days after the accident she began experiencing pain in her neck, shoulder and lower back area. She testified that she presented to her primary physician, Dr. Friedman, with complaints of stiffness in her neck and the sensation of pins and needles. She testified that Dr. Friedman examined her and prescribed Naproxen, and that she also presented to Dr. Allen who ordered a Magnetic Resonance Imaging examination (MRI) of her brain, neck and back.

Plaintiff testified that Dr. Allen told her that she had bulged and herniated discs, and she began physical therapy and treated two times per week for approximately six months. She testified that she stopped physical therapy because it did not help her, and that she declined to have injections suggested by Dr. Allen. Plaintiff testified that after the accident she took four days off from work, but she was not confined to her bed.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

To recover for non-economic loss resulting from an automobile accident, Insurance Law § 5104 requires that a plaintiff establish, as a threshold matter, that the injury he or she suffered was a “serious injury” within the meaning of the statute. 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.” The court determines, in the first instance, whether a plaintiff has sustained a serious injury and may maintain an action under the statute (*Licari v Elliott*, 57

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NY2d 230, 455 NYS2d 570 [1982]; *Ammonds v Rodriguez*, 126 AD2d 504, 510 NYS2d 480 [2d Dept 1987]).

The bill of particulars alleges that plaintiff's injuries are serious under each of the above categories. Plaintiff alleges that as a result of the subject accident she suffered disc herniation at C6-C7, bulging at C5-C6, disc herniation at L5-S1 and that she suffers pain, loss of range of motion in the lumbar area and cervical area of the spine, straightening of the cervical spine and soft tissue injury.

To qualify as a permanent consequential limitation of use of a body organ or member, the limitation must be permanent, and important or significant (*Counterline v Galka*, 189 AD2d 1043, 593 NYS2d 113 [3d Dept 1993]). To qualify as a significant limitation of use, permanence need not be established nor is a total loss required. The determination of whether a loss is significant or consequential, for both categories, 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. Either objective evidence of the extent, percentage or degree of plaintiff's limitation or loss of range of motion must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, correlating plaintiff's limitations to the normal function, purpose and use of the body part (see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Strictly subjective complaints of a plaintiff unsupported by credible medical evidence do not suffice to establish a serious injury (*Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]). Further, proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury (*Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]).

In a personal injury action, a defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that plaintiff did not sustain a "serious injury" (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865; *Gaddy v Eyster*, 79 NY2d 955, 582 NYS2d 990 [1992]). Here, defendant submits the affirmed reports of Dr. Craig Orgway, Dr. Mathew Chacko and Dr. Melissa Sapan Cohn.

Dr. Orgway, an orthopedist, states that he performed a physical examination of plaintiff on October 15, 2020 at the request of defendant. He states that he performed range of motion tests using a goniometer, and he provides the numerical values of the range of motion measurements for the lumbar spine and cervical spine. Regarding the cervical spine: "Downwards flexion of the cervical spine is restricted to 25 degrees (normal 50). Upwards extension is carried to 30 degrees (normal 60). Lateral bending is limited to 15 degrees (normal 45) bilaterally from neutral. Rotation of the cervical spine to both the left and right side from neutral is measured at 40 degrees (normal 80)." Dr. Orgway states that plaintiff states that she has discomfort at each endpoint, and he states that "[t]here is no finding of spasm in the paravertebral musculature, the trapezii, or anterior strap muscles as range of motion is tested."

With respect to the lumbar spine: "The flexion at the lumbar levels is limited to 45 degrees (normal 60°) by complaints of pain. The claimant permits lateral bending to 15 degrees (normal 25) bilaterally from neutral. He states that "Once again with an endpoint of subjective complaint of pain. There is no objective finding of spasm in the paravertebral musculature as these ranges are measured."

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Dr. Orgway concludes that plaintiff's complaints are subjective, and that there are no objective findings of post-traumatic injury.

The report created by Dr. Orgway is insufficient to establish defendant's prima facie case, as it is conclusory and speculative (*see Matott v Ward*, 48 NY2d 455, 423 NYS2d 645 [1979]). The report fails to explain the significance of the different numerical values from plaintiff's results compared to the normal values, Dr. Orgway fails to state how he was able to conclude that there was no "objective finding of spasm" while conducting the range of motion test, and more significantly, Dr. Orgway does not state that his opinion is made with a reasonable degree of medical certainty nor can it be ascertained from his reports that it was (*see Kahvejian v Pardo*, 125 AD3d 936, 4 NYS3d 133 [2d Dept 2015]).

Dr. Chacko, a neurologist, submits a report and states that he performed an independent neurological evaluation of plaintiff on November 12, 2020 at defendant's request. The report fails to indicate what type of tests were performed other than range of motion tests. Like the report created by Dr. Orgway, the report created by Dr. Chacko is conclusory and speculative (*see Matott v Ward*, 48 NY2d 455, 423 NYS2d 645), and he, too, does not state that his opinion is made with a reasonable degree of medical certainty nor can it be ascertained from his reports that it was (*see Kahvejian v Pardo*, 125 AD3d 936, 4 NYS3d 133).

Finally, defendant submits correspondence addressed to Desena & Sweeney created by Dr. Melissa Sapan Cohn, a radiologist. Dr. Cohn states that an MRI was performed on plaintiff's lumbar spine, cervical spine and brain on March 30, 2019 by Zwanger-Pesiri Radiology. Dr. Cohn does not state that she performed or ordered the examination and she fails to indicate the manner in which she reviewed the images. Rather, she merely states: "I have reviewed the lumbosacral spine MRI on Michelle Sefcik. The examination consists of multiple multiplanar pulse sequences and was obtained on 3/30/2019 at Zwanger-Pesiri Radiology and is diagnostic." The same language is used for the cervical MRI and brain MRI.

Defendant's submissions fail to establish his prima facie entitlement to summary judgment. Therefore, it is unnecessary to determine whether the opposing papers are sufficient to raise a triable issue of fact (*Singleton v F & R Royal, Inc.*, 166 AD3d 837, 88 NYS3d 81[2d Dept 2018]). Accordingly, defendant's motion for summary judgment dismissing the complaint against him on the grounds that plaintiff did not sustain a serious injury is denied.

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the decision and **Order** of the Court.



 LINDA KEVINS, JSC

Dated: 4/28/21

____ FINAL DISPOSITION X NON-FINAL DISPOSITION