

Campbell v Tustian
2024 NY Slip Op 35503(U)
November 13, 2024
Supreme Court, Westchester County
Docket Number: Index No. 61924/2022
Judge: Janet C. Malone
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
MICHAEL CAMPBELL and LORRAINE CAMPBELL,

Plaintiffs,

-against-

ANDREW D. TUSTIAN,

Defendant.

-----X
MALONE, J.

DECISION AND ORDER

Index No.: 61924/2022

Mot. Seq. No. 1

This personal injury action arises from a two-car motor vehicle accident that occurred on March 24, 2022 at approximately 8:30 a.m. at or near the intersection of Route 100 and Campfire Road in the Town of New Castle, County of Westchester, State of New York; when the vehicle operated by Defendant allegedly came into contact with the vehicle operated by Plaintiff Michael Campbell (“Plaintiff”)¹. Plaintiff claims that as the result of the accident, he sustained permanent serious and severe injuries. See Complaint at NYSCEF Doc. No. 25.

Now, Defendant moves by Notice of Motion seeking an order granting him summary judgment dismissing the complaint on the ground that Plaintiff did not sustain a serious injury under New York Insurance Law § 5102(d) as a consequence of the accident; and such other and further relief as this Court may seem just, proper, and equitable (NYSCEF Doc. No. 23).

Defendant’s motion is supported *inter alia* by the Affirmation of George P. Epstein, II in Support and in Reply, Examination Before Trial of Plaintiff, Independent Orthopedic Surgery Report Affirmed by Richard D. Semble, M.D., and Independent Neurologic Report Affirmed by Vikas Agrawal, M.D. (see NYSCEF Doc. Nos. 23-27, 30-32, 40).

Plaintiffs’ oppose Defendant’s motion arguing that as a result of the accident, he has suffered “a permanent loss of use of a body organ, member, function or system and/or permanent

¹ Plaintiff’s wife Lorraine Campbell has a derivative claim.

consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system.” Affirmation of Michael Chinitz, Esq. in Opposition [NYSCEF Doc. No. 33] at ¶14. In addition to the Affirmation of Michael Chintz, Esq., Plaintiff relies on uncertified records from Northern Westchester Hospital, Specialty Orthopaedics, Comprehensive MRI of White Plains; the uncertified and unaffirmed Spine Options report signed by Lyle Posecion, M.D., and the unsigned Affirmation of Board-Certified Orthopaedic Surgeon Yasmin Dhar, M.D. (see NYSCEF Doc. No. 34-38).

Upon review and consideration of the NYSCEF file and the foregoing papers, Defendant’s motion is granted as follows:

Relevant Background

Plaintiff testified to the following at his Examination Before Trial (NYSCEF Doc. No. 30) held on February 7, 2023:

In 2010, Plaintiff injured his lower back in a work-related accident when he slipped and fell while getting out of a cement truck (*Id.* at 67:5-18). Then in or about 2012, Plaintiff retired on disability from the concrete business as a “batch man” for a union loading concrete trucks due to a ruptured cyst in his abdomen that required surgeries in 2011, 2012 and revision surgery in 2019. Despite his health issues and chronic pain, for which Plaintiff has been prescribed methadone and gabapentin (*Id.* at 57:19-58:16), since 2018 Plaintiff has been the caretaker for his wife who retired in 2013 due to her own medical reasons (*Id.* at 8:12-12:10; 59:2-25).

As was his usual routine, on the day of the accident, March 24, 2022, at approximately 8:00 a.m., then 64-year-old Plaintiff (*Id.* at 12:14-21) left his home in Briarcliff Manor and drove to the Millwood Market Exxon/Mobil (the “Market”) gas station where he purchased a cup of coffee for himself and one for his wife (*Id.* at 19:14- 20; 20:14-18). It was clear and cool outside, there was no precipitation falling, and the roads were dry (*Id.* at 14:8-18); and Plaintiff was wearing his seat belt (39:2-4) as he stopped at the stop sign before turning out of the Market onto the righthand lane on Route 100 (*Id.* at 28:3-14; 45:6-9). As Plaintiff proceeded to the green traffic light at a low rate of speed, Defendant turned his car from the left lane into the right lane where Plaintiff was travelling striking Plaintiff’s vehicle and causing Plaintiff to become stuck to the quarter panel driver’s door of Plaintiff’s vehicle (*Id.* at 29:19-25; 30:2-18; 32:15-22; 33:19-

34:7). The impact Defendant's vehicle made with Plaintiff's vehicle caused Plaintiff's left shoulder and left hip to make contact with the interior of the driver's door of his vehicle (*Id.* at 35:12-19). Plaintiff's airbags did not deploy; however, Plaintiff could not open the driver's door (*Id.* at 37:16- 39:4).

Plaintiff was shaken, but showed no outward signs of injuries, such as bleeding or loss of consciousness (Independent Neurologic Report Affirmed by Vikas Agrawal, M.D., NYSCEF Doc. No. 32) and did not ask for medical attention at the scene or that his car be towed after the police arrived (NYSCEF Doc. No. 30 at 42:25-43:8). Instead, Plaintiff drove his vehicle to a nearby autobody shop where he was excavated from his vehicle by an autobody worker using a crowbar. The cost to repair Plaintiff's vehicle was approximately \$7400 (*Id.* at 50:13-16, 52:3-15).

That evening, Plaintiff was experiencing pain in his left shoulder and hip, and his neck was tightening up so, he drove himself to Northern Westchester Hospital Emergency Room in the same car that was involved in the accident (*Id.* at 53:15-54:13; 54:16-23). Plaintiff was at the hospital for approximately two hours, had an x-ray and possibly a CAT scan and was sent home (*Id.* at 65:10-66:10).

Thereafter, Plaintiff received physical therapy from August 10, 2022-October 7, 2022, but did not receive any therapy in 2023 (*Id.* at 81:7-14; 82:16-18; 83:5-13). Plaintiff last saw a doctor for the accident in December of 2022 (*Id.* at 60:5-10); he had no future appointments for treatment with any of the accident-related doctors (*Id.* at 83:11-24; 84:22-88:3); and he had no surgeries scheduled although it was recommended that he have hip replacement and that due to a degenerative condition his shoulder should be "clean[ed] up" and his torn labrum repaired. Plaintiff admits that the accident aggravated the pre-accident conditions of his hip and shoulder (*Id.* at 90:2-94:11).

On June 24, 2022, Plaintiff commenced this action; issue was joined on September 20, 2022 (*see* Answer [NYSCEF Doc. No. 25] dated September 2, 2022); and Plaintiff served his Verified Bill of Particulars dated October 25, 2022 (NYSCEF Doc. No. 26) wherein Plaintiff stated:

Plaintiff claimed, in substance, that he sustained a serious injury as defined by Article 51 of the New York State Insurance Law , to wit, a significant limitation of use of a body function or system and a permanent consequential limitation of use

of a body organ or member resulting from a majority of injuries that were either aggravated, exacerbated and/or precipitated by the accident.

See NYSCEF Doc. Nos. 26 and 8 at ¶¶ 13.

Plaintiff's Examination before trial was taken by videoconference on February 7, 2023, (NYSCEF Doc. No. 30); and the Note of Issue and Certificate of Readiness (NSCEF Doc. No. 27) were filed on August 31, 2023.

Summary Judgment

Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact, but "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231, 413 N.Y.S.2d 141 (1978).

The function of the Court on a summary judgment motion "is not to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" *Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 716, 719 (2d Dept 2020); *Charlery v Allied Tr. Corp.*, 163 AD3d 914, 915, (2d Dept. 2018); see *Chimbo v Bolivar*, 142 AD3d 944, 945 (2d Dept. 2016).) The court should construe the facts in a way most favorable to the non-moving party (*Yerry v. Whole Food Market*, 208 A.D.3d 733, 734 [2d Dept. 2022]), and draw all reasonable inferences in favor of that party. *Abdenbi v. Walgreen*, 197 A.D.3d 1140 (2d Dept. 2022).

On this motion, Defendant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact." *Winegrad v. New York University Medical Center*, 64 N.Y.S.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.S.2d 557, 562 (1980); see also CPLR R. 3212. However, when the submissions of the moving party are insufficient to demonstrate entitlement to judgment as a matter of law, the motion for summary judgment should be denied, without regard to the sufficiency of the opposing papers. *Rentz v. Modell*, 262 A.D.2d 545 (2d Dept. 1999) citing *Winegard v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); see also *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 (2012).

In an action arising out of the negligent operation of a motor vehicle, the complaint must state that the plaintiff sustained a serious injury, which is defined by Insurance Law §5102(d) as “a personal injury which results ...in a fracture; ...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.” *See also* CPLR R. 3106 (g).

When presented with the question of serious physical injury on summary judgment, “[i]t is incumbent upon the court to decide in the first instance whether plaintiff has a cause of action to assert within the meaning of the statute.” “If it can be said, as a matter of law, that plaintiff suffered no serious injury . . . then plaintiff has no claim to assert and there is nothing for the jury to decide.” *Licari v. Elliott*, 57 N.Y.2d 230, 237-238 (1982) (internal citations omitted).

Therefore, as the movant seeking summary judgment here, Defendant must establish a prima facie case that Plaintiff’s injuries are not serious thereby shifting the burden to Plaintiff to proffer sufficient evidence demonstrating that he sustained a serious injury within the meaning of No-Fault Insurance Law. *See, Gersbeck v. Cheema*, 176 AD3d 684 685-686 (2d Dept. 2019); *Gaddy v. Eyler*, 79 N.Y. 2d 955, 956-7 (1992).

“In order to 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.” *Brand v. Evangelista*, 103 AD3d 539, 539-540 (1st Dept. 2013); *Toure v. Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 350 (2002). “Even when there is objective medical proof,” “additional contributory factors that can interrupt chain of causation [include] a preexisting condition” *Pommells v. Perez*, 4 NY3d 566, 572 (2005). “[T]he defendant may meet his burden upon the submission of expert affidavits indicating that plaintiff’s injury was caused by a pre-existing condition and not the accident” *Spencer v Golden Eagle, Inc.*, 82 A.D.3d 589, 590 (1st Dept. 2011).

“Conflicting medical reports of the parties’ respective experts raise a triable issue of fact as to whether the plaintiff sustained a serious injury within the meaning of Insurance Law §5102(d)” *Garcia v. Long Island MTA*, 2 AD3d 675, 675 (2d Dept. 2003).

Here, Defendant contends that Plaintiff was already receiving disability retirement at the time of the incident; his prescriptions for methadone and gabapentin had not changed after the accident; and that the independent neurologic and orthopedic examinations of Plaintiff reveal that

Plaintiff's claims relate to prior injuries and not to the accident that is the subject of this litigation (NYSCEF Doc. No. 24, at ¶¶ 33-36).

Vikas Agrawal, MD conducted an independent neurologic examination of Plaintiff (NYSCEF Doc. No. 32) and reviewed certain records prior to and after the March 24, 2022 accident (pgs. 3-5), in making the following findings in his report dated March 22, 2023:

Plaintiff had a history of low back pain from a prior workers compensation injury "25 years ago" (at pgs. 3 and 9), arthritis and low back and neck pain related to age related arthritis. Plaintiff's "pain is causally related to this accident" (pg.8), but that his diagnosis of "cervical spine pain (sprain/strain) and lumbar spine pain (sprain/strain)" were resolved and were "not causally related to the accident on 03/24/2022".

Plaintiff has no disability or permanency, does not need any testing or treatment at this time, and he has returned to his previous level of independent functioning in his daily life, including basic and advanced activities of living and driving. Plaintiff "has an excellent prognosis" (pg.8).

Plaintiff's neurological examination is normal. A hand-held goniometer used to measure the range of motion of the cervical spine showed flexion at a normal 50 degrees, extension at a normal 60 degrees, right and left lateral flexion at a normal 45 degrees; and right and left lateral rotation at a normal 80 degrees (pg.6). The "Laguere's Test" and the "Clonus Test" of the thoracic spine had negative results as did the "foraminal compression", "spurling test" and "soto hall test" of the cervical spine (pg. 6). There was no tenderness over the thoracic spine and thoracic paraspinal muscles. There was no spasm of the thoracic paraspinal muscles. The range of motion of the thoracic spine using the goniometer showed a normal flexion at a normal 45 degrees, extension at a normal 0 degrees, right and left lateral bending at a normal 45 degrees, and right and left lateral rotation at a normal 30 degrees. Further, the supine straight leg raising test was at a normal 90 degrees on both sides; the sitting straight leg raising test was at a normal 90 degrees on both sides. The "Waddell's Test" was also negative. The range of motion of the lumbar spine using the goniometer showed flexion at a normal 60 degrees, extension at a normal 25 degrees, and right and left lateral flexion was a normal 25 degrees (pg.7).

Orthopedic surgeon Richard D. Semble, M.D. conducted an examination of Plaintiff (NYSCEF Doc. No. 31) and reviewed records in making the following findings in his report dated May 11, 2023:

“There is causality of the cervical and lumbar sprain, left shoulder sprain, right shoulder sprain to the date of the injury (pg.3) . Plaintiff complained of and was troubled by a pre-existing osteoarthritic left hip, which although he received treatment for, he ambulated with an antalgic gait using a cane. Plaintiff’s “ongoing complaints are related to a pre-existing osteoarthritis of the left hip for which he is undergoing surgery within the next month and pre-existing osteoarthritis of the left shoulder” (pg.2).

Using a hand-held goniometer, the following measurements were made:

“The cervical spine demonstrates mild paraspinal tenderness. Range of motion is full, with flexion 50/50°, extension 60/60°, rotation 90/90° right and left. There is pain at the extremes. There is full physiologic right shoulder, elbow and wrist motion with no numbness or tingling. The left shoulder demonstrates crepitans on range of motion with active forward flexion 90/180°, abduction 95/180°, 0/70° internal rotation, 20/90° external rotation. There is full bilateral elbow motion 0° to 150°. There is full left wrist motion with normal grip strength and pinch. The lumbar spine demonstrates mild paraspinal tenderness with active flexion 40/60°, extension 15/25°. Negative straight leg raising to 90° bilaterally with no sensory deficits. It is difficult to perform provocative maneuvers due to the significant restrictions in left hip motion. There is full, pain-free range of motion of the right hip. The left hip demonstrates 0° of internal rotation, 45° external rotation and hip flexion to 90°” (pg.2).

The “cervical spine, left shoulder with underlying osteoarthritis with a sprain of the left shoulder, right shoulder sprain, and lumbar sprain” were all “resolved”. “There are no objective residuals remaining on the basis of the motor vehicle accident. Plaintiff is capable of performing activities of daily living. Plaintiff is on powerful prescription medications, but these are not needed on the basis of the motor vehicle accident” (pgs. 2, 3)

Defendant has carried his burden of establishing that Plaintiff did not suffer serious injury incidental to the accident on March 24, 2022, that his injuries were pre-existing conditions (*Wettstein v Tucker*, 178 A.D.3d 1121, 1122 [2d Dept. 2019])[“Defendant submitted competent medical evidence establishing, prima facie, that Michelle suffered from pre-existing conditions in that region”]. And although one expert found pain causally related to this accident, “[f]indings

based on subjective complaints of pain are simply insufficient to raise a triable issue under section 5102 (d)” (*Lloyd v. Green*, 45 A.D.3d 373, 374 [1st Dept. 2007]); thereby, shifting the burden to Plaintiff to establish an issue of fact that would defeat summary judgment.

In opposition, Plaintiff has failed to raise a triable issue of fact. The unsigned affirmation of Plaintiff’s medical expert Dr. Dhar is insufficient to raise a triable issue of fact to rebut Defendant’s claim that Plaintiff has not suffered a serious injury incidental to the accident. *France v Packy*, 121 A.D.3d 836, 838 (2d Dept. 2014)(“Court properly rejected the redacted and unsigned affirmation of the plaintiff’s medical expert”).

While ordinarily an unsigned expert’s affirmation is not the type of evidence that can successfully oppose a motion for summary judgment (*Zuckerman v. New York*, 49 N.Y. 2d 557, 563 [1980]) , Plaintiff has failed to remedy the defect by submitting Dr. Dhar’s signed affirmation as indicated by Plaintiff’s counsel. (Affirmation of Michael Chintz, Esq. [NYSCEF Doc. No. 33] at ¶ 4). Therefore, just as the hearsay submission of Plaintiff’s counsel alone does not meet the admissible evidence requirement (*Zuckerman v. New York*, 49 N.Y. 2d at 560); similarly, neither does the submission of uncertified medical records (CPLR R. 4518 [c]); *see also* Reply Affirmation of George P. Epstein, II, at NYSCEF Doc. No. 40.

Thus, Plaintiff has failed to rebut Defendant’s prima facie showing that Plaintiff did not suffer a serious injury consisting of a sustained a significant limitation of use of a body function or system and a permanent consequential limitation of use of a body organ or member as defined by New York Insurance Law § 5102(d).

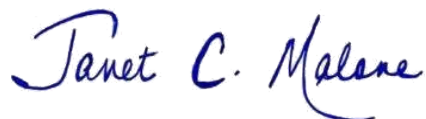
The Court having considered Plaintiff’s and Defendants’ remaining arguments, find them without merit or moot in light of the foregoing.

Accordingly, it is hereby

ORDERED, that Defendant’s motion for summary judgment is granted; and it is further ORDERED, that Plaintiff’s complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
November 13, 2024



HON. JANET C. MALONE, J.S.C.