Arciuolo v Fusca
2021 NY Slip Op 33325(U)
March 31, 2021
Supreme Court, Westchester County
Docket Number: Index No. 53249/2019
Judge: Sam D. Walker
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To commence the statutory time 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. SAM D. WALKER, J.S.C.

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THOMAS ARCIUOLO,

Plaintiff,

DECISION & ORDER
Index No. 53249/2019
Motion Sequence 1

-against-

MARISSA LYNN FUSCA and AMEDEO FUSCA

Defendants.

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The following papers were read on the motion (Sequence#1) for an order, pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment in favor of the defendants, Marissa Lynn Fusca and Amedeo Fusca, dismissing the verified complaint:

Notice of Motion/Affirmation in Support/Exhibits A-H
Affirmation in Opposition/Exhibits A-F
Reply Affirmation

Factual and Procedural Background

The plaintiff, Thomas Arciuolo, commenced this action on February 27, 2019, seeking damages for alleged serious injuries sustained in a motor vehicle accident that occurred on December 6, 2016, at or near the intersection of Maple Avenue and Longview Avenue in the County of Westchester, State of New York. The parties completed discovery and the plaintiff filed the note of issue.

The plaintiff's bill of particulars alleges that he sustained the following injuries, all of which are claimed to be permanent: significant internal derangement of left shoulder with SLAP tear, adhesive synovitis, impingement syndrome and labial tear, which injuries required surgery on November 14, 2018. The plaintiff alleges in his bill of particulars that he was confined to his bed for approximately three weeks following the accident, and to his home for approximately two weeks following the accident. The plaintiff alleges that, as a result of the accident, he can no longer play volleyball or throw a football, he had to purchase a snowblower because shoveling is difficult and is concerned that, if he has children, he will not be able to play with them as they grow up. He did not file a no-fault claim with his insurance carrier due to this accident.

The defendants, by their attorney, now file the instant motion, arguing that the plaintiff failed to meet the threshold as required per Insurance Law § 5102(d) and the action cannot be maintained according to the provisions of Insurance Law § 5104. The defendants assert that the plaintiff was involved in a prior lawsuit arising out of a work-related injury that occurred on July 31, 2015, and he appeared at a deposition for that lawsuit on April 24, 2017, five months after the subject accident in this case, and testified that he had not been involved in any incidents or accidents since July 31, 2015, in which he suffered an injury. He also complained of the same problems in that deposition for those work-related injuries, as for this accident. The defendants further assert that the plaintiff's bill of particulars in that case, alleges the same left shoulder injuries as he alleges as a result of his alleged injuries from motor vehicle accident in this case.

The defendants contend that the plaintiff's medical records indicate that he underwent surgery for a left shoulder tear on February 3, 2016, ten months before the subject accident. He treated with Dr. Cushner, who diagnosed the plaintiff with impingement syndrome of the left shoulder, which is the same injury he is now alleging as a result of the accident in this case. The doctor noted the date of the injury as July 31, 2015, the date of the plaintiff's work-related injury.

The plaintiff, by his attorney, opposes the motion arguing that prior to his accident on December 6, 2016, Arciuolo had last treated with Dr. Cushner on October 27, 2016, at which time he reported a recent aggravation of his prior left shoulder pain while lifting. The attorney argues that, following the plaintiff's car accident on December 6, 2016, he then resumed treatment with Dr. Cushner from January 12, 2017, with continued worsening complaints with regard to his left shoulder and eventually having to undergo surgery.

The attorney asserts that the evidence submitted is sufficient to meet the threshold requirements and that the plaintiff has established that he sustained an exacerbation of and aggravation of the pre-existing injuries and the plaintiff has raised a triable issue of fact as to whether he sustained a serious injury to his left shoulder and cervical spine under the permanent consequential limitation and/or significant limitation of use categories of Insurance Law § 5102(d). .

In reply, the defendants' attorney argues that the plaintiff's opposition papers fail to address his deposition testimony from his prior incident of July 31, 2015, in which he testified that he had not been involved in any accidents or incidents since July 31, 2015. The deposition was approximately five months after the accident in this case. Therefore, by the plaintiff's own admission, he was not injured in this motor vehicle accident.

In the opposition, the plaintiff cites Dr. Cushner's report to show that he had underlying shoulder pain and a condition, which was exacerbated by the subject motor vehicle accident, but it was unclear whether this caused a complete new tearing or injured an already injured portion of his body. Therefore, the plaintiff's own physician confirmed that the plaintiff had an underlying shoulder condition and that it was questionable whether

the subject accident made the condition worse. The defendants' attorney argues that there is no evidence in the record that the plaintiff sustained any significant injury to his left shoulder as a result of the subject motor vehicle accident, that would satisfy the requirements of the Insurance Law. Nor is there evidence that the plaintiff sustained a medically determined non-permanent injury that restricted him from 90 out of the first 180 days following the accident.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If a sufficient prima facie showing is made, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); *see also, Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept 1990]).

Insurance Law §5104(a) provides in pertinent part that:

> Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(NY Insurance Law §5104[a])

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. (NY Insurance Law §5102[d])

"The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury." (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; *see also*, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). "[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law" (*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (*see Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, the plaintiff did not suffer death, dismemberment, significant disfigurement, fracture or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. Therefore, the plaintiff would be claiming a permanent loss of use of a body organ, member, function or system; a 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 prevented him from performing substantially all of the material acts which constitute his 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. The defendants argue that the plaintiff had pre-existing injuries not causally related to the incident.

In support of the motion, the defendants submit the report of Richard N. Weinstein, M.D., a board certified orthopedic surgeon, license to practice in New York, who performed an independent medical examination on the plaintiff on June 24, 2020. .Dr. Weinstein notes in his report that the plaintiff denies any previous problems in relation to the areas injured in this accident and reported that prior to the accident, he bilateral shoulder surgery, but no previous neck or back problems. He states that past negative history is negative. Dr. Weinstein states that the plaintiff reported that he had surgery from the subject accident for his left proximal biceps repair on November 14, 2018.

Dr. Weinstein reports limited range of motion in the plaintiff's left shoulder with slight impingement and diffuse tenderness and pain in the superior aspect of the left shoulder. Dr. Weinstein states that the plaintiff has an extensive past medical history that includes a prior work related accident that occurred on July 31, 2015, when he fell off of a ladder. He underwent prior bilateral shoulder surgery and his treatment continued through the

subject accident. The doctor states that the majority of the medical records from his providers note July 31, 2015 as the date of injury.

Dr. Weinstein opines that there is no documentation to support that the plaintiff sustained an acute traumatic injury to his neck, lower back or left shoulder. He states that the post accident MRI of the left shoulder revealed preexisting chronic changes. He opines that the November 14, 2018 left shoulder surgery, was not related to the accident of December 6, 2016, and further opines that any ongoing symptomology or residuals is unrelated to the accident of 12/06/2016

The defendants also submit the report of Jessica F. Berkowitz, M.D., a board certified radiologist, who states that she reviewed the radiological examination performed on the plaintiff on November 19, 2015, prior to the subject accident, and after the subject accident and found no causal relationship between the findings of the post accident MRI of the left shoulder and the subject accident. She opines that areas of signal abnormality in the distal rotator cuff are related to chronic repetitive microtrauma to the rotator cuff and the wear and tear on the rotator cuff leads to rotator cuff degeneration, tendinopathy and tearing. She opines that there is no evidence of acute traumatic injury to the shoulder such as fracture, truamatic bone marrow edema or musculotendinous junction tear.

Upon review and viewing the facts in the light most favorable to the plaintiff, this Court finds that the defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiff suffering a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system.

Dr. Weinstein's own examination, using a goniometer, revealed significant decreased range of motion in the plaintiff's left shoulder. The doctor simply states in a conclusory manner that the post accident MRI of the left shoulder revealed preexisting chronic changes and in his opinion the left shoulder surgery was not related to the accident of December 6, 2016. Dr. Weinstein states that any ongoing symptomology or residuals is unrelated to the subject accident and no objective evidence of any disability, impairment or permanency as it relates to the December 6, 2016, but provides no basis for his opinion and simply states it in a conclusory manner.

Further, the defendants' attorney argues throughout that the plaintiff previously injured his shoulder and that he testified that there was no other injury after his work-related injury. However, such testimony goes to the plaintiff's credibility, which is an issue to be decided by the trier of fact and is not a question of law. Additionally, the plaintiff's bill of particulars states that his injuries were superimposed and/or aggravated prior underlying conditions of his left shoulder. Therefore, the plaintiff has claiming an exacerbation or aggravation of his prior injury, which is allowed.

Since, the defendant has failed to make a prima facie showing, the Court need not address the adequacy of the plaintiff's opposition.

However, with regard to any claims of alleged injuries that prevented the plaintiff from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following his alleged injury, such is denied.

To sustain impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his 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 plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature" (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 357 [2002]). Curtailment of recreational and household activities is insufficient to meet the burden (*Omar v Goodman*, 295 AD2d 413 [2d Dept 2002]). The plaintiff did not offer any medical evidence to support a claim that he was unable to perform substantially all of his usual and customary activities under this category and his bill of particulars states that he was confined to his bed for approximately three weeks following the accident and was confined to his home for approximately two weeks following the accident. Therefore, there is no evidence to show that Rodriguez sustained an injury in this category.

Accordingly, based on the foregoing, it is hereby;

ORDERED that the motion for summary judgment is denied in part and granted in part.

The parties are directed to appear before the Settlement Conference Part on a date to be determined. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
March 31, 2021

HON. SAM D. WALKER, J.S.C.