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SHORT FORM ORDER

INDEX No. 08-37174
CAL. No. 11-01232MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 10-13-11 (#004 & #005)
MOTION DATE 1-5-12 (#006)
ADJ. DATE: 2-12-12
Mot. Seq. # 004 - MD
005 - XMD
006 - XMG

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MARK HAAVE,

Plaintiff,

- against -

FRITZ JEAN-LOUIS, MARGARET JEAN-LOUIS, MOHAMMED A. PATWARY and ADEL M. MINA,

Defendants.

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Upon the following papers numbered 1 to 33 read on this motion and cross motions for summary judgment, serve supplemental bill of particulars ; Notice of Motion/ Order to Show Cause and supporting papers (004) 1-10 ; Notice of Cross Motion and supporting papers (005) 11-15; (006) 16-26 ; Answering Affidavits and supporting papers 27-28; 29-30 ; Replying Affidavits and supporting papers 31-32 ; Other 33 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (004) by the defendants, Fritz Jean-Louis, Margaret Jean-Louis, and Mohammed A. Patwary, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d), is denied; and it is further

ORDERED that motion (005) by the defendant, Adel M. Mina, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d), is denied; and it is further

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ORDERED that motion (006) by the plaintiff, Mark Haave, pursuant to CPLR 3043 and 3025 for an order granting him leave to serve a Supplemental Bill of Particulars, is granted and the proposed Supplemental Bill of Particulars dated December 23, 2011 is deemed served nunc pro tunc; and it is further

ORDERED that the defendants, if so advised, may conduct independent orthopedic and neurological examinations of the plaintiff within forty days of the date of this order upon service of a copy of this order with notice of entry upon all parties, and upon a minimum of fifteen days notice to the plaintiff of the date of said independent orthopedic and neurological examinations.

In this negligence action, the plaintiff, Mark Haave, seeks damages for personal injuries allegedly sustained in the accident which occurred on December 24, 2006 on East 83rd Street at its intersection with 3rd Avenue, New York, New York. The plaintiff was a passenger in the vehicle operated by the defendant Mohammed A. Patwary, when their vehicle, and the vehicle operated by the defendant Adel M. Mina, came into contact.

Pursuant to Insurance Law § 5102 (d), "'[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed

or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

By way of the verified bill of particulars, the plaintiff alleges that as a result of this accident he sustained injuries consisting of left knee medial meniscal tear and arthritis requiring left knee arthroscopy, shaving of the medial meniscus tear, debridement of arthritis with chondroplasty of the medial femoral condyle; post operative scarring and disfigurement of the left knee area; medial collateral ligaments-sprain left knee; bilateral knee patella femoral syndrome; herniated disc L5-S1 with mass effect of the left S1 nerve root; lumbosacral radiculopathy; lumbosacral spine sprain; lumbosacral neuritis; aggravation and/or exacerbation of degenerative disc disease of the lumbar spine; thoracic neuritis; and laceration of the right scalp area. The plaintiff additionally has claimed to have been confined to bed from December 24, 2006 through May 2008, during which time he was totally incapacitated.

In support of motion (004), the defendants have submitted, inter alia, an attorney's affirmation; copies of the pleadings; plaintiff's verified bill of particulars; the reports of A. Robert Tantleff, M.D. dated May 12, 2009 concerning his review of the MRI of the plaintiff's left knee dated September 11, 2007, Edward L. Mills, M.D. concerning his independent orthopedic examination of the plaintiff on January 28, 2010, and Charles Bagley, M.D dated January 28, 2010 concerning his independent neurological examination of the plaintiff; and the signed and certified transcript of the examination before trial of Mark Haave dated December 3, 2009.

Upon review and consideration of the defendants' evidentiary submissions submitted with motion (004), it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Mark Haave did not sustain a serious injury as defined by Insurance Law § 5102 (d).

Neither Dr. Tantleff, Dr. Mills, nor Dr. Bagley have submitted a copy of their curriculum vitae to qualify as experts, other than each stating he is licensed to practice medicine in New York.

The defendants have failed to support this motion with the medical records and initial test results for the x-ray and MRI studies obtained by the plaintiff relative to his claimed injuries. In fact, Dr. Mills has set forth that there were no medical records available for his review, thus leaving this court to speculate as to how Dr. Mills reached his impressions and opinions relative to the plaintiff's prior clinical presentations and findings. Dr. Mills further set forth in his report that he would be pleased to review the plaintiff's medical records and advise whether they affect his opinion which was based upon the examination alone. Thus, Dr. Mill's report raises factual issues precluding summary judgment.

Dr. Tantleff has offered opinions based upon his review of the MRI of the plaintiff's left knee, but has not submitted a copy of the initial report generated with that study. Thus, this Court is left to speculate as to the contents of the MRI study and report reviewed. Expert testimony is limited to facts in evidence. (*see also* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716

NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]). The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that expert testimony is limited to facts in evidence. (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]).

Dr. Tantleff set forth that there is degenerative tearing of the posterior horn of the medial meniscus with an associated parameniscal cyst indicative of degenerative tearing; degenerative changes of the anterior horn of the lateral meniscus; and fibrocystic degenerative changes of the medial tibial plateau, however, he does not indicate the time frame in which the opined degeneration occurred. Although he has found evidence of a recent contusive change of the medial femoral condyle and medial tibial plateau, he opined that this new injury is unassociated with the date of the incident of December 24, 2006, but does not state the time frame or basis for this finding. Thus, Dr. Tantleff's conclusory and unsupported opinions raise factual issues which preclude summary judgment.

Dr. Mills set forth in his report that Mr. Haave stated that initially he sustained injuries to his head, mid-back, low-back, right knee and left knee, and noted that Mr. Haave underwent left knee arthroscopic surgery on April 28, 2008. Dr. Mills indicated that Mr. Haave underwent lumbar surgery in 1999, but he does not indicate the type of surgery or the level at which such surgery was performed. Although Dr. Mills set forth his impression that the plaintiff sustained an alleged injury to his thoracic spine, lumbar spine, right knee and left knee, he does not indicate what those injuries were or that they were not causally related to the subject accident. Although Dr. Mills opined that the plaintiff had surgery to his left knee, he does not rule out that such surgery was necessitated by an injury sustained in the subject accident. Thus, Dr. Mills' report raises further factual issues.

Dr. Bagley has set forth that Mr. Haave had diagnostic testing consisting of x-rays and MRI's of his back and knee, and that he received left knee arthroscopic surgery on April 28, 2008, and epidural injections to the spine for pain management. However, Dr. Bagley did not review any medical records or the reports of the diagnostic testing to which he referred, leaving this court to speculate as to whether or not a review of the plaintiff's medical records from his treating physicians, and the results of the diagnostic testing, would have any effect upon his opinion offered without the benefit of such information. Upon examination, Dr. Bagley conducted range of motion testing with the use of a goniometer and compared his findings to the purported normal ranges of motion for the lumbar spine, but has omitted any range of motion for the knees. Dr. Bagley set forth that knee flexion-extension strength testing is normal, but he has not set forth the findings for range of motion for the same.

Although the plaintiff has claimed that he sustained a laceration to his scalp and has scarring and disfigurement of his left knee, no report from a plastic surgeon has been submitted relative thereto (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), raising further factual issues precluding summary judgment.

It is noted that the defendants' examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendants' physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the experts offer no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). Additionally, the plaintiff claimed in the bill of particulars that he was confined to bed from December 24, 2006 through May 2007. He testified at his examination before trial that at the time of the accident he was a carpenter/supervising foreman for Bonnano Construction Corp. After the accident, he tried to return to work the third week of January 2007, but was unable to function at his job and had to perform light duty. He also was employed with Pizzo Brothers at the time of the accident, as a shared employee with Bonnano Construction. He had to stop working due to his physical limitation in March 2007, and has not returned to work. Thus, the defendant has failed to demonstrate entitlement to summary judgment on this category of injury in that there are factual issues concerning whether or not he was able to substantially perform his usual and customary duties for a period of ninety days during the 180 days immediately following the accident.

The factual issues raised in defendants' moving papers preclude summary judgment. The defendants have failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]), as the burden has not shifted to the plaintiff.

Accordingly, motion (004) by the defendants, Fritz Jean-Louis, Margaret Jean-Louis, and Mohammed A. Patwary, for summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d) is denied.

Turning to cross motion (005) by defendant Adel Mina which seeks summary judgment in her favor, it is noted that the note of issue and certificate of readiness were filed with this court on June 10, 2011. CPLR 3212(a) provides in pertinent part that a motion for summary judgment shall be made no later than one hundred twenty days after the filing of the Note of Issue, except with leave of court on good cause shown. According to the affidavit of service, cross motion (005) was served on October 21, 2011 by defendant Adel Mina, more than one hundred twenty days after the Note of Issue was filed. The defendant Adel Mina has made no application for leave of court on good cause shown to file this cross motion beyond the statutory one hundred twenty days, and, in fact, has not submitted any reason for the delay in serving the moving papers (*see* ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Thus, motion (005) is deemed untimely.

Additionally, even if motion (005) were timely submitted and considered by this court, it is determined that defendant Mina has not demonstrated prima facie entitlement to summary judgment. Defendant Mina has incorporated by reference all the evidentiary proof, submissions and arguments set forth by the co-defendants in motion (004), which motion was denied due to the failure of the moving defendants to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury, as set forth above. Thus, it is determined that the application by defendant Mina does not establish prima facie entitlement for summary judgment dismissing the complaint.

Accordingly, motion (005) by defendant Mina for summary judgment in her favor is denied.

In motion (006) the plaintiff seeks leave to serve a supplemental bill of particulars upon the defendants. The proposed supplemental bill of particulars seeks to supplement items 10 and 11: lumbar laminectomy L4, L5, S1 bilaterally; excision herniated disc left L4-5 and left L5-S1; transforaminal lumbar interbody fusion L4-5 and L5-S1; broad based left paracentral herniation at L5-S1 encroaching upon the ventral aspect of the thecal sac; and right lateral L4-5 herniation; item 5: plaintiff was admitted to Huntington Hospital on October 27, 2011 through October 31, 2011 for the above referenced surgery as well as on May 27, 2011 for discography at L5-S1; items 14 and 20: that the plaintiff remains totally incapacitated and unable to engage in gainful employment and that by award dated July 13, 2009, (Cohen, A.L.J.) plaintiff was granted Social Security Disability benefits effective April 7, 2007. The defendants oppose this application.

The Administrative Law Judge, in awarding the Social Security Disability benefits to the plaintiff, has set forth findings of fact upon which the award was based, and includes that the claimant has a past medical history of lumbar back surgery in 1999 related to a motor vehicle accident, with a re-injury to his back in an accident in December 2006. An x-ray of the lumbar spine performed on February 15, 2007 suggested evidence of a facetectomy or lumbar laminectomy on the right side at the L4-L5 levels. MRI scans of the lumbar spine performed in July 2007 and January 2009 revealed a paracentral herniated disc at L5-S1 associated with a mass effect on the left S1 nerve root, degenerative disc disease, and mild central stenosis at L4-L5. The Administrative Law Judge accorded significant weight to the opinion of Dr. Lastehenos, an orthopedist who treated the claimant on a regular basis since February 2007.

It is determined that the plaintiff seeks to allege continuing consequences of the injuries suffered and previously described in the his previous bill of particulars, rather than assert new and unrelated injuries or a new cause of action. Thus, the proposed supplemental bill of particulars is deemed a supplemental bill of particulars (*see* ***Maraviglia v Lokshina***, 68 AD3d 1066, 890 NYS2d 349 [2d Dept 2009]). In light of the dynamics of a maturing injury, the supplemental bill of particulars sets forth a sequellae relative to the claimed lumbar herniated discs as originally pleaded. Leave to supplement a bill of particulars should be freely given (CPLR 3043; ***Jesselli v City of New York***, 59 AD2d 755, 398 NYS2d 701 [2d Dept 1977]). Here, the proposed supplemental bill of particulars dated December 23, 2011, was served within thirty days before trial, and the defendants have not demonstrated prejudice (CPLR 3043; ***Sparkle v McGuire***, 81 AD2d 861, 442 NYS2d 528 [2d Dept 1981]). The defendants were made aware, pursuant to the testimony given by the plaintiff at his examination before trial, that he was unable to work after the accident.

Dr. Mills and Dr. Bagley both conducted their respective independent examinations of the plaintiff on January 28, 2010, thus, their independent examinations of the plaintiff preceded the plaintiff's discography of May 2011 and subsequent back surgery in October, 2011.

Accordingly, motion (006) is granted, and the proposed supplemental bill of particulars is deemed served nunc pro tunc. The defendants, if so advised, may conduct independent orthopedic and neurological examinations of the plaintiff within forty days of the date of this order upon service of a copy of this order with Notice of Entry upon all parties, and upon a minimum of fifteen days notice to the plaintiff of the date of said independent orthopedic and neurological examinations.

Dated: April 6, 2012

J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION