

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D26140
Y/prt

_____AD3d_____

Submitted - October 28, 2009

REINALDO E. RIVERA, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
JOHN M. LEVENTHAL
SHERI S. ROMAN, JJ.

2009-02269

DECISION & ORDER

Linda Daly-Caffrey, respondent,
v Alfred Licausi, appellant.

(Index No. 17102/07)

Breen & Clancy, Hauppauge, N.Y. (Anne Marie Caradonna of counsel), for appellant.

Bamundo, Zwal & Schermerhorn, LLP, New York, N.Y. (Ben Bartolotta of counsel),
for respondent.

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Nassau County (Cozzens, J.), dated February 17, 2009, which denied his motion to dismiss the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), and granted the plaintiff's cross motion for leave to amend the bill of particulars.

ORDERED that the order is modified, on the law and the facts, by deleting the provision thereof granting the plaintiff's cross motion for leave to amend the bill of particulars and substituting therefor a provision denying the cross motion; as so modified, the order is affirmed, without costs or disbursements.

"Motions to amend or supplement a bill of particulars are governed by the same standards as those applying to motions to amend pleadings" (*Koch v St. Francis Hospital*, 112 AD2d 142, 143; *see Carranza v Brooklyn Union Gas Co.*, 233 AD2d 287). A plaintiff seeking leave to amend a bill of particulars by asserting a new injury must show a reason for the delay in asserting the

injury and include a medical affidavit showing a causal connection between the alleged injury and the original injuries sustained (see *Kyong Hi Wohn v County of Suffolk*, 237 AD2d 412; *Simino v St. Mary's Hosp. of Brooklyn, Catholic Med. Ctr. of Brooklyn & Queens*, 107 AD2d 800). In this case, the plaintiff sought to add a new injury to the bill of particulars which had not been mentioned previously, and which did not appear in the medical records until nearly a year after the date of the accident. Under these circumstances, it was an improvident exercise of discretion to grant the plaintiff leave to amend her bill of particulars (see *Kraycar v Monahan*, 49 AD3d 507).

The defendant failed to make a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (see *McMillan v Naparano*, 61 AD3d 943; *Lunja v Mocha Limo Car Serv.*, 50 AD3d 971; *Dettori v Molzon*, 306 AD2d 308). Since the defendant failed to satisfy his prima facie burden, it is unnecessary to consider whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact (see *Weingrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

RIVERA, J.P., COVELLO, ANGIOLILLO, LEVENTHAL and ROMAN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court