SHORT FORM ORDER

INDEX No. 06-3266

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 7-5-12 (#006 & #007)
MOTION DATE 9-27-12 (#008)
ADJ. DATE
Mot. Seq. # 006 - MD
007 - MD
008 - XMD

BRETT J. BALLIET, Plaintiff, - against - NORTH AMITYVILLE FIRE DEPARTMENT, TOWN OF BABYLON, PUBLIC ADMINISTRATOR OF SUFFOLK COUNTY FRANKLYN A. FARRIS, TAQIYYA M. JENKINS and LL COOL J. INC., Defendants.	STANTON & GUZMAN, LLP Attorney for Plaintiff 820 Hempstead Turnpike, 2nd Floor Franklin Square, New York 11010 FUREY, FUREY, LEVERAGE, et al. Attorney for Defendants North Amityville F.D. & Public Administrator of Suffolk County Franklyn A. Farris 600 Front Street Hempstead, New York 11550 NICHOLAS GOODMAN & ASSOCIATES Attorney for Defendants Taqiyya M. Jenkins & LL Cool J, Inc. 41 Madison Avenue, 31st Floor New York, New York 10010

Upon the following papers numbered 1 to 91 read on these motions and cross motions for reargue and renew : Notice of Motion/ Order to Show Cause and supporting papers 1 - 40; 41 - 67 ; Notice of Cross Motion and supporting papers 68 - 83 ; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 84 - 86; 87 - 91 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#006) by defendants Taqiyya Jenkins and LL Cool J, Inc., the motion (#007) by defendants North Amityville Fire Company, Inc. and Public Administrator of Suffolk County, and the cross motion (#008) by plaintiff are consolidated for purposes of this determination; and it is

ORDERED that the renewed motion by defendants Taqiyya Jenkins and LL Cool J, Inc. for summary judgment dismissing the complaint and the cross claims against them is denied; and it is

ORDERED that the renewed motion by defendants North Amityville Fire Company, Inc. and Public Administrator of Suffolk County for summary judgment dismissing the complaint against them is denied; and it is further

ORDERED that the motion by plaintiff for an order granting leave to serve a supplemental bill of particulars and extending his time to file a note of issue is denied.

Plaintiff Brett Balliet commenced this action to recover damages for personal injuries allegedly sustained as a result of two separate motor vehicle accidents that occurred within one month of each other. The first motor vehicle accident allegedly happened in the Town of Babylon on November 12, 2004, when a fire truck owned by defendant North Amityville Fire Company, Inc., s/h/a North Amityville Fire Department, and driven by John Daley collided with a vehicle driven by plaintiff as it was traveling southbound on Route 110. The second accident allegedly occurred in the Town of North Hempstead on December 4, 2004, when a vehicle owned by defendant LL Cool J, Inc. and driven by defendant Taqiyya Jenkins struck plaintiff as he was walking across Northern Boulevard. By his bill of particulars, plaintiff alleges he suffered various injuries due to the accidents, including an annular tear at level L4-L5 and a herniated disc at level L5-S1 in the lumbar region; a "mild sprain" of the medial collateral ligament in the right knee; a "tiny interstitial tear of the supraspinatus" in the right shoulder; and "multilevel degenerative change with a combination of disc bulging and disc herniations" in the cervical region.

In December 2008, defendants LL Cool J and Jenkins moved for summary judgment dismissing all claims against them on the ground that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the December 2004 accident. The next month, defendants North Amityville Fire Company and John Daley also moved for summary judgment in their favor based on plaintiff's failure to meet the serious injury threshold. Shortly thereafter, the Town of Babylon moved for summary judgment in its favor. By order dated December 9, 2009, this Court denied defendants' motions, without prejudice, finding that John Daley's death in December 2008 stayed the action until a proper substitution was made for him. Subsequently, on March 5, 2012, the Court granted a motion by plaintiff for an order permitting the Public Administrator of Suffolk County, Franklyn Farris, to be substituted as a defendant in the place of John Daley. It is noted that a stipulation discontinuing the claims against the Town of Babylon has been executed by the parties.

Defendants Taqiyya Jenkins and LL Cool J, Inc. (hereinafter collectively referred to as the Jenkins defendants) now renew their motion for summary judgment dismissing the complaint and all cross claims against them, arguing that plaintiff did not suffer a serious injury as a result of the December 2004 accident. The Jenkins defendants further assert that, as plaintiff did not serve a supplemental bill of particulars or disclose any evidence related to treatment he received for his alleged injuries after the previous summary judgment motions were made, the Court should not consider any new medical reports or records submitted by plaintiff in opposition to the motion. In support of their motion, the Jenkins defendants submit the same papers submitted with their original motion, including a transcript of plaintiff's deposition testimony and sworn medical reports prepared by Dr. Arthur Bernhang and Dr. Howard Reiser. They also submit evidence showing plaintiff was involved in a boating accident in 1998, which allegedly caused multiple herniated discs in his lumbar region.

Defendants North Amityville Fire Company and the Public Administrator of Suffolk County (hereinafter collectively referred to as the Fire Company defendants) also renew their motion for summary judgment dismissing the complaint on the ground plaintiff did not suffer a serious injury in the November 2004 accident. Like the Jenkins defendants, the Fire Company defendants submit the same evidence proffered on their prior summary judgment motion, including the sworn reports of Dr. Bernhang and Dr. Reiser. At the Fire Company defendants' request, Dr. Bernhang, an orthopaedist, and Dr. Reiser, a neurologist, conducted examinations of plaintiff in March 2008. As part of their examination of plaintiff, they also reviewed various medical records relating to the injuries alleged in this action, as well as records relating to the injuries he allegedly suffered in the 1998 boating accident.

Plaintiff opposes defendants' motions and cross-moves for an order granting him leave to serve a supplemental bill of particulars and extending the time to file a note of issue. In opposition to the defendants' motions, plaintiff submits copies of the evidence filed in opposition to the prior summary judgment motions, namely, an attorney's affirmation, an affidavit of his treating chiropractor, Jamie Skurka, dated September 11, 2009, and his own affidavit. Plaintiff also submits an affidavit of Dr. Vincent Leone, an orthopaedic surgeon who began treating plaintiff in May 2012, medical reports prepared after the submission of the earlier summary judgment motions, and the proposed supplemental bill of particulars. In support of his cross motion, plaintiff alleges that the medical evidence annexed to his papers shows that the condition of his spine has deteriorated over the past few years, and that defendants will not be prejudiced by the proposed supplemental bill of particulars or by an extension of the time to file the note of issue.

As to defendants' renewed motions for summary judgment in their favor, it is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). 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 by 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 a 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). 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***, 182 AD2d 268, 587 NYS2d 692). 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***, 79 NY2d 955, 582 NYS2d 990; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The report prepared by Dr. Bernhang states that plaintiff presented at the March 2008 medical examination with complaints of neck "fatigue," muscle spasms three or four times a week, "fatigue problems" and pain in his right shoulder with use, a sore back, and occasional pain and swelling in his right knee. It states, in relevant part, that Dr. Bernhang performed active range of motion testing on plaintiff's cervical spine, shoulders, and knees, using a goniometer to measure mobility. The report sets out the range of motion findings for plaintiff and the "Average Range of Joint Motion" (ARJM) values for such movements. According to Dr. Bernhang's report, range of motion testing of plaintiff's cervical region revealed 55 degrees of extension (70 degrees ARJM), 40 degrees of flexion (70 degrees ARJM), 40 degrees of left lateral flexion and 45 degrees of right lateral flexion (45 degrees ARJM), and 60 degrees of left and right lateral rotation (55 degrees ARJM). As to the lumbar region, the report states that "[d]orsal lumbar expansion with the knees extended is 6" (normal being 4" or >); lateral flexion is 30/30 (20 degrees or > being normal) and there is no reported pain on extension of the lumbar spine." It further states that while the findings of the straight-leg raise test, used to assess lumbar nerve root irritation, were normal in the sitting position, plaintiff demonstrated movement restricted to 45 degrees on the left and 40 degrees on the right out of a "normal" of "55 degrees and greater" in the supine position. The findings of the straight leg test, states the report, are "inconsistent." The report states that objective tests for cervical radiculopathy were negative, as were tests used to assess lumbar discogenic disorder. Dr. Bernhang concludes that plaintiff suffered soft tissue injuries to the lumbar and cervical regions, as well as to the right knee and shoulder, as a result of the November 2004 accident, and that such injuries "appear to have resolved at the present time without residual." He further opines that while plaintiff suffered injuries to his back and knee prior to the November 2004 accident, there was "no objective evidence of any residual of these injuries."

The report of Dr. Reiser states, in part, that while plaintiff reported mild discomfort on palpation of the cervical muscles, he did not report tenderness on palpation of the thoracic or lumbosacral regions, and that the straight-leg raise test was negative bilaterally. It states that plaintiff's station and gait were normal, and that examination of his motor system showed normal tone, bulk and power. It also states that plaintiff's sensation was intact, and that his deep tendon reflexes were "1-2+" and equal bilaterally in the upper and lower extremities. It is noted Dr. Reiser did not perform range of motion testing during his examination of plaintiff. Dr. Reiser concludes that, though plaintiff has a history of low back injury and reported symptoms after the subject motor vehicle accident, his examination of plaintiff did not reveal any objective evidence of an ongoing neurological disorder causally related to the subject accidents.

The medical evidence submitted by defendants is insufficient to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of either the November 12 or December 4 motor vehicle accidents. Here, Dr. Bernhang's report indicates that plaintiff suffers from significant limitations in his cervical spine (*see* ***Swensen v MV Transp., Inc.***, 89 AD3d 924, 933 NYS2d 96 [2d Dept 2011]; ***Ambroselli v Team Massapequa, Inc.***, 88 AD3d 927, 931 NYS2d 652

[2d Dept 2011]; ***Cheour v Pete & Sals Harborview Transp., Inc.***, 76 AD3d 989, 907 NYS2d 517 [2d Dept 2010]; ***Smith v Hartman***, 73 AD3d 736, 899 NYS2d 648 [2d Dept 2010]). Also, despite the allegation that plaintiff suffered a herniated disc and an annular tear in the lumbar region, the orthopaedist's report indicates that the only movement measured for such region was lateral flexion measured and does not explain why the findings of the straight-leg raise test were "inconsistent." Further, though Dr. Bernhang states that plaintiff suffered only soft tissue injuries as a result of the accident and that such injuries have resolved, he fails to explain how his findings of restricted movement in plaintiff's cervical region do not evidence significant limitations in joint function causally related to the subject accidents (*see* ***Balducci v Velasquez***, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]; ***Taylor v Taylor***, 87 AD3d 1129, 930 NYS2d 32 [2d Dept 2011]; ***Cheour v Pete & Sals Harborview Transp., Inc.***, 76 AD3d 989, 907 NYS2d 517; ***Smith v Hartman***, 73 AD3d 736, 899 NYS2d 648).

Moreover, the standard of comparison used by Dr. Bernhang to assess joint function, ARJM, does not comport with the required comparison to the normal range of motion one would expect of a healthy person of the same age, weight, and height (*see* ***Frey v Fedorciuc***, 36 AD3d 587, 828 NYS2d 454 [2d Dept 2007]; ***Powell v Alade***, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]; *see also* ***Doherty v Galla***, 46 AD3d 610, 848 NYS2d 269 [2d Dept 2007]; ***Somers v Macpherson***, 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]). Dr. Bernhang's medical report, therefore, is insufficient to meet defendant's burden on the motion (*see* ***Balducci v Velasquez***, 92 AD3d 626, 938 NYS2d 178; ***Smith v Hartman***, 73 AD3d 736, 899 NYS2d 648). Dr. Reiser's report also fails to establish a prima facie case that plaintiff did not suffer a serious injury, as the findings contained therein do not address the allegation that plaintiff suffers from significant limitations in spinal joint function as a result of the subject accidents. Defendants' motions for summary judgment dismissing the claims against them on the ground plaintiff did not suffer a serious injury, therefore, are denied.

As to plaintiff's cross motion, a supplemental bill of particulars may be used for updating "claims of continuing special damages and disabilities" (CPLR 3043 [b]), but not for adding new injuries or damages (***Kraycar v Monahan***, 49 AD3d 507, 507, 856 NYS2d 123 [2d Dept 2008]; *see* ***Kyong v Hi Wohn v County of Suffolk***, 237 AD2d 412, 654 NYS2d 826 [2d Dept 1987]; ***Sagar v Khun Y. Son***, 208 AD2d 1092, 617 NYS2d 409 [3d Dept 1994]). A supplemental bill of particulars, therefore, may be served without leave of court when a plaintiff is alleging continuing consequences of the injuries allegedly suffered and described in the prior bill of particulars (*see* ***Tate v Colabello***, 58 NY2d 84, 459 NYS2d 422 [1983]; ***Witherspoon v Surat Realty Corp.***, 82 AD3d 1087, 918 NYS2d 889 [2d Dept 2011]; ***Maraviglia v Lokshina***, 68 AD3d 1066, 890 NYS2d 349 [2d Dept 2009]; ***Zenteno v Geils***, 17 AD3d 457, 793 NYS2d 112 [2d Dept 2005]). However, where a "supplemental" bill of particulars asserts new injuries, a new theory of liability or a new category of damages, it will be deemed an amended bill of particulars (*see* ***Kraycar v Monahan***, 49 AD3d 507, 507, 856 NYS2d 123; ***Dalrymple v Koka***, 295 AD2d 469, 744 NYS2d 427 [2d Dept 2002]; ***Aversa v Taubes***, 194 AD2d 580, 598 NYS2d 801 [2d Dept 1993]), requiring the plaintiff to obtain leave of court to serve (*see* CPLR 3025 [b]).

Here, while objecting that plaintiff's actions have unduly delayed the prosecution of this action, defendants do not dispute that the proposed supplemental bill of particulars merely amplifies the injuries already alleged in the prior bills of particulars. As no trial date has been set for this matter, leave to serve

a supplemental bill of particulars is not required (*see* CPLR 3043 [b]; ***Erickson v Cross Ready Mix, Inc.***, 98 AD3d 717, 950 NYS2d 175 [2d Dept 2012]; ***Thaler v Felsberg***, 91 AD3d 850, 936 NYS2d 690 [2d Dept 2012]). Therefore, the branch of plaintiff's cross motion for leave to serve the proposed supplemental bill of particulars is denied, as unnecessary (*see* ***Erickson v Cross Ready Mix, Inc.***, 98 AD3d 717, 950 NYS2d 175). The branch of the cross motion seeking to extend plaintiff's time for filing a note of issue on the grounds that plaintiff's attorneys just recently obtained the case file from plaintiff's prior attorney, and that defendants will be able to conduct further depositions and independent medical examinations of plaintiff if desired, also is denied. The time for the filing of the note of issue begins to run when a Compliance Conference Order is signed certifying that discovery is complete, and such has not yet taken place in this matter. Accordingly, plaintiff's cross motion is denied.

Dated: January 9, 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION