

**Ghosio v Weiser**

2022 NY Slip Op 34467(U)

April 1, 2022

Supreme Court, Rockland County

Docket Number: Index No. 032209/2020

Judge: Sherri L. Eisenpress

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

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MICHELLE J. GHOSIO,

*Plaintiff,*

-against-

SANDRA F. WEISER,

*Defendants.*

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*Sherri L. Eisenpress, J.*

**DECISION AND ORDER**

Index No.: 032209/2020

(Motions # 2 and #3)

The following papers, NYSCEF documents 41-74, were considered in connection with (i) Defendant’s Notice of Motion for an Order granting summary judgment and dismissal of the Complaint on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d); and (ii) Plaintiff’s Notice of Cross-Motion for an Order granting leave to serve an Amended Verified of Particulars upon Defendant:

Upon the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff on June 12, 2020, with the filing of the Summons and Complaint through the NYSCEF system. Issue was joined as to Defendant with the filing of an Answer through the NYSCEF system on June 23, 2020. This action arises from a two car accident on April 22, 2019, on Route 59, at the intersection of Oakdale Manor, in the Village of Suffern, County of Rockland, when the vehicle operated by Defendant Weiser, struck the rear of Plaintiff’s vehicle, who was stopped, waiting to make a left hand turn. Plaintiff was granted summary judgment as to liability by Order dated December 1, 2020. After completion of discovery, Plaintiff filed her Note of Issue on August 30, 2021, certifying that all discovery was complete. Defendant timely filed the instant summary judgment motion on October 29, 2021.

Defendant moves for summary judgment and dismissal of the action on the

ground that Plaintiff did not sustain a "serious injury" pursuant to the no-fault threshold law. In her Verified Bill of Particulars, Plaintiff, a 25 year old woman at the time of the subject occurrence, alleged that as a result of the accident she sustained the following injuries: cerebral concussion; damages to the surrounding nerves and muscles; pain and tenderness of the back of the head radiating to the neck; traumatic headaches; and natural psychological consequences including depression, anxiety and personality change. Plaintiff saw Dr. Etienne, a neurologist she had previously treated with, approximately five times after the accident for headaches. Plaintiff, who was a student at the time of the accident, returned to classes one week after the accident and returned to work, full time, a few weeks after the accident. She testified that after the accident, she had severe headaches with nausea, phono and sonophobia, several days a week which could last a few hours to all day. Treatment was attempted with topiramate which helped some but caused side effects of anxiety. She then began receiving Botox injections every two to three months, for approximately two years, which has been successful. She now has a headache once to twice a month.

In 2011, Plaintiff sustained serious injuries in a prior motor vehicle accident in which her head hit the seat in front of her and the window to her left, causing the window to break. With respect to that accident, Plaintiff claimed, in her Verified Bill of Particulars and Supplemental Bill of Particulars, that she sustained multiple injuries including thoracic disc herniations; headaches; cranial trauma and head injury; cerebral concussion; pain in the back of the head radiating into the neck; amnesia; post-traumatic stress disorder; difficulty thinking and concentrating; anxiety; cervical strain/sprain; lumbar disc herniations; and natural psychological consequences including depression, anxiety and personality change. Plaintiff took Topamax for a few months to help treat her migraines but did not recall for how long she had the headaches. Plaintiff testified that her headaches were infrequent and controlled with over the counter medicine thereafter; however, she did testify that she saw Dr. Etienne in the year before the 2019 accident complaining of headaches.

In fact, Dr. Etienne's records confirm a visit on January 21, 2019, three months prior to the subject accident. At that time, Plaintiff's chief complaint is listed as "migraine." Dr. Etienne's notes mention the motor vehicle accident in 2011, after which Plaintiff started having migraines. The headaches are described as typically in the bilateral frontal region or left temporal region/consist of throbbing/sharp pain rated up to 9/10 but typically rated 6-7/10; are positive for photophobia, phonophobia and nausea; last a few hours to the entire day; and most significantly, have been occurring "every day to every other day." The diagnosis for this visit is "chronic migraine" for which she received a prescription of Topamax.

### **The Parties' Contentions**

In support of her summary judgment motion, Defendant submits Plaintiff's medical records from the Emergency Room at Good Samaritan Hospital and Dr. Etienne's records from the date of the accident through January 2020; Plaintiff's examination before trial transcript; the Verified Bill of Particulars and Supplemental Bill of Particulars for the 2011 accident; and the affirmed medical reports of Dr. Barry Kraushaar, orthopedist, and Dr. Alexander Merkler, neurologist.

Dr. Kraushaar examined Plaintiff's cervical and lumbar spine, as well as her right and left shoulders. Based upon measurements with a goniometer, he found all examined body parts to have normal range of motion. It is his orthopedic opinion that as a result of the subject accident, Plaintiff suffered no orthopedic disability or permanency and can work and perform all her normal activities of daily living without restriction. Likewise, Dr. Merkler found Plaintiff's range of motion for her cervical and lumbar spine, and shoulders, to be normal based upon measurements taken with the use of a goniometer. He also opined that Plaintiff did not sustain a causally related a permanent brain injury. More specifically, Dr. Merkler noted that Plaintiff has no objective evidence of having suffered a traumatic brain injury; she had a normal CT scan of her head on 4/22/2019 which showed no evidence of trauma; and he found that the re-emergence of her migraines to constitute a pre-existing disorder that was not permanent in nature. Lastly, Defendant notes that Plaintiff went back to school and work within weeks of the

subject occurrence, and as such, cannot satisfy the 90/180 day category of the no-fault law. Given these normal findings, Defendant argues that Plaintiff did not sustain a "serious injury" under any category of the no-fault law, which requires dismissal of the action.

In response to the motion, on January 12, 2022, Plaintiff filed the instant cross-motion to amend/supplement her Verified Bill of Particulars. Among the injuries now sought to be alleged were the following: stroke/infarction; post-traumatic headaches and migraines; post concussion syndrome; increase risk of Alzheimers Disease and Parkinsons Disease; photophobia and/or phonophobia; herniated lumbar discs at L4-5 and L5-S1; lumbar sprain with disc pathology; trapezius muscle spasm; cervical muscle strain/sprain with disc pathology and psychological consequences including depression, anxiety and personality change. Plaintiff asserts that these injuries constitute a Supplemental Bill of Particulars, as opposed to an Amended Bill of Particulars and offers no explanation for the delay in serving the Supplemental/Amended Bill of Particulars prior to the filing of the Note of Issue, and not until after the summary judgment motion was made.

Plaintiff also opposes Defendant's summary judgment motion and submits the expert affirmation of neurologist David Rosenbaum M.D. who examined Plaintiff on November 5, 2021. In describing Plaintiff's medical history, Dr. Rosenbaum states that about one year after the 2011 accident Plaintiff's headaches came under good control and occurred only once or twice a year, in direct contrast to the medical records of Plaintiff's treating neurologist, Dr. Etienne (who's notes he reviewed), who memorialized three months before the subject accident that Plaintiff was having frequent migraines. In fact, Dr. Rosenbaum states that Plaintiff had only a minor concussion in the motor vehicle accident in 2011, suffered some minor back pain at the time and suffers from no chronic medical conditions. Dr. Rosenbaum also references records allegedly from Dr. Etienne regarding visits on June 15, 2021 and September 20, 2021, and an MRI of the brain on July 13, 2021<sup>1</sup>, none of which are submitted in evidentiary form nor

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<sup>1</sup>The unproduced brain MRI allegedly shows (according to Dr. Rosenbaum) a focal area of restricted diffusion in the cortex of the lingual gyrus of the right occipital lobe

were they affirmatively relied upon by defendants.

Dr. Rosenbaum opines that as a result of the accident of April 22, 2019, Plaintiff sustained a closed head injury; concussion of the brain; post concussion syndrome; post traumatic headache disorder, representing aggravation and exacerbation of a pre-existing but well-controlled migraine syndrome associated with auras; and cervical and lumbar spine sprain and strain. Dr. Rosenbaum makes no effort to measure and/or quantify whether Plaintiff has any limitation in motion of her cervical or lumbar spine. Cranial examination reveals no signs of trauma; mental status evaluation finds her to be alert, appropriate and fully oriented; language function is normal; cranial nerves are normal; motor examination and muscle tone are normal; deep tendon reflexes are symmetrical and cerebellar function was normal for limb coordination and tandem gait. Dr. Rosenbaum acknowledges a history of pre-existing headache syndrome but states that this was under "relatively" good control until it was aggravated and exacerbated by the subject accident. He also opines that with a reasonable degree of medical probability the subject accident aggravated her migraine disorder and resulted in a stroke. Plaintiff argues that Defendant's summary judgment must be denied because this case presents a classic battle of the experts concerning whether Plaintiff's injuries exceed the no-fault threshold so as to allow the matter to move to trial.

In opposition to the cross-motion, Defendant argues that injuries sought to be plead by Plaintiff are not "continuing special damages and disabilities" but rather new and unrelated injuries. For example, Plaintiff now alleges various injuries to her cervical and lumbar spine that were never alleged in her original Bill of Particulars. Likewise, completely new head injuries are alleged such as Stroke/Infarction. Defendant asserts that it clearly would experience prejudice since she has not had the opportunity to depose Plaintiff on the newly alleged injuries, to demand and review records on same and to have Plaintiff submit to an independent examination. To do so would take discovery back to the beginning. Defendant also notes that

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consistent with acute infarction.

Defendant has made no effort to demonstrate unanticipated circumstances and/or explain why such an amendment was not made prior to the filing of the Note of Issue.

#### **Legal Discussion**

A motion to amend is committed to the broad discretion of the trial court, and the resulting determination will not be lightly set aside. Scott v. General Motors Corp., 202 A.D.2d 570, 609 N.Y.S.2d 252 (2d dept. 1994). Leave to amend a bill of particulars "is to be freely given in the absence of prejudice or surprise to the opposing party." Ancona v. Waldbaum, Inc., 305 A.D.2d 436; 758 N.Y.S.2d 816 (2d Dept. 2003) citing Scheuerman v. Health & Hosps. Corp. of City of N.Y., 243 A.D.2d 553, 554, 663 N.Y.S.2d 123 (1997). Prejudice...is not found in the mere exposure of the defendant to greater liability and requires "some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." Cherebin v. Empress Ambulance Service, Inc., 43 A.D.3d 364 A.D.3d 364, 841 N.Y.S.2d 277 (1<sup>st</sup> Dept. 2007); Abdelnabi v. NYCTA, 273 A.D.2d 114, 115; 709 N.Y.S.2d 548 (1<sup>st</sup> Dept. 2000).

"While leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise, 'once discovery has been completed and the case has been certified as ready for trial, [a] party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances.'" Cioffi v. S.M. Foods, Inc., 178 A.D.3d 1015, 1016, 116 N.Y.S.3d 68 (2d Dept. 2019); Mackauer v. Parikh, 148 A.D.3d 873, 876, 49 N.Y.S.3d 488 (2d Dept. 2017); Skerrett v. LIC Bite B2 Owner, LLC, 199 A.D.3d 956, 158 N.Y.S.3d 186, 191 (2d Dept. 2021). Moreover, where there has been an inordinate delay in seeking leave the plaintiff must establish a reasonable excuse for the delay, and submit an affidavit to establish the merits of the proposed amendment. Fuentes v. City of New York, 3 A.D.3d 549, 550, 771 N.Y.S.2d 178 (2d Dept. 178); Green v. New York City Housing Authority, 81 A.D.3d 890, 891, 917 N.Y.S.2d 313 (2d Dept. 2011); Barrera v. City of New York, 265 A.D.2d 516, 518, 697 N.Y.S.2d 132 (2d Dept. 1999). Although delay alone is insufficient to deny a motion for leave to amend a bill of particulars, when un-excused lateness is coupled

with prejudice to the opposing party, denial of the motion is justified. Stewart v. Dunkleman, 128 A.D.3d 1338, 1340, 8 N.Y.S.2d 515 (4<sup>th</sup> Dept. 2015).

As an initial matter, with the exception of post-concussion syndrome, migraines and photophobia and/or phonophobia, all the other injuries set forth in the proposed "Supplemental/Amended Verified Bill of Particulars" constitute new injuries as opposed to continuing damages. Thus, leave of court is required to amend the Bill of Particulars to allege all injuries set forth in the proposed Amended/Supplemental Bill of Particulars with the exception of those injuries set forth above. Upon consideration of the motion papers, the Court denies the application to amend for the following reasons. Plaintiff's counsel offers no reason why it failed to Amend its Bill of Particulars to assert these injuries prior to the filing of the Note of Issue, when it appears that such information was, or should have been, in counsel's possession prior to certifying that all discovery was complete. Nor is any showing made of "special or extraordinary circumstances", as required for an application post Note of Issue. Additionally, the Court finds that there is significant prejudice to Defendant based upon the timing of the proposed amendment. Defendant has already had Plaintiff examined by her experts, and a summary judgment has already been made based upon those examinations and the resultant reports. To permit Plaintiff to now have to defend against allegations of new injuries, including a stroke/infarction, after a summary judgment motion has already been made (which is arguably the functional equivalent of the "trial") would be patently unfair. As such, Plaintiff's cross-motion to amend is denied.

For the following reasons, this Court grants Defendant's motion for summary judgment for failure to meet the no-fault "serious injury" threshold. Notwithstanding denial of Plaintiff's cross-motion, the Court would reach this same conclusion even if it considered all the injuries set forth in the Proposed Supplemental/Amended Verified Bill of Particulars. Plaintiff opposes the summary judgment motion with respect to the following "serious injury" categories: a "permanent consequential limitation of use of a body organ or member" and a

“significant limitation of use of a body function or system”<sup>2</sup>. “Whether a limitation of use or function is ‘significant’ or ‘consequential’ (i.e., important) 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.” Mesiti v. Knight, 190 A.D.3d 1141, 138 N.Y.S.3d 740, 741 (3d Dept. 2021). Any conclusion as to the degree of the limitation must state what objective tests those conclusions were based on. Jiminez v. Kambli, 272 A.D.2d 581, 582, 708 N.Y.S.2d 460 (2d Dept. 2000).

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance Law §5102(d) as a serious injury that was caused by the subject accident. Healea v Andriani, 158 A.D.2d 587, 551 N.Y.S.2d 554 (2d Dept 1990). The defendant “may meet this burden by establishing that [the] plaintiff had a ‘documented history of extensive pre-existing conditions and injuries that have produced the same types of symptoms that [the] plaintiff now attributes to the subject accident.’” Noor v. Fera, 200 A.D.3d 1366, 160 N.Y.S.3d 151, 153 (3d Dept. 2021).

In the instant matter, Defendant has met her burden on summary judgment. With respect to the migraines/headaches, Dr. Etienne’s medical records are submitted which confirm that three months prior to the subject accident, Plaintiff was still receiving medical treatment for chronic migraines which were described as causing photophobia, phonophobia and nausea; lasting a few hours to the entire day; and most significantly, were occurring “every day to every other day.” Dr. Etienne’s pre-accident diagnosis shortly before the accident was “chronic migraine” for which she received a prescription of Topamax to treat the condition. Additionally, Defendant’s neurologist opines that the headache/migraine condition pre-existed

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<sup>2</sup>Although the 90/180 category was affirmatively addressed by Defendant, Plaintiff did not oppose it. Moreover, the Court finds that there is no triable issue of fact as to this “serious injury” category based on Plaintiff’s admission in at her examination before trial that she returned to school after one week and returned to work several weeks thereafter.

the accident of 2019. Lastly, this Court finds that with respect to any allegations related to Plaintiff's cervical and lumbar spine, and shoulders, both Dr. Kraushaar and Dr. Merkle found normal ranges of motion, thus meeting their burden with regard to these injuries as well.

Defendant having met her burden on summary judgment, plaintiff must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether the plaintiff, suffered a "serious injury" within the meaning of the Insurance Law. Zoldas v St. Louis Cab Corp., 108 A.D.2d 378, 489 N.Y.S.2d 468 (1st Dept 1985); Dwyer v Tracey, 105 AD2d 476, 480 N.Y.S.2d 781 (3d Dept. 1984). One way to substantiate a claim of serious injury is through an expert's designation of a numeric percentage of a plaintiff's loss of range of motion, i.e., quantitatively. McEachin v. City of New York, 137 A.D.3d 753, 756, 25 N.Y.S.3d 672 (2d Dept. 2016). However, an expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Id. Additionally, given the evidence of a pre-existing injury or injuries, the burden now shifts to plaintiff to provide "objective medical evidence distinguishing [her] preexisting condition[s] from the injuries claimed to have been caused by" her 2019 accident. Noor, 160 N.Y.S.3d at 154.

In the instant matter, Plaintiff has not met her burden to demonstrate a triable issue of fact. Although Dr. Rosenbaum acknowledges a history of pre-existing headache syndrome, he states that this was under "relatively" good control until it was aggravated and exacerbated by the subject accident.<sup>3</sup> However, this description is greatly contradicted by the medical evidence wherein Plaintiff's complaints to Dr. Etienne after the April 2019 accident, largely mimicked the complaints that were previously made to him by Plaintiff in January 2019,

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<sup>3</sup>The Court notes that while Dr. Rosenbaum opines that the subject accident exacerbated and aggravated a pre-existing headache syndrome, Plaintiff does not, even in her proposed Supplemental/Amended Verified Bill of Particulars, claim an aggravation of a pre-existing condition but rather "post-traumatic headaches" and "migraines."

three months prior to the subject accident, including that she was already suffering from photophobia and/or phonophobia. In fact, her headaches were so bad three months prior to the subject accident that Plaintiff was prescribed medication to treat the headache/migraine condition. Nor does Dr. Rosenbaum make any objective findings based upon his neurological examination of Plaintiff (which he found to be normal), thus failing to raise a triable issue of fact as to her headaches/migraine condition. See Fitzmaurice v. Chase, 288 A.D.2d 651, 732 N.Y.S.2d 690, 692 (3d Dept. 2001)(Plaintiff's medical affidavits regarding post-concussive syndrome found to be deficient as they were not based on objective tests but rather subjective complaints.)

Additionally, even if this Court, arguendo, considered the additional injuries set forth in the cross-motion, no triable issue of fact is raised sufficient to deny summary judgment. Although Dr. Rosenbaum finds that Plaintiff is suffering from a closed head injury; concussion; post-concussion syndrome; and cervical and lumbar spine, sprain and strain, he fails to address the fact that these very same injuries were each previously claimed in the 2011 Verified Bill of Particulars. Since Dr. Rosenbaum's report as to these injuries lacked any explanation as to how plaintiff's post-accident condition was objectively different from her pre-accident condition after the the 2011 accident, his opinion is both conclusory and speculative. See Noor, 160 N.Y.S.3d at155. Additionally, with regard to the lumbar and cervical spine injuries, Dr. Rosenbaum's failure to quantify, in any manner, any limitations in motion of these body parts based on measurements made with a goniometer, results in the failure to demonstrate a triable issue of fact.

Lastly, with respect to the claim that Plaintiff suffered a stroke/infarction as a result of the subject accident, this opinion is not based upon admissible evidence. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which are not in evidence, and that expert testimony is limited to facts in evidence. Marzuillo v. Isom, 277 A.D.2d 362, 363, 716 N.Y.S.2d 98 (2d Dept. 2000). It appears from Dr. Rosenbaum's report that this opinion is based upon an MRI report performed on or about July 14, 2021.

However, that MRI report was not provided to the Court, nor is it a document relied upon Defendant in moving for summary judgment. As such, Dr. Rosenbaum's opinion as to this injury is speculative. As Plaintiff has failed to demonstrate a triable issue of fact so as to warrant denial of summary judgment, Defendant's motion to dismiss the Complaint must be granted in its entirety.

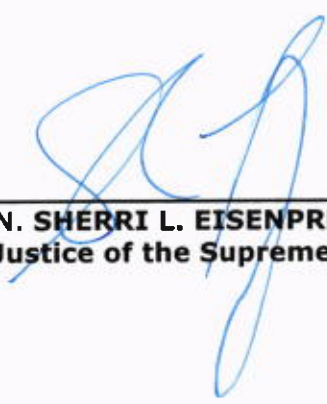
Accordingly, it is hereby

**ORDERED** that Plaintiff's Notice of Motion for leave to file an Amended Verified Bill of Particulars in the form annexed to the moving papers (Motion #3) is DENIED; and it is further

**ORDERED** that Defendant's Notice of Motion to dismiss the Complaint for failure to satisfy the no-fault "serious injury" threshold is GRANTED in its entirety; and the Complaint is deemed dismissed.

The foregoing constitutes the Decision and Order of this Court on Motion #2 and #3.

Dated: New City, New York  
April 1, 2022



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**HON. SHERRI L. EISENPRESS**  
Acting Justice of the Supreme Court

To: All Parties (via NYSCEF)