

<b>Yip v Flores</b>
2022 NY Slip Op 30975(U)
March 28, 2022
Supreme Court, New York County
Docket Number: Index No. 155808/2019
Judge: Lisa S. Headley
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LISA S. HEADLEY **PART** **22M**

*Justice*

-----X

HELEN YIP,

Plaintiff,

- v -

OSCAR FLORES, NICE FENCE & RAILING CORP.

Defendant.

-----X

**INDEX NO.** 155808/2019

**MOTION DATE** 11/22/2021

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for

JUDGMENT - SUMMARY

Defendants Oscar Flores (“defendant Flores”) and Nice Fence and Railing Corp. (“defendant Nice”) move for summary judgment dismissing the complaint. Plaintiff Helen Yip (“plaintiff Yip”) cross-moves for leave to amend the verified Bill of Particulars. Opposition papers have been filed for defendants’ motion and plaintiff’s cross-motion. Defendants filed a reply.

In this personal injury action, plaintiff is suing defendants for negligence and seeks physical and economic damages as a result of a motor vehicle accident. The complaint alleges that on December 15, 2018, a vehicle operated by plaintiff Yip was traveling in the right lane on Merrick Road in Hempstead, New York, when the vehicle operated by defendant Flores and owned by defendant Nice struck plaintiff’s vehicle. As a result, of the collision, plaintiff Yip alleges that her vehicle overturned, and she sustained severe injuries, including to her cervical spine and left shoulder.

In the instant motion, defendants move for summary judgment to dismiss the complaint on the ground that plaintiff’s injuries do not satisfy the serious injury threshold requirements of *NY Insurance Law § 5102(d)*. Defendants argue that plaintiff’s claim for non-economic loss should be denied because plaintiff’s deposition testimony contradicts the ISO evidence. Defendants contend that plaintiff Yip testified that she did not suffer from pre-existing injuries caused by earlier accidents, however defendants submit evidence of prior incidents. Defendants also contend that plaintiff did not experience a serious injury based on the short duration of her therapy subsequent to the subject accident.

In support of the motion, defendants submit copies of plaintiff’s MRI records, an affirmation from defendants’ independent medical examiner, Dr. Jerry Lubliner, who examined plaintiff on March 31, 2021 and reviewed the MRI records and other medical records. Dr. Lubliner concluded that plaintiff was not seriously injured from the accident and is presently in a normal state of health. In addition, defendants argue that plaintiff failed to specify the particular category of serious injury from which she was suffering in her pleadings under *NY Insurance Law § 5102(d)*.

Here, defendants also submit plaintiff's deposition testimony and the MRI results of plaintiff's cervical spine, dated December 21, 2018, and the MRI results of plaintiff's left shoulder, dated May 23, 2019, which demonstrate a joint degenerative disease, as well as the findings of their independent medical examiners. Further, defendants submit that plaintiff testified that after the subject accident, that occurred on December 15, 2018, she sought treatment for neck and back pain on December 18, 2018, and then she was referred to undergo physical therapy at Brooklyn Millennium Physical Therapy, where she was treated twice a week for one month. Plaintiff Yip testified that she later went to a holistic healing facility, and defendants argues that plaintiff did not maintain records of such treatment. Defendants submit that plaintiff testified that she ceased all recorded medical treatment within two months after the accident. Defendants also aver that the ISO claim search records contradict plaintiff's testimony as to her prior accident and treatment history. Specifically, plaintiff testified that she was not involved in an accident in Las Vegas on August 25, 2005, whereas an ISO claim search indicates that Plaintiff Yip was involved in a prior incident and she injured her lower back.

Plaintiff opposes the motion, and cross-moves for leave to amend her verified Bill of Particulars to include specific categories of serious injury under *NY Insurance Law § 5102(d)*. Plaintiff contends that her failure to specify the categories of serious injury was not done in bad faith and that defendants would not be prejudiced if she was granted leave to amend the Verified Bill of Particulars.

In support of the cross-motion, plaintiff submits a copy of the amended Bill of Particulars, which provides as follows:

"... plaintiff has sustained permanent loss of use of a body organ, member, function or system, and/or permanent consequential limitation of the use of a body function or system, a significant limitation of use of a body function or system... ."

Plaintiff alleges in her amended Bill of Particulars that she suffers permanent and/or significant limitation in her body parts as a result of the accident.

In opposition to defendants' motion for summary judgment, plaintiff submits as her own affidavit, the medical records and affirmations from treating physicians Dr. Mehrdad Hedayatnia and Dr. Irving Friedman. Specifically, Dr. Friedman examined plaintiff Yip on July 24, 2020 and November 5, 2021. Dr. Friedman affirms that plaintiff was complaining of neck pain and numbness in her left shoulder. Dr. Friedman concluded that plaintiff had chronic post traumatic cervical myofascitis/spasm with radiculopathy, post traumatic disc herniation C-4 - C-5, post traumatic left shoulder syndrome and chronic post traumatic occipital cephalgia. Specially, Dr. Friedman concluded that plaintiff continues to suffer permanent and significant injuries which resulted from the subject accident.

Dr. Hedayatnia affirms that he first examined plaintiff for neck pain on December 18, 2018. On August 10, 2021, Dr. Hedayatnia also examined plaintiff and found left cervical radiculopathy and increased pain through hyperextension of the cervical spine. Dr. Hedayatnia ordered a cervical epidural steroid injection. Based on his examination, Dr. Hedayatnia concluded that plaintiff has significant limitation in the use of her cervical spine and left shoulder as a result of the accident.

In reply, defendants argue that the findings of plaintiff's physicians are insufficient and inadequate, as compared to the findings of defendants' independent medical examiner, Dr. Lubliner. Defendants argue, *inter alia*, that plaintiff's cross-motion is inadequate as it fails to

explain why plaintiff did not previously submit a complete Bill of Particulars. Defendants also contend that they would be prejudiced if plaintiff's cross-motion is granted.

### **Discussion**

This court will first address plaintiff's cross-motion for leave to amend the verified bill of particulars. Pursuant to *CPLR §3025(b)*, "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." Leave to amend pleadings is generally freely granted, absent prejudice and surprise resulting from the delay. *See, Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983); *Antwerpse Diamantbank N.V. v. Nissel*, 27 A.D.3d 207, 208 (1st Dep't 2006). To find prejudice there must be some indication that a party 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 A.D.2d 114, 115 (1st Dep't 2000).

Here, the plaintiff seeks to amend the bill of particulars in order to specify her serious injuries. The amended Bill of Particular defines her alleged condition pursuant to *NY Insurance Law §5102(d)*. The court finds no prejudice to defendants in the delay of this cross motion. Furthermore, in the interest of deciding this issue on the merits, the court hereby grants plaintiff's cross-motion to amend the verified bill of particulars.

As it pertains to the defendants' underlying motion for summary judgment, defendants argue, *inter alia*, that they are not required to address a category of serious injury when plaintiff failed to allege such injuries in the Bill of Particulars, however, defendants submitted evidence to establish a lack of any type of serious injury on plaintiff's part.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." *Birnbaum v. Hyman*, 43 A.D.3d 374, 375 (1st Dep't 2007). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment.'" *People v. Grasso*, 50 A.D. 3d 535, 545 (1st Dep't 2008). "To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor." *Kershaw v. Hospital of Special Surgery*, 114 A.D.3d 75, 81 (1st Dep't 2013). "Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial." *Id.* at 82.

The court finds that there are issues of fact as to whether plaintiff has suffered serious injuries resulting from the subject accident and whether plaintiff sustained previous injuries from another motor vehicle accident. There is evidence of conflicting results from medical examinations from defendants' independent medical examiners, including that of Dr. Lubliner and plaintiff's physician, Dr. Friedman. Dr. Lubliner concluded that despite her subjective complaints of pain, plaintiff had no evidence of objective orthopedic impairment, no radiculopathy, no traumatic injury, but some evidence of chronic disease. Dr. Lubliner found that plaintiff's prognosis was good and found no evidence of permanency related to the accident. To the contrary, Dr. Friedman concluded that plaintiff continues to suffer permanent and significant injuries which resulted from the subject accident.

Here, there are conflicting medical opinions of the nature and diagnosis of plaintiff's alleged injuries, and conflicting opinions as to whether plaintiff's injuries are permanent or significant in nature. Further, there are issues of facts as to whether plaintiff's injuries are causally related to the accident. These issues raised in the defendants' motion and in plaintiff's opposition

should be determined by a trier of fact. Thus, defendants' motion for summary judgment must be denied.

Accordingly, it is

**ORDERED** that plaintiff's cross-motion for leave to amend her verified Bill of Particulars is GRANTED and the proposed form annexed to her papers shall be deemed served upon defendants; and it is further

**ORDERED** that defendants' motion for summary judgment dismissing the complaint is DENIED; and it is further

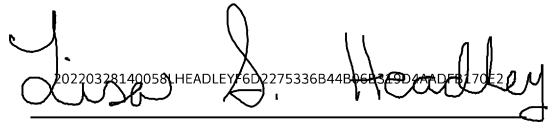
**ORDERED** that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

**ORDERED** that within 30 days of entry, movant-defendants shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

3/28/2022

DATE

  
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LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE