Giron v Johnson
2017 NY Slip Op 30672(U)
April 6, 2017
Supreme Court, Suffolk County
Docket Number: 13-7392
Judge: Joseph A. Santorelli
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[* 1]

SHORT FORM ORDER

INDEX No. 13-7392
CAL. No. 16-00970MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7-21-16 (003)
MOTION DATE 7-29-16 (004)
MOTION DATE 8-30-16 (005, 006)
MOTION DATE 9-29-16 (007, 008)
ADJ. DATE 11-3-16
Mot. Seq. # 003 - MD # 006 - MD
004 - MG # 007 - XMD
005 - MD # 008 - XMD

OVIDIO H. GIRON,

Plaintiff,

- against -

ERIC JOHNSON, ROBERT A. MIELKO, DANIEL E. LOPEZ-EUCEDA and M. LOPEZBETANCOORTH,

Defendants.

BORDA, KENNEDY, ALSEN & GOLD, LLP
Attorney for Plaintiff Giron
1805 Fifth Avenue
Bay Shore, New York 11706

RUSSO & TAMBASCO, ESQS.
Attorney for Defendants Lopez-Euceda and Lopezbetancoorth
115 Broadhollow Road, Suite 300
Melville, New York 11747

ERIC JOHNSON and ROBERT A. MIELKO,

Third-Party Plaintiffs,

- against -

THOMAS BENTIVEGNA,

Third-Party Defendant.

DESENA & SWEENEY, LLP
Attorney for Defendants/Third-Party Plaintiffs Johnson & Mielko
1500 Lakeland Avenue
Bohemia, New York 11716

PICCIANO & SCAHILL, P.C.
Attorney for Third-Party Defendant Bentivegna
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Westbury, New York 11590

Upon the following papers numbered 1 to 104 read on these motions for summary judgment and cross motions for leave to amend ; Notice of Motion/ Order to Show Cause and supporting papers _

1 - 29; 30 - 45; 46 - 60; 61 - 76 ; Notice of Cross Motion and supporting papers 77 - 80; 81 - 84 ; Answering Affidavits and supporting papers 85 - 86; 87 - 88; 89 - 92; 93 - 94; 95 - 96 ; Replying Affidavits and supporting papers 97 - 98; 99 - 100; 101 - 102; 103 - 104 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by third-party defendant Thomas Bentivegna, the motion by defendants/third-party plaintiffs Eric Johnson and Robert Mielko, the motions by defendants Daniel Lopez-Euceda and M. Lopezbetancoorth, and the cross motions by plaintiff Ovidio Giron are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendants/third-party plaintiffs Johnson and Mielko for summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102 (d) is granted; and it is

ORDERED that the cross motions by plaintiff for leave to amend his bill of particulars is denied; and it is further

ORDERED that the motion by third party defendant Bentivegna and the motions by defendants Daniel Lopez-Euceda and M. Lopezbetancoorth are denied, as moot.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff Ovidio Giron as the result of a motor vehicle accident that occurred on Route 495 in the Town of Oyster Bay on December 14, 2012. The accident allegedly occurred when a vehicle operated by defendant/third-party plaintiff Robert Mielko and owned by defendant/third-party plaintiff Eric Johnson struck a vehicle operated by defendant Daniel Lopez-Euceda and owned by defendant M. Lopezbetancoorth. The vehicle operated by Mielko then struck the vehicle operated by third-party defendant Thomas Bentivegna, in which plaintiff was riding as passenger. The bill of particulars alleges that as a result of the subject accident, plaintiff suffered various injuries, including cervical, lumbosacral and thoracic sprain and strain, and multiple disc bulges and herniations. Defendants/third-party plaintiffs Mielko and Johnson brought a third-party action against Bentivegna for contribution.

Bentivegna moves for summary judgment dismissing the third party complaint against him, arguing that the action is barred pursuant to Workers' Compensation Law §§ 11 and 29 and that he did not cause the subject accident. In support of the motion, Bentivegna submits, among other things, copies of the pleadings and transcripts of the parties' deposition testimony. Mielko and Johnson oppose the motion.

Mielko and Johnson move for summary judgment dismissing the complaint against them on the ground that Giron did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of this motion, they submit copies of the pleadings, an affirmed medical report of Dr. Joseph Stubel, and a transcript of Giron's deposition testimony.

Lopez-Euceda and Lopezbetancoorth move for summary judgment dismissing the complaint against them, arguing that they were not the proximate cause of the accident and that the accident was caused by Mielko. In support of their motion, they submit copies of the pleadings and transcripts of the

parties' deposition testimony. They also make a separate motion for summary judgment dismissing the complaint against them on the ground that Giron did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of this motion, they submit copies of the pleadings, an affirmed medical report of Dr. Joseph Stubel, and a transcript of Giron's deposition testimony.

Giron opposes the motions and cross-moves for leave to amend the bill of particulars to include a claim that he suffered a significant disfigurement due to the accident. In support of his cross motion and opposition to the motions by Johnson and Mielko, and Bentivenga, Giron submits photographs of the scar on his elbow taken after the subject accident. Here, the photographs submitted by Giron were not in admissible form and cannot not be considered in this determination (*see* ***Azevedo v Platform Taxi Serv., Inc.***, 84 AD3d 847, 923 NYS2d 849 [2d Dept 2011]). Johnson and Mielko oppose Giron's cross motion, arguing that it is defective, as it does not contain an affidavit of merit or an affidavit setting forth a reasonable excuse for the delay in seeking leave to amend the bill of particulars.

Motions for leave to amend or supplement a bill of particulars are governed by the same standards applied to motions to amend pleadings (***Scarangello v State of New York***, 111 AD2d 798, 798, 490 NYS2d 781 [2d Dept 1985]). Generally, leave to amend a pleading or bill of particulars "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient or patently devoid of merit, or where a delay in seeking the amendment would cause prejudice or surprise the opposing party (*see* ***Rogers v New York City Tr. Auth.***, 109 AD3d 535, 970 NYS2d 572 [2d Dept 2013]; ***Trystate Mech., Inc. v Macy's Retail Holdings, Inc.***, 94 AD3d 1095, 943 NYS2d 158 [2d Dept 2012]; ***Daly-Caffrey v Licausi***, 70 AD3d 884, 895 NYS2d 197 [2d Dept 2010]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). However, when an amendment to a bill of particulars is sought after the action has been certified as ready for trial, "judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious" (***Clarkin v Staten Is. Univ. Hosp.***, 242 AD2d 552, 552, 662 NYS2d 91 [2d Dept 1997]; *see* ***Rodgers v New York City Tr. Auth.***, *supra*; ***Schreiber-Cross v State of New York***, 57 AD3d 881, 870 NYS2d 438 [2d Dept 2008]). Further, in exercising its discretion, a court should consider how long the party seeking the amendment was aware of the facts upon which the motion is based, whether a reasonable excuse for the delay was offered, and whether prejudice resulted from such delay (***American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co.***, 68 AD3d 792, 794, 891 NYS2d 127; ***Cohen v Ho***, 38 AD3d 705, 706, 833 NYS2d 542 [2d Dept 2007]; *see* ***Sunrise Harbor Realty, LLC v 35th Sunrise Corp.***, 86 AD3d 562, 927 NYS2d 145 [2d Dept 2011]; ***Sampson v Contillo***, 55 AD3d 591, 865 NYS2d 137 [2d Dept 2008]).

Giron's cross motions for leave to serve the proposed amended bill of particulars are denied. Here, Giron has failed to submit a copy of the proposed amendment with his moving papers (*see*, ***Chang v First Am. Title Ins. Co. of N. Y.***, 20 AD3d 502, 799 NYS2d 121 [2d Dept 2005]; ***Ferdinand v Crecca & Blair***, 5 AD3d 538, 774 NYS2d 714 [2d Dept 2004]). Moreover, Giron failed to offer a reasonable excuse for his delay in seeking to amend the bill of particulars until more than three years after the commencement of the action and three months after the filing of the note of issue (*see* ***Al-Khilewi v Turman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]; ***Kyong Hi Wohn v County of Suffolk***, 237 AD2d 412, 654 NYS2d 826 [2d Dept 1997]).

Johnson and Mielko move for summary judgment on the ground that Giron did not sustain a "serious injury". 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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Here, Johnson's and Mielko's submissions established prima facie that Giron did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject car accident (*see* ***Gaddy v Eyler***, *supra*; ***Laurent v McIntosh***, 49 AD3d 820, 854 NYS2d 228 [2d Dept 2008]; ***Albano v Onolfo***, 36 AD3d 728, 830 NYS2d 205 [2d Dept 2007]). The report of Dr. Stubel states that an examination of Giron's cervical spine revealed no tenderness or muscle spasm upon palpation, and that range of motion testing revealed extension to 45 degrees (45 degrees normal), flexion to 45 degrees (45 degrees normal), rotation bilaterally to 80 degrees (80 degrees normal), and lateral flexion bilaterally to 45 degrees (45 degrees normal). He states that an examination of Giron's lower back revealed no swelling or erythema, and no tenderness or muscle spasm upon palpation. He states that range of motion testing revealed forward bending to 90 degrees (90 degrees normal), lateral flexion bilaterally to 30 degrees (30 degrees normal), and lateral rotation to 60 degrees (60 degrees normal). Dr. Stubel states that an examination of Giron's right elbow revealed a well healed laceration and that there is no swelling or erythema, and no reported tenderness upon palpation. He states that range of motion testing revealed flexion and extension was 0 to 150 degrees (0 to 150 degrees normal), supination to 80 degrees (80 degrees normal), and pronation to 80 degrees (80 degrees normal). Dr. Stubel concludes that Giron has no objective signs of a disability and can perform his usual activities of daily living and work.

In opposition, Giron does not submit any medical evidence and fails to raise a triable issue of fact. Here, Giron's main contention is that the moving papers failed to address his scar which he alleges is a significant disfigurement. However, Giron's bill of particulars does not allege a significant disfigurement. In any event, Giron has failed to raise an issue of fact as to whether he sustained a significant disfigurement as a result of the accident (*see* ***Lynch v Iqbal***, 56 AD3d 621, 868 NYS2d 676 [2d Dept 2008]; ***Sirmans v Mannah***, 300 AD2d 465, 752 NYS2d 359 [2d Dept 2002]; ***Edwards v De Haven***, 155 AD2d 757, 547 NYS2d 462 [3d Dept 1989]).

Accordingly, the motion by Johnson and Mielko for summary judgment is granted and the complaint is dismissed. In view of this determination, the remaining motions are denied, as moot.

Dated: APR 06 2017.

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**