Palombo v Uguna
2021 NY Slip Op 33190(U)
November 23, 2021
Supreme Court, Dutchess County
Docket Number: Index No. 2018-51319
Judge: Christi J. Acker
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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CARMINE PALOMBO,

Plaintiff,

DECISION AND ORDER
INDEX NO. 2018-51319

-against-

HERNAN UGUNA and
UGUNA ELECTRIC, INC.,

Defendants.

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ACKER, J.

Defendants, Hernan Uguna and Uguna Electric, Inc., move for an order, pursuant to CPLR 3212, granting them summary judgment and dismissing the complaint on the ground that Plaintiff fails to meet the serious injury threshold of Insurance Law §5102. Plaintiff opposes the motion.

The following documents were considered:

NYSCEF documents numbered 35-68, 71-80

Plaintiff commenced this personal injury action against Defendants alleging that he was injured as the result of a car accident that occurred on January 8, 2016. Plaintiff's vehicle was stopped at a red light when he was rear-ended by a vehicle operated by Defendant Hernan Uguna. According to the Bill of Particulars and the supplements, Plaintiff claims injuries to his lumbar spine, cervical spine and left shoulder. [1]

[1] These are also the injuries addressed by Plaintiff's doctors in their narrative reports.

In support of the summary judgment application, Defendants provide copies of the pleadings, including the Bill of Particulars and seven supplemental Bills of Particulars, Plaintiff's medical records from numerous providers, photographs and a No-Fault application signed by Plaintiff regarding an April 14, 2012 accident. Defendants further proffer the affirmed report of Bradley Wiener, M.D., dated December 17, 2019, an addendum to his report dated December 21, 2020 and his affidavit dated April 15, 2021.

Plaintiff opposes the motion with the affirmed narrative reports of Sathish Modugu. M.D. and Richard Dentico, M.D., as well as certain medical records and his deposition transcript.

Pursuant to CPLR §3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The movant "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Medical Ctr.*, 64 NY2d 851, 852 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]. In opposition, "the nonmoving party need only rebut the *prima facie* showing made by the moving party so as to demonstrate the existence of a triable issue of fact." *Poon v. Nisanov*, 162 AD3d 804, 806 [2d Dept. 2018], *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986].

Whether a claimed injury falls within the statutory definition of "serious injury" is a question of law that may be decided by the court on a motion for summary judgment. *See Licari v. Elliott*, 57 NY2d 230, 237 [1982]. A defendant seeking summary judgment bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury." *Toure v. Avis Rent A Car Sys, Inc.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955 [1992]. In order to

meet the burden, a defendant may rely upon the sworn or affirmed statements of their own examining physician, the plaintiff's sworn testimony and/or the plaintiff's unsworn physician's reports. *McGovern v. Walls*, 201 AD2d 628 [2d Dept. 1994]; *Grossman v. Wright*, 268 AD2d 79 [2d Dept. 2000]; *Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept. 1992].

Once a defendant has made a *prima facie* showing, the burden shifts to the plaintiff to submit evidence, in admissible form, sufficient to create a material issue of fact necessitating a trial. *Franchini v. Palmireri*, 1 NY3d 536 [2003]; *Grossman v. Wright*, *supra*. There must be some objective proof of a plaintiff's injuries; subjective complaints are insufficient. *Toure*, 98 NY2d at 352. A plaintiff can establish the extent or degree of physical limitation through expert opinion which provides a numeric percentage of the loss of range of motion, i.e. quantitatively, or an expert can submit a "qualitative" assessment as long as the "evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose or use of the affected body organ, member, function or system." *Id.*

The Defendants have met their *prima facie* burden. *See Pommells v. Perez*, 4 NY3d 566 [2005]; *Pryce v. Nelson*, 124 AD3d 859 [2d Dept. 2015]; *Inzlaco v. Cansalvo*, 115 AD3d 807 [2d Dept. 2014]. Dr. Wiener reviewed numerous records from Plaintiff's extensive medical history. Some of these records date from 1993. Mr. Palombo had been involved in several accidents, including a pedestrian knockdown in the 1980s, motor vehicle accidents in 2007 and in 2012 as well as a fall in November, 2007. In the 2007 motor vehicle accident, Plaintiff claimed injuries to his cervical spine, lumbar spine and shoulders. In the 2012 accident, he reported neck pain, lower back pain, left arm pain and right hip pain. Plaintiff has a twenty-plus year history of chiropractic care and underwent a lumbar discectomy in 2010.

Dr. Wiener also reviewed imaging reports, including those of X-rays and MRIs taken after the accident at issue here, as well as those taken before the accident. Some of the pre-2016 accident studies include an MRI of Plaintiff's left shoulder dated March 28, 2008, an MRI of the lumbar spine dated June 20, 2014, and an MRI of the lumbar spine performed on April 29, 2016 which was compared to a study dated January 11, 2010, an x-ray of the lumbar spine which was compared to a 2014 study, a 2008 EMG nerve conduction study of the left upper extremities and a January 21, 2010 EMG nerve conduction study.

After review of these records and a physical examination of the Plaintiff, Dr. Weiner concludes that Mr. Palombo did not sustain a serious injury as a result of a fracture, permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member, a significant limitation of use of a bodily function or system, or medically determined injury or impairment of a non-permanent nature which prevented the Plaintiff from performing substantially all material acts which constitutes his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. According to Dr. Wiener, any noted limitations are due to Plaintiff's pre-existing degenerative conditions. Dr. Wiener compared studies of the lumbar spine completed after the 2016 accident with the 2010 and 2014 studies. He determined these studies "clearly document identical pathology." Plaintiff has degenerative disc disease and a documented history of trauma to the lumbar spine. Plaintiff also has a history of "traumatic injury to the cervical spine and degenerative disc disease." Dr. Wiener further opines that Plaintiff had degenerative issues with his left shoulder rather than a traumatic injury. Dr. Wiener supports this conclusion with review of the 2008 MRI report among other reasons.

Plaintiff fails to raise a triable issue of fact as to causation. Both of Plaintiff's experts assert that his injuries were caused by the accident at issue. However, neither doctor addresses the defense claims of pre-existing degeneration nor do they explain why degeneration was not the cause of the injury. In fact, despite his lengthy medical history, none of Plaintiff's medical experts reviewed any of his medical records which pre-date the instant accident. Instead, they largely relied on Plaintiff's self-reported history. It does not appear, however, that Plaintiff reported the entirety of his history. For example, Mr. Polombo indicated to Dr. Modugu that he did not have prior history or treatment for his cervical spine and his left shoulder. He also told Dr. Modugu about his lumbar spine surgery and "occasional" chiropractic care such that the doctor understands Mr. Palombo had been doing "reasonably well".

But, Plaintiff's own medical records submitted in support of the motion controvert these claims. Defendants submit records from many prior treatment providers including Plaintiff's chiropractor, New York Spine, Surgery and Rehabilitation Medicine and Orthopedic Associates of Dutchess County. These records show a history of complaints to all these areas where Plaintiff now claims injuries. Plaintiff received chiropractic treatment for his lumbar spine throughout 2014 and as recently as one month before the accident. He had an MRI on his left shoulder in 2008. It also bears mention that Dr. Modugu's report conflicts with the report of Plaintiff's other expert, Dr. Dentico. Dr. Modugu says there is no history of cervical issues while Dr. Dentico states the Plaintiff has "underlying spinal pathology in the cervical spine." *See* report of Richard Dentico, M.D., dated January 15, 2021 at pg. 4.

Notably, Dr. Modugu's affirmed report specifically states that his analysis was "based upon the subjective complaints, the history given by the examinee, the medical records and tests

provided, the physical exam findings and current medical literature. It is assumed that the material provided is correct and that the history provided was correct." As set forth above, the expert did not have all of the relevant information from the Plaintiff. Thus, his opinion is flawed.

For his part, Dr. Dentico references degenerative disc disease in both the cervical and lumbar spine. His report details the post-accident treatment he provided to the Plaintiff but his brief opinion as "exacerbation" is conclusory. *See Brand v. Evangelista*, 103 AD3d 539 [2d Dept. 2013] (while plaintiff's physician concluded his pre-existing condition was aggravated by subject motor vehicle accident, the expert failed to provide any basis for determining the extent of any exacerbation).

As both of Plaintiff's experts' fail to address the conclusions of the defense expert as to the causation of Plaintiff's injuries, their opinions are speculative and insufficient to raise a triable issue of fact. *Zavala v. Zizzo*, 172 AD3d 793, 794 [2d Dept. 2019]; *Mnatcakanova v. Elliot*, 174 AD3d 798 [2d Dept. 2019]. Defendants' showing the Plaintiff did not suffer any injuries causally related to the subject action also requires dismissal of the 90/180 claim.

Now, therefore, it is hereby

ORDERED that summary judgment is granted to the Defendants and the complaint is dismissed.

Dated: November 23, 2021
Poughkeepsie, New York

CHRISTI J. ACKER
Justice of the Supreme Court

To: All parties via NYSCEF

[6]