

Postiglione v National Gen. Ins. Co.

2024 NY Slip Op 32718(U)

July 9, 2024

Supreme Court, New York County

Docket Number: Index No. 656988/2020

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X INDEX NO. 656988/2020

JOHN POSTIGLIONE MOTION DATE 05/11/2024

Plaintiff, MOTION SEQ. NO. 006

- v -

NATIONAL GENERAL INSURANCE COMPANY, **DECISION + ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and after oral argument, which took place on March 12, 2024, where Eric Rothstein, Esq. appeared for Plaintiff John Positglione (“Plaintiff”) and Gregory Day, Esq. appeared for Defendant National General Insurance Company (“Defendant”), Defendant’s motion for summary judgment is denied.

I. Background

This is an action for underinsured benefits related to a car accident which occurred on December 1, 2019 (NYSCEF Doc. 1). Defendant moves for summary judgment arguing that as a matter of law, Plaintiff cannot satisfy the “serious injury” threshold requirement of Section 15102(d) of the Comprehensive Motor Vehicle Insurance Reparations Act. Defendant argues that the majority of Plaintiff’s injuries are pre-existing and not causally related to the accident giving rise to this case. Instead, Defendant attributes Plaintiff’s injuries to a prior 2014 motor vehicle accident, a 2017 escalator accident, and pre-existing degenerative conditions. Defendant argues

that Plaintiff was receiving treatment for injuries sustained in prior accidents at the time of the 2019 accident and social security disability benefits for prior injuries.

Defendant relies on the orthopedic examination of Plaintiff by Dr. Bazos, which took place on December 15, 2022. Dr. Bazos opined that Plaintiff sustained a minor soft tissue injury to the spine and left knee, that the spinal fracture Plaintiff complained of was “age indeterminate and clearly predated the subject accident,” that Plaintiff’s alleged right elbow injury was purely incidental and in no way attributed to the subject accident, and believed Plaintiff’s left knee surgery was “not medically necessary” and was based purely on subjective complaints. Defendant also argues that Plaintiff did not sustain a “serious injury” under the 90/180 category because he was already disabled prior to the accident.

In opposition, Plaintiff produced an affirmation of Michael A. Schwartz, M.D. (“Dr. Schwartz”). Dr. Schwartz treated Plaintiff shortly after the accident on January 27, 2020, and opined with a reasonable degree of medical certainty, Plaintiff suffered left knee medial and lateral meniscal tears and right elbow olecranon bursitis, which was causally related to the December 1, 2019 accident (*see* NYSCEF Doc. 194). Dr. Schwartz reviewed MRIs of Plaintiff’s left knee on January 20, 2020, which indicated the meniscal tears and reviewed an MRI of the right elbow dated February 8, 2020, indicating a strain, small hematoma of the anconeus muscle, and lateral epicondylitis with partial thickness tear.

As a result of these findings, on May 27, 2020, Dr. Schwartz performed a left knee arthroscopy and partial meniscectomy, and a right elbow extensor tendon debridement and repair. Dr. Schwartz opined that to a reasonable degree of medical certainty, these surgeries were necessitated by and causally related to the December 1, 2019 accident. Since the surgeries, Dr. Schwartz continued to treat Plaintiff with various injections. Dr. Schwartz opined with a reasonable degree of medical

certainty that Plaintiff's injuries and limited range of motion of his right elbow and left knee are permanent and causally related to the December 1, 2019 accident. Plaintiff argues that Dr. Schwartz' findings, which directly contradict Dr. Bazos' findings, raise a triable issue of fact.¹

In reply, Defendant argues that Dr. Schwartz' operative report noted degenerative findings during his surgeries which are at odds with Dr. Schwartz's assertions regarding causality.

II. Discussion

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

Section 5104 (a) of the Comprehensive Motor Vehicle Insurance Reparations Act provides:

“there shall be no right of recovery for non-economic loss, except in the case of a serious injury.” “Serious Injury” means a personal injury which results in death, dismemberment, significant disfigurement, a fracture...permanent consequential limitation of use of a body function or system, significant limitation of use of a body organ or member, 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

¹ Plaintiff raises a variety of other arguments in opposition, including triable issues of fact raised by numerous other providers, but for the sake of brevity, and since the Court finds Dr. Schwartz's affirmation sufficient to deny summary judgment, the Court omits discussion of those arguments from its decision and order.

activities for not less than ninety days during one hundred eighty days immediately following the occurrence of the injury or impairment.”

The Court of Appeals has held that if a medical expert treats a plaintiff, examines the plaintiff's MRIs, and based on said physical examination and review of the MRIs concludes that an accident victim's injuries are permanent, this is sufficient to defeat a defendant's motion for summary judgment (*Toure v Avis Rent A Car Systems, Inc.*, 90 NY2d 345 [2002]).

Moreover, where there is evidence that a plaintiff's degenerative conditions were aggravated by an accident, there is a triable issue of fact as to whether a plaintiff suffered a serious injury under §5102(d) (*Giap v Hathi Son Pham*, 159 AD3d 484 [1st Dept 2018]; *see also Lazzari v Qualcon Construction, LLC*, 162 AD3d 440, 441 [1st Dept 2018]).

Although Defendant points out to Plaintiff's bill of particulars in the 2014 accident, his injuries in that accident were alleged to be on the **right knee** while in this accident Plaintiff received surgery to the **left knee**. Likewise, Plaintiff's right elbow injury, which required surgery according to Dr. Schwartz, was not alleged in any of his prior lawsuits. These constitute serious injuries under §5102(d) (*see Fedorova v Kirkland*, 126 AD3d 624, 626 [1st Dept 2015] [material issue of fact raised where postoperative report from arthroscopic surgery performed on left knee provided a diagnosis of tear of the medial meniscus and lateral meniscus, as well as degenerative changes]). Although Dr. Bazos disputes the necessity or cause of Plaintiff's left knee and right elbow surgery, this conflicting report merely creates an issue of fact.

Because Plaintiff has established that at least some of the injuries may meet the threshold, there is no need to examine proof with respect to other injuries (*Linton v Nawaz*, 14 NY3d 821, 822 [2010]). “If the trier of fact determines that plaintiff sustained a serious injury, it may award damages for all [his] injuries causally related to the accident, even those that do not meet the threshold” (*Fedorova, supra* citing *Angeles v American United Transp., Inc.*, 110 AD3d 639, 640

[1st Dept 2013]). Viewing the facts in the light most favorable to the non-movant, here, the Plaintiff, the Court finds Dr. Schwartz's affirmation and surgical reports raise a triable issue of fact. Thus, Defendant's motion for summary judgment is denied.

Accordingly, it is hereby,

ORDERED that Defendant's motion for summary judgment is denied; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this

Decision and Order, with notice of entry, on all parties via NYSCEF; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

7/9/2024
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE