

**Leach v Castillo**

2018 NY Slip Op 31607(U)

July 10, 2018

Supreme Court, New York County

Docket Number: 162885/2015

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 22

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DORIAN LEACH,

Plaintiff,

- v -

RAFAEL CASTILLO, ELVIN CASTILLO

Defendant.

INDEX NO. 162885/2015

MOTION DATE 05/30/2018

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendants motion for summary judgment and to dismiss is denied and plaintiff’s cross-motion for leave to amend his Bill of Particulars is granted for the reasons set forth below. Before the court is defendants’ motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants on the grounds that defendants were not liable for the incident and to dismiss the Complaint of plaintiff for failure demonstrate that plaintiff has suffered a “serious injury” as defined under Section 5102(d) of the Insurance Law. Plaintiff opposes defendants’ motion and cross-moves to amend plaintiff’s Bill of Particulars. Defendants oppose plaintiff’s cross-motion.

**BACKGROUND**

The suit at bar stems from a motor vehicle collision which occurred on August 26, 2015, on Ninth Avenue, at or near its intersection with West 203<sup>rd</sup> Street in the County, City and State of New York when a vehicle owned by defendant Rafael Castillo and operated by defendant

Elvin Castillo allegedly struck a vehicle operated by plaintiff Dorian Leach and resulted in the serious injury of plaintiff.

## DISCUSSION

### Summary Judgment (Serious Injury)

Defendants' motion, for summary judgment, pursuant to CPLR 3212, against plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is denied. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

Defendants allege that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for stem from prior motor vehicle accidents. Defendants point to two accidents. The first accident occurred on July 2, 2009, in which plaintiff sustained injuries

to his neck, back, knees, and left shoulder. The second accident was on July 25, 2010, and resulted in injuries to plaintiff's neck, back, right shoulder and left knee.

Defendants provide the affirmed report of Dr. Igor Rubinshteyn who examined plaintiff and determined that plaintiff's injuries are due to the above mentioned prior incidents and not from the subject accident (Mot, Exh L). Dr. Rubinshteyn further found that plaintiff has a normal range of motion in both his cervical and lumbar spine (*id.*) Defendants submit the Affirmed Report of Dr. Naunihal Sachdev Singh to demonstrate no serious injury (Mot, Exh K). However, plaintiff, in opposition, highlights that Dr. Singh's report does indeed show a limited range of motion in plaintiff's lumbar spine and both shoulder joints (Mot. At 62). Dr. Singh's report merely states that plaintiff does not have a neurological disability as a result of the motor vehicle accident at issue and clearly shows that plaintiff has a limited range of motion (*id.* at 4-6). Plaintiff submits the affirmed reports of Dr. Joyce Goldenberg, Dr. Thomas M. Kolb and Dr. Nirmal Patel who affirm that plaintiff sustained a serious injury to his cervical and lumbar spine as a result of the incident at issue (Cross Mot., Exh A-C).

Dr. Goldenberg reports that she found significant limitations to the range of motion of plaintiff's cervical and lumbar spine (*id.*, Exh A). Dr. Goldenberg found that plaintiff sustained losses of 53% of range of motion to the cervical spine and 60% loss of range of motion to the lumbar spine (*id.*) Thus, defendants have failed to meet their burden and plaintiff has demonstrated a triable issue of fact and that the alleged injuries are causally related to the incident at issue. Thus, the branch of defendants' motion for summary judgment on the issue of "serious injury" as defined by Insurance Law § 5102(d) is denied.

#### **Summary Judgment (Liability)**

The branch of defendants' motion for summary judgment on the issue of liability in favor of defendants against plaintiff is denied. The motion fails to make out a prima facie case of negligence as there is a triable issue of fact. (*See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *see also Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Here defendants' own motion raises issues of fact as to the rate of speed defendant was traveling at and whether plaintiff stopped at the stop sign before driving into the intersection where the incident occurred. Defendants' counsel affirms that defendant was traveling at a "safe rate of speed" however defendant testified that he was travelling 40 miles per hour (the speed limit in New York City is 25 miles per hour) (Mot, Exh E at 27). The sequence of events of the crash raises an issue of fact with respect to liability. Thus, defendants' motion for summary judgment on the issue of liability is denied.

#### **Plaintiff's Cross-Motion**

Plaintiff's cross-motion for leave to amend his Bill of Particulars as to defendant to include language regarding exacerbation and/or aggravation, and deeming the proposed Amended Bill of Particulars served on the defendants through service of the Motion papers upon the defendants is granted. Leave to amend pleadings is generally freely granted, absent prejudice and surprise (*See Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 (1983); *Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 [1st Dept 2006]). To find prejudice, there must be some indication that the defendant has been hindered in the preparation of his case or prevented from taking some measure in support of his position (*See Abdelnabi v NYC Transit Authority*, 273 AD2d 114, 115 (1st Dep't 2000)). "On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered

amendment is not palpably insufficient or clearly devoid of merit, which it has done” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [internal citations omitted]).

Here, defendants have failed to demonstrate that the relief being sought is palpably improper or will cause defendants to suffer prejudice or surprise from any delay. The medical information related to exacerbation and/or aggravation has been available to the defendants since the time of discovery in this action. Thus, plaintiff’s cross motion is granted.

Accordingly, it is

ORDERED that the branch of defendants’ motion for summary judgment against plaintiff on the issue of “serious injury” as defined under Section § 5102(d) of the Insurance Law is denied; and it is further

ORDERED that the branch of defendants’ motion for summary judgment on the issue of liability against plaintiff and to dismiss the plaintiff’s Complaint is denied; and it is further

ORDERED that plaintiff’s cross-motion to amend his Bill of Particulars as to defendants to include language regarding exacerbation and/or aggravation, and deeming the proposed Amended Bill of Particulars served on the defendants is granted; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

ADAM SILVERA, J.S.C.

7/10/2018  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: