

**Bailey v American Fleet Maintenance, Inc.**

2019 NY Slip Op 33999(U)

September 20, 2019

Supreme Court, Monroe County

Docket Number: 2017-6424

Judge: William K. Taylor

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF MONROE

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BRITTNEY BAILEY,

Plaintiff,

**DECISION, ORDER  
& JUDGMENT**

Index # 2017-6424

vs.

AMERICAN FLEET MAINTENANCE, INC. and  
CHARLES MONACHINO,

Defendants.

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Special Term September 5, 2019

**Counsel:**

Timothy C. Bellavia, Esq., for Plaintiff  
Alyson C. Culliton, Esq., for Defendants

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Taylor, J.,

Brittney Bailey ("Plaintiff") commenced this personal injury action seeking damages for alleged serious injuries she sustained when a car she was driving was struck by a car operated by Charles Monachino and owned by American Fleet Maintenance, Inc.

("Defendants"). Defendants moved and Plaintiff subsequently cross-moved for summary judgment under CPLR 3212 as to whether Plaintiff sustained a causally related serious injury under Insurance Law § 5102(d).

Through the papers submitted and concessions at oral argument this case has crystallized to Plaintiff alleging that she suffers traumatic occipital neuralgia and that this alleged injury qualifies as a causally related serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180 categories under Insurance Law § 5102(d). Plaintiff also

claims economic loss in excess of basic economic loss, which is not challenged via motion by Defendants. See Woodward v Ciamaricone, 175 AD3d 942 (4<sup>th</sup> Dept 2019); Cook v Peterson, 137 AD3d 1594, 1599 (4<sup>th</sup> Dept 2016).

Applying the well-worn standards for summary judgment<sup>1</sup>, Defendants have met their initial burden by submitting Plaintiff's deposition and the affirmed report of Dr. Robert S. Knapp, which constitute proof in admissible form showing that Plaintiff has not sustained a threshold serious injury under any of the Insurance Law § 5102(d) categories advanced by Plaintiff.<sup>2</sup> This Court disagrees with Plaintiff that Dr. Knapp's report fails to establish a prima facie case because he did not review treatment records from Ontario Neurology Associates. His conclusions were in no way "undermined" by not considering this information. See Crewe v Pisanova, 124 AD3d 1264, 1265 (4<sup>th</sup> Dept 2015). These records allegedly establish that Plaintiff underwent a series of bilateral occipital nerve blocks between January 4, 2019 and June 28, 2019, and Plaintiff thus argues that this "important objective medical evidence" was not provided to Dr. Knapp so he could neither establish Defendants' prima facie case nor refute Plaintiff's prima facie case on her

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<sup>1</sup> When considering a summary judgment motion "the proponent...must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" necessitating a trial. Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); CPLR 3212(b). Proof offered by the moving party must be in admissible form. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Dix v Pines Hotel, Inc., 188 AD2d 1007 (4th Dept 1992). And once a prima facie showing has been made, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 NY2d at 324; see also Mortillaro v Rochester Gen. Hosp., 94 AD3d 1497, 1499 (4th Dept 2012).

<sup>2</sup> To make out a prima facie case for serious injury under the permanent consequential limitation of use and significant limitation of use categories, the Court must look to "[w]hether a limitation of use or function is 'significant' or 'consequential' [as it] relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part." Toure v Avis Rent A Car Sys., Inc., 98 NY2d 345, 353 (2002). Objective medical proof is required and subjective complaints, standing alone, are insufficient. See Id. at 350; see also Pommells v Perez, 4 NY3d 566, 572 (2005); Jaromin v Northrup, 39 AD3d 1264, 1265 (4th Dept 2007). Limitations found to be minor, mild or slight "are properly characterized as 'insignificant' or inconsequential within the meaning of the statute." Downie v McDonough, 117 AD3d 1401, 1403 (4<sup>th</sup> Dept 2014). To make out their prima facie case for summary judgment as to Plaintiff's claim under the 90/180-day category, Defendants are "required to 'establish as a matter of law that plaintiff was not curtailed from performing h[er] usual activities to a great extent rather than some slight curtailment' during the relevant time period." Cook v Peterson, 137 AD3d 1594, 1598 (4<sup>th</sup> Dept 2016).

motion.<sup>3</sup> These issues turn on whether the evidence submitted by Plaintiff as to the claimed occipital neuralgia is truly objective. As will be discussed further below, this Court thinks not.

With Defendants having met their initial burden, Plaintiff offers an affirmation from her treating neurologist Dr. Eugene Tolomeo in opposition to Defendants motion and in support of her cross-motion. Focusing on the objective proof contained in Dr. Tolomeo's affirmation, it essentially states that he performed four occipital nerve blocks on Plaintiff, these provided her with pain relief, and as a result he determined that she suffered from traumatic occipital neuralgia. Upon questioning at oral argument, Plaintiff's counsel provided that nerve blocks are injections of medication around the occipital nerve in the back of the head above the neck, and that the pain relief achieved was ascertained by speaking with Plaintiff. Plaintiff's counsel further noted his view that a patient's pain response to such nerve blocks constitutes objective medical proof of occipital neuralgia; this explanation, however, is not in Dr. Tolomeo's affirmation. Indeed, this affirmation provides only a recitation of Plaintiff's subjective complaints, medications and treatments provided, and conclusions without objective justification or explanation. Thus, Plaintiff has neither met her burden in response to Defendants' motion nor met her own initial burden for summary judgment.<sup>4</sup>

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<sup>3</sup> It is important to note that, when Defendants' made their motion, Plaintiff's bill of particulars did not include any allegations of traumatic occipital neuralgia. This begs the question as to how Defendants could be asked to specifically address an injury in their motion that was only named in the amended bill of particulars filed by Plaintiff with her response and cross-motion? See footnote 4.

<sup>4</sup> In the alternative, the Court would also grant summary judgment to Defendants based on their argument that the serious injury alleged by Plaintiff - traumatic occipital neuralgia - is not found in Plaintiff's bill of particulars. See Defendants' Reply Affirmation, § 6. Rather the injury is alleged for the first time in an amended bill filed along with Plaintiff's reply and cross-motion. "A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars." Anonymous v. Gleason, 2019 NY Slip Op 06207, \*\*3 (2<sup>nd</sup> Dept August 21, 2019); Hanson v Sewanhaka Centr. High Sch. Dist., 155 AD3d 702, 703 (2d Dept 2017); Palka v Village of Ossining, 120 AD3d 641, 643 (2d Dept 2014). This ground is addressed only in the alternative as it is unclear how this line of cases jibes with the power to amend the bill per CPLR 3042(b).

Plaintiff points to Cook v Peterson, 137 AD3d 1594, 1596 (4<sup>th</sup> Dept 2016), for the proposition that traumatic occipital neuralgia qualifies as a "serious injury" under Insurance Law § 5102(d). But Plaintiff steps past the fact that in Cook, unlike here, the allegedly injured plaintiff underwent surgery to have a permanent occipital nerve stimulator implanted to address the diagnosed occipital neuralgia. This is an important distinction. Also there, unlike here, the expert diagnosing occipital neuralgia established that pain relief after a nerve block constitutes an objective diagnostic confirmation of occipital neuralgia per a cited medical journal, tied range of motion deficits to irritated occipital nerves, and offered other objective proof.

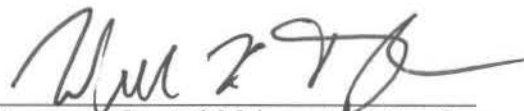
Plaintiff directed this Court to review page 353 of the record on appeal in Cook, which is one page of the IME of Dr. Saad Sohby in that case. Doing so only illustrates to this Court the austerity of the Tolomeo affirmation; putting the IME in Cook side by side with the medical proof here shows that these cases are clearly distinguishable. Plaintiff here has undergone no surgery related to occipital neuralgia, and Dr. Tolomeo's affirmation provides no explanation as to how nerve blocks and a patient's subjective report of alleviated pain constitute objective proof of occipital neuralgia. Indeed, when compared to the IME in Cook showing what is possible in terms of objective proof of occipital neuralgia, the Tolomeo affirmation here provides no such support. Ultimately, Cook does not appear to stand for the proposition that nerve blocks plus subjective reports of alleviated pain always equal objective proof of occipital neuralgia and thus serious injury. Rather, each case must rise or fall on the specific facts presented. And while traumatic occipital neuralgia may be a qualifying "serious injury" under Insurance Law § 5102(d) in certain cases, the Tolomeo affirmation here fails to meet that threshold.

For these reasons, this case appears to hew closer to Beaton v Jones, 50 AD3d 1500, 1502 (4<sup>th</sup> Dept 2008), which held that "the views of plaintiff's experts with respect to plaintiff's head pain, including one expert's diagnosis of 'occipital neuralgia,' were based upon plaintiff's subjective complaints only, and thus were insufficient to defeat defendant's motion." Therein lies the path of this Court.

Plaintiff has thus failed to raise a question of fact in response to Defendants' initial showing on their motion for summary judgment and that motion is granted, and for these same reasons Plaintiff did not sustain her initial burden on her cross-motion<sup>5</sup> so it is therefore denied.

Accordingly, Defendants' motion for summary judgment is hereby GRANTED in part and Plaintiff's claims alleging "serious injury" under Insurance Law § 5102(d) are therefore DISMISSED; Plaintiff's cross-motion for summary judgment is hereby DENIED. Any prayers for relief requested by the parties but not specifically addressed herein are denied.

This constitutes the Decision, Order and Judgment of the Court.



Honorable William K. Taylor  
Supreme Court Justice  
September 20, 2019

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<sup>5</sup> Because Plaintiff did not meet her initial burden on the cross-motion the Court need not consider the July 19, 2019 affirmation of Dr. Knapp affirming that he had reviewed the treatment records from Ontario Neurology Associates and that they did not alter his initial opinion submitted in support of Defendants' motion. This not surprising, however, as Dr. Tolomeo's affirmation appears to rest upon the subjective.