

<b>Roman v S.T.M. Trucking, Inc.</b>
2017 NY Slip Op 30867(U)
February 14, 2017
Supreme Court, Bronx County
Docket Number: 24882/13E
Judge: Mary Ann Brigantti
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**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15**

**PRESENT:** Honorable Mary Ann Briganti

-----X  
MICHELLE ROMAN,

Plaintiff,

-against-

**DECISION / ORDER**

Index No. 24882/13E

S.T.M. TRUCKING, INC., et als.,

Defendants.  
-----X

The following papers numbered 1 to 7 read on the below motions noticed on **September 13, 2016** and duly submitted on the Part IA15 Motion calendar of **November 22, 2016**:

<u>Papers Submitted</u>	<u>Numbered</u>
Defs.' Notice of Motion, Affirmation, Exhibits	1,2
Pl.'s Cross-Motion, Affirmation, Exhibits	3,4
Defs.' Opp. To Cross-Motion, Affirmation.	5
Pl.'s Reply Aff., Exhibits	6,7

Upon the foregoing papers, defendants S.T.M. Trucking, Inc. and Guillermo R. Guzman ("Defendants") move for summary judgment, dismissing the complaint of the plaintiff Michelle Roman ("Plaintiff") for the failure to satisfy the "serious injury" threshold as required by New York Insurance Law §5102(d). Plaintiff opposes the motion and cross-moves for leave to amend her bill of particulars, pursuant to CPLR 3025(b). Defendants oppose the cross-motion.

**I. Background**

This matter arises out of an alleged motor vehicle accident that occurred on November 26, 2013. Plaintiff's verified bill of particulars alleges that as a result of this accident, she sustained the following injuries: (1) biceps tendon tear, left shoulder, requiring surgical repair; (2) impingement syndrome, left shoulder, requiring surgical repair; (3) C3-4, C4-5, C5-6, and C6-7 herniations; and (4) L3-4, L4-5, and L5-S1 herniations. Defendants now move for summary judgment on the grounds that Plaintiff's allegedly "serious" injuries are not causally related to this accident, but are instead related to a prior accident that occurred in 1998. While

Defendants acknowledge that their motion is untimely (3212[a]), they allege that the untimeliness is attributable to the fact that they recently received medical records stemming from the 1998 accident from the no-fault insurance carrier. Plaintiff opposes the motion and seeks leave to amend her verified bill of particulars to assert that the subject accident aggravated and/or exacerbated her cervical and lumbar spine injuries. Plaintiff alleges that Defendants' motion must be denied as untimely and the moving papers do not set forth sufficient good cause for the delay. Furthermore, Plaintiff contends that Defendants have either failed to carry their initial burden of proof, or that issues of fact with respect to causation prevent entry of judgment in their favor. Defendants, in reply, allege that the proposed amendment to Plaintiff's bill of particulars is improper because, among other reasons, Plaintiff testified that she sustained no significant injuries as a result of the 1998 accident, and it is only after Defendants uncovered medical records stemming from that 1998 accident does Plaintiff seek leave to amend her injury claim.

## II. Applicable Law and Analysis

Plaintiff initially argues that the motion must be denied as untimely. CPLR 3212(a) requires that a motion for summary judgment be made no later than 120 days of the Note of Issue being filed, "except with leave of court on good cause shown." (*Brill v. City of New York*, 2 N.Y.3d 648 [2004]). Here, contrary to Plaintiff's contentions, Defendants have demonstrated the requisite "good cause" for filing their motion for summary judgment 18 months late. Defendants were led to believe that any records relating to Plaintiff's prior 1998 accident were either lost or destroyed, and only in August of 2016 were they able to secure those records and have them certified. The motion will therefore be determined on its merits.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the threshold required to maintain a lawsuit, the burden is on the defendant to first establish that plaintiff's injuries are not serious (*Franchini v. Plameri*, 1 N.Y.3d 536 [2003]; *Brown v. Achy*, 9 A.D.3d 30 [1<sup>st</sup> Dept. 2004]). To meet their burden, defendants' medical evidence must not be conclusory and must be based on objective testing (*See Nix v. Xiang*, 19 A.D.3d 227 [1<sup>st</sup> Dept. 2005]). With regard to range-of-motion issues, defendant's medical doctor is required to specify the degree of plaintiff's range of motion and what constitutes normal range of motion (*Webb v.*

*Johnson*, 13 A.D.3d 54 [1<sup>st</sup> Dept. 2004]). Where defendant's medical expert finds restricted range-of-motion, and a doctor believes they are self-imposed, the doctor must explain the reasons for the restricted range of motion and why the same are not related to the accident (*Style v. Joseph*, 32 A.D.3d 212 [1<sup>st</sup> Dept. 2006]). A defendant may also meet his or her initial burden with sufficient, objective medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (*see Tuberman v. Hall*, 61 A.D.3d 441 [1<sup>st</sup> Dept. 2009]; *Boone v. Elizabeth Taxi, Inc.*, 117 A.D.3d 515 [1<sup>st</sup> Dept. 2014]).

In this matter, Defendants have established entitlement to dismissal of Plaintiff's alleged lumbar spine and cervical spine injuries by relying on Plaintiff's deposition testimony and medical records evincing the fact that she was involved in a 1998 motor vehicle accident and sustained injuries to those same body parts (*see Silverman v. MTA Bus Co.*, 101 A.D.3d 515 [1<sup>st</sup> Dept. 2012], citing *Chintam v. Fenelus*, 65 A.D.3d 946 [1<sup>st</sup> Dept. 2009]; *Brewster v. FTM Servo, Corp.*, 44 A.D.3d 351 [1<sup>st</sup> Dept. 2007]). Plaintiff's medical records stemming from the 1998 accident reveal that she sustained disc bulging and herniations in her cervical and lumbar spine with radiculopathy, and her doctors at the time opined that those injuries were permanent in nature and rendered Plaintiff partially disabled. This constitutes sufficient "persuasive evidence" of pre-existing conditions to the allegedly injured body parts, so as to shift the burden to the Plaintiff to raise an issue of fact regarding causation (*see Linton v. Nawaz*, 62 A.D.3d 434 [1<sup>st</sup> Dept. 2009]).

Defendants, however, failed to shift the burden of proof with respect to Plaintiff's claimed left shoulder injuries. The medical records and reports only contain a single mention of bilateral shoulder pain, described as "shooting electric-shock" like pains stemming from Plaintiff's neck. None of Plaintiff's prior doctors ever rendered an opinion that she suffered a distinct left shoulder injury as a result of the August 1998 accident. Defendants' moving papers, moreover, contain no admissible records concerning an alleged June 2, 1999 accident. Defendants have only produced a New York Daily News article that makes no mention of Plaintiff. Defendants' motion is therefore denied insofar as it seeks dismissal of any claims relating to Plaintiff's left shoulder.

Regarding the cervical and lumbar spine, "[w]here, as here, plaintiff sustained injuries as

a result of accident or incidents that preceded the accident giving rise to the litigation, plaintiff's expert must adequately address how plaintiff's current medical problems, in light of her past medical history, are causally related to the subject accident" (*Style v. Joseph*, 32 A.D.3d 212, 214 [1<sup>st</sup> Dept. 2006]; citing *Flores v. Leslie*, 27 A.D.3d 220 [1<sup>st</sup> Dept. 2006]; *Pommells v Perez*, 4 NY3d 566 [2005]; *Carter v Full Serv., Inc.*, 29 AD3d 342 [1<sup>st</sup> Dept. 2006]; *Montgomery v Pena*, 19 AD3d 288 [1<sup>st</sup> Dept. 2005]). Here, the affirmed narrative report of Dr. Jeffrey D. Klien, when coupled with the other record submitted in opposition to the motion, raises an issue of fact as to whether Plaintiff's cervical and lumbar spine injuries are casually related to this accident. Dr. Klein found that the prior medical records did reveal that Plaintiff sustained some damage to her cervical and lumbar spine, however those injuries were different than those sustained as a result of the subject 2013 accident. Plaintiff's 1998 cervical spine MRI revealed an anterior bulge at C5/6- which does not affect the spinal canal - and a left side herniation at C6/7. Plaintiff's 2013 cervical MRI revealed posterior left sided disc herniations at C4/5, C5/6, and C6/7, worse at C5/6 and C6/7. Dr. Klien notes that significant pathology was not described in the C4/5 and C5/6 1998 study. Regarding the lumbar spine, Plaintiff's prior MRI only detailed injuries at the L5-S1 level. The primary pathology of the 2013 lumbar spine MRI was at L3/4 and 4/5, not L5-S1. The doctor notes that Plaintiff underwent posterior decompression surgery at L3/4, not L5/S1. Plaintiff also eventually underwent a C5/7 anterior cervical discectomy, decompression, and fusion with plating on April 2, 2014. Dr. Klein ultimately opines that, to a reasonable degree of medical certainty, Plaintiff's 2013 accident caused a severe aggravation/exacerbation of Plaintiff's underlying but quiescent pre-existing cervical and lumbar spine conditions. In addition, "there are new and very significant radiographic findings on the 2013 MRI scans not seen in 1998. This lead directly to the need for both the cervical spine and lumbar spine surgeries." The foregoing attestations competently raise an issue of fact as to whether Plaintiff's cervical and lumbar spine injuries are materially different from those she allegedly sustained in 1998, and are causally related to the 2013 accident. Accordingly, Defendants' motion seeking dismissal of Plaintiff's complaint on the grounds that her alleged injuries are not causally related to this accident, is denied.

Plaintiff has filed a cross-motion seeking leave to amend her verified bill of particulars to

add “aggravation/exacerbation of pre-existing, but quiescent” injuries to her cervical and lumbar spine, requiring surgery. Leave to amend pleadings shall be freely given absent prejudice or surprise resulting from the delay (*see McCaskey David and Assoc., Inc. v. New York City Health & Hosp. Corp.*, 59 N.Y.2d 755, 757 [1983]). Importantly, on a motion to amend, “a plaintiff need not establish the merits of the proposed new allegations, but must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit (*see MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499 [1<sup>st</sup> Dept. 2010]).

Here, as detailed *supra*, the sworn report from Dr. Klein establishes that Plaintiff’s proposed amendment is not “palpably insufficient or clearly devoid of merit.” In opposition to the cross-motion, Defendants failed to establish that they would be surprised or prejudiced by the late amendment. Defendants have been aware of the 1998 accident since Plaintiff’s examination before trial, and neither party was able to obtain the medical records associated with that accident until recently. As Defendants’ note in their moving papers, the no-fault insurer represented that the medical records were either lost or destroyed. Defendants only vaguely state that they obtained those records “earlier this year [2016]” and only exchanged those records with Plaintiff shortly before moving for summary judgment. Furthermore, Defendants have not demonstrated that Plaintiff made wilfully false statements at her deposition concerning medical treatment stemming from the accident that occurred nearly 16 years beforehand. Plaintiff further explains in an affidavit that she never recalled seeing any MRI results related to those injuries. Any issues of credibility are to be assessed by a jury and not the court. “[L]eave to amend a bill of particulars following the filing of a note of issue ... is ordinarily freely given absent surprise or prejudice to the defendants” (*see Henchy v. VAS Exp. Corp.*, 115 A.D.3d 478 [1<sup>st</sup> Dept. 2014][internal citations omitted]). Plaintiff’s delay in seeking the amendment is largely attributable to the issues that both parties had in securing Plaintiff’s 1998 medical records. Defendants, who were aware of a prior accident with injuries as early as September 2014, but did not exchange the records until August 2016, have not established that they would be prejudiced by the late amendment, which was not made at the “eve of trial” (*see Nociforo v. Penna*, 42 A.D.3d 514 [2<sup>nd</sup> Dept. 2007]). Defendants have failed to establish that it would be unduly burdensome or prejudicial for their medical experts to review and respond to the 1998 records,

which Defendants have possessed since some point before August 2016.

III. Conclusion

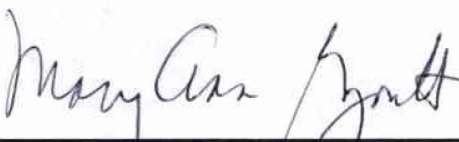
Accordingly, it is hereby

ORDERED, that Defendants' motion for summary judgment is denied, and it is further,

ORDERED, that Plaintiff's cross-motion for leave to amend her bill of particulars is granted, and the proposed amended bill of particulars annexed to the cross-motion is deemed served as of this date.

This constitutes the Decision and Order of this Court.

Dated: 2/14, 2017

  
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Hon. Mary Ann Brigantti, J.S.C.