

Benson v Hall
2021 NY Slip Op 33407(U)
May 21, 2021
Supreme Court, Dutchess County
Docket Number: Index No. 2019-52948
Judge: Christi J. Acker
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To commence the 30-day 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 DUTCHESS

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CHRISTIAN D. BENSON,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 2019-52948

COURTNEY A. HALL,

Motion Seq. No. 1 & 2

Defendant.
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The following papers, numbered 1 to 22, were read on the following applications: (1) motion of Defendant Courtney A. Hall (hereinafter "Defendant") for summary judgment pursuant to CPLR 3212 due to Plaintiff Christian D. Benson's (hereinafter "Plaintiff") failure to meet the threshold limits set by Insurance Law §5102 and §5104 and (2) Plaintiff's cross-motion for an Order pursuant to CPLR 3025 granting plaintiff leave to amend his Bill of Particulars:

Notice of Motion-Affirmation of Keri A. Wehrheim, Esq.-Exhibits A-F	1-8
Notice of Cross-Motion-Affirmation in Support of Cross-Motion and in	
Opposition of Mark P. Cambareri, Esq.-Exhibits 1-9	9-19
Affirmation in Opposition to Cross-Motion of Keri A. Wehrheim, Esq.-	
Exhibits A-B	19-21
Affirmation in Reply of Keri A. Wehrheim, Esq.	22

Plaintiff commenced this personal injury action against Defendant on or about July 26, 2019. It is alleged that Plaintiff was injured as the result of a motor vehicle accident that occurred on July 20, 2017 on Mill Street near its intersection with North Clinton Street in the City of Poughkeepsie when his vehicle was struck by the vehicle owned and operated by Defendant.

Defendant moves for summary judgment on Plaintiff's claims, alleging that said Plaintiff fails to meet the "serious injury" threshold pursuant to the New York State Insurance Law. In support of her summary judgment application, Defendant submits copies of the pleadings, Plaintiff's Verified Bill of Particulars, Plaintiff's deposition transcript, the June 22, 2020 affirmed report of Adam Soyer, D.O., who examined Plaintiff on May 27, 2020 (attached to the Wehrheim Affirmation as Exhibit D, hereinafter referred to as the "Soyer Report") and the February 11, 2020 affirmed report of Loren E. Rosenthal, M.D., CPE, FRSM, who examined Plaintiff on that same date (attached to the Wehrheim Affirmation as Exhibit E, hereinafter referred to as the "Rosenthal Report").

The New York Insurance Law 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.

N.Y. Ins. Law § 5102(d) (McKinney's 2018)

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trials." *Licari v. Elliott*, 57 NY2d 230, 237 [1982]. Any injury outside the definition of "serious injury" is considered an insignificant injury and, therefore, a trial is not allowed under the no-fault statute. *Id.* at 235. The term "significant" refers to "something more than a minor limitation of use". *Id.* at 236.

Whether a claimed injury falls within the statutory definition of "serious injury" is a

question of law that may be decided by the court on a motion for summary judgment. *See Licari, supra*, at 237. A defendant seeking summary judgment bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a “serious injury.” *Toure v. Avis Rent A Car Sys, Inc.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955 [1992]. Once a defendant has made a prima facie showing, the burden shifts to the plaintiff to submit evidence, in admissible form, sufficient to create a material issue of fact necessitating a trial. *Franchini v. Palmireri*, 1 N.Y.3d 536 [2003]; *Grossman v. Wright*, 268 AD2d 79, 84 [2d Dept 2000]. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court that should only be employed when there is no doubt as to the absence of triable issues. *Castlepoint Ins. Co. v. Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept. 2016].

A review of Defendant’s submissions demonstrates that she failed to satisfy her prima facie burden of establishing that Plaintiff did not suffer a serious injury. At the examination on May 27, 2020, Defendant’s orthopedic expert, Dr. Soyer, measured Plaintiff’s lumbar extension range of motion at 15 degrees, with 25 degrees being normal. This 10-degree reduction of lumbar range of motion translates to a 40% loss. Accordingly, Defendant fails to establish her prima facie case as her expert found significant limitation in the Plaintiff’s lumbar extension range of motion. *McGee v. Bronner*, 188 AD3d 1033 [2d Dept. 2020]. Further, Dr. Soyer diagnosed Plaintiff with a resolved sprain of his lumbar spine, superimposed on pre-existing degenerative disc disease, but he does not opine as to whether this “resolved” sprain was, or was not, the result of the accident at issue herein. Notably, Dr. Soyer also fails to state affirmatively that the subject accident had not caused the measured limitation, similarly rendering his report insufficient to satisfy the Defendant’s prima facie burden. *Murphy v. Hurdle*, 132 AD3d 646, 647 [2d Dept. 2015]. Finally,

Defendant's own doctors' reports create an issue of fact as Defendant's expert neurologist, Dr. Rosenthal, measured Plaintiff's lumbar ranges of motion and found them to all be within normal limits. Since Defendant failed to meet her *prima facie* burden, it is unnecessary to determine whether the opposing papers were sufficient to raise a triable issue of fact.¹ *McGee, supra*; see also *Nunez v. Alies*, 162 AD3d 1058, 1059 [2d Dept. 2018].

Plaintiff's Cross-Motion to Amend the Bill of Particulars

According to Plaintiff's counsel, the "entire basis" for leave to amend Plaintiff's Bill of Particulars is to claim activation and exacerbation of previously asymptomatic degenerative condition. Counsel maintains that such an amendment can be accomplished through a supplemental bill of particulars pursuant to CPLR 3043(b).² That section provides that 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. Provided however that no new cause of action may be alleged **or new injury claimed** and that the other party shall upon seven days notice, be entitled to newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities. (Emphasis supplied)

Plaintiff argues that the "activation" of degenerative conditions which were previously asymptomatic is "not entirely a new injury." *Cambareri Affirmation*, ¶9.³ The Court disagrees. Plaintiff's current Bill of Particulars alleges that the accident in question caused the lumbar injuries, which includes herniations and bulges. Plaintiff now seeks to allege that these injuries existed before the accident, but were asymptomatic, and were aggravated or activated by the

¹ Nevertheless, although the Court need not consider Plaintiff's opposition, Plaintiff submitted affirmed medical reports and an expert affirmation, which raise triable issues of fact.

² Counsel mistakenly cites CPLR 3042(b), but thereafter quotes from CPLR 3043(b).

³ Indeed, relying upon this section, Plaintiff served a Verified Supplemental Bill of Particulars dated January 18, 2021 and annexed to the *Cambareri Affirmation* as Exhibit 1.

accident. Although the proposed amendment involves the same area of the spine, Plaintiff's theory of the injury has changed dramatically – from the accident causing the lumbar injuries to the accident aggravating pre-existing injuries. As this is clearly a newly claimed injury, it is not the appropriate subject of a Supplemental Bill of Particulars pursuant to CPLR 3043(b).

Accordingly, Plaintiff's application will be evaluated as one to amend the Bill of Particulars pursuant to CPLR 3025. Although leave to amend a bill of particulars should be freely granted, where the application for leave to amend is made after the action has been certified for trial, “judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious” [citation omitted].” *Rodgers v. New York City Transit Auth.*, 109 AD3d 535, 536-37 [2d Dept. 2013]. “A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed.” *Gitlin v. Chirinkin*, 60 AD3d 901, 902 [2d Dept. 2009].

Plaintiff argues that there is no prejudice in allowing the amendment as Defendant's own experts indicate that the accident exacerbated Plaintiff's pre-existing degenerative condition in his lumbar spine. However, Plaintiff's application is devoid of any explanation for the delay in seeking this amendment. It is uncontested that the October 5, 2017 MRI report makes numerous references to disc disease and concludes with an impression of “Moderate degenerative disease of lumbar spine.” Exhibit 4, Cambareri Affirmation. In addition, as noted by Defendant's counsel in opposition, Plaintiff was on notice of the opinions of the Defendant's experts as early as March 20, 2020 and did not make the instant motion until Defendant moved for summary judgment. More importantly, Plaintiff's own expert clearly maintains that the injuries to Plaintiff's lumbar spine “were caused by the July 20, 2017 accident and not by degenerative disc disease.” January

2021 Affirmation of Gabriel L. Dassa, D.O, Exhibit 8, Cambareri Affirmation. Given the delay in seeking this amendment and the fact that the opinion of Plaintiff's own expert does not support the proposed amendment, Plaintiff's motion to amend the Bill of Particulars is denied. See *Rodgers, supra* at 537 ("Under the circumstances of this case, including the fact that, during four years of discovery, the plaintiff affirmatively maintained that his injuries did not include the aggravation of a pre-existing condition, as well as the lateness of his request for leave to amend, the prejudice to the defendants, and the lack of any reasonable excuse for the delay, the Supreme Court improvidently exercised its discretion in granting the plaintiff's motion for leave to amend his bill of particulars."):

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Now, therefore, it is hereby

ORDERED that Defendant's motion is DENIED in its entirety; and it is further

ORDERED that Plaintiff's cross-motion is DENIED in its entirety; and it is further

ORDERED that the trial in this matter is hereby scheduled for jury selection on

September 13, 2021; and it is further

ORDERED that this matter is scheduled for a virtual settlement conference on June 7, 2021 at 11:30 a.m., via Microsoft Teams.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
May 21, 2021


CHRISTI J. ACKER, J.S.C.

To: All parties via ECF