

<b>Zane v Iafallo</b>
2020 NY Slip Op 34820(U)
May 27, 2020
Supreme Court, Erie County
Docket Number: Index No. 815300/2018
Judge: E. Jeannette Ogden
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At a Special Term of the Supreme Court, Part 35 thereof, held in the City of Buffalo, N.Y. and County of Erie on the 27 day of May 2020.

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

CLIFFORD ZANE

PLAINTIFF

v.

INDEX NO. 815300/2018

DEBORAH L. IAFALLO

DEFENDANT

**APPEARANCES:**

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**PLEADINGS REVIEWED:**

The following electronically filed documents were considered in connection with these motions:

**DOCUMENTS**

**NUMBERED**

Defendant's Notice of Motion, Affirmation of Devan M. Omahen Esq. with Exhibits and Memorandum of Law	12-20
Affirmation in opposition to Defendant's Motion for summary judgment and in support of Plaintiff's cross-motion of Jason C. Luna, Esq. with exhibits	21-30
Attorney Affirmation in Reply and also in	31

Response to Plaintiff's cross-motion

Plaintiff's Reply Affirmation

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The Plaintiff commenced this personal injury action to recover damages for alleged serious injuries sustained as a result of a motor vehicle collision that occurred on November 23, 2015. Following joinder of issue and completion of discovery, Defendant moves for an Order granting Summary Judgment dismissing Plaintiff's complaint alleging that Plaintiff has not sustained a serious injury within the meaning of Insurance Law §5102(d). Plaintiff opposes Defendant's motion and cross moves for an Order granting Plaintiff Summary Judgment on the issues of negligence. Upon consideration of the pleadings reviewed and due deliberation having been had thereon, the Court denies Defendant's motion for summary judgment upon the grounds that Plaintiff did not sustain a serious injury and grants Plaintiff's motion for summary judgment on negligence for reasons hereinafter set forth.

**Defendant's Motion for Summary Judgment pursuant to CPLR §5102(d)**

Plaintiff alleges, in the Verified Bill of Particulars, that the motor vehicle collision caused injury to his cervical, thoracic and lumbar spine, bilateral arms, shoulders and resulting headaches and scarring. Plaintiff further alleges that his injuries prevented him from performing his customary daily activities for a period of at least 90 days immediately following the 180 days after the collision, that he has 40 percent loss of range of motion of his cervical spine and that said injuries are permanent. Thus, Plaintiff claims to have sustained serious injury as defined in § 5102(d) of the NYS Insurance Law pursuant to the categories of significant disfigurement; permanent consequential limitation of use of a body organ or member (permanent consequential limitation), significant limitation of use of a body function or system (significant limitation), a medically determined injury of a non-permanent nature

which prevented Plaintiff from performing substantially all of the acts which constituted her usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment (90/180) and the significant disfigurement due to surgical scarring (significant disfigurement) categories set forth in the statute.

In support of its motion, Defendant submits Plaintiff's Verified Bill of Particulars, transcripts of the deposition testimony of Plaintiff and the sworn independent medical examination report of Dr. John Leddy's examination of Plaintiff, which includes medical records of the Plaintiff and concludes that "Plaintiff's injuries were pre-existing and Plaintiff only sustained sprains and strains in the November 2015 accident. Dr. Leddy also opines that Plaintiff's surgery in 2019 was due to a subsequent accident/injury after the 2015 motor vehicle collision because the medical examinations of Plaintiff after the 2015 accident indicate Plaintiff has extremely advanced and long-standing degenerative disc and bone disease at every cervical level from C2-3 through C6-7 with advanced disc-osteophyte complex at C6-7, without any evidence of traumatic edema, traumatic disc bulge, traumatic disc herniation or fracture at any cervical level." Dr. Leddy further opines that "there is no medical evidence of the need for current or future medical or surgical treatment of Plaintiff as a direct result of the November 23, 2015 motor vehicle collision, that Plaintiff did not sustained a permanent or consequential limitation of use of his cervical spine as a direct result of the November 23, 2015 collision and Plaintiff did not sustain a medically determined injury that limited most of his daily activities during the first 90 days out of 180 days after the November 23, 2015 collision.

Defendant pleads that Plaintiff's claim of significant disfigurement as a result of the surgical scarring must also be dismissed because the surgery was not required as a result of the

collision. In support thereof, Defendant relies on the portion of Dr. Leddy's report wherein he opines that the cervical discectomy and fusion was not casually related to the motor vehicle collision but rather to a pre-existing degenerative condition.

Defendant further pleads that, in addition to the opinion of Dr. Leddy as aforementioned, the Plaintiff's deposition testimony establishes that he was never unable to shower or get dressed on his own, so his usual and customary activities were never interrupted.

Based upon the sworn deposition testimony of the Plaintiff, submitted by Defendant in support of the motion, as well as and the report of Dr. Leddy, it is determined that Defendant has met her burden with respect to the claim of permanent consequential limitation, significant limitation, significant disfigurement and 90/180 serious injury categories, thereby shifting the burden to Plaintiff to submit evidence sufficient to raise a triable issue of fact regarding those categories.

In opposition to Defendant's motion, Plaintiff also relies on the Verified Bill of Particulars, the certification of medical clearance, chiropractic records and the affirmation of Dr. Loubert Suddaby, a neurosurgeon who treated Plaintiff for injuries sustained to his cervical spine in the motor vehicle collision and who disagrees with the opinion of Dr. Leddy.

Dr. Suddaby notes that the objective findings of the MRI's he reviewed demonstrate disc herniations at C3-C7 and objective testing indicates that Plaintiff experienced restriction of his cervical spine, 40 percent loss of normal flexion, extension and rotation of his cervical spine as well as weakness in the pper and lower extremities bilaterally. He opines that Plaintiff sustained a permanent consequential limitation of use of his cervical spine at C3 -C7 with resulting radiculopathy down his upper extremities bilaterally, inclusive of his arms, hands and fingers. and decreased loss of fine motor skills. When Plaintiff uses neck, arms, hands and

fingers to perform his usual, normal, ordinary functions such as getting dressed, washing dishes and activities that involve bending and lifting, it will cause inflammation of the nerve roots of the cervical spine. Plaintiff's inability to perform the tasks identified are natural and expected medical consequences of his injuries. This will be continuing and permanent. The fusion surgery that was required to correct the injuries sustained in the November 23, 2015 motor vehicle collision resulted in a significant loss of range of Plaintiff's cervical spine and permanent disfiguring scarring at the surgical site.

With regard to the 90/180 claim, the pain, numbness and tingles in Plaintiff's upper extremities explain the difficulty he experiences in performing everyday tasks and Plaintiff has sustained a qualitative use of his cervical spine and upper extremities that is permanent.

Dr. Suddaby's affirmation report and Plaintiff's deposition testimony create questions of fact as to whether Plaintiff's scar and resultant injuries are causally related to the motor vehicle collision and whether Plaintiff sustained a permanent consequential limitation, significant limitation and whether Plaintiff sustained a medically determined injury that limited most of his daily activities during the first 90 days out of 180 days after the motor vehicle collision.

Thus, there is a difference of opinion regarding the serious injury categories, the nature, cause and extent of plaintiff's injuries, creating triable issues of fact for resolution by a jury (*Cook v. Peterson*, 137 A.D.3d 1394 (4th Dep't 2016)).

#### **Plaintiff's motion for Summary Judgment on Negligence**

Plaintiff has cross moved for summary judgment on the issues of negligence. Plaintiff offers the deposition testimony of Defendant, along with the uncertified copy of the police report and pleads that Defendant's testimony establishes that she "failed to see what there was to be

seen" and was therefore negligent. The accident at issue was a rear end collision so Plaintiff has met the initial burden on the issue of negligence, thereby shifting the burden to Defendant to establish material issues of fact. Defendant replies to Plaintiff's cross motion and avers that Plaintiff suddenly and without warning slammed on the breaks thereby creating questions of fact regarding how this accident happened.

It is well established that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle. To rebut the presumption, the driver of the rear vehicle must submit a non-negligent explanation for the collision (*Bender v. Rodriguez, et al.*, 302 A.D.2d 882 (4th Dept. 2003)). In the instant case, Defendant states that she looked away momentarily and saw no reason why Plaintiff would slam on her breaks and suddenly stop. Generally, a claim that the driver of a rear-ended vehicle made a sudden stop is insufficient to constitute a non-negligent explanation for the accident (*Bajrami v Twinkly Cap Corp.*, 147 AD 3d 469 [1<sup>st</sup> Dept. 2017]). Looking away immediately before impact is not a sufficient non-negligent explanation for the collision. Accordingly, it is hereby

**ORDERED** that the motion of Defendant for summary judgment on the issue of causation and serious injury pursuant to the claimed categories of Insurance Law §5102 (d) is **DENIED**, and it is further

**ORDERED** that Plaintiff's motion for summary judgment on the issue of negligence is **GRANTED**.

  
HON. E. JEANNETTE OGDEN, JSC

Entered: May 27, 2020