

Eiff v Rengifo-Candela
2021 NY Slip Op 33659(U)
November 12, 2021
Supreme Court, Westchester County
Docket Number: Index No. 70528/2019
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.**

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THOMAS EIFF,

Plaintiff,

Index No. 70528/2019

– against –

Motion Seq. 4

ARFAXAD RENGIFO-CANDELA and C. BLACKBURN
INC.,

Defendants.

DECISION & ORDER

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In an action to recover damages for personal injuries, defendants move for summary judgment pursuant to CPLR 3212 to dismiss plaintiff’s complaint on the grounds that plaintiff did not sustain a serious injury pursuant to N.Y. Insurance Law 5102(d):

Papers Considered

NYSCEF Doc. No. 58-69; 73-76

1. Notice of Motion/Memorandum of Law/Statement of Kristina Drolet, Esq. of material facts/Affidavit of service/Exhibits A-H
2. Affirmation of Matthew D. Goodstein, Esq. in opposition and response to statement of material facts/Exhibits A1-A2
3. Reply Affirmation of Kristina Drolet, Esq.

Factual and Procedural Background

Plaintiff commenced this action for personal injuries sustained as a result of a motor vehicle accident that occurred on August 23, 2017. Defendants joined issue with the service and filing of their answer.

In support of the Motion, defendants submit an affirmed IME report of orthopedic surgeon Andrew N. Bazos, M.D., dated April 16, 2021, as well as an addendum report dated June 25, 2021. Dr. Bazos performed an examination of the plaintiff on April 15, 2021. Dr. Bazos noted that he reviewed the verified bill of particulars and examination before trial of the plaintiff as well as the plaintiff’s medical records and radiology films from July 2017, prior to the accident, the date of the accident, August 23, 2017, and through January 4, 2021. Dr. Bazos noted that he also took the plaintiff’s past medical history including the motor vehicle accident at issue and thereafter.

Dr. Bazos performed a physical examination and, inter alia, noted that cervical spine exam showed normal flexion of 45 degrees and extension of 45 degrees, and

normal left and right rotation of 70 degrees respectively. Examination of the thoracolumbar spine demonstrated normal flexion to 90 degree, and extension was normal at 30 degrees. Dr. Bazos noted that the plaintiff was able to heel and toe walk without difficulty, and mini squat without difficulty. Straight leg raise was negative on both sides at 90 degrees. Dr. Bazos' impression was "soft tissue injuries, resolved. No objective evidence of any ongoing pathology." Based on his review of the plaintiff's medical records and his examination, Dr. Bazos opines that the plaintiff sustained at most minor, self-limited, soft tissue strain and contusion injuries to the cervical spine, lumbar spine, left shoulder and left hip. Dr. Bazos states that the plaintiff made a complete recovery from his injuries and requires no additional treatment. He further states that the plaintiff is left with no disability or limitations in performing his normal daily activities. Dr. Bazos states that the plaintiff "was able to perform all of his pre-accident activities within six months of the subject incident."

Dr. Bazos wrote an addendum report, dated June 25, 2021, upon review of additional radiology studies from September 5, 2017 through July 20, 2020. Dr. Bazos' impression remains the same, that the findings on the radiologic studies were all chronic and degenerative and not caused by acute trauma. Dr. Bazos opines that none of the "issues" seen on the studies are causally related to the subject accident. Dr. Bazos states that had the plaintiff sustained acute intervertebral disc herniation injuries in the cervical spine as well and acute internal derangement injuries into the upper and lower extremities, pain would have been severe and immediate requiring emergent medical attention at the scene and immediately thereafter, and he would have been rendered disabled due to his inability to stand upright, move his trunk or head or upper extremities and bear weight on the lower extremities. Here, the plaintiff only described low back pain at the scene of the incident. Dr. Bazos also opines that the interventional pain management procedures and left ankle surgery performed on the plaintiff were not medically necessary as a result of the subject accident. Dr. Bazos again opines that the plaintiff "has made a complete recovery from his injuries and requires no additional medical treatment. He was able to perform all of his pre-accident activities within six months of the subject incident."

In opposition, plaintiff argues that Dr. Bazos failed to render an opinion on the ability of the plaintiff to engage in his usual and customary activities during the 180 days following the collision, and therefore does not refute the plaintiff's "90/180" claim. Plaintiff references deposition testimony wherein plaintiff testified about his inability to perform his usual and customary activities for over three years after the accident at issue. In support, plaintiff submits the affirmation of plaintiff's treating physician Christopher Lee, M.D. The plaintiff was first seen in Dr. Lee's office after the accident on October 6, 2017 and most recently on September 17, 2021. Dr. Lee states that that plaintiff's injuries restricted substantially all of his activity for at least 90 of the first 180 days immediately following the motor vehicle accident at issue on August 23, 2017. Dr. Lee opines that since the motor vehicle collision on August 23, 2017, plaintiff has continued to experience pain in the back, left elbow, left wrist and left ankle which has fluctuated in improvement over his

extended course of treatment. Dr. Lee states that plaintiff's injuries have continued to limit his physical abilities including his ability to sit for an extended period of time, stand for an extended period of time, and freely move, which limits his ability to drive or walk long distances. Dr. Lee opines that, within a reasonable degree of medical certainty, plaintiff sustained serious and permanent injuries, to the lumbar spine, left ankle, left hand/wrist, and left elbow, as a result of the automobile collision of August 23, 2017. He also opines, within a reasonable degree of medical certainty, that that the August 23, 2017 collision is the competent cause of the plaintiff's left elbow, left hand/wrist, and left ankle injuries, the aggravation of plaintiff's lumbar injuries, and the accompanying pain and resultant physical limitations.

Discussion

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) (see *Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002]; *Gaddy v Eyer*, 79 N.Y.2d 955 [1992]; *Licari v Elliott*, 57 N.Y.2d 230 [1982]).

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."

Defendants failed to demonstrate entitlement to summary judgment. Defendant's expert, Dr. Bazos failed to adequately address the plaintiff's claim, set forth in his bill of particulars, that he sustained a medically determined injury or impairment which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for at least ninety days during the one hundred and eighty days immediately following the date of the occurrence (*Yampolskiy v Baron*, 150 AD2d 795, 796 [2d Dept 2017]). Even if defendants 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 *Yu Feng Jiang v Francois*, 177 AD3d 826 [2d Dept 2019]). The competing expert opinions presents an issue of credibility for the trier of fact to determine (*Rapaport v. Sears, Roebuck & Co.*, 28 A.D.3d 449, 450 [2d Dept. 2006]).

Since 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]).

Accordingly, it is hereby

ORDERED that the defendants' motion for summary judgment is DENIED.

The parties are directed to appear in the Settlement Conference Part at a date and time to be provided.

Dated: White Plains, New York
November 12, 2021


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