

Laine v National Maintenance, Inc.
2024 NY Slip Op 35478(U)
April 2, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 619723/2021
Judge: George M. Nolan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 619723/2021CAL. No. 202300911MVSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY**PRESENT:**Hon. GEORGE M. NOLAN
Justice of the Supreme CourtMOTION DATE 9/1/23
ADJ. DATE 11/30/23
Mot. Seq. # 001 MD-----X
ARDELIS LAINE,

Plaintiff,

- against -

NATIONAL MAINTENANCE, INC.,
NATIONAL SIGN & LIGHTING, INC., and
MARVIN RAMIREZ GRIJALVA,Defendants.
-----XSURIS & ASSOCIATES, P.C.
Attorney for Plaintiff
395 North Service Road, Suite 302
Melville, New York 11747LAW OFFICES OF MARTYN, SMITH,
MURRAY & YONG
Attorney for Defendants
102 Motor Parkway, Suite 230
Hauppauge, New York 11788

Upon the following e-filed papers read on this motion for summary judgment: Notice of Motion and supporting papers by defendants, dated July 28, 2023; Answering Affidavits and supporting papers by plaintiff, dated November 7, 2023; it is

ORDERED that the motion by defendants for summary judgment dismissing the complaint against them on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5104 is denied.

This action was commenced by plaintiff Ardelis Laine to recover damages for injuries he allegedly sustained on December 24, 2020, when the motor vehicle he was operating at the intersection of Pinelawn Road and Half Hollow Road in the Town of Huntington, New York, collided with a vehicle owned by defendant National Maintenance Inc., d/b/a National Sign & Lighting, Inc., and operated by defendant Marvin Ramirez Grijalva. By his bill of particulars, plaintiff alleges he sustained various injuries and symptoms as a result of the collision, including multilevel cervical disc herniations, a lumbar disc herniation at level L4-L5, and right shoulder impingement.

Defendants now move for summary judgment in their favor, arguing that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d) and, therefore, his complaint must be dismissed. In support of their motion, defendants submit, among other things, a transcript of plaintiff's deposition testimony and three sworn medical reports of Marc Chernoff, M.D.

Laine v National Maintenance
Index No. 619723/2021
Page 2

A party moving for summary judgment “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 issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (see *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

It is for the Court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained “serious injury” and may maintain a common law tort action (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). Insurance Law § 5102 (d) defines “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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

A defendant moving for summary judgment on the ground that a plaintiff’s negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury” (see *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). A defendant can establish that a 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” (*Nuñez v Teel*, 162 AD3d 1058, 1059, 75 NYS3d 541 [2d Dept 2018], quoting *Grossman v Wright*, 268 AD2d 79, 83-84, 707 NYS2d 233 [2d Dept 2000]). Once a defendant meets this burden, plaintiff must present proof in admissible form which creates a material issue of fact (see *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990; see generally *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). “[S]ubjective pain cannot form the basis of a serious injury” (*Canner v Diamond*, 187 AD3d 1127, 1128, 131 NYS3d 574 [2d Dept 2020]) and “[s]prains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d)” (*Rabolt v Park*, 50 AD3d 995, 995, 858 NYS2d 197 [2d Dept 2008]).

A plaintiff claiming injury within the “permanent consequential limitation” or “significant limitation” of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration

Laine v National Maintenance
Index No. 619723/2021
Page 3

(see *Schilling v Labrador*, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; *McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose, and use of the body part (see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865; *McEachin v City of New York*, 137 AD3d 753, 756, 25 NYS3d 672 [2d Dept 2016]).

The 90/180 category of serious injury, as codified in Insurance Law § 5102 (d), requires that a plaintiff prove he or she experienced 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.” To qualify as a serious injury within the 90/180 category, there must be objective medical evidence of a medically-determined injury or impairment of a non-permanent nature, as well as evidence that plaintiff’s activities were significantly curtailed due to such injury (see *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865; *Ocasio v Henry*, 276 AD2d 611, 714 NYS2d 139 [2d Dept 2000]). In addition to demonstrating an inability to perform “substantially all” usual activities for at least 90 days of the 180 days following the accident, a plaintiff asserting a 90/180 claim must show through competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (see *Penaloza v Chavez*, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]).

In his first report, Dr. Chernoff states, in part, that multiple diagnostic studies ordered by Dr. Scott Roteman revealed “partial fusion at C4/5 and spondylosis at C5/6, as well as disc height reduction at L5/S1, and multilevel facet sclerosis, which [he] finds to be consistent with a preexistent degenerative condition of the cervical and lumbar spine.” Dr. Chernoff states, “MRIs of the right shoulder and x-rays of the right shoulder, also performed on January 11, 2021, demonstrate degenerative changes of the acromioclavicular joint, and rotator cuff tendinosis[, but] [n]o rotator cuff tears or labral tears were noted.” He also states “[l]umbar MRIs performed on March 19, 2021 note a disc bulge at L4/5 and right foraminal herniation, as well as a disc bulge at L5/S1[, but he] would request review of the lumbar MRI study images, if and when they become available.” Dr. Chernoff notes that “disc herniations above and below congenital fusions are common findings.”

Dr. Chernoff states that “Dr. Johnson, on September 9, 2021, nine months after the accident of record, notes a review of an MRI with C5/6, C6/7 herniated discs on the left side, recommending C5/6, C6/7 anterior cervical discectomy and fusion.” He states that Dr. Johnson’s operative report from September 28, 2021, “includes a diagnosis of disc osteophyte complexes, removing anterior osteophytes, and drilling down osteophytes, noting a partially calcified posterior longitudinal ligament at both levels.” Dr. Chernoff opines that such findings are “consistent with a significant degenerative condition at the C5/6 and C6/7 levels below a congenitally fused C4/5 segment.”

In his second report, Dr. Chernoff states that he performed an independent medical examination of plaintiff on January 13, 2023, at which time plaintiff complained of “neck pain, pain in the right side of the

Laine v National Maintenance
Index No. 619723/2021
Page 4

lower back, right hip pain, and right shoulder pain.” He avers that he used a goniometer to measure plaintiff’s ranges of motion, and compared the measured values to the “normal” values which were obtained from “Hoppenfeld’s Physical Examination of the Spine and Extremities, the New York State Medical Guidelines, and the AMA Guidelines.” Dr. Chernoff states that range-of-motion testing revealed normal joint function in plaintiff’s lumbar spine and right shoulder. However, examination of plaintiff’s cervical spine revealed “a 5 cm right anterior transverse incisional scar of the neck, which is well-healed”; flexion to 40 degrees, with complaints of pain, where normal is 60 degrees; extension to 15 degrees, with complaints of pain, where normal is 30 degrees; lateral bending to 25 degrees bilaterally, where normal is from 30 to 45 degrees; and lateral rotation to 55 degrees bilaterally, where normal is 80 degrees. He further states testing of plaintiff’s right hip revealed flexion to 90 degrees, with pain and active guarding, where the normal value is 120 degrees; abduction to 45 degrees, where the normal value is 45 degrees; internal rotation to 40 degrees, where the normal value is from 40 to 45 degrees; and external rotation to 50 degrees, where normal external rotation is from 40 to 50 degrees. Dr. Chernoff states that such findings “are consistent with a preexistent degenerative condition of the cervical and lumbar spine, including documentation of partial fusion at C4/5 and spondylosis at C5/6, and disc height reduction at L5/S1 with multilevel facet sclerosis.” Yet, with regard to plaintiff’s right hip, Dr. Chernoff states that “an MRI performed on January 16, 2021 noted no fractures or arthropathy.”

In his third report, Dr. Chernoff states that a review of x-ray and MRI films previously unavailable to him, including those obtained on January 11, 2021, March 19, 2021, and August 18, 2021, confirms “a congenital fusion at C4/5, with cervical spondylosis at C5/6, C6/7 with left paracentral disc osteophyte complexes.” He indicates that the lumbar MRI films fail to demonstrate any significant spinal pathology, and that his “overall diagnostic impression remains unchanged.” Specifically, Dr. Chernoff states that he “continue[s] to find that [plaintiff] has a preexistent degenerative condition of the cervical spine, with congenital fusion at C4/5 and cervical spondylosis at C5/6 and C6/7”; “that the anterior cervical discectomy and fusion C5 to C7 appears to have been performed for a significant degenerative condition of the cervical spine, which is unrelated to the accident of record of December 24, 2020”; that plaintiff “had delayed complaints of lower back pain, with a delayed lumbar sprain”; and found no “disc height reduction at L5/S1, nor any significant facet sclerosis or disc herniations to be present, which had been noted in prior treatment records.” In addition, Dr. Chernoff opines that plaintiff’s “right shoulder images demonstrate[] degenerative changes of the acromioclavicular joint with rotator cuff tendinosis and confirm[] no rotator cuff or labral tears.”

As to his 90/180 claim, plaintiff testified that he returned to work approximately one week after the accident and, thus, did not sustain such manner of serious injury (*see Strenk v Rodas*, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]). As to the “permanent consequential limitation” or “significant limitation” of use categories, defendants’ expert stated, within a reasonable degree of medical certainty, that plaintiff’s present conditions are either degenerative, or too mild to constitute a serious injury. Thus, the burden shifted to plaintiff to raise a triable issue (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990).

In opposition, plaintiff argues that defendants have failed to meet their burden and that triable issues remain. In support of his arguments, plaintiff submits, among other things, his own affidavit, a transcript of his own deposition testimony, an uncertified copy of an MV-104A police accident report, seven

Laine v National Maintenance
Index No. 619723/2021
Page 5

photographs, uncertified medical records, an unsworn/un-notarized report of a chiropractic examination by Robert Snitkoff, D.C., and the expert affirmations of Scott Roteman, M.D., and Richard Johnson, M.D.

In his own affidavit, plaintiff states, in relevant part, that he “had never injured [his] neck, back, right shoulder, right hip, or any other part of [his] body that was injured as a result of this accident, and [he has] not re-injured [his] neck, back, right shoulder, right hip, or any other part of [his] body that was injured as a result of this accident.”

In his affirmation, submitted at plaintiff’s request, Dr. Richard Johnson, a neurosurgeon, states that he first evaluated plaintiff on August 16, 2021, when plaintiff presented to him complaining of neck, back, right hip, and right shoulder pain. His initial impression was that plaintiff sustained “cervical disc herniation at C5-6 and C6-7, also [a] bulging disc at C3-4, all as a direct result of the motor vehicle accident on December 24, 2020.” Dr. Johnson avers that he next evaluated plaintiff on September 9, 2021, and that a review of MRI films of plaintiff’s spine, dated August 18, 2021, revealed a “C3-C4 disc bulge effacing the ventral thecal sac; C5-C6 disc herniation and bulge; C6-C7 disc herniation and disc bulge; [and] C7-T1 disc herniation.” He states that he recommended a “C5-6 and C6-7 anterior cervical discectomy and fusion,” which was performed on September 28, 2021.

Dr. Johnson avers that he did not examine plaintiff again until August 28, 2023, at which time he “conducted range of motion testing of [plaintiff’s] cervical spine using objective measuring through a handheld goniometer,” which revealed 10 degrees of flexion (normal 60 degrees), 15 degrees of left and right lateral rotation (normal 80 degrees), and 0 degrees of extension (normal 60 degrees). However, Dr. Johnson does not state to which standard he relied on in determining the “normal” ranges of human motion.

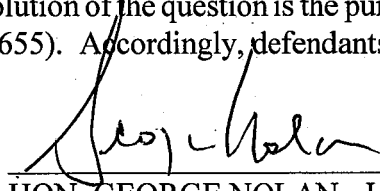
In his affirmation, Dr. Scott Roteman, a physician, states that he examined plaintiff and “administered trigger point injections to his cervical spine” on January 8, 2021. He indicates that plaintiff underwent physical therapy at his office from January 8, 2021 through December 2, 2021, and that he re-evaluated plaintiff on November 1, 2023. He states that range-of-motion testing revealed significant restrictions in plaintiff’s cervical and lumbar spine, as well as in his right shoulder and right hip. He avers that plaintiff’s “injuries are not pre-existing or degenerative in nature” because he “was 33 years old at the time of the accident,” he “reported a non-contributory medical history,” “[h]is pain was first noticed after the accident,” and “[h]is symptoms and objective findings are consistent with the nature of the onset of injury.”

As each of the parties’ expert physicians records significant restrictions in plaintiff’s relevant ranges of motion, the question remaining before the Court is whether plaintiff’s injuries were the pre-existing result of degenerative changes, or were caused by the subject motor vehicle collision. Here, while defendants’ counsel demonstrated, prima facie, through their expert, that a degenerative condition was present in plaintiff’s spine, plaintiff’s counsel demonstrated, prima facie, that plaintiff’s symptoms appeared only after the subject collision, tending to prove that plaintiff’s injuries were caused by the collision. “[C]onflicting medical opinions expressed in the parties’ submissions present a triable issue of fact that cannot be resolved

Laine v National Maintenance
Index No. 619723/2021
Page 6

on a summary judgment motion” (*Scully v Stephens*, 214 AD3d 834, 835, 186 NYS3d 60 [2d Dept 2023]). Further, defendants submitted no medical records documenting any pre-accident complaints of back, neck, shoulder, or hip pain by plaintiff. Thus, the Court cannot say, as a matter of law, that each of plaintiff’s conditions were pre-existing and, therefore, resolution of the question is the purview of the factfinder at trial (see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655). Accordingly, defendants’ motion is denied.

Dated: April 2, 2024


HON. GEORGE NOLAN, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION