Pappas v Afshani
2021 NY Slip Op 33783(U)
October 14, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 620968/2019
Judge: Joseph A. Santorelli
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SHORT FORM ORDER **ORIGINAL** INDEX No. 620968/2019
CAL No. ____________

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:
Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 5-20-2021
SUBMIT DATE 8-26-2021
Mot. Seq. # 02 - MD

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STEPHEN L. PAPPAS,

Plaintiff,

-against-

MARIE F. AFSHANI and ARMAN D. AFSHANI,

Defendants.

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Upon the following papers read on this motion for summary judgment; e-filed on the NYSCEF system as documents 32 - 43, 55 - 74 & 75 - 77, it is,

ORDERED, that the motion is determined as follows:

This motion by defendants, Marie F. Afshani and Arman D. Afshani, for an order granting summary judgment dismissing the complaint on the ground that the plaintiff, Stephen L. Pappas, did not sustain a "serious injury" within the meaning of N.Y. Insurance Law § 5102(d) is denied.

The plaintiff seeks recovery of damages for personal injuries sustained as the result of a motor vehicle accident on August 20, 2019 at 8:35 pm, on Main Street at or near its intersection with Ridge Court North, Town of Amherst, County of Erie, State of New York. Plaintiff alleges that he was operating a 2009 Saturn motor vehicle eastbound on Main Street when a 2014 Dodge Ram pickup truck operated by defendant Marie F. Afshani and owned by defendant Arman D. Afshani, which was traveling westbound on Main Street did not yield the right of way and made a left turn directly in front of the plaintiff's vehicle resulting in a collision. Defendant Marie F. Afshani testified at her examination before trial that she was issued a ticket at the time of this accident. The plaintiff went via ambulance to the hospital emergency room complaining of pain in his back, collar bone and legs. It is alleged in the bill of particulars that plaintiff sustained L2-3 left foraminal disc herniation;

L5-S1 Grade 1 anterolisthesis with uncovering of the intervertebral disc; moderate bilateral facet arthrosis, posterior annular fissure, severe bilateral neural foraminal narrowing, left greater than right with impingement of the exiting L5 nerve root; transitional vertebrae with lumbarization of the designated S1 vertebral body; severe bilateral neural foraminal narrowing at L5-Sl with impingement of the exiting L5 nerve roots, left greater than right; grade 1 anterolisthesis of L5 on S1 secondary to bilateral L5 spondylosis; lumbosacral spondylolisthesis with bilateral L5 spondylolysis and lumbosacral radiculopathy as well as L5 on Sl anterolisthesis, Grade 1; loss of range of motion of lumbar spine; exacerbation of an asymptomic lumbar spine condition; in the event that the injuries to the plaintiff's lumbar spine were superimposed upon any pre-existing conditions which may have contributed to the extent and severity of her injuries and rendered her more prone or susceptible to further injury, then such pre-existing conditions or susceptibility, if any, were aggravated, activated, precipitated, accelerated and acted upon by the injuries sustained by her in the subject occurrence; contusion of left arm; contusion of left leg; left shoulder sprain and strain; cervical sprain and strain; and left hip sprain and strain. The plaintiff also underwent lumbar spine injections on October 9, 2019 and October 30, 2019, and lumbar spine fusion surgery on December 17, 2019. Subsequent to the surgery the plaintiff claims urological injuries.

In order to effectuate the purpose of no-fault legislation to reduce litigation, a court is required to decide, in the first instant, whether a plaintiff has made out a *prima facie* case of "serious injury" sufficient to satisfy the statutory requirements (***Licari v Elliott,*** 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [1982]; ***Brown v Stark,*** 205 AD2d 725, 613 NYS2d 705 [2d Dept 1994]). If it is found that the injury sustained does not fit within the definition of "serious injury" under Insurance Law § 5102(d), then the plaintiff has no judicial remedy and the action must be dismissed (***Licari v Elliott,*** *supra,* at 57 NY2d 238; ***Velez v Cohan,*** 203 AD2d 156, 610 NYS2d 257 [1st Dept 1994]). A "serious injury" is defined 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 constitutes 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." (Insurance Law § 5102 [d]).

Defendants submitted the affirmed medical report of Dr. Stephen W. Lastig, MD, who reviewed the chest x-ray of the plaintiff taken on August 20, 2019. It was opined by Dr. Lastig that "there are no findings on this study which are causally related to the reported accident 8/20/10 and that he saw "no evidence of an osseous or visceral injury". Dr. Lastig also reviewed the venous Doppler ultrasound examination of the lower extremities of the plaintiff taken on December 22, 2019. He opined that there was "no evidence of intra-luminal thrombus" and "no sonographic evidence of deep venous thrombosis". Dr. Latig also reviewed the MRI study of the plaintiff's right shoulder taken on June 22, 2010 that predates the accident at issue in this case. He opined that there was "no evidence of rotator cuff tear or labral tear" and "no evidence of osseous injury". Dr. Lastig also reviewed the x-ray

study of the right knee of the plaintiff taken on August 13, 2014 that predates the accident. He opined that there was "no evidence of an acute fracture or dislocation". Dr. Lastig also reviewed the venous Doppler ultrasound examination of the right lower extremity of the plaintiff taken on August 13, 2014 that predates the accident. He opined that there was "no evidence of intra-luminal thrombus" and "no sonographic evidence of deep venous thrombosis within the right lower extremity". Dr. Lastig also reviewed the x-ray study of the right tibia and fibula of the plaintiff taken on August 14, 2014 that predates the accident. He opined that there was "no evidence of an acute fracture or dislocation". Dr. Lastig also reviewed the ultrasound examination of the right groin and right inguinal region of the plaintiff taken on November 14, 2014 that predates the accident. He opined that there was "no evidence of a mass or localized fluid collection" and "no evidence of a hernia". Dr. Lastig also reviewed the ultrasound examination of the scrotum and testicles of the plaintiff taken on December 30, 2014 that predates the accident. He opined that there was "no testicular masses are identified", "no evidence of testicular torsion" and "there is a small 3 mm. left epidiymal cyst or spermatocele". Dr. Lastig also reviewed the radiographic study of the lumbosacral spine of the plaintiff taken on March 9, 2015 that predates the accident. He opined that there was "no evidence of an acute fracture or subluxation", and there is a "Grade 1 anterior spondylolisthesis of L5 on S1, Bilateral spondylolysis defects are present within the L5 pars intra-articularis". Dr. Lastig also reviewed the x-ray study of the orbits of the plaintiff taken on March 6, 2017 that predates the accident. He opined that there was "no evidence of an acute fracture", and "no radio-opaque foreign bodies are identified". Dr. Lastig also reviewed the x-ray study of the orbits of the plaintiff taken on September 5, 2019. He opined that there was "no evidence of an acute fracture", " no evidence of an osseous injury", "no radio-opaque foreign bodies are identified", and "no findings on this study which are causally related to the reported accident of 8/20/19." Dr. Lastig also reviewed the CT study of the abdomen and pelvis of the plaintiff taken on February 15, 2019 that predates the accident. He opined that there was a "small 2 mm. non-obstructing right renal stone", "no evidence of a mechanical bowel obstruction or acute inflammatory bowel disease", "no evidence of ascites or adenopathy", and "L5-S1 disc degeneration. Mild Grade 1 anterior spondylolisthesis of L5 on S1 with bilateral spondylolysis defects present within the L5 pars intra-articularis". Dr. Lastig also reviewed the MRI study of the lumbar spine of the plaintiff taken on March 11, 2015 that predates the accident. He opined that there was "Lumbarization of the transitional S1 vertebral body. Mild disc desiccation at L5-S1", "Focal right paracentral disc protrusion at L5-SI which is encroaching on the right neural foramen", "Mild Grade 1 anterior spondylolisthesis of L5 on S1 with bilateral spondylolysis defects present within the L5 pars intra-articularis", and "Mild degenerative lower lumbar facet arthropathy. No evidence of spinal stenosis". Dr. Lastig also reviewed the MRI study of the lumbar spine of the plaintiff taken on September 5, 2019. He opined that there was "again noted to be a Grade 1 anterior spondylolisthesis of L5 on S1 with bilateral spondylolysis defects present within the L5 pars intra-articularis. The degree of slippage of L5 on S1 has increased compared with the prior study from 3/11/15 resulting in bilateral cephalocaudad foraminal narrowing and compromise of the exiting L5 nerve roots", "the previously described right paracentral disc protrusion at the L5-S1 level is no longer identified", and "there is no evidence of central lumbar canal stenosis". Dr. Lastig also reviewed the radiographic studies of the lumbosacral spine of the plaintiff taken on January 15, 2020. He opined that there was "no evidence of an acute fracture or subluxation", "Status-post posterior lumbar interbody fusion at the L5-S1 levels...

Intact hardware", "Mild Grade 1 anterior spondylolisthesis of L5 on S1 measuring approximately 3mm", and "The studies demonstrate post-surgical changes consistent with a posterior lumbar interbody fusion at the L5-S1 levels. The hardware is intact. There is a mild Grade I anterior spondylolisthesis of L5 on S1 measuring approximately 3 mm. on all three examinations".

The defendants also submitted the medical report of its expert witness, Dr. William A. Healy, III, MD, who reviewed the plaintiff's medical records and performed an independent medical examination on October 21, 2020. Cervical spine range of motion testing reportedly showed that the plaintiff has 0% loss in cervical flexion, 0% loss in cervical extension, 0% loss in lateral flexion, and 0% loss in rotation. Right shoulder range of motion testing reportedly showed that the plaintiff has 0% loss in forward elevation, 0% loss in abduction, 0% loss in external rotation and 0% loss in internal rotation. Left shoulder range of motion testing reportedly showed that the plaintiff has 0% loss in forward elevation, 0% loss in abduction, 0% loss in external rotation and 0% loss in internal rotation. Right elbow range of motion testing reportedly showed that the plaintiff has 0% loss in flexion, 0% loss in extension, 0% loss in pronation, and 0% loss in supination. Left elbow range of motion testing reportedly showed that the plaintiff has 0% loss in flexion, 0% loss in extension, 0% loss in pronation, and 0% loss in supination. Right wrist range of motion testing reportedly showed that the plaintiff has 0% loss inn dorsiflexion, 0% loss in palmar flexion, 0% loss in radial & ulnar deviation, and 0% loss pronation/supination. Left wrist range of motion testing reportedly showed that the plaintiff has 0% loss inn dorsiflexion, 0% loss in palmar flexion, 0% loss in radial & ulnar deviation, and 0% loss pronation/supination. Right hand and fingers range of motion testing reportedly showed that the plaintiff has 0% loss in thumb interphalangeal hyperextension/flexion, 0% loss in thumb metacarpophalangeal hyperextension/flexion, 0% loss in finger DIP joints extension/flexion, 0% loss in finger PIP joints extension/flexion, and 0% loss in finger MCP joints hyperextension/flexion. Left hand and fingers range of motion testing reportedly showed that the plaintiff has 0% loss in thumb interphalangeal hyperextension/flexion, 0% loss in thumb metacarpophalangeal hyperextension/flexion, 0% loss in finger DIP joints extension/flexion, 0% loss in finger PIP joints extension/flexion, and 0% loss in finger MCP joints hyperextension/flexion. Lumbar spine range of motion testing reportedly showed that the plaintiff has 0% loss in flexion, 0% loss in extension, 0% loss in lateral flexion, and 0% loss in rotation. Right hip range of motion testing reportedly showed that the plaintiff has 0% loss in flexion, 0% loss in extension, 0% loss in abduction, 0% loss in external rotation and 0% loss in internal rotation. Left hip range of motion testing reportedly showed that the plaintiff has 0% loss in flexion, 0% loss in extension, 0% loss in abduction, 0% loss in external rotation and 0% loss in internal rotation. Right knee range of motion testing reportedly showed that the plaintiff has 0% loss in flexion, and 0% loss in extension. Left knee range of motion testing reportedly showed that the plaintiff has 0% loss in flexion, and 0% loss in extension. Ankle range of motion testing reportedly showed that the plaintiff has 0% loss in dorsiflexion, 0% loss in plantar, 0% loss in inversion, and 0% loss in eversion. Feet range of motion testing reportedly showed that the plaintiff has 0% loss in dorsiflexion, 0% loss in plantar, 0% loss in inversion, and 0% loss in eversion. It was opined by Dr. Healy that the plaintiff may have sustained a contusion to the left shoulder, bilateral knees, left hip, arm, and leg, but these contusions have "gone on to full and

maximal recovery". He further opines that the plaintiff may have sustained a cervical strain "that has gone on to full and maximal recovery". He opines that

> As far as his low back is concerned, it is obvious the patient has a preexistent L5-S1 spondylolisthesis that necessitated management several years prior to this accident, including radiofrequency ablation and epidural steroid injections. The patient may have sustained a strain to the lumbar spine that should have gone on to full and maximal recovery. He is left with his preexistent spondylolisthesis that subsequently necessitated surgical intervention. At this point, I would have expected the patient to have a full and maximal recovery and no further intervention is warranted

The defendants also submitted the medical report of its expert witness, Dr. Richard A. Schoor, MD, who reviewed the plaintiff's medical records and performed an independent medical examination on December 3, 2020. He opined that

> It is my medical judgement that the urologic injuries were the result of surgical complications not as a result the car accident. The claimant will need further treatment for the condition. The claimant has not been able to return to his old job. There were no pre-existing conditions. There will be need for further testing.

Based on the foregoing, it is the conclusion of the Court that the defendants met their initial burden of establishing, as a matter of law, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see* ***McKinney v Lane,*** 288 AD2d 274, 733 NYS2d 456 [2d Dept 2001], citing ***Gaddy v Eyler***, 79 NY2d 955, 591 NE2d 1176, 582 NYS2d 990; ***Licari v Elliott,*** 57 NY2d 230, 441 NE2d 1088, 455 NYS2d 570).

In opposition to the defendants' application, the plaintiff submitted that affidavit of his treating physician, Dr. Daniel M. Birk, MD, who noted that the plaintiff received treatment in his office from September 27, 2019 for injuries sustained in the August 20, 2019 motor vehicle accident. A limited examination was performed on September 27, 2019 and Dr. Birk determined that "Mr. Pappas was suffering from an exacerbation of a previously asymptomatic Grade 1 anterolisthesis of L5 on S1 with bilateral L5 pars defects (spondylolysis)". On October 4, 2019 Dr. Birk again performed a physical examination of the plaintiff's lumbar spine. After that examination Dr. Birk advised the plaintiff to "avoid all bending, twisting, lifting and kneeling due to the instability of his lumbosacral spine." On November 8, 2019 Dr. Birk again performed a physical examination of the plaintiff's lumbar spine. The plaintiff was again advised "that he should avoid all lifting, bending, twisting, and working on his knees until he is fully treated for his condition". On December 6, 2019 Dr. Birk performed a neurological examination of the plaintiff. He found

> Mr. Pappas had weakness in his left foot. I reviewed lumbar x-ray films of the lumbar spine performed on October 8, 2019, which showed that Mr. Pappas had dynamic instability of the spondylolisthesis and demonstrated pars interarticularis fractures consistent with spondylolysis (Grade 1 anterior spondylolisthesis L4-L5 with bilateral lysis and evidence of instability). In fact, the x-rays films showed that there was instability on extension flexion imaging with the lysis measuring approximately 9 mm on extension and 12 mm on flexion. The findings of the dynamic lumbar x-ray (ap, lateral, extension, and flexion radiographic views) performed on October 8, 2019, as noted above, was not present on any imaging that I reviewed prior to the motor vehicle accident of August 20, 2019.

On December 17, 2019 Dr. Birk performed a surgical procedure on the plaintiff consisting of:

> L5-Sl Instrumented Fusion; L5-S1 interbody arthmdesis; Placement of pedicle screws in the pedicles of L5 and S1 bilaterally; Placement of biomechanical device to the L5-S1 interspace; Use of allograft to spine surgery only; Intraoperative frameless steretactic image-guided neuronavigation; Intraoperative neuromonitoring for motor-evoked potentials and somatosensory evoked potentials and EMG; Intraoperative fluoroscopy with data interpretation; Use of operative microscope and microsurgical instrument and techniques.

Dr. Birk indicated that the plaintiff's "hospital course was complicated by a traumatic Foley catheter attempt and, as a result, a postoperative suprapubic catheter placement was performed by urology". On January 3, 2020 the plaintiff had his first post operative appointment with Dr. Birk. Dr. Birk examined the plaintiff and observed that he "was ambulating with a walker" and "progressing as expected". On January 17, 2020 the plaintiff had his second post operative appointment with Dr. Birk. Dr. Birk indicated that the plaintiff "transitioned to using a cane and was progressing as I had expected". The plaintiff advised Dr. Birk that "he was scheduled for a cystoscopy operative procedure and removal of the suprapubic catheter to be performed in two weeks". The plaintiff continues to see Dr. Birk for post operative appointments and ongoing treatment. Dr. Birk opined that the plaintiff's "lumbar spine injuries consisting of Grade 1 anterolisthesis of L5 on S1 secondary to bilateral spondylolysis and L5-Sl herniation were asymptomatic for almost 4 years prior to the collision of August 20, 2019". Dr. Birk further opined that "the August 2019 collision aggravated and/or exacerbated his asymptomatic lumbar spine condition, and that these injuries and the dynamic instability exhibited at the L4-L5 level necessitated a lumbar fusion to stabilize the spine". He further opined that "the aggravation and/or exacerbation of any degenerative conditions that were asymptomatic prior to the motor vehicle collision are also causally related to the motor vehicle accident, and that the L2-3 left foraminal disc herniation shown on the September 5, 2019 lumbar spine MRI films, are not pre-existing and are also causally related to this accident." He also opined that

"these injuries are as a direct result of the motor vehicle collision and causally related to the collision of August 20, 2019."

In opposition, plaintiff has submitted competent medical evidence raising a triable issue of fact as to whether he sustained a serious injury under the limitations of uses categories of the Insurance Law (*see* ***Foy v Pieters***, 190 AD3d 700, 135 NYS3d 899 [2d Dept 2021]; ***Ledee v Matthes***, 188 AD3d 857, 132 NYS3d 311 [2d Dept 2020]; ***Reyes v Kashem***, 187 AD3d 1080, 131 NYS2d 175 [2d Dept 2020]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102 (d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). Plaintiff has submitted the affirmed medical report of Dr. Birk who opined that he suffers from lumbar spine injuries, and that such injuries were causally related to the subject accident (*see* ***Vaughan-Ware v Darcy***, 103 AD3d 621, 959 NYS2d 698 [2d Dept 2013]; ***Bykova v Sisters Trans, Inc.***, 99 AD3d 654, 952 NYS2d 95 [2d Dept 2012]; ***Kanard v Setter***, 87 AD3d 714, 928 NYS2d 782 [2d Dept 2011]; ***Harris v Boudart***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]; ***Pearson v Guapisaca***, 61 AD3d 833, 876 NYS2d 890 [2d Dept 2009]). Dr. Birk further states that, although plaintiff has undergone surgery, the prognosis is guarded, plaintiff is still actively treating with National Spine & Pain, and is still experiencing pain and limitations. Thus, Dr. Birk's affidavit is sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury tohis lumbar spine within the limitations of use categories of the Insurance Law as a result of the subject accident (*see* ***Young Chool Yoi v Rui Dong Wang***, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; ***Gussack v McCoy***, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]).

Consequently, the affirmed medical report of plaintiff's expert conflicts with that of defendant's experts. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1998]; *see* ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Thue plaintiff has submitted sufficient evidence to raise a triable issue of fact as to whether his injuries are causally related to the subject accident and the motion for summary judgment must be denied (*see* ***Barry v Valerio***, 72 AD3d 996, 902 NYS2d 97 [2d Dept 2010]; ***Paula v Natala***, 61 AD3d 944, 879 NYS2d 153 [2d Dept 2009]; ***Azor v Torado***, 59 AD3d 367, 873 NYS2d 655 [2d Dept 2009]).

The foregoing constitutes the decision and Order of this Court.

Dated: October 14, 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION