SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

---x **IAS PART 6**

ORDER

JASON M. CASUSO and AMBER FOOTE,

Plaintiffs,

- against –

Index Number: 151159/17

Hon. Justice
Judith N. McMahon

MERCY CARE TRANSPORTATION, INC., and
VERA P. TORRES,

Defendants.

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Defendants', Mercy Care Transportation and Vera P. Torres, motion (sequence 003) for summary judgment is granted as detailed herein.

Plaintiff alleges that he sustained personal injuries as a result of a motor vehicle accident that occurred on December 4, 2015 in the parking lot of 200 Lafayette Avenue, Staten Island, New York. An ambulance, owned by Defendant Mercy Care and driven by Defendant Vera P. Torres, was parked in front of Plaintiff's truck and backed into Plaintiff's truck.

New York Insurance Law Section 5104 states 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 or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.

In his Bill of Particulars, Plaintiff alleges injuries to his right knee, lumbar spine and cervical spine. Plaintiff does not make a claim for economic loss.

'Serious Injury' is defined in New York Insurance Law Section 5102 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...

Defendants are now moving for summary judgment to dismiss the case based upon Plaintiff's failure to sustain a "serious injury" in accordance with New York Insurance Law 5102.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

"A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim." *Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (N.Y.A.D. 2nd Dept. 2000).

In support of their motion for summary judgment, Defendants submitted the report of Dr. Gregory Montalbano, a Board Certified Orthopedic Surgeon, who examined Plaintiff on April 16, 2019. In his report, Dr. Montalbano refers to MRIs of Plaintiff from November 2013 and April 2015, which pre-date the accident date of December 4, 2015. Dr. Montalbano concludes that, based upon his "review of the medical records provided and clinical examination, that Jason Casuso did not sustain any injury to the cervical spine or lumbar spine as a result of the accident.

It is also [Dr. Montalbano's] opinion that the examinee has a pre-existing condition of degenerative disc disease which is unrelated to the accident in question and is likely the cause of any ongoing symptoms."

As to Plaintiff's allegations related to his knee, Dr. Montalbano states "there are no positive clinical objective signs of a permanent injury to the right knee from the accident...It is my opinion that the right knee is degenerative secondary to his age, occupation (work in construction) and comorbidity of obesity (with a BMI of 36.3)."

Additionally, Defendants also submitted the report of Dr. William Head, a Neurologist, who examined Plaintiff on or about July 16, 2019. In the section of his report titled "Review of films on CDs", Dr. Head states that, "I have reviewed MRI scan films of the lumbar spine from Healthcare Associates in Medicine, dated April 7, 2015. The films were interpreted by Richard Pinto, M.D., a neuroradiologist. The referring physician was Dr. Alastra, a neurosurgeon. Mr. Casuso had been 24 years of age. The reason for this study to be performed was not stated. Dr. Pinto diagnosed 'extruded disc herniation central and paracentral, moreso to the right than to the left, at L5-S1, slightly compressing the thecal sac as well as the exiting right S1 root sleeve.' [Dr. Pinto] also diagnosed 'small central disc herniation L4-L5 with slight to mild thecal sac compression in the midline.' [Dr. Head noted that] These were extraordinary findings in a very young man. Also, these findings pre-existed his accident of December 4, 2015, for which [Dr. Head] was later to examine him."

Dr. Head later stated in his report, "Now that I have reviewed his lumbar MRI scan films, I have noted that Mr. Casuso has extensive lumbar degenerative disc disease."

Regarding the medical history provided by Plaintiff during the examination, Dr. Head noted that, "Mr. Casuso told me he had a history of low back pain, one or two years prior to the

December 4, 2015 motor vehicle accident. He claimed that his low back pain had resolved prior to the December 4, 2015 accident, but I note that he had undergone a lumbar MRI scan just 8 months before the December 4, 2015 motor vehicle accident, which indicates that his complaints had not resolved, or such testing would not have been ordered. My review of those April 7, 2015 lumbar MRI scan films revealed extensive degenerative disc disease, as described above, which does not resolve."

In conclusion, Dr. Head stated that his "review of [Plaintiff's] pre-accident April 7, 2015 lumbar scan films and his post accident January 18, 2016 lumbar MRI scan films revealed essentially the same findings, without evidence of disc herniation or trauma, but with evidence of a remarkable amount of lumbar degenerative disease for such a young individual."

As to Plaintiff's cervical spine, Dr. Head concluded that Plaintiff's "cervical MRI scan films also revealed extensive degenerative disease, which had already been present on films obtained shortly after the December 4, 2015 motor vehicle accident and which is not causally related to the accident."

"In reviewing a summary judgment motion, the court must consider the facts in a light most favorable to the nonmoving party, and examine whether the proponent has made 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. Once the moving party has done so, the nonmoving party must show facts sufficient to require a trial on any issue of fact. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Lau v. Margaret E. Pescatore Parking, Inc.*, 30 N.Y.3d 1025, 90 N.E.3d 1276 (2017).

Defendants have met their prima facie burden of showing that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 as a result of the accident. *See Nicholson v. Kwarteng*, 115 N.Y.S.3d 707 (N.Y.A.D. 2nd Dept. 2020).

In opposition to Defendants' motion, Plaintiff submitted the Affirmation of Dr. Michael Gerling, a spinal surgery specialist, who began treating Plaintiff Jason Casuso on November 17, 2017.

In laying the foundation for his conclusions, Dr. Gerling states that, "there was no prior history of back disorders."

At his examination before trial, Plaintiff was asked if he told Dr. Gerling that he had a prior back condition, and Plaintiff answered "yes".

Plaintiff was also asked if he had "ever treated for a prior back condition before the accident." Plaintiff responded that he had, and described it as "just a sore back."

Plaintiff testified that the only treatment for his sore back prior to the date of the accident was one or two visits to a healthcare provider he could not remember the name of and his only treatment was a single injection, and that after the single injection "it was good until the accident."

In his Affirmation submitted by Plaintiff in opposition to Defendants' motion, Dr. Gerling stated that, "I performed surgery on Mr. Casuso on November 12, 2019 at Island Ambulatory Surgical Center. During the surgery, my examination of the patient confirmed herniated discs at L 4-5 and L 5-S1. A discectomy and decompression were performed at the locations."

In conclusion, Dr. Gerling states that, "***As there is no prior history of cervical or lumbar disorders***, it is my professional opinion that the cervical and lumbar spine injuries above,

treatments above and resultant permanent disability are directly casually (*sic*) related to the above stated accident." (Emphasis added).

In Reply, Defendants argue that Plaintiff's Opposition fails to address Plaintiff's pre-existing lumbar condition.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues. The function of a court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. Thus, summary judgment should only be granted where there are no material and triable issues of fact, and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion." *114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 A.D.3d 757, 114 N.Y.S.3d 100 (N.Y.A.D. 2nd Dept. 2019).

Dr. Gerling expressly made his conclusion conditioned on the fact that Plaintiff had no prior history of lumbar disorders.

"In opposition, [Plaintiff] failed to raise a triable issue of fact. Contrary to [Plaintiff's] contention, his medical expert's affidavit, submitted in opposition to...the [summary judgment motion], was conclusory, speculative, and without basis in the record, and, therefore, it was insufficient to raise a triable issue of fact." *Giacinto v. Shapiro*, 151 A.D.3d 1029, 59 N.Y.S.3d 42 (N.Y.A.D. 2nd Dept. 2017).

Dr. Gerling failed to explain in a specific and nonconclusory manner, how Plaintiff's injuries were causally related to the subject accident. *See Wettstein v. Tucker*, 178 A.D.3d 1121, 112 N.Y.S.3d 557 (N.Y.A.D. 2nd Dept. 2019). Dr. Gerling's Affidavit listed Plaintiff's medical condition and then posited that because Plaintiff had no prior disorders that the injuries are

causally related. This is the definition of a conclusory opinion. *See Luciano v. Luchsinger*, 46 A.D.3d 634, 847 N.Y.S.2d 622 (N.Y.A.D. 2nd Dept. 2007).

Not only is Dr. Gerling's opinion conclusory, but it failed to address Defendants' Experts' extensive review of medical records related to Plaintiff's prior medical treatment resulting in their opinion of Plaintiff's pre-existing degenerative condition. *See Cavitolo v. Broser*, 163 A.D.3d 913, 81 N.Y.S.3d 188 (N.Y.A.D. 2nd Dept. 2018).

"Under these circumstances, [Plaintiff] failed to raise a triable fact issue as to causation." *Inzalaco v. Consalvo*, 115 A.D.3d 807, 982 N.Y.S.2d 165 (N.Y.A.D. 2nd Dept. 2014).

Therefore, Defendants' motion for summary judgment must be granted.

ORDERED that Defendants', Mercy Care Transportation and Vera P. Torres, motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to Defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: 3/6/2020

So Ordered.

ENTER: ____________________

J.S.C

Hon. Judith N. McMahon
J.S.C.