Stevenson v Guimaraes
2025 NY Slip Op 35369(U)
January 29, 2025
Supreme Court, Westchester County
Docket Number: Index No. 56931/2023
Judge: William J. Giacomo
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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, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

- x

SCOTT STEVENSON,

Plaintiff,

– against –

DAVI GUIMARAES and DG PAINTING & DECORATING, INC.,

Defendants.

- x

Index No. 56931/2023

Motion Seq. 002

DECISION & ORDER

In an action to recover damages for personal injuries sustained in a motor vehicle accident, defendant Davi Guimaraes (hereinafter, defendant) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint for failure to meet the serious injury threshold pursuant to Insurance Law § 5102(d) and/or for establishing a lack of liability for the accident.

Papers Considered **NYSCEF Doc. No. 22; 40; 42-48; 66-82**

1. Notice of Motion/ Statement of Material Facts/ Affirmation of Shawn P. O'Shaughnessy, Esq. in Support/ Exhibits A-B/Memorandum of Law/Affirmation
2. Counterstatement of Material Facts/ Exhibits A-L
3. Affirmation of Shawn P. O'Shaughnessy, Esq. in Reply/Affirmation
4. Expert Witness Disclosure/Response to Demand

FACTUAL AND RELEVANT PROCEDURAL BACKGROUND

Plaintiff commenced this action on or about February 17, 2023 by filing a summons and complaint and was subsequently granted leave to serve a supplemental summons and amended complaint. The amended complaint alleged that, on December 10, 2021, the vehicle owned and operated by defendant Guimaraes came into contact with plaintiff's vehicle, causing plaintiff to sustain serious injuries. The amended complaint further alleged that, at the time of the accident, defendant Guimaraes operated the aforesaid vehicle within the course and scope of his

employment with defendant DG Painting & Decorating, Inc. Further, the accident was due to defendants' negligence. The bill of particulars indicated that plaintiff suffers from headaches, back pain and shoulder strain, among other things, as a result of the accident.

Defendant DG Painting & Decorating, Inc. failed to appear or answer the amended complaint. Pursuant to a decision dated December 23, 2024, this Court granted plaintiff's motion for default judgment against Defendant DG Painting & Decorating, Inc. on liability grounds.

Instant Motion

Defendant moves for summary judgment dismissing the complaint on the grounds that the plaintiff's injuries fail to meet the "serious injury" threshold requirement of New York State Insurance Law § 5102(d). According to defendant, plaintiff's allegations of a variety of soft tissue injuries do not sustain the serious injury threshold. Further, plaintiff's injuries are allegedly pre-existing and degenerative and are not connected to the accident. In support of his contentions, defendant submits the independent medical examination report of Scott V. Haig, M.D., an expert in the field of orthopedic surgery. Dr. Haig examined plaintiff and issued a report on December 15, 2023. Dr. Haig states that he performed range of motion testing with a goniometer and listed the range of motion measurements for the lumbar spine and cervical spine. Later in his report, he evidently lists normal measurements for cervical and lumbar ranges of motion, stating that "[n]ormal values adjusted for clinical factors are found in the New York State Workmen's Compensation 2018 guidelines." He also listed the ranges of motion for plaintiff's shoulder and opined that "[t]hese are normal ranges of motion for the shoulder; however, his right shoulder has greater internal rotation . . . ." Dr. Haig opined that plaintiff was in "excellent physical shape," with "normal gait," and concluded with the following:

> "IMPRESSION: He is a very strong man who has a normal left shoulder, some trapezius spasm which is a nonspecific symptom finding. His neurologic exam is intact in his upper extremities and lower extremities. He has calluses on his hands and muscular definition indicative of serious weightlifting ongoing. There is no indication of acute injury having occurred or being treated in this claimant's situation with normal cervical spine, thoracic spine, lumbar spine, and left shoulder being observed on examination. There is no indication that the left shoulder trapezius spasm is related to the subject accident in a causal way. No causal relationship is seen to be upheld by any objective findings on physical examination, or in supplied medical records.. . . It is therefore held with reasonable degree of medical certainty that it is seen that the current clinical state of the following body parts are as follows: Left shoulder resolved, cervical spine, resolved, thoracic spine, resolved, lumbar spine, resolved"

Defendant also submits the report from Jonathan Lerner, M.D., P.C., who conducted a radiological review of the plaintiff's pre and post-accident MRI Reports. According to Dr. Lerner, the MRI performed on the cervical spine after the accident occurred revealed "degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event." Plaintiff also testified that he had a prior accident in 2018 or 2019 that resulted in leg and neck injuries. He testified that he was treated with acupuncture and physical therapy and that he finished treatment prior to the instant accident. After reviewing the MRI report from 2019, Dr. Lerner opined that this MRI similarly revealed degenerative disc disease and osteoarthritis. Further, the MRI's performed in 2022 revealed "no interval change from [the] prior study" in 2019. As a result, plaintiff is purportedly unable to establish that the claimed injuries are due to the subject accident, rather than the result of his prior accident or a pre-existing condition.

Defendant also argues that plaintiff cannot satisfy the 90/180 claim as he testified that he did not have to hire anyone to assist him around the house post-accident and that he did not recall receiving a doctor's note advising him to remain out of work for a period of time. In sum, defendant alleges that plaintiff did not sustain a serious injury related to this accident.

In opposition, plaintiff submits affirmations and records from three of his treating doctors, his deposition testimony and his affirmation. The treating doctors supported plaintiff's claim for a serious injury. They found limited range of motion in plaintiff's cervical spine and lumbar spine measured by a goniometer and found these limitations were casually connected to the accident.

For example, among other treating providers, plaintiff submits the affirmation and chart notes from Robert Fitzgerald, plaintiff's treating chiropractor. The medical record indicates that plaintiff first sought treatment from Dr. Fitzgerald on December 23, 2021. Plaintiff had reported that due to his spinal pain and dysfunction he could hardly sleep and could not return to work. Dr. Fitzgerald performed cervical and thoraco-lumbar range of motion testing, indicating a decreased range of motion with localized pain. Dr. Fitzgerald diagnosed plaintiff with cervical, thoracic, lumbar and sacral dysfunction and left shoulder sprain, among other injuries. Dr. Fitzgerald opined that based on his treatment and examinations, the injuries plaintiff sustained to his cervical spine and thoraco-lumbar spine were directly related to and as a result of the subject motor vehicle accident that occurred on December 10, 2021. Further, as a result of that accident, plaintiff needed medical treatment, including chiropractic treatment, physical therapy and acupuncture.

Dr. Fitzgerald also affirmed that, while plaintiff was under his care up to and including August 3, 2022, plaintiff was "disabled and unable to work and was unable to perform many of his activities of daily living."

As another example, plaintiff submits an affirmation from Susan Distasio, D.O., who recently examined plaintiff on August 8, 2024. Upon examination, plaintiff had limited range of motion and pain in his spine. Among other things, Dr. Distasio recommended "cervical and lumbar epidural steroid injections with epidurograms since the patient had not improved with physical therapy and medications." She opined that plaintiff's injuries were causally connected to the subject accident. Further, any pre-existing degeneration, herniation or bulging discs, which were asymptomatic for more than one year prior to the existing accident, were activated and/or precipitated as a result of the instant accident.

Finally, plaintiff submits a report from the radiologist who read and interpreted plaintiff's MRI's. This report contradicted the review performed by defendant's expert.

Plaintiff also submits an affirmation in opposition to the motion and argues that his neck, back and right shoulder injuries satisfy the serious injury threshold requirement. According to plaintiff, as a result of the instant accident occurring on December 10, 2021, he sustained injuries to his neck, back and left shoulder with resultant pain, restriction limitation of motion, and headaches. Plaintiff sought medical treatment for his head, neck, back, and shoulder pain shortly after the accident. Plaintiff affirms that, although he had been in a prior motor vehicle accident in 2018 or 2019, he was treated for these injuries and did not have any pain, restrictions or limitations of motion in his neck or back for more than one year before the instant accident occurred. He had also been working without any limitations or restrictions in 2019.

With respect to the 90/180 claim, plaintiff affirms that he was unable to return to work for at least 6 months following the accident. He states the following, in pertinent part:

> "Prior to the accident I was employed working full time working in my brother's book store, Know Thyself Book Store in Mt. Vernon, NY, since 2019. My duties included receiving boxes of books that were delivered to the store, unpacking the books and placing them on the shelves in the store, taking inventory and helping customers. I could not return to work for about six and one half to seven months following the accident. My doctors at the therapy office advised me not to work because of my accident injuries, as well as advised me not to do any strenuous activity or any heavy lifting due to my accident injuries. When I returned to work at the bookstore in August 2022, I performed only light duty type work, did no heavy lifting and mainly worked the cash register which permitted me to sit when necessary."

Plaintiff also affirms that he is restricted in many of the activities that he was able to do prior to the accident, such as lifting things, standing for long periods of time without pain, walking distances, sleeping comfortably, among others. He affirms that he has been experiencing daily neck and back pain since the date of the accident.

Liability

Defendant also moves to dismiss plaintiff's complaint on the basis that he was allegedly neither negligent nor a proximate cause of the accident. Defendant avers that plaintiff undisputedly failed to yield the right of way. In support of his contentions, defendant notes his own testimony that he had been traveling on West Lincoln Avenue when plaintiff's vehicle exited an adjacent driveway and struck defendant's vehicle. Specifically, defendant testified that he been driving his van at approximately 25 miles per hour. He observed plaintiff's vehicle to the left "getting out of the driveway," and that part of plaintiff's vehicle had been on the roadway. However, he did not see the vehicle until the moment two vehicles collided. He could not recall whether plaintiff's vehicle was moving or was stopped, or whether it had the turn signal on.

In opposition, plaintiff argues that defendant failed to meet his burden that he was not negligent in the happening of the accident. Plaintiff testified when the accident occurred, his vehicle was in the driveway in a stopped position with the left turn signal on. He continued that he never got a chance to make the left turn out because the defendant "came to my lane and hit me." Plaintiff testified that defendant "came speeding and crashed right direct into the front of my car."

Plaintiff affirmed the following, in relevant part:

> "I was stopped, waiting in the driveway of 128 W. Lincoln Avenue, Mount Vernon, NY which was an auto mechanic shop. I was stopped in the driveway with the front of my vehicle facing W. Lincoln Avenue, with my left directional on waiting to make a left turn onto W. Lincoln Avenue. There was no stop sign or traffic light for traffic at the driveway where I was stopped. W. Lincoln Avenue is a two way street. I was looking left for oncoming traffic to clear when suddenly and without warning, my vehicle was struck on the front right side by a van that came into my lane from my right. My vehicle was completely stopped, in the driveway and my foot was on the brake when the impact occurred."

In sum, plaintiff argues that both he and defendant provided a different description for how the accident occurred. As a result, triable issues of fact remain, as there can be more than one proximate cause of an accident.

DISCUSSION

Rule 202.8-b of the Uniform Rules for the Trial Courts

At the outset, the Court notes that plaintiff's affirmation in opposition (NYSCEF Doc. No. 65) was not considered by this Court. This Court's Individual Part Rules provide that "[a]bsent advance express permission from the Court, which will be granted only upon a showing of good cause, affidavits, affirmations, briefs and memoranda of law shall be limited to 7,000 words each pursuant to Rule 202.8-b of the Uniform Rules for the Trial Courts and contain a certificate of compliance. . . . Papers submitted to the Court in violation of this rule may not be considered by the Court in deciding the motion." The Appellate Division, Second Department has consistently held that "page limits on submissions are appropriate, as is the rejection of papers that fail to comply with those limits." *Macias v City of Yonkers*, 65 AD3d 1298, 1299 (2d Dept 2009) (internal citations omitted). In opposition to the motion, plaintiff's counsel submitted an affirmation in opposition stating that "pursuant to Rule 202.8-b, the length of this filing is 17,104 words, using the proportionally spaced typeface, Times New Roman, 12 point size, double spaced and prepared using Microsoft Word." Thus, counsel's affirmation was not considered as it failed to comply with the Court's page-limits. The Court did, however, consider plaintiff's other submissions when determining this motion.

Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

Serious Injury

> "To recover damages for noneconomic loss related to personal injury allegedly sustained in a motor vehicle accident, the plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of Insurance Law § 5102 (d), but also that the injury was causally related to the accident."

Valentin v Pomilla, 59 AD3d 184, 186 (1st Dept 2009) (internal quotation marks and citation omitted).

On a motion for summary judgment in a personal injury action arising from a motor vehicle accident, the defendant is required to establish that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. *See Owens v ELRAC, LLC*, 213 AD3d 684, 685 (2d Dept 2023). In pertinent part, a "serious injury" has been defined as permanent loss of use of a body organ, a significant limitation of use of a body function, or an "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).

The Court finds that defendant failed to establish, prima facie, that the plaintiff's alleged injuries did not constitute a serious injury under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d). While defendant's medical expert opines that "there is no indication of acute injury," he fails to adequately explain and substantiate his opinion that the ranges of motion for plaintiff's back or neck were within normal ranges. The report is difficult to read and cites to the New York State Workmen's' Compensation 2018 guidelines. However, Dr. Haig does not attach these values, and when the Court reviewed the guidelines, there were no suggested normal ranges of motion for the neck and back. Moreover, this is not a workers' compensation case. *See e.g. Tolstocheev v Bajrovic*, 28 AD3d 473, 474 (2d Dept 2006) (Defendant's motion was denied, as the "defendant's examining neurologist and orthopedist both failed to set forth the objective tests used to determine that the plaintiff did not have any range of motion restrictions").

In addition, Dr. Haig affirms that he reviewed the medical records and that no causal relationship is supplied in the medical records. However, the medical records submitted indicate that plaintiff sought medical treatment directly as a result of the injuries sustained in the accident.

Dr. Haig does not address any of these records or support his own conclusion. *See e.g. Rich-Wing v Baboolal*, 18 AD3d 726, 726 (2d Dept 2005) ("Although the respondents' examining physicians concluded that the plaintiff had no neurologic or orthopedic disability or impairment, the stated findings in their reports did not support such a conclusion").

Nonetheless, even if defendant demonstrated entitlement to summary judgment, plaintiff raised an issue of fact in opposition as to whether he sustained a serious injury pursuant to Insurance Law § 5102(d) as a result of the accident. *See e.g. Yu Feng Jiang v Francois*, 177 AD3d 826 (2d Dept 2019). Plaintiff's treating doctors affirmed that plaintiff was still symptomatic from neck and back conditions that were causally connected to the accident and that he has ongoing pain and limitations to mobility. *See e.g. Pesce v Tillotson*, 7 AD3d 597, 598 (2d Dept 2004) (internal citation omitted) ("The orthopedist, after reviewing, inter alia, the MRI report and conducting a physical examination of the plaintiff that included objective range of motion testing, opined that the plaintiff sustained trauma-induced C5/6 central disc herniation, radiculopathy, and quantified limitations of her range of motion. This evidence was sufficient to raise a triable issue of fact").

Thus, the conflicting medical opinions of the parties' respective medical experts raise triable issues of fact as to whether plaintiff's injuries are causally related to the accident and, therefore, a serious injury within the meaning of Insurance Law § 5102 (d). *See Garcia v Long Is. MTA*, 2 AD3d 675 (2d Dept 2003); *see also Rapaport v Sears, Roebuck & Co.*, 28 AD3d 449, 450 (2d Dept 2006) ("The competing expert opinions presented an issue of credibility for the trier of fact to determine").

Further, as "plaintiff established that at least some of his injuries meet the 'no-fault' threshold, it is unnecessary to address whether his proof with respect to other injuries he allegedly sustained would have been sufficient to withstand defendants' motion for summary judgment." *Linton v Nawaz*, 14 NY3d 821, 822 (2010).

The Court finds that triable issues of fact also remain as to whether the plaintiff's injuries meet the threshold of serious injury within the 90/180 category. Plaintiff affirmed that prior to the accident he had been employed at a bookstore and used to unpack the boxes of books and place them on the shelves, among other duties. He was unable to return to work until August 2022. Plaintiff also affirmed that the pain and other issues from his injuries caused him to be unable to attend to his usual and customary activities for a period not less than 90 days during the

180 days immediately following the accident. For example, plaintiff states that he is limited in his activities, such as lifting heavy things, standing for long periods of time without pain and sleeping comfortably. Plaintiff's treating doctors also affirmed that plaintiff was disabled and unable to work as a result of the accident, specifically noting the residual disability at least six months after the accident. *See e.g. Connors v Center City, Inc.*, 291 AD2d 476, 477 (2d Dept 2002) ("Moreover, the injured plaintiff's affidavit, the affidavit of her treating [doctors], and other medical evidence in the record, raised a triable issue of fact as to whether the injured plaintiff sustained a medically-determined injury which prevented her from performing her usual activities 'to a great extent rather than some slight curtailment' for the statutory period").

Dr. Haig's expert report was insufficient, as he conducted his independent examination of the plaintiff approximately two years after the accident. Although he concluded that plaintiff's injuries had resolved by the time of the examination, "this proof was insufficient to establish that the injured plaintiff did not sustain a medically-determined injury or impairment of a nonpermanent nature which prevented [him] from performing substantially all of the material acts which constituted [his] usual and customary daily activities for a period of not less than 90 days during the 180-day period immediately following the accident." *Id.*

Accordingly, for the reasons set forth above, the branch of defendant's motion for summary judgment dismissing the complaint for failure to meet the serious injury threshold pursuant to Insurance Law § 5102(d), is denied.

Liability

"A defendant moving for summary judgment has the burden of establishing, prima facie, that he or she was not a proximate cause of the accident." *Gonzalez v Gonzales*, 212 AD3d 716, 716-717 (2d Dept 2023). There can be more than one proximate cause of an accident. *Hartsuff v Michaels*, 139 AD3d 1005, 1006 (2d Dept 2016). A driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident. *Rabenstein v Suffolk County Dept. of Pub. Works*, 131 AD3d 1145, 1146 (2d Dept 2015); *see also Jones v Haifeng Zuo*, 220 AD3d 933, 934 (2d Dept 2023) (internal quotation marks omitted) ("a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision . . . [and] to see what there is to be seen through the proper use of his or her senses"). Nonetheless, a driver with the right-of-way who has only seconds to react

to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision. *Cheese v Ferguson,* 208 AD3d at 1303.

Defendant moves to dismiss the complaint on the basis that he not liable for the accident since plaintiff allegedly failed to yield the right of way. Here, however, defendant failed to establish, prima facie, that his conduct was not a proximate cause of the accident. The defendant testified that, as he was driving down West Lincoln Avenue, plaintiff's car came out of the driveway and the two vehicles collided. Defendant could not recall if plaintiff's vehicle was stopped or whether it had the turn signal on, and did not recall seeing the vehicle prior to the impact. Plaintiff testified that he had been stopped and waiting to make a left turn with his signal on when he was suddenly struck on the front right side by defendant's van that came into his lane. "Thus, the [defendant's] own submissions raised triable issues of fact as to whether [defendant] failed to see what was there to be seen through the proper use of his senses, or failed to exercise due care to avoid the collision." *Gonzalez v Gonzales*, 212 AD3d at 717 (internal citations omitted).

Moreover, the testimonies provided conflicting versions as to the facts surrounding the accident. There is no definitive evidence to indicate the speed of either driver. It is well settled that "credibility issues are not appropriately resolved on a summary judgment motion." *Latif v Eugene Smilovic Hous. Dev. Fund Co., Inc.*, 147 AD3d 507, 508 (1st Dept 2017). Accordingly, the branch of defendant's motion seeking summary judgment in his favor on liability, is denied.

All other arguments raised on these motions and evidence submitted by the parties in connection thereto have been considered by this court notwithstanding the specific absence of reference thereto.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant Davi Guimaraes's motion, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint is denied.

The parties are directed to appear for a virtual settlement conference on March 10, 2025 at 10:00a.m. subject to confirmation by the virtual conference link emailed by this Court.

Dated: White Plains, New York
January 29, 2025

HON. WILLIAM J. GIACOMO, J.S.C.