

Eagan v Gingo
2024 NY Slip Op 35300(U)
March 25, 2024
Supreme Court, Nassau County
Docket Number: Index No. 617525/2019
Judge: Eileen C. Daly-Sapraicone
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**SUPREME COURT – STATE OF NEW YORK
COUNTY OF NASSAU**

**PRESENT: HON. EILEEN C. DALY-SAPRAICONE,
JUSTICE OF THE SUPREME COURT**

-----X
LISA ANN EAGAN,

Plaintiff,

**TRIAL/IAS, PART 21
Index No.: 617525/2019**

-against-

**Motion Seq. No.: 002, 003
Motion Submitted: 11/13/23**

**ROBERT JOHN GINGO, NORTH SHORE UNIVERSITY
HOSPITAL AND NORTHWELL HEALTH, INC.,
Defendants.**

**DECISION AND ORDER
XXX**

-----X
The following papers were read on this motion

**NYSCEF
DOCUMENT NUMBERS**

Notice of Motion, Statement of Material Facts, Affirmation, Exhibits	29 – 36
Affirmation in Opposition Exhibits	39 – 43
Notice of Cross-Motion, Affirmation, Memorandum of Law, Exhibits.....	44 – 60; 62 – 64
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Plaintiff, LISA ANN EAGAN (hereinafter, Plaintiff) moves for an order pursuant to CPLR Section 3212 granting summary judgment on the issue of liability, finding Defendants, ROBERT JOHN GINGO (hereinafter, Defendant Gingo), NORTH SHORE UNIVERSITY HOSPITAL AND NORTHWELL HEALTH, INC. (Defendant Northwell Health) (hereinafter, collectively Defendants) completely liable for the subject automobile accident and pursuant to CPLR Section 3211(b) dismissing Defendants' Sixth Affirmative Defense alleging contributory negligence and setting this matter down for a trial on the issue of Plaintiff's damages, and for such other and further relief as this Court may deem just and proper (hereinafter, Motion Sequence No. 002).

Defendants cross-move for an order pursuant to CPLR Section 3212 granting summary judgment dismissing the Plaintiff's Complaint and all claims asserted against Defendants on the grounds that Plaintiff did not sustain a "serious injury" as defined and required under New York Insurance Law Sections 5102(d) and 5104 respectively and cannot establish a causal link between her alleged injuries and the subject accident and for such other and further relief as this Court deems just, equitable, and proper (hereinafter, Motion Sequence No. 003). Motion Sequence No. 002 and Motion Sequence No. 003 are consolidated for decision as set forth herein below.

This action arises from a motor vehicle accident which occurred on May 15, 2019 when Plaintiff was traveling northbound on Henry Street at or near its intersection with Gladys Avenue, Hempstead, Nassau County, New York. Plaintiff alleges that her vehicle was struck in the rear by Defendants' ambulance. Plaintiff alleges that she was caused to sustain severe personal injuries.

Motion Sequence No. 002

Plaintiff alleges that she is entitled to summary judgment as the Defendants' ambulance struck her vehicle while she was completely stopped. Plaintiff testified that she was stopped at a red light at the time of the motor vehicle accident. Plaintiff states that as she was struck in the rear, Defendants are negligent as a matter of law.

Defendants argue that Plaintiff's vehicle was not stopped when the motor vehicle accident occurred. Defendants submit the affidavit of Defendant Gingo's partner, Benjamin Kurian (hereinafter, Kurian) who was in the ambulance at the time of the subject occurrence. Kurian's Affidavit states that he is an Emergency Medical Technician for Defendant Northwell Health and that, on May 15, 2019, he was in the vehicle at the time of the accident. Mr. Kurian states that Mr. Gingo was driving approximately 1 mile-per-hour in heavy traffic, the traffic light was green and traffic was moving. Mr. Kurian states that the vehicle directly in front of the ambulance was moving towards the green light when the Plaintiff's vehicle "suddenly and unexpectedly slammed on her brakes for no apparent reason thereby precipitating the unavoidable rear-end collision" (NYSCEF Docket Entry No. 40). Defendant Gingo testified that Plaintiff suddenly and unexpectedly stopped short of the intersection while the light was green, causing the accident. Defendants argue that while a sudden stop by a leading vehicle, alone, is generally insufficient to rebut the presumption of negligence in a rear-end motor vehicle accident, a sudden and unexpected stop by the lead vehicle – contrary to prevailing traffic conditions and without signaling the stop to following drivers – is a non-negligent explanation sufficient to defeat summary judgment. Defendants argue that it is the function of the jury to weigh the contradictory factual testimony, assess the credibility of each witness and the other admissible evidence.

Here, the Court finds that there are triable issues of fact regarding how the accident occurred, including whether the traffic light was green when the Plaintiff's vehicle suddenly and unexpectedly stopped short, and whether the rear driver had a nonnegligent explanation of the accident. As such, this Court finds that the Plaintiff has failed to demonstrate their prima facie entitlement to judgment as a matter of law on the issue of liability. *Harding v Royal Waste Servs, Inc.*, 208 AD3d 762 [2d Dept. 2022]; *Despinos-Cadet v Stein*, 209 AD 3d 978 [2d Dept. 2022]; and *Balanta v Wu*, 220 AD 3d 720 [2d Dept. 2023].

Motion Sequence No. 003

Defendants allege that they must be granted summary judgment because Plaintiff did not sustain a "serious injury" as defined under and required by New York Insurance Law Sections 5102(d) and 5104 and cannot establish a causal link between the subject accident and her alleged injuries.

Defendants allege that Plaintiff was involved in at least three (3) accidents prior to the instant accident in which Plaintiff alleges she injured her cervical spine, lumbar spine, right wrist, right shoulder, and bilateral knees.

Defendants stated that, according to Plaintiff's medical records, Plaintiff's January 16, 2009 Accident (hereinafter, January 2009 Accident) resulted in injuries to her cervical spine including herniations at C3-C7, C5-C6 radiculopathies and right S1 radiculopathy with bilateral tibial neuropathies. In connection with Plaintiff's January 2009 Accident, Plaintiff was recommended for physical therapy and received cervical and lumbar epidural injections.

Defendants stated that, according to Plaintiff's medical records, Plaintiff's second accident occurred on September 18, 2013 (hereinafter, September 2013 Accident). Records evidence that Plaintiff incurred injuries to her neck, mid and low back as a result of the September 2013 Accident. Plaintiff's MRI scans showed degenerative spondylitic changes at C4-5 and C5-6 consistent with chronic degenerative cervical spine disease, degenerative vertebral bodies in her lumbar spine and degenerative disc disease at L5-S1.

Defendants state that, according to Plaintiff's medical records, Plaintiff was also injured at work on June 11, 2018 (hereinafter, June 2018 Accident) when she injured her left wrist, left elbow, left shoulder, and cervical spine region. Plaintiff's workers' compensation records reveal that Plaintiff sustained a right wrist injury and complained of right shoulder pain. In addition, Plaintiff's September 24, 2018 MRI showed disc herniations at C4-C5 and C6-C7, disc bulges at C3-C4 and C5-C6. Plaintiff was indicated for light work restrictions and received a cervical epidural and trigger point injections. Plaintiff's December 29, 2018 right wrist MRI revealed tenosynovitis. Plaintiff testified at her deposition that she returned to work on May 11, 2020 and she still currently works, driving herself to work everyday (NYSCEF Docket Entry No. 46).

Defendants state that they have established prima facie that Plaintiff's alleged injuries are attributable to at least three (3) previous accidents and pre-existing degenerative conditions. Specifically, Defendants argue that Plaintiff claims almost identical injuries as in her previous three (3) accidents and all of Defendants' three expert physicians have opined that Plaintiff's injuries are not causally related to the accident and that there is no sign of traumatic injuries arising from the subject accident.

Defendants submit a report of John Killian, M.D. (hereinafter, Dr. Killian) who performed an independent orthopedic medical examination of the Plaintiff on January 10, 2023 (NYSCEF Docket Entry No. 54). Dr. Killian found that Plaintiff did not sustain injuries to her right shoulder, right wrist, bilateral knees or right ankle/foot as a result of her May 15, 2019 accident. Dr. Killian further concluded that based on a review of Plaintiff's films, that there were no traumatic abnormalities seen in Plaintiff's right shoulder, right wrist, bilateral knees, or right ankle/foot on x-rays or MRIs and the arthroscopic evaluations of her knees revealed degenerative changes only. Dr. Killian noted that Plaintiff was diagnosed with carpal tunnel syndrome and de Quervain's tendonitis in the right wrist, which Dr. Killian concluded from a reasonable degree of medical certainty, was not caused by trauma from May 15, 2019 accident. Dr. Killian found that the MRI of the right shoulder showed various degenerative conditions, but showed no traumatic abnormalities and the physical examination was normal without subjective complaints of

tenderness or pain with shoulder motions. With regard to Plaintiff's knees, the Plaintiff eventually had bilateral arthroscopic surgery but the records show that it was due to early degenerative disease and there were not traumatic abnormalities seen in either knee. Dr. Killian found no objective findings in Plaintiff's knees including restricted motion, atrophy, or positive provocative tests for knee derangements and found the knees unrelated to this accident. Dr. Killian concluded that Plaintiff was able to work at normal capacity and perform all of her usual activities of daily living without restrictions from problems with those areas.

Defendants submit a report of Alan Mechanic, M.D. (hereinafter, Dr. Mechanic) who performed an independent neurosurgeon medical examination of Plaintiff on February 7, 2023 (NYSCEF Docket Entry No. 55). Dr. Mechanic concluded that a review of the Plaintiff's scans and films demonstrates a history of chronic progressive degenerative cervical disc disease without evidence of traumatic injuries to the soft tissues, osseous or neural structures of the cervical spine and are not related to the accident of May 15, 2019. Dr. Mechanic also stated that there was no objective evidence of a neurologic deficit, neurological disability, neurologic impairment, or neurological permanency, casually related to the accident of May 15, 2019 that would affect Plaintiff's range of motion or ability to perform activities of daily living.

Defendants submit a report of Alain Hyman, M.D. (hereinafter, Dr. Hyman) who conducted a radiological review of Plaintiff's cervical spine, lumbar spine, right wrist, right shoulder, right knee, and left knee MRI's within fifteen (15) days-post accident on May 29, 2019 and May 30, 2019 (NYSCEF Docket Entry No. 56). Dr. Hyman opined that none of the conditions alleged by Plaintiff in her Bill of Particulars are casually related to the subject accident. Dr. Hyman further concluded with a reasonable degree of medical certainty that the accident could not and did not cause the Plaintiff's alleged injuries in her cervical spine as the cervical injuries are degenerative in nature and were not caused by an acute injury. Dr. Hyman also concluded that the Plaintiff's lumbar injuries are degenerative in nature and existed long before the subject accident. Dr. Hyman concluded that Plaintiff's right wrist injuries are degenerative in nature and existed long before the subject accident. Dr. Hyman concluded with a reasonable degree of medical certainty that the accident could not and did not cause the Plaintiff's injuries to her right knee as the right knee injuries are degenerative in nature and were not caused by an acute injury. With respect to Plaintiff's left knee, Dr. Hyman concluded that Plaintiff's left knee injuries were degenerative in nature and could not have been caused by an acute injury. Finally, Dr. Hyman concluded with a reasonable degree of medical certainty that the accident could not and did not cause the Plaintiff's alleged injuries in her right shoulder as the right shoulder injuries are degenerative in nature and were not caused by an acute injury.

Defendants also submit an expert affidavit of biomechanical expert David L. Gushue, Ph.D. (hereinafter, Gushue) (NYSCEF Docket Entry No. 50). Gushue opined that the accident could not have caused the injury to the cervical spine because in order to cause the injury, there must be between 400 and 900 pounds of compressive force and in the subject accident, the compressive forces were below 30 pounds. Gushue further opined that the accident could not have caused the injury to the lumbar spine because in order to cause a disc injury, there must be in excess of 1200 pounds of compressive force and the in the subject accident, the compressive forces were below 80 pounds. As for the injuries to the right wrist, right shoulder, right knee, and left

knee injuries. As such, a causal relationship between the subject incident and the claimed right wrist, right shoulder, right knee, and left knee injuries cannot be made.

Plaintiff files opposition stating that even if the defense has established their prima facie case, there is sufficient evidence to establish that Plaintiff suffered a permanent consequential limitation, or significant limitation of her left shoulder, right shoulder, cervical spine, thoracic spine and lumbar spine and that she was prevented from her usual and customary activities during a period of 90/180 days following the accident as a result of her injuries. Plaintiff states that she treated at Quantum Physical Therapy and went to physical therapy treatment 2-3 times per week for more than three (3) years following the subject accident.

Plaintiff submits a report of Dr. Paul Manadan (hereinafter, Dr. Manadan) at New Millennium Pain and Spine Medicine, PLLC (NYSCEF Docket Entry No. 67). Dr. Mandan suggested that Plaintiff avoid heavy lifting, undergo a course of physical therapy treatment 3-4x per week, take over the counter pain medication and consider undergoing MRI's to rule out tears.

Plaintiff submits a report of Dr. Randall V. Ehrlich (hereinafter, Dr. Ehrlich) at OrthoCare Surgical. (NYSCEF Docket Entry No. 69). Dr. Ehrlich diagnosed Plaintiff with symptomatic traumatic right shoulder internal derangement resulting from the subject motor vehicle accident.

Plaintiff submits the report of Anthony Finuoli, M.D. (Dr. Finouli) of Branch Orthopedics (NYSCEF Docket Entry No. 70) in which Plaintiff complains of right wrist/hand pain with numbness of the fingers and weakness with gripping.

Plaintiff states that Dr. Manadan reviewed Plaintiff's prior MRI studies from her September 2013 Accident and her 2019 MRI's and states that Plaintiff's MRI comparisons show a worsening/progression of Plaintiff's disc disease with the development of new herniations and nerve root impingement caused by the subject accident. Mr. Manadan states that with a reasonable degree of medical certainty that the subject accident exacerbated/aggravated Plaintiff's prior cervical and lumbar injuries and that Plaintiff's injuries to her cervical spine, lumbar spine, right hip, left hip, right wrist, right shoulder, right knee and left knee were caused or exacerbated by the subject accident and are permanent in nature.

Plaintiff also submits a report from Dr. Kaisman (hereinafter, Dr. Kaisman) (NYSCEF Docket Entry No. 71). Dr. Kaisman states that Plaintiff's injuries are causally related to the subject motor vehicle accident of May 15, 2019, and states that Plaintiff underwent a cervical discectomy of the C4-C5 disc, cervical discectomy of the C5-C6 disc, fluoroscopy, annuloplasty at the C4-C5 level and annuloplasty at the C5-C6 level under his care. Dr. Kaisman further states that with a reasonable degree of certainty that Ms. Eagan's injuries are permanent in nature.

Pursuant to Insurance Law Section 5102, there are nine categories defining a serious injury resulting from an automobile accident (Insurance Law Section 5102). They include (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body function or system; (8) significant limitation of the use of a body function or system; or (9) a medically determined injury or impairment of a non-permanent nature which prevents the 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 (*Id.*).

A movant bears the initial burden to establish that the Plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the Plaintiff to produce prima facie evidence to support the claim of serious injury (*Lopez v Senatore*, 65 NY2d 1017 [1985]).

It is undisputed that categories (1), (2), (3), and (5) do not apply to this case. The Defendants argue that the deposition testimony and medical reports submitted in connection with this case prove that the Plaintiff did not sustain a fracture (category 4), permanent loss of use (category 6), permanent consequential limitation of use (category 7), significant limitation of use (category 8), or an injury or impairment which prevents usual and customary daily activities for “90 out of 180” days (category 9) in this low impact collision. Defendants allege that the independent examinations of Dr. Killian, Dr. Mechanic, Dr. Hyman and biomechanical expert, Gushue, establish that Plaintiff’s injuries do not rise to the permanent consequential limitation nor the significant limitation category or the 90/180 category. Upon review, this Court agrees.

The medical records, scans and films establish that Plaintiff’s cervical spine, lumbar spine, right shoulder, right wrist, bilateral knee injuries were degenerative, or as a result of previous injuries. (*see* Insurance Law Section 5102[d]; *Altman v Gassman*, 202 AD 2d 265 [1st Dept 1994]; *Licari v Elliott*, 57 NY 2d 230 [1982]; *Ranford v Tim’s Tree & Lawn Service, Inc.* 71 AD3d 973 [2d Dept 2010]). Further, the evidence establishes that immediately following Plaintiff’s accident, Plaintiff continued to work for almost four (4) weeks until her left shoulder surgery on June 13, 2019, which was necessitated by her prior accident. Plaintiff testified that she is still currently working. This evidence clearly establishes Plaintiff’s lack of serious injury under the 90/180 category. Plaintiff’s evidence submitted in opposition to this motion failed to adequately rebut Defendants’ prima facie case with admissible evidence. There are no material issues of fact regarding the asserted threshold categories.

Defendants also argue that the alleged injuries are not causally related to the subject accident in that biomechanically, the accident could not have caused Plaintiff’s alleged injuries and that the alleged injuries to the cervical spine, lumbar spine, right wrist, right shoulder, right knee, and left knee were degenerative in nature and pre-existing and thus unrelated to the subject accident. This Court finds that Plaintiff has failed to create a triable issue of fact with respect to causation. Plaintiff does not contest the findings of Dr. Killian, Dr. Mechanic and Dr. Hyman regarding the degenerative nature of Plaintiff’s injuries and the fact that they existed before the May 2019 accident (*Tudisco v James*, 28 AD 3d 536 [2d Dept 2006]; *Valentin v Pomila*, 59 AD 3d 184 [1st Dept 2009]). Dr. Manadan’s affirmation is inadmissible as it relies on inadmissible records (*Mohammed v Siffra*, 19 AD3d 561 [2d Dept 2005]) and none of Plaintiff’s experts set forth any objective medical evidence to support the conclusions they reach (*Nozine v Sav-On Car Rentals*, 15 AD3d 555 [2d Dept 2005]). A plaintiff must submit expert medical evidence addressing or contesting a defendant expert’s detailed findings of pre-existing conditions (*Ramos v Jahar*, 79 Misc. 3d 1214(A) [Sup Ct Kings County 2023] citing *Lemieux v Horn*, 39 NY3d 1108; *Franklin v Gareyua*, 29 NY3d 925 [2017], *affg* 136 AD3d 464 [1st Dept 2016]; *Rivera v Fernandez & Ulloa Auto Group*, 25 NY 3d 1222 [2015], *affg* 123 AD 3d 509 [1st Dept 2014]; *Alvarez v NYLL Mgt. Ltd.*, 24 NY 3d 1191.) There are no material issues of fact regarding proximate causation.

For the foregoing reasons, Defendants are entitled to summary judgment as a matter of law and Plaintiff's Complaint must be dismissed (*Bishop v Estevez*, 78 Misc. 3d 1232(A) [Sup Ct Kings County 2023]).

Accordingly, it is hereby

ORDERED that Plaintiff's motion for an order pursuant to CPLR Section 3212 granting summary judgment on the issue of liability and pursuant to CPLR Section 3211(b) dismissing Defendants' Sixth Affirmative Defense alleging contributory negligence (Motion Sequence No. 002) is **DENIED**; and it is further

ORDERED that Defendants' motion for summary judgment dismissing the Plaintiff's Complaint and all claims asserted against Defendants on the grounds that Plaintiff did not sustain a "serious injury" as defined and required under New York Insurance Law is **GRANTED**; and it is further

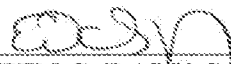
ORDERED that Index Number 617525/2019 is **DISMISSED**; and it is further

ORDERED that any relief not specifically addressed herein is **DENIED**.

This constitutes the Decision and Order of the Court.

Dated: March 25, 2024
Mineola, New York

ENTER:


HON. EILEEN C. DALY-SAPRAICONE, J. S. C.

ENTERED

Mar 26 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE