

**Nowak v Callahan**

2021 NY Slip Op 34182(U)

September 28, 2021

Supreme Court, Queens County

Docket Number: Index No. 704641/2018

Judge: Ulysses B. Leverett

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

-----X  
JACEK NOWAK,

Plaintiffs,

-against-

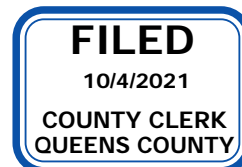
CHRISTOPHER G. CALLAHAN, JOSELYN  
SANTANA and JOSE L. FERNANDEZ, JR.,

Defendants.  
-----X

Index No.: 704641//2018

Motion Seq. No. 006

**Decision and Order**



Present: **HONORABLE ULYSSES B. LEVERET:**

Papers Numbered

Notice of Motion-Affirmation-Exhibits.....	EF-99-109
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Affirmation In Opposition/Cross Motion-Exhibits.....	EF-148-150
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Upon the foregoing papers, it is ordered that defendants Joselyn Santana and Jose L. Fernandez' motion for an order pursuant to CPLR § 3212 for summary judgment in favor of defendant, and dismissing the complaint of plaintiff Jacek Nowak is granted to the extent that plaintiff has failed to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d). Plaintiff's cross motion for an order granting partial summary judgment on the issue of liability is granted.

Plaintiff Jacek Nowak seeks to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on March 3, 2018 on the Long Island Expressway at or near its intersection with Kissena Boulevard, County of Queens, State of New York.

Plaintiff Jacek Nowak asserts that on March 3, 2018, he was the driver of a fully stopped motor vehicle that was struck in the rear twice by a vehicle operated by co-defendant Jose Fernandez. Plaintiff alleges that as a result of the accident, he sustained injuries to his head, neck, middle and lower back and right leg.

Insurance Law § 5102(d) defines a "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 permanent nature which prevents the injured from performing substantially all of the material acts, which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

Defendants Joselyn Santana and Jose L. Fernandez Jr. allege that plaintiff has not suffered a serious injury within the meaning of the No Fault Law. In support of the motion, defendants submitted an orthopedic evaluation dated July 30, 2020 of plaintiff Jacek Nowak by Dr. R. Hillsman, a board certified orthopedic surgeon, who examined plaintiff on 7/27/2020 using a goniometer and reviewed plaintiff's medical records. Dr. Hillsman reports that the examination of plaintiff's cervical spine range of motion revealed flexion to 50 degrees (normal 50 degrees), extension to 60 degrees (normal 60 degrees), right/left lateral flexion 45 degrees (normal 45 degrees), right/left rotation to 80 degrees (normal 80 degrees). Dr. Hillsman states that inspection of the cervical spine revealed a normal lordosis, no atrophy, evidence of muscle spasm or tenderness noted.

Plaintiff's lumbar spine range of motion examination revealed flexion 60 degrees (normal 60 degrees), extension to 25 degrees (normal 25 degrees), right/left lateral bending to 25 degrees (normal 25 degrees). No muscle spasm was noted and palpation revealed no tenderness.

Plaintiff's thoracic spine range of motion revealed flexion to 45 degrees (normal 45 degrees), extension to 0 degrees (normal 0 degrees), right/left lateral bending 45 degrees (normal 45 degrees), right/left rotation to 30 degrees (normal 30 degrees). Dr. Hillsman states that the thoracic curvature is normal with no paraspinal spasm and no sensory loss.

Dr. Hillsman diagnosis revealed plaintiff's cervical, thoracic and lumbar spine/sprains are all resolved and that based on the orthopedic evaluation, plaintiff does not demonstrate any disability.

Defendants submitted a sworn report dated May 10, 2020 by Dr. Melissa Sapan Cohn, a board certified radiologist who reviewed plaintiff's 5/4/2018 cervical spine MRI. The review revealed that the marrow signal is normal, no intrinsic spinal cord abnormality identified, disc spaces are well maintained and there is no evidence of disc herniation or disc bulge at any level. Dr. Cohn states that there is no evidence for pathology or acute traumatic related injury on the submitted examination.

Dr. Cohn's review of plaintiff's 5/14/2018 lumbosacral spine MRI revealed multilevel degenerative changes with a right foraminal disc herniation at L4-5. Dr. Cohn states that there is disc desiccation at L2-3 through L5-S1 which indicates commencement of degenerative disc disease. Dr. Cohn states that plaintiff's disc bulging at L2-3 through L5-S1 is unrelated to trauma and that plaintiff's multilevel facet arthropathy is consistent with chronic and longstanding disease.

When defendant has established that plaintiff's injuries are not serious within the meaning of No-Fault Law, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. See *Jin v Reilly*, 296 AD 2d 373 (2002).

Plaintiff in opposition to defendants motion for summary judgment asserts that plaintiff sustained a serious injury in that she sustained both permanent consequential limitations and significant limitations of the use of his head, cervical, thoracic and lumbar spine. Plaintiff submitted a sworn physician affirmation dated April 22, 2021 of Dr. Eric Goldberg who recently examined plaintiff on March 4, 2021 and reviewed plaintiff's medical records relating to the subject accident. Dr. Goldberg's examination of plaintiff's cervical spine range of motion by use

of a hand held goniometer revealed flexion to 40 degrees (normal 50 degrees/20% restriction), extension to 50 degrees (normal 60 degrees/16% restriction), right/left lateral flexion 45 degrees(normal 45 degrees), right/left rotation to 70 degrees (normal 80 degrees/13% restriction). DR. Goldberg found significant trigger points present including the bilateral cervical paraspinals, bilateral trapezii and bilateral rhomboids worse on the right side.

Plaintiff's lumbar spine range of motion examination found flexion 70 degrees (normal 90 degrees/22% restriction), extension to 20 degrees (normal 30 degrees/22% restriction). Dr. Goldberg found multiple trigger points palpated including bilateral paraspinal muscles, superior aspect of gluteus maximus and medius and piriformis musculature worse on the right side.

Dr. Goldberg states that plaintiff's lumbar spine MRI showed disc bulging and facet arthropathy, right lateral focal protrusion and the lumbar MRI showed a central focal disc protrusion at L5-S1 without neural encroachment. Dr. Goldberg states that in his opinion to a reasonable degree of medical certainty, plaintiff sustained a significant limitation of and a permanent consequential limitation to his lumbar spine and that his injuries limit plaintiff in his daily activities. Dr. Goldberg states that the subject accident is the proximate cause of plaintiff's injuries.

Plaintiff submitted a physician affirmation dated May 11, 2021 from Dr. Eric J. Sax, a radiologist who read and interpreted plaintiff's 5/4/2018 lumbar spine MRI. Dr Sax findings were disc bulging and facet arthropathy L2-L3 through L5-S1 with additional right lateral focal protrusion at L4-L5 and moderate to severe right L4-L5 exit foraminal narrowing as a result. There is a very small central focal disc protrusion at L5-S1 without neural encroachment.

The "significant limitation" category requires a plaintiff to demonstrate that the injury has limited the use of the afflicted area in a "significant" way rather than a "minor, mild or slight limitation of use and a "permanent consequential limitation of use of a body organ or member requires an even greater degree of proof that a significant limitation. See *Licari v Elliot*, 57 NY2d 230 (1982)

It is well established that the proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980).

The Court finds that the medical evidence submitted by defendants in support of their motion for summary judgment made out a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Dr Hillsman found normal ranges of motions in plaintiff's cervical, thoracic and lumbar spine. Dr. Cohn's findings were all attributed to degenerative changes in plaintiff's lumbar spine. Plaintiff's opposition was insufficient to raise a triable issue of fact. Plaintiff's Dr. Sax failed to relate his MRI findings of disc bulges/protrusions to the subject accident. While Dr. Goldberg's examination revealed deficits in plaintiff's range of motion certain injuries that fall within the objective definition of serious injury but are minor, mild, or slight are classified as insignificant within the meaning of the statute. See *Licari v Elliot*, 57 NY2d 230 (1982). Additionally, plaintiff's doctors did not rebut or address defendant's Dr. Cohn's findings that plaintiff's injuries were attributed to chronic and long standing degenerative changes.

Plaintiff cross moves for summary judgment on the issue of liability against defendants. Plaintiff alleges that his vehicle was stopped for at least 15 to 20 seconds because of traffic conditions ahead when defendant Fernandez' vehicle came into contact with the rear of plaintiff's vehicle and subsequently struck in the rear a second time by the Fernandez vehicle.

Defendants Joselyn Santana and Jose L. Fernandez in opposition to plaintiff's cross motion on the issue of liability allege that plaintiff's cause of action or defense has no merit and that the cross motion is untimely as per this Court's 12/6/2018 Preliminary Conference Order. The Court finds that plaintiff's motion is timely since significant discovery was still outstanding on the November 4, 2019 filing of the note of issue. Additionally, the parties entered into a December 15, 2020 so-ordered stipulation that provided for an additional 30 day extension from the completion of discovery for all parties to move for summary judgment.

Defendant Fernandez alleges that plaintiff was operating his vehicle aggressively as it moved from the right lane, across the middle lane, and to the left lane only to stop suddenly in front of the Fernandez vehicle. Defendant Fernandez also states that he was able to bring his vehicle to a safe and complete stop behind plaintiff's vehicle despite the foregoing actions by plaintiff. Fernandez asserts that after coming to a complete stop, he was subsequently struck from behind by co-defendant Christopher G. Callahan's vehicle and propelled into the rear of plaintiff's vehicle.

Defendant Christopher G. Callahan in opposition to plaintiff's cross motion for summary judgment on the issue of liability alleges that the motion must be denied because there are issues of fact as to how the accident occurred and whether negligence on the part of plaintiff caused or contributed to the subject accident.

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. See *Kimyagarov v Nixon Taxi Corp., et al*, 45 A.D. 3d 736, 846 N.Y.S. 2d 309 (2007). If the operator of the moving vehicle cannot come forward with the evidence to rebut the inference of negligence, the occupants and owner of the stationary vehicle are entitled to summary judgment on the issue of liability. See *Piltser v Donna Lee Mgt Corp.*, 29 AD 3d 973, 816 NYS 2d 543 (2006).

Vehicle and Traffic Law (VTL) § 1129 (a) provides that "the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway". Failure to do so constitutes negligence per se, entitling the plaintiff whose vehicle was rear-ended to summary judgment in the absence of an adequate non-negligent explanation. See *Comas-Bourne v City of New York*, 146 AD 3d 855 (2017).

Here, there is no dispute that plaintiff's vehicle was stopped prior to the rear end collision. The Court finds that plaintiff has met his burden of establishing his prima facie entitlement to judgment on the issue of liability against defendants. Defendants have failed to offer any reasonable non-negligent cause of the subject accident. Additionally, a plaintiff does not bear the burden of establishing the absence of their own comparative negligence in order to obtain partial summary judgment in a comparative negligence case. *Rodriguez v City of New York*, 31 NY 3d 312 (2018).

Accordingly, defendants Joselyn Santana and Jose L. Fernandez' motion for an order pursuant to CPLR § 3212 for summary judgment in favor of defendants, and dismissing the complaint of plaintiff Jacek Nowak is granted to the extent that plaintiff has failed to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d). Plaintiff's cross motion for an order granting partial summary judgment on the issue of liability is granted.

This is the decision and order of this Court.

Dated: September 28, 2021

  
Ulysses B. Leverett, JSC

