

Raskin v Almonte

2020 NY Slip Op 35418(U)

July 28, 2020

Supreme Court, Kings County

Docket Number: Index No. 510204/2018

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 28th day of 2020.

P R E S E N T:

Honorable Reginald A. Boddie
Justice, Supreme Court

-----X
AVROHOM E. RASKIN and SHAINDY RASKIN,

Plaintiff,

Index No. 510204/2018
Cal. No. 24 and 33 (MS 1 and 2)

-against-

DECISION AND ORDER

RAFAEL VASQUEZ ALMONTE,

Defendant.
-----X

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Def Notice of Motion (MS 1)	1
Affirmation/Affidavit in Support	2
Plaintiff Cross-Motion (MS 2)	3
Affirmation/Affidavit in Support	4
Reply (MS1)	5
Reply (MS2)	6

Upon the foregoing cited papers, the decision and order on plaintiffs' motion to amend the pleadings and permit plaintiffs to serve a supplemental bill of particulars, and other relief, regarding the injuries sustained and defendant's motion for summary judgment, pursuant to CPLR 3212 and Insurance Law § 5102 (d), is as follows:

Plaintiffs and defendant were involved in an automobile accident on October 26, 2017, on Bay Parkway in Brooklyn, New York. Plaintiff Avrohom Raskin and Rafael Almonte were the drivers of the vehicles. Shaindy Raskin is the spouse of plaintiff. She was not in the vehicle. Plaintiff Avrohom filed a lawsuit on May 16, 2018, related to the accident, seeking damages for

personal injuries. Shaindy Raskin sought damages for loss of services of the plaintiff. Defendant answered on August 28, 2018. Several conferences with the court were conducted. A final pre-note conference was held on August 13, 2019. A note of issue was filed on September 4, 2019. Defendant filed a motion for summary judgment on the ground of failure to prove a “serious injury” on November 1, 2019. Plaintiffs thereafter served two alleged Supplemental Bills of Particulars, dated November 8, 2019 and January 27, 2019, in which multiple new injuries were alleged, including partial tear of the left ankle, partial tear of left shoulder, lumbar annular tear, lumbar herniation, and multiple cervical bulges. Defendant objected to the late amendment and sought to exclude same. Defendant also contended summary judgment should be awarded since plaintiff had previously only alleged sprains and strains and a very brief period of time out of work and it would be significantly prejudiced if the amendments were allowed to stand. Plaintiffs contend the amendments should be permitted since the MRI details in the file were previously overlooked.

CPLR 3042 (b) provides, “ In any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as a matter of course prior to the filing of the note of issue.”

CPLR 3043 (b) provides:

A party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed and that the other party shall upon seven days notice, be entitled to newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities.

CPLR §3043(c) also provides: “Nothing contained in the foregoing shall be deemed to

limit the court in denying in a proper case, any one or more of the foregoing particulars, or in a proper case, in granting other, further or different particulars.”

However, here plaintiffs are seeking to assert new injury claims, which are impermissible under CPLR 3043 (b) without leave of court. Further, plaintiffs contend defendant failed to object to service of the amended bills of particular. Since the bills of particular were amended bills of particular including new injuries, service of same without leave of court were a nullity (*Barrera v City of New York*, 265 AD2d 516 [2d Dept 1999]).


Plaintiffs now seek to amend with leave of court, pursuant to CPLR 3043 (c). Generally it has been held that leave to serve an amended bill of particulars asserting new injuries, as here, after the note of issue has been filed, should not be granted absent special and extraordinary circumstances (*Wohn v County of Suffolk*, 237 AD2d 412 [2d Dept 1997]). Here, plaintiffs filed a note of issue and waited until after a threshold summary judgment motion was filed to serve amended bills of particulars adding new injuries. Plaintiffs contended after the summary judgment motion was served, they reviewed the file and discovered the errors. The defendant alleged this effort to file an amended bill of particulars was intended to change the quality of plaintiffs’ injuries. The court finds the reason proffered by plaintiffs does not constitute a reasonable excuse and as such does not establish extraordinary or special circumstances. Moreover, permitting the amendment at this late juncture would prejudice the defendant. Accordingly, the motion to amend is denied in entirety.

Turning to the motion for summary judgment, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary

judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman*, 49 NY2d at 562).

Further, in a “serious injury” threshold motion for summary judgment, as here, defendants must initially submit competent medical evidence establishing that plaintiff did not suffer a “serious injury” and the injuries are not causally related to the accident (*see* Insurance Law § 5102 [d]; *see Kelly v Ghee*, 87 AD3d 1054, 1055 [2d Dept 2011]; *see Winegrad*, 64 NY2d at 853). The issue is not whether plaintiff can ultimately establish a “serious injury,” but whether there exists an issue of fact in the case on such issue (*see Barr v Albany County*, 50 NY2d 247, 267 [1980]). Defendant met its prima facie burden of establishing, with admissible evidence, the complained of sprains and strains in the cervical, lumbar and thoracic spine and shoulder do not constitute a serious injury (Insurance Law §5102[d]). Defendant also established that plaintiff missed only two weeks of work on his food truck and cannot establish a 90/180 claim. Plaintiffs’ opposition to the extent not already excluded was inadequate to rebut defendants’ prima facie case. Accordingly, defendant’s motion for summary judgment is granted, and plaintiffs’ cross-motion is denied in entirety.

E N T E R:


Hon. Reginald A. Boddie
Justice, Supreme Court

REGINALD A. BODDIE
J.S.C.

2020 AUG -4 AM 11:00

KINGS COUNTY CLERK
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