

Carrasco v Soto
2024 NY Slip Op 35323(U)
March 5, 2024
Supreme Court, Queens County
Docket Number: Index No. 724519/2021
Judge: Ulysses B. Leverett
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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JOHAN CARRASCO, BELEN J. CUEVA
GARBAO & MARLENE LOOR-ORDONEZ,

Plaintiff,

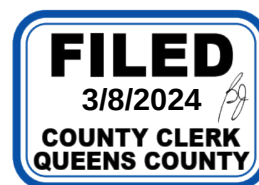
-against-

ESTHER SOTO,

Defendant.
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Present: **HONORABLE ULYSSES B. LEVERETT**

Notice of Motion-Statement of Material Facts-Affirmation-Exhibits
Affirmation in Opposition
Affirmation in Reply



Index No.: 724519/2021
Motion Seq. No.:1

DECISION and ORDER

Papers Numbered
EF 11-19
EF 22
EF 23

Upon the foregoing papers, it is ordered that defendant Esther Soto's motion for an order pursuant to CPLR §3212 granting defendants summary judgment and dismissing plaintiff's complaint pursuant to Insurance Law §5104(a) in that plaintiff did not sustain a serious injury as defined under Insurance Law §5102(d) is denied.

This action was brought to recover damages for serious personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident on November 30, 2018 on the eastbound Grand Central parkway, at or near its intersection with Northern Boulevard, in the County of Queens, City and State of New York.

Plaintiff alleges that a vehicle operated by Defendant came into contact with a vehicle in which he was a passenger. Plaintiff states that as a result of the accident, he sustained injuries to his lumbar and cervical spine and left knee.

Insurance Law §5102(d) defines a "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 90 days during the 180 days immediately following the occurrence of the injury or impairment."

"[T]o prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury... An expert's qualitative assessment of a plaintiff's condition may also suffice, provided that

the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" See *Toure v Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 350 (2002).

In support of the motion, defendant Esther Soto asserts that plaintiff did not sustain a serious injury as defined in Insurance Law §5102(d). Defendants submitted a report from Eial Faierman, M.D. dated November 10, 2022 based upon his review of the plaintiff's medical records.

The report states that Dr. Faierman reviewed the operative report of October 12, 2021, operative photographs of October 12, 2021 and the Bill of Particulars. After reviewing the records, Dr. Faierman came to the conclusion that there was no traumatic pathology on the operative report that could be related to the November 30, 2018 motor vehicle accident. The report further stated that the doctor could not see traumatic pathology on the operative photographs related to the accident of 11/30/18. The operative photographs revealed medial patellar facet grade three degenerative chondromalacia with chronic fibrillations. The meniscus photographs revealed minimal fraying of the edge of the meniscus but no traumatic meniscus tears in his opinion. Dr. Faierman stated there were no traumatic meniscus tears, traumatic ligamentous tears, osteochondral defects, intra articular patellar or quadriceps tendon strains, fractures, subluxations or dislocations and that the operative photographs do not allow visualization of any extra articular tendon pathology.

In further support, defendant submitted a report from Melissa Sapan Cohn, M.D. dated October 25, 2022 based upon her review of the plaintiff's radiological records and MRI reports. As to the lumbosacral spine MRI conducted on November 25, 2019, she opined that normal lumbar lordosis and disc spaces were maintained, there was no evidence for disc bulge or herniation at any level. She ultimately found that there was no evidence for pathology or acute traumatic related injury on the submitted examination.

Her opinion was that there was normal cervical lordosis present which would exclude the presence of muscular spasm. In addition, she stated there was mild disc desiccation at C4-5 and C5-6 which indicates that the disc has dried out and lost its normal water content. In her opinion, there were mild degenerative changes. She believed there was no evidence for disc herniation or acute traumatic related injury on the submitted examination.

The review of the August 21, 2020 left knee MRI led Dr. Sapan to conclude that there was patellar tendinosis represented degeneration of the tendon due to chronic wear and tear. There was superimposed interstitial tearing she stated represented further progression of the degenerative process which has progressed to interstitial tearing due to chronic wear and tear and does not represent an acute traumatic related injury. She stated the examination was performed over 1 year and a half following the date of accident which made any causal relationship impossible to determine. Degenerative changes of the patellofemoral joint space were frequently associated with patellar tendon degeneration as the patellar tendon is intimately associated with movement of the patella which is adversely affected in degenerative joint disease. In her opinion, there were degenerative changes of the patellofemoral joint space, tendinosis and interstitial tearing of the proximal patellar tendon which is likely degenerative in nature. She further found there was nothing to indicate an acute traumatic related injury occurring on 11/30/2018.

Plaintiff in opposition to the motion states that defendants have not demonstrated that plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d) and that the conflicting medical evidence submitted by the parties precludes the granting of summary judgement

in favor of defendant on the issue of whether the plaintiff sustained a serious injury as defined in Insurance Law §5102(d)

Plaintiff submitted an independent medical examination report from board certified orthopedic surgeon, Dr. Teofilo A. Dauhajre, Jr. M.D. dated April 7, 2023. Dr. Dauhajre reviewed the plaintiff's records from December 10, 2019 through July 22, 2021 and noted the plaintiff denied any further workup, treatment or medical consults.

The report states the neck examination revealed full right and 95% of left lateral rotation, full flexion and extension, no interspinous or spinous tenderness, negative compression and distraction tests, no step-offs, no muscle spasms, C5 to T1 motor and sensory were grossly within normal limits, deep tendon reflexes were 1+ and symmetrical in the upper extremities, no thenar or hypothenar muscle wasting, negative Tinel sign, negative Phalen sign, negative Spurling's, and negative Hoffman test.

Physical examination of the lower back revealed the patient was able to walk on his heels and toes, able to reach his toes with his fingers, forward flexion 90°, 35° of right and 30° of left lateral rotation, no scoliosis, no skin tags, no cellulitis, no step-offs, no muscle spasms, no interspinous, spinous, or sciatic notch tenderness, negative Trendelenburg test, no evidence of a list, L4 through S1 motor and sensory were grossly within normal limits, deep tendon reflexes were 1+ and symmetrical in the lower extremities, no evidence of clonus, Babinskis were down, and straight leg raising was negative.

The physical examination of the left knee revealed full range of motion, no effusions, collateral ligaments were stable at 0° and 30°, negative drawer, negative Lachman's, negative pivot shift sign, no medial or lateral joint line tenderness, there was mild tenderness of the proximal mid patellar tendon, no gaps of the patellar tendon, full extension of the left knee against resistance, good patellar tracking, mild patellofemoral grind test, no evidence of a plica, and a negative apprehension sign. There was a 2.5 cm longitudinal scar anteriorly, extending from the inferior pole of the patella to the proximal patellar tendon. There was tenderness of the anterior midline of the patellar tendon and healed arthroscopic scars.

Based upon the review of the medical records and the medical examination, the doctor opined that with a reasonable degree of medical probability that the plaintiff had sustained residual permanent to the neck, lower back and left knee causally related to the motor vehicle accident of November 30, 2018.

Defendant argues in their reply affirmation that plaintiff has failed to submit admissible medical evidence to support their claims as plaintiff they did not submit sworn or affirmed reports. As the defendant's submitted evidence does not include a medical examination by a provider, just a review of the records the Court will accept the records submitted by plaintiff. Courts have suggested that the absence of sworn expert evidence is a defect that may be excused in a proper case. *See Pagano v. Kingsbury*, 182 A.D.2d 268 (2d Dep't 1992), *Parmisani v. Grasso*, 218 A.D.2d 870 (3d Dep't 1995) and *Mitchell v. New York City housing Authority*, 204 A.D.2d 91 (1st Dep't 1994).

It is well established that the proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. *See Zuckerman v. City of New York*, 49 NY 2d 557 (1980). Here, the Defendant movant's affirmed medical reports based upon review of Plaintiff's

unsworn medical records and no independent medical examination report does not satisfy Defendant's burden on summary judgement and directly contradicts Plaintiff's excused unsworn independent medical examination report. See *Itkin v. Devlin*, 286 A.D.2d 477 (2d Dep't 2001). Where parties offer conflicting medical evidence on the existence of a serious injury, the existence of such injury is a matter for a jury's determination. See *Cracchiolo v Omerza*, 87 AD 3d 674 (2011).

Consequently, defendant Esther Soto's motion for an order pursuant to CPLR § 3212 granting defendant summary judgment and dismissing the complaint of plaintiff Johan Carrasco on the grounds that there are no triable issues of fact, in that plaintiff cannot meet the serious threshold requirement mandated by Insurance Law §5102 (d) is denied.

Dated: March 5, 2024


Hon. Ulysses B. Leverett, J.S.C.

HON. ULYSSES B. LEVERETT

