

**Minaya v Sierra**

2023 NY Slip Op 31288(U)

April 21, 2023

Supreme Court, New York County

Docket Number: Index No. 158373/2017

Judge: James G. Clynnes

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JAMES G. CLYNES PART 22M**

*Justice*

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LUBER A. MINAYA,

Plaintiff,

- v -

ANTHONY SIERRA, JUAN RIVERA

Defendant.

INDEX NO. 158373/2017

MOTION DATE 12/31/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and following oral argument, the motion by Defendant Juan Rivera and the cross-motion by Defendant Anthony Sierra for summary judgment on the grounds that Plaintiff's claimed injuries do not satisfy the serious injury threshold under Insurance Law 5102 (d) are decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of an August 30, 2016 motor vehicle accident between a vehicle owned and operated by Defendant Sierra, within which Plaintiff was a passenger, and a vehicle owned and operated by Defendant Rivera. Plaintiff's Bill of Particulars alleges injuries to his cervical spine, lumbar spine, and left shoulder and that these injuries fall within the categories set forth under Insurance Law 5102 (d).

The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Lopez v Senatore*, 65 NY2d 1017 [1985]).

In support of their motions, both Defendants rely on the affirmed independent orthopedic examination report of Dr. Jeffrey Passick, orthopedic surgeon, who reported that Plaintiff's cervical spine strain, lumbar spine strain, and left shoulder strains were all resolved. Dr. Passick measured Plaintiff's range of motion with a goniometer pursuant to AMA Guidelines and found normal range of motion and negative objective tests as to Plaintiff's cervical spine, lumbar spine, and right and left shoulders. With regard to causation, Dr. Passick found that the strains of Plaintiff's cervical spine, lumbar spine, and left shoulder were causally related to the subject accident but found no orthopedic disability and no permanency as a result of the accident.

Defendant Sierra also relied on the report of Dr. Jonathan Lerner, who undertook an independent review of the MRIs of Plaintiff's left shoulder, cervical spine, and lumbar spine. As to Plaintiff's left shoulder, Dr. Lerner reported no evidence of fracture, rotator cuff or labral tear to suggest an acute traumatic event, but did find curved (Type II) acromion, moderate acromioclavicular joint osteoarthritis with capsular hypertrophy and reactive bone marrow edema, which is consistent with a chronic degenerative process as opposed to an acute traumatic event. Dr. Lerner observed a mild disc bulge at C4-C5 and C5-C6 of Plaintiff's cervical spine. However, Dr. Lerner notes that these bulges were seen in the setting of desiccation in the areas, which is consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event. As to Plaintiff's lumbar spine, Dr. Lerner observed disc protrusion and bilateral facet osteoarthritis at L3-L4, L4-L5, and L5-S1, and further noted that these findings were seen in the setting of desiccation of the L3-L4 through L5-S1 intervertebral disc space levels, which is consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event. Dr. Lerner further reported that the finding of bilateral facet osteoarthritis at the above levels contributes to the degree of effacement

of the thecal sac and bilateral neural foraminal narrowing, further suggesting a chronic degenerative process as opposed to an acute traumatic event. Dr. Lerner found no causal relationship between the subject accident and his findings with regard to Plaintiff's left shoulder, cervical spine, and lumbar spine.

Defendants also argue that Plaintiff admitted that he was only confined for the first, "maybe even the second" week after the accident, and that he was unemployed and thus did not lose any days of work during 90 days within the 180 days following the accident. During his examination before trial (EBT), Plaintiff testified that immediately after the accident he could not exercise, lift heavy weight, but now that he is employed, he is still able to go to work and perform his normal job duties. The activities Plaintiff described do not rise to the threshold of preventing him from performing substantially all his usual activities (*Manrique v Warsaw Woolen Assoc.*, 297 AD2d 519 [1st Dept 2002]).

Defendants have met their initial burdens of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]). The burden therefore shifts to Plaintiff to produce prima facie evidence to support his claim of serious injury.

In opposition, Plaintiff relies on the medical records from Saint Barnabas Hospital, the treatment records and affirmation of Dr. Denny X. Rodriguez from Neighborhood Medical Care, P.C., the records from treatment with Dr. Lester Nadel, the affirmation and MRI report of Dr. Steve B. Losik, and the affirmed orthopedic surgical consultation report by Dr. Donald I. Goldman.<sup>1</sup>

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<sup>1</sup> Plaintiff is correct that despite being unsworn and ordinarily inadmissible, contemporaneous medical reports, including MRIs, may be used in a summary judgment motion if reviewed and cited by opposing experts (*Gorden v Tibulcio*, 50 AD3d 460 [1st Dept 2008]). However, if the medical records are simply viewed by Defendants' experts

As an initial matter, some portions of the medical records from Saint Barnabas Hospital are illegible and those that are not illegible do not contain any information regarding Plaintiff's injuries. As such, the Court will not consider the records from Saint Barnabas Hospital.

The records from treatment with Dr. Nadel to which Plaintiff attaches the certification for Plaintiff's medical records at Neighborhood Medical will also not be considered by the Court as they are not in admissible form. There is no indication that Dr. Nadel and Dr. Rodriguez worked at the same facility as there is no letterhead on Dr. Nadel's records as there is on Dr. Rodriguez's, Dr. Nadel's name is simply handwritten at the top of the first page of the records, the format of the records is different than those by Dr. Rodriguez, and finally, although Dr. Nadel's records are illegibly signed at the bottom of the last page, they are neither affirmed nor is Dr. Nadel's name or license number listed.

The treatment records and affirmation of Dr. Rodriguez, the affirmation and MRI report of Dr. Losik, and the report by Dr. Goldman do raise an issue of fact.

Dr. Rodriguez first examined Plaintiff on August 31, 2016 and found limited range of motion as to Plaintiff's cervical spine, lumbar spine, and right shoulder. Dr. Rodriguez noted positive distraction and compression tests on the cervical spine, as well as positive spinal percussion, Faber-Patrick, and straight leg raising on the lumbar spine. Dr. Rodriguez measured Plaintiff's range of motion again on October 3, 2016 and found limitation to the subject areas as well as a lumbar spine bilateral paraspinal spasm. Dr. Rodriguez measured Plaintiff's range of motion again on November 21, 2016, January 3, 2017, and March 3, 2017, and noted limitations to Plaintiff's cervical spine, lumbar spine, and right shoulder with spasms and tenderness. Although Dr. Rodriguez did not report using an instrument to measure the ranges of motion, he

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and not relied upon by them, as in this case, the exception does not apply (*Malupa v Oppong*, 106 AD3d 538 [1st Dept 2013]).

identified the objective tests he employed, and documented spasms and tenderness, making his report sufficient to demonstrate continuing limitations (*De Los Santos v Basilio*, 176 AD3d 544, 545 [1st Dept 2019]; *Frias v Son Tien Liu*, 107 AD3d 589 [1st Dept 2013]).

Dr. Losik personally reviewed the MRIs taken of Plaintiff's left shoulder, cervical spine, and lumbar spine, and found as to Plaintiff's left shoulder, productive hypertrophic changes of the acromioclavicular joint and bone marrow edema in the distal clavicle and adjacent acromion with fluid in the acromioclavicular joint, likely as a result of recent trauma. This is in direct contrast to Dr. Lerner's findings of no indication of trauma. Although Dr. Losik did not expressly reject the conclusion of Defendant Sierra's expert that Plaintiff's left shoulder injuries were degenerative in origin, by attributing the injuries to a different, yet equally plausible cause, Plaintiff raised a triable issue of fact (*Vaughan v Leon*, 94 AD3d 646 [1st Dept 2012]; *Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]). As to Plaintiff's cervical spine and lumbar spine, Dr. Losik noted disc bulges and herniations.

Dr. Goldman examined Plaintiff on February 3, 2020. Dr. Goldman measured Plaintiff's range of motion with a goniometer and found limitation as to his cervical, lumbar spine, and left shoulder, and positive objective tests as to his lumbar spine and left shoulder. Dr. Goldman concluded that the injuries to Plaintiff's cervical spine, lumbar spine, and left shoulder were causally related to the subject accident and should be considered permanent. He also recommended laser surgery for Plaintiff's cervical spine and a surgical series of epidural steroids and arthroscopic surgery for Plaintiff's left shoulder.

With regard to Plaintiff's cervical spine and lumbar spine, Plaintiff's opposition fails to address the degeneration cited by Defendant Sierra's medical expert, other than the conclusory statement of Plaintiff who provided that no doctor ever told him that he had any preexisting injuries or

degeneration. However, as Plaintiff has shown sufficient evidence of serious injury to his left shoulder, it is not necessary to determine the adequacy of the evidence as to his cervical spine and lumbar spine injuries. She may be entitled to recover for all injuries causally related to the subject accident (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

With respect to the 90/180 days serious injury claim, Plaintiff relied on his EBT testimony and his affidavit, in which he testified that he worked as a freelance personal trainer with three clients, currently works full time as manager on deck/maintenance at Equinox, he can no longer exercise in the same capacity as he used to, and he is able to perform, but with restriction shopping, washing clothes, and washing his back. Plaintiff's testimony as to his restrictions in conjunction with the reported permanency of Plaintiff's injury from Dr. Goldman and the prognosis of Dr. Rodriguez that Plaintiff is limited to some extent in activities of daily living, Plaintiff has raised an issue of fact as to the 90/180 days category as well.

#### *Supplemental Bill of Particulars*

Within Plaintiff's opposition to Defendants' motions, Plaintiff includes a "Supplemental Verified Bill of Particulars" alleging an additional injury to Plaintiff's left shoulder, a fracture of the distal clavicle. In reply, Defendant Sierra contends that Plaintiff may not amend his Bill of Particulars to add a new injury, a clavicle fracture, which has never been alleged, has not appeared in any of Plaintiff's medical records, was not mentioned at his deposition, and has never before been suggested in this litigation. Defendant Sierra further contends that this injury and Dr. Goldman are mentioned in the first time in the opposition papers.

Pursuant to CPLR 3043, "[a] party may serve a supplemental bill of particulars with respect to claims of continuing damages and disabilities without leave of court at any time, but not less

than thirty days prior to trial.” The supplemental bill of particulars must not set forth a new legal theory of liability or new injuries, but merely expand upon the continuing disabilities alleged in the original bill (*Scherrer v Time Equities, Inc.*, 27 AD3d 208 [1st Dept 2006]).

Here, Plaintiff is alleging a fracture to Plaintiff’s clavicle, an injury that was not in his original Bill of Particulars (BP). This fracture is a new injury and therefore the Supplemental Bill of Particulars is in fact an Amended Bill of Particulars (*Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389 [1st Dept 2006] where the original BP claimed a right fractured distal radius and physiological and somatic overlay and the supplemental BP alleged left distal radius fracture, scarring on her forehead and cognitive and neuropsychological dysfunction as a result of the accident, the Court ruled that the supplemental BP was, in fact, an amended BP, since it sought to assert new injuries) (*compare Scherrer v Time Equities, Inc.*, 27 AD3d 208 [1st Dept 2006] where the Court reinstated the supplemental BP regarding a plaintiff’s respiratory condition and his treatment, since they merely elaborated on injuries already alleged in the original BP by expanding upon the extent of the continuing disability, and the nature of plaintiff’s treatment, except for the allegations of diabetes and headaches since those injuries were new and not alleged in the original BP).

Under CPLR 3042 (b), a party has a right to amend a Bill of Particulars once as a matter of course before the Note of Issue is filed, however in this case, the Note of Issue was filed on November 6, 2019, before the Amended Bill of Particulars was served. The Court agrees with Defendant Sierra that Plaintiff improperly asserted a “new injury” in his “supplemental verified Bill of Particulars” and the Court will not consider that injury as it was raised for the first time in opposition to Defendants’ motion for summary judgment. The Court notes that Defendant Sierra

did not move to strike Plaintiff's Amended Bill of Particulars and will therefore not make that determination. Accordingly, it is

**ORDERED** that the motion by Defendant Juan Rivera and the cross-motion by Defendant Anthony Sierra for summary judgment on the grounds that Plaintiff's claimed injuries do not satisfy the serious injury threshold under Insurance Law 5102 (d) are denied; and it is further

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

**ORDERED** that within 30 days of entry, Plaintiffs shall serve a copy of this Decision and Order upon Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

4/21/2023

DATE

*James G. Clynes*  
JAMES G. CLYNES, 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