

Sittler v Adams

2021 NY Slip Op 33233(U)

January 14, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 605868/2017

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX No. 605868/2017
CAL. No. 201902013MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 3/21/20 (002)
MOTION DATE 7/23/20 (003)
ADJ. DATE 8/20/20
Mot. Seq. # 002 MD
 # 003 MG

-----X
KAREN SITTLER,

Plaintiff,

- against -

MATTHEW W. ADAMS,

Defendant.
-----X

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Upon the following papers read on this e-filed motions for summary judgment and to amend the pleadings : Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated February 7, 2020, and by plaintiff, dated July 7, 2020; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by plaintiff, dated May 6, 2020, and by defendant, dated August 13, 2020; Replying Affidavits and supporting papers by defendant, dated July 1, 2020, and by plaintiff, dated August 19, 2020; Other ____; it is

ORDERED that the motion (#002) by defendant Matthew Adams and the motion (#003) by plaintiff Karen Sittler are consolidated for the purposes of this determination, and it is

ORDERED that the motion (#002) by defendant Matthew Adams for summary judgment dismissing the complaint on the ground that plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the motion (#003) by plaintiff for leave to file an amended bill of particulars is granted.

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This action was commenced by plaintiff Karen Sittler to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred on eastbound Sunrise Highway in the Town of Babylon on July 17, 2015. The collision allegedly happened when a vehicle operated by defendant Matthew Adams came in contact with plaintiff's vehicle. The bill of particulars alleges that as a result of the subject accident plaintiff suffered various injuries, including disc herniations at levels C3/C4, C5/C6, and C6/C7; cervical sprain and strain; left shoulder sprain and strain; and carpal tunnel syndrome.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of his motion, defendant submits, among other things, copies of pleadings, a transcripts of plaintiff's deposition testimony, affirmed medical reports of Dr. Edward Toriello and Dr. Adam Mednick, and an affirmed magnetic resonance imaging (MRI) report of Dr. Scott Coyne.

Plaintiff opposes the motion, arguing that defendant's submissions are insufficient to demonstrate *prima facie* that she did not sustain a serious injury as a result of the subject accident. Alternatively, plaintiff asserts that the evidence presented in opposition to the motion raises triable issues of fact. In opposition, plaintiff submits, among other things, affirmed medical reports of Dr. David Weissberg and Dr. Jacob Rauchwerger, an affirmed MRI report of Dr. Marc Katzman, and a statement of Fred Goldberg, an economist.

Plaintiff moves pursuant to CPLR 3025 (b) and 3043 for leave to amend her bill of particulars. Defendant opposes plaintiff's motion, arguing that it would be prejudicial and that plaintiff failed to provide a reasonable excuse for the delay. Defendant also requests that the court preclude the expert testimony of plaintiff's experts, Rauchwerger and Goldberg, arguing that no discovery was exchanged for those experts.

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

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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 Eycler*, *supra*; *Pagano v Kingsbury*, *supra*; *see generally Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Dr. Toriello's medical report states that an examination of plaintiff's cervical spine revealed pain-free bilateral lateral bending of 45 degrees (normal 40 to 45 degrees), bilateral rotation to 80 degrees (normal 70 to 80 degrees), flexion to 50 degrees (normal 45 to 50 degrees), and extension to 30 degrees (normal 55 to 60 degrees). He states that range of motion testing of plaintiff's left shoulder revealed abduction of 150 degrees (150 to 180 normal), flexion to 130 degrees (150 to 180 degrees normal), internal rotation to 80 degrees (80 to 90 degrees normal), external rotation to 90 degrees (90 degrees normal), extension to 40 degrees (40 to 50 degrees normal), and adduction to 30 degrees (30 to 50 degrees normal). He states that range of motion testing of plaintiff's right shoulder revealed abduction and flexion to 150 degrees (150 to 180 degrees normal), internal rotation to 80 degrees (80 to 90 degrees normal), external rotation to 90 degrees (90 degrees normal), extension to 40 degrees (40 to 50 degrees normal), and adduction to 30 degrees (30 to 50 degrees normal). He states that range of motion testing of plaintiff's lumbosacral spine revealed pain-free range of motion with flexion to 60 degrees (normal 60 to 75 degrees), extension to 25 degrees (normal 25 to 30 degrees), bilateral lateral bending to 25 degrees (normal 25 to 35 degrees). And he states that range of motion testing of plaintiff's elbows, wrists and hands revealed normal ranges. Dr. Toriello opines that the examination of plaintiff revealed no objective evidence of continued disability, and that plaintiff is able to return to work and normal daily living activities without restriction.

The medical report of Dr. Mednick, a neurologist, states that an examination of plaintiff revealed normal gait and motor tone within normal limits. It states that range of motion testing of plaintiff's cervical spine revealed flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), lateral flexion to the right and left to 45 degrees (45 degrees normal), and rotation to 80 degrees (80 degrees normal). It states that range of motion testing of the lumbar spine revealed flexion to 60 degrees (60 degrees normal), extension to 25 degrees (25 degrees normal), lateral flexion to the right and left to 25 degrees (25 degrees normal), and rotation to 30 degrees (30 degrees normal). It further states that range of motion testing of both shoulders revealed flexion to 180 degrees (180 degrees normal), extension to 40 degrees (40 degrees normal), abduction to 180 degrees (180 degrees normal), internal rotation to 80 degrees (80 degrees normal), and external rotation to 90 degrees (90 degrees normal). Dr. Mednick opines that from a neurologic perspective, there is no disability or permanency with regards to the subject accident. He concludes that plaintiff may continue to work and perform her regular activities of daily living without any restrictions.

Here, defendant failed to make a *prima facie* showing that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Astudillo v MV Transp., Inc.*, 84 AD3d 1289, 923 NYS2d 722 [2d Dept 2011]; *Rizzo v Torchiano*, 57 AD3d 872,

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868 NYS2d 926 [2d Dept 2008]). Significantly, Dr. Toriello's medical report revealed significant limitations in the ranges of motion of plaintiff's cervical spine and left shoulder based upon his examination of plaintiff, which took place over three years after the subject accident (*see Joseph v Hampton*, 48 AD3d 638, 852 NYS2d 335 [2d Dept 2008]; *Joissaint v Starrett-1 Inc.*, 46 AD3d 622, 848 NYS2d 259 [2d Dept 2007]; *Zamaniyan v Vrabeck*, 41 AD3d 472, 835 NYS2d 903 [2d Dept 2007]). Moreover, Dr. Toriello's medical report is deficient in that the normal range of motion measurements that he sets forth for plaintiff consists of variable ranges, leaving the Court to speculate as to under what circumstances those variable ranges occur (*see Powell v Alade*, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]; *Manceri v Bowe*, 19 AD3d 462, 798 NYS2d 441 [2d Dept 2005]). In addition, the measurements ascribed to plaintiff's shoulders are at the low end of the so-called "normal" ranges for such movements. Specifically, Dr. Toriello states that range of motion testing of plaintiff's shoulders revealed flexion to 150 degrees (150 to 180 degrees normal) and adduction to 30 degrees (30 to 50 degrees normal). Furthermore, the reports prepared by defendant's experts cite different and contradictory numbers for plaintiff's range of motion. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (*Noble v Ackerman*, 252 AD2d 392, 395, 675 NYS2d 86 [2d Dept 1998]; *see LaMasa v Bachman*, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; *Reynolds v Burgezi*, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). These discrepancies between defendant's experts create an issue of fact for the jury to determine (*see Suazo v Brown*, 88 AD3d 602, 931 NYS2d 67 [1st Dept 2011]; *Martinez v Pioneer Transp. Corp.*, 48 AD3d 306, 851 NYS2d 306 [1st Dept 2008]; *Martin v Schwartz*, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Inasmuch as defendant failed to establish his prima facie entitlement to judgment as a matter of law based on whether plaintiff sustained serious injuries, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact on that matter (*see Penoro v Firshing*, 70 AD3d 659, 897 NYS2d 110 [2d Dept 2010]; *Umar v Ohrnberger*, 46 AD3d 543, 846 NYS2d 612 [2d Dept 2007]). Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

As to plaintiff's motion, leave to serve a supplemental or amended pleading shall be freely granted (CPLR 3025 [b]), and such a motion is committed to the sound discretion of the trial court (*see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 471 NYS2d 55 [1983]). CPLR 3043 (b) provides that in personal injury actions, "[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial." Such service is permitted "[p]rovided however that no new cause of action may be alleged or new injury claimed" (CPLR 3043 [b]). Where new claims or injuries are alleged, however, the bill of particulars must be amended pursuant to CPLR 3042 (b). CPLR 3042 (b) provides that "a party may amend his bill of particulars once as of course before trial, prior to the filing of a note of issue." However, "where an action has long been certified as ready for trial and the moving party had full knowledge of the new cause of action, in the absence of good cause for the failure to move to amend at an earlier date, the motion should be denied on the ground of gross laches alone" (*Felix v Lettre*, 204 AD2d 679, 680, 612 NYS2d 435 [2d Dept 1994]; *see Edenwald Contr. Co. v City of New York*, *supra*).

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Plaintiff's motion to amend the bill of particulars is granted. Here, the proposed amended bill of particulars dated February 1, 2020, does not allege new injuries not alleged in the original bill of particulars or the prior supplemental bills of particulars. Plaintiff did not specifically plead in her bill of particulars which categories of threshold applies to her injuries as a result of the subject accident, and the proposed supplemental bill of particulars corrects this oversight. Defendant is not prejudiced by the oversight as he has moved for summary judgment dismissing the complaint and addressed the relevant categories. The fifth supplemental bill of particulars shall be deemed served as of the return date of plaintiff's motion.

Dated: January 14, 2021



Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION