

Pappas v Judy
2024 NY Slip Op 35380(U)
March 19, 2024
Supreme Court, Dutchess County
Docket Number: Index No. 2022-50761
Judge: Maria G. Rosa
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

RUSS D. PAPPAS, JR. and KAYLA MARIE
FERROTTA,

Plaintiffs,

-against-

KENNETH W. JUDY,

Defendant.

DECISION AND ORDER

Index No.: 2022-50761

Motion Sequence: 3

The following papers were read and considered on Defendant's motion for summary judgment to dismiss the complaint:

<u>Document:</u>	<u>NYSCEF Doc. No(s):</u>
NOTICE OF MOTION.....	61
AFFIRMATION IN SUPPORT and EXHIBITS A-P	62, 64-79
STATEMENT OF MATERIAL FACTS	63
AFFIRMATION IN OPPOSITION and EXHIBITS A-K.....	89, 92-102
AFFIDAVITS IN OPPOSITION.....	103-104
REPLY AFFIRMATION.....	105

This is an action for personal injuries arising out of a motor vehicle accident. The accident occurred on August 22, 2020 on Route 22 in the Town of Pawling. Plaintiffs were passengers in a vehicle being driven by former defendant Kim M. Lavacca. At approximately 10:00 a.m. and in the vicinity of Page's Hardware Store, Lavacca's vehicle collided with a vehicle being driven by Defendant Kenneth W. Judy ("Defendant"), who had been traveling northbound and made a left turn into Lavacca's path of travel while attempting to enter the driveway of the hardware store.

On July 20, 2023, the Court issued a Decision and Order granting summary judgment on liability in favor of former defendant Lavacca, holding that Defendant's negligence was the sole proximate cause of the accident. On December 12, 2023, the Court issued a further Decision and Order granting summary judgment on liability in favor of Plaintiffs on the same basis. Presently

pending before the Court is Defendant's motion for summary judgment to dismiss the complaint, on the basis that Plaintiffs' injuries fail to meet the "serious injury" threshold of Insurance Law §§ 5102(d) and 5104.

On a motion for summary judgment "[t]he movant 'must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact'" (*Bazdaric v Almah Partners LLC*, ___ NY3d ___, 2024 NY Slip Op 00847 [Ct App Feb. 20, 2024], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant has met this threshold burden, to defeat the motion the opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 320; CPLR 3212[b]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding a motion for summary judgment, "the trial court must afford the party opposing the motion every inference which may be properly drawn from the facts presented, and the facts must be considered favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553 [1997]). The function of the Court on such a motion is issue finding, rather than issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Since it deprives litigants of their day in court, summary judgment is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 505 [2012]).

Under New York's "No-Fault Law," a civil action for damages based upon the use or operation of a motor vehicle cannot be maintained unless the plaintiff suffered a "serious injury" (Insurance Law § 5104). A "serious injury" is defined as

a . . . 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.

(Insurance Law § 5102[d]).

On a motion for summary judgment under these statutes, the defendant has the threshold burden of establishing that a serious injury did not occur (see *Serrano v. Canton*, 299 AD3d 703

[3d Dept 2002]). Generally, “a defendant can establish that the plaintiff’s injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Grossman v Wright*, 268 AD2d 79, 83–84 [2d Dept 2000]; *see also Gaddy v Eyler*, 79 NY2d 955, 956–957 [1992]). “With this established, the burden shifts to the plaintiff to come forward with . . . objective evidence of the injury” in order to defeat summary judgment (*Grossman*, 268 AD2d at 84).

Defendant’s Motion as against Plaintiff Pappas

Plaintiff Russ D. Pappas, Jr. (“Plaintiff Pappas”) alleges that he suffered the following injuries to his cervical spine: bulging discs at C5-C6; strain and sprain; muscle spasm; adjacent segment degeneration; radiculopathy; severe pain, swelling and tenderness; striking nerve pain and numbness; traumatic arthritis; need for future injections; and need for future surgery. He further alleges that he suffered the following injuries to his lumbar spine: sprain and strain; adjacent segment degeneration; radiculopathy; severe pain, swelling and tenderness; striking nerve pain and numbness; traumatic arthritis; need for future injections; and need for future surgery.

Defendant argues that these injuries are merely the type of soft tissue injuries that are non-actionable under the No-Fault Law, even if accompanied by persistent neurological symptoms (such as radiculopathy) and ongoing pain (*see, e.g., Pazmino v Universal Distribs., LLC*, 45 AD3d 554, 555 [2d Dept 2007] [“the mere existence of a herniated or bulging disc, and even radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from [a] disc injury and its duration”]). In support of his motion, Defendant submits Plaintiffs’ deposition transcripts, affirmations of two physicians who performed examinations of each Plaintiff, and certain medical records. Notably, Defendant’s examining orthopedic physician, who examined Plaintiff Pappas on March 2, 2023, measured reductions in the range of motion of Plaintiff Pappas’s cervical spine between 25% and 64%, and reductions in the range of motion of his lumbar spine between 60% to 75%. Such objective evidence of significantly reduced range of motion may substantiate a serious injury, regardless of whether the examining physician believes that the patient is “malingering” (*Perl v Meher*, 18 NY3d 208, 219 [2011]). Since Defendant’s own expert evidence raises the possibility Plaintiff Pappas suffered a “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” (*Id.* at 215), Defendant fails to meet his *prima facie* burden on summary judgment. The motion should therefore be denied as to Plaintiff Pappas regardless of the sufficiency of the opposition papers (*see Garbutt v United Parcel Serv.*, 131 AD3d 444, 445 [2d Dept 2015]).

Defendant’s Motion as against Plaintiff Ferrotta

Plaintiff Kayla Marie Ferrotta (“Plaintiff Ferrotta”) alleges that she suffered nearly identical types of injuries to her cervical spine as alleged by Plaintiff Pappas. The alleged injuries to her lumbar spine are also substantially similar, with the following added: bulging disc at T12/L1; bulging disc at L1-L2; bulging disc at L2-L3; and bulging disc at L4-L5 with foraminal narrowing.

Defendant's orthopedic expert examined Plaintiff Ferrotta on March 2, 2023, and measured reductions in the range of motion of Plaintiff Ferrotta's cervical spine of between 27% to 44%, and minimal or no reductions in the range of motion of her lumbar spine. Defendant's neurology expert examined Plaintiff Ferrotta on February 13, 2023, and measured no reductions in the range of motion of her cervical and lumbar spine. Both experts opined that her injuries are not permanent or significant, and that her prognosis is "excellent." During her deposition taken December 19, 2022, Plaintiff Ferrotta testified that she was confined to bed for a period of two weeks following the accident, but was not otherwise prevented from continuing her dental school studies. Although she testified that she did not work for three months following the accident, she did not testify that this was due to being injured in the accident. She did not testify to any continuing significant impairments in her usual activities. Based on this evidence, Defendant established, *prima facie*, that Plaintiff Ferrotta did not suffer a permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or system, or an injury in the 90/180 day category.

In opposition, Plaintiff Ferrotta submits an affidavit, an affirmation of a neurologist expert who examined her on December 20, 2023, and her medical records. Plaintiff Ferrotta states:

I still have pain which goes down from my neck into my arms and hands, with tingling and numbness, as well as pain which goes from my lower back down legs to my feet, with tingling and numbness. My pain worsens from activity, and from cold or wet weather.

...

I still experience daily headaches, sometimes lasting all day, and I still have neck pain which radiates into my shoulders and down my arms to my hands, as well as constant lower back pain which radiates down my legs to my feet, and numbness with 'pins and needles' in my feet and hands.

My injuries have affected my ability to perform my usual daily activities as I was able to before my accident. I can no longer do any kind of lifting. Pushing and pulling aggravates my injuries, as does prolonged sitting, standing and walking. I become very fatigued after any activity, and by at the end of the day [*sic*], and experience daily pain in the parts of my body injured in this accident.

The neurologist expert measured reductions in the range of motion in Plaintiff Ferrotta's cervical spine between 13% to 25%, and in her lumbar spine between 11% to 33%. The expert further found "Yeoman's and Kemp's tests are positive" and "positive straight leg raise at 65° bilaterally." Based upon these observations and Plaintiff Ferrotta's above-referenced complaints, the expert opines that her injuries are "of a permanent in nature and resultant in a permanent partial residual disabilities and limitations with significant restriction of motion," and that the injuries were caused by the accident. The foregoing is sufficient to raise a triable issue of fact as to whether Plaintiff Ferrotta sustained a serious injury in either the "permanent consequential limitation" or

“significant limitation” categories (*see Kholdarov v Hyman*, 165 AD3d 1087, 1088 [2d Dept 2018] [in reversing the trial court’s dismissal of the complaint, the appellate court found that plaintiff’s expert’s finding of a 20% reduction in range of motion of cervical spine was sufficient to create an issue of fact]; *see also Howard v King*, 307 AD2d 278 [2d Dept 2003]).

Based on the foregoing, it is hereby

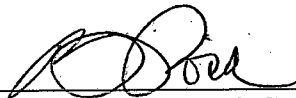
ORDERED that Defendant’s summary judgment motion is denied; and it is further

ORDERED that a pretrial conference shall be held in this matter and in the related matter, *Lavacca v. Judy*, Index No. 2020-54126, on April 23, 2024 at 9:15 a.m., at which time counsel should be prepared to discuss settlement.

The foregoing constitutes the decision and order of the Court.

Dated: March 19, 2024
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

Alan Ripka & Associates, LLP
400 Madison Avenue, Suite 12D
New York, NY 10017

Law Office of Thomas K. Moore
PO Box 2903
Hartford, CT 06104