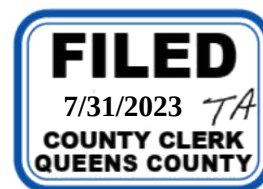


Alcaide v Martinez
2023 NY Slip Op 35250(U)
July 28, 2023
Supreme Court, Queens County
Docket Number: Index No. 725472/2020
Judge: Maurice E. Muir
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY



Present: HONORABLE MAURICE E. MUIR
Justice

LINO ALCAIDE,

Plaintiff,

-against-

MARIA ELENA MARTINEZ,

Defendant.

IAS Part - 42

Index No.: 725472/2020

Motion Date: 12/22/22

Motion Cal. No. 3

Motion Seq. No. 3

The following electronically filed (“EF”) documents read on this motion by Maria Elena Martinez (“Ms. Martinez” or “defendant”) for an order: a) pursuant to CPLR § 3212, for summary judgment due to plaintiff’s failure to meet the threshold limits set by New York State Insurance Law, § 5102(d); or alternatively, pursuant to CPLR § 3212, which dismisses any/all sub-portions of Insurance Law Section 5102(d) which are not viable as a matter of law. Moreover, Lino Alcaide (“Mr. Alcaide” or “plaintiff”) cross moves for an order pursuant to CPLR § 3212 granting summary judgment in his favor and against Defendant, Maria Elena Martinez, on the issue of liability because plaintiff has established his prima facie case of negligence that Defendant was negligent per se together with such other and further relief as this Court may deem just and proper

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	EF 31 - 40
Notice of Cross-Affirmation-Exhibits.....	EF 42 - 45
Affirmation in Opposition to Cross Motion-Exhibits-Service.....	EF 49 - 56
Affirmation in Reply-Exhibit.....	EF 57 - 58

Upon the foregoing papers it is ordered that the motion and cross-motion are combined herein for disposition, and determined as follows:

This is an action to recover damages for personal injuries Mr. Alcaide allegedly sustained in a motor vehicle collision. In particular, the plaintiff alleges that August 1, 2020, at approximately 3:30 p.m., Ms. Martinez rear-ended his motor vehicle while he was stopped on the Grand Central Parkway ("GCP"), at or near its intersection with 108th Street, Queens, New York ("subject accident"), wherein he sustained serious injuries to his neck, back and right shoulder. As a result, on December 31, 2020, the plaintiff commenced the instant action; and on or about February 8, 2021, issue was joined. According to the plaintiff's Bill of Particulars ("BP"), he sustained the following injuries:

Trauma, injury and damage to the right shoulder: biceps tendon tear of right shoulder, impingement syndrome right shoulder, partial rupture of the right rotator cuff, synovitis of the right shoulder, tendinitis, bursitis, tenosynovitis aforementioned requiring right shoulder arthroscopic surgery performed by Andrew Miller, M.D. on October 9, 2020, joint effusion, tendonitis, bursitis, synovitis, resulting in permanent disfiguring, deforming keloid scarring, severe internal derangement, need for future surgeries and possible complete shoulder replacement;

Trauma, injury, damage to the lumbar spine, including but not limited to: L3-L4, L4- L5 and L5-S1 herniations and associated annular tears, L1-L2 and L2-L3 annular bulges, spinal canal and nerve root impingement, lumbar radiculopathy aforementioned requiring lumbar discectomy at the L4-L5 level with incision performed by Arden Kaisman, M.D. on November 9, 2020, disc bulges, disc herniations, sprains, strains, requiring multiple trigger point injections, epidurals and other spinal surgeries, evidence of abnormal alignment with loss of normal curvature with resultant straightening; vertebral subluxation complex, numbness; muscle spasm; lumbar strain; lumbar pain, radiculopathy, need for future invasive spinal surgeries;

Trauma, injury, damage to the cervical spine, including but not limited to: C3-C4, C4-C5, C5-C6, C6-C7 and C7-T1 herniations, canal foraminal and cord impingement, spinal stenosis, torticollis, disc bulges, disc herniations, sprains, strains, requiring multiple trigger point injections, epidurals and other spinal surgeries, evidence of abnormal alignment with loss of normal cervical curvature with resultant straightening; vertebral subluxation complex, numbness; muscle spasm; cervical strain, cervical pain, cervicgia, cervical subluxation, radiculopathy, need for future invasive spinal surgeries;

Trauma, injury, damage to thoracic spine, including but not limited to: abnormal alignment with loss of normal thoracic, thoracic spine derangement, sprain and strain, vertebral subluxation complex;

Internal derangement; muscle spasms; body tightness; body weakness; need to undertake physical therapy, chiropractic care, and/or acupuncture; possible need for future surgery to the left shoulder, left hand, lumbar spine and cervical spine.

Notwithstanding the same, the defendant seeks summary judgment on the ground that the plaintiff did not sustain a "serious injury" as defined by § 5102(d) of the New York's Insurance Law. It has long been established that the "legislative intent underlying the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (i.e., Insurance Law § 5101, *et seq.* – commonly known as New York's "No-Fault" Insurance Law) was to weed out frivolous claims and limit recovery to significant injuries (*Licari v. Elliot*, 57 NY2d 230 [1982]; *see also Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002] quoting *Duel v. Green*, 84 NY2d 795 [1995]). New York's No-Fault Insurance Law § 5102 (d) defines "serious injury" as follows:

... a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see Licari v. Elliott*, 57 NY2d 230 [1982]; *see also Charley v. Goss*, 54 AD3d 569 [1st Dept 2008] *aff'd* 12 NY3d 750 [2009]; *Porcano v. Lelzman*, 255 AD2d 430 [2d Dept 1998]; *Nolan v. Ford*, 100 AD2d 579 [2d Dept 1984] *aff'd* 64 NYS2d 681 [1984]). On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of New York's No-Fault Insurance Law § 5102(d) (*see Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Akhtar v. Santos*, 57 AD3d 593 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*Moore v. Edison*, 25 AD3d 672 [2d Dept 2006]; *Faroze v. Kamran*, 22 AD3d 458 [2d Dept 2005]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v. Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). A defendant may also establish

entitlement to summary judgment by using medical reports and records prepared by the plaintiff's own physicians (*see Fragale v. Geiger*, 288 AD2d 431 [2d Dept 2001]; *Grossman v. Wright*, 268 AD2d 79 [2d Dept 2000]; *Vignola v. Varrichio*, 243 AD2d 464 [2d Dept 1997]; *Torres v. Micheletti*, 208 AD2d 519 [2d Dept 1994]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Xin Fang Xin v. Saft*, 177 AD3d 823 [2d Dept 2019]; *Rosenblum v. Schloss*, 175 AD3d 1339 [2d Dept 2019]; *Burns v. Stranger*, 31 AD3d 360 [2d Dept 2006]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see Duel v. Green*, 84 NY2d 795 [1995]; *Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]). The mere parroting of language tailored to meet statutory requirements is insufficient (*see Grossman v. Wright*, 268 AD2d at 84).

Here, the complete record before the Court indicates that there are conflicting medical reports submitted by the parties, which raise triable issues of fact as to whether the plaintiff sustained serious injuries within the meaning of Insurance Law § 5102(d) (*see Pommells v. Perez*, 4 NY3d 566 [2005]; *Wilcoxon v. Palladino*, 122 AD3d 727 [2d Dept 2014]; *Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2013]; *Tinao v. City of New York*, 112 AD2d 363 [2d Dept 1985]; *Cassagnol v. Williamsburg Plaza Taxi*, 234 AD2d 208 [1st Dept 1996]). It is well settled that conflicting medical evidence on the issue of the permanency and significance of a plaintiff's injuries warrants denial of summary judgment. (*Pommells v. Perez*, 4 NY3d 566 [2005]; *Wilcoxon v. Palladino*, 122 AD3d 727 [2d Dept 2014]; *Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2013]; *Noble v. Ackerman*, 252 AD2d 392 [1st Dept 1998]). This is a matter to be resolved by a trier of fact.

Now, the court turns to the plaintiff's cross motion for summary judgment, which was not timely filed. CPLR § 3212(a) mandates that motions for summary judgment be made no later than 120 days after the filing of the note of issue. This statutory deadline is strictly enforced and can only be extended upon a showing of good cause. (*Brill v. City of New York*, 2 NY3d 648 [2004]; *Milano v. George*, 17 AD3d 644 [2d Dept 2005]; *Foo-Lu Co. v. Rojas*, 160 AD3d 932 [2d Dept 2018]; *Navarro v. Damac Realty, LLC*, 202 AD3d 111 [2d Dept 2022]). Whether good cause exists is a matter committed to the court's discretion and requires a showing of a "satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy." (*Id.* at 652; *Bargil Assoc., LLC v. Crites*, 173 AD3d 958

[2d Dept 2019] quoting *Bivona v. Bob's Discount Furniture of NY, LLC*, 90 AD3d 796 [2d Dept 2011]). The Court of Appeals, in *Brill v. City of New York*, 2 NY3d 648 [2004], addressed the “recurring scenario” of litigants filing late summary judgment motions, in effect “ignor[ing] statutory law, disrupt[ing] trial calendars, and undermin[ing] the goals of orderliness and efficiency in state court practice” (*Brill v. City of New York*, 2 NY3d at 650). *Brill* holds that to rein in these late motions, brought as late as shortly before trial, CPLR § 3212(a) requires that motions for summary judgment must be brought within 120 days of the filing of the note of issue or the time established by the court; where a motion is untimely, the movant must show good cause for the delay, otherwise the late motion will not be addressed (*see Isolabella v. Sapir*, 96 AD3d 427 [1st Dept 2012]). *Brill* draws a bright line based on the two elements of CPLR § 3212(a): a) the statutorily imposed or court-imposed deadlines for filing summary judgment motions; and b) the showing of good cause by a late movant in order for its motion to be considered. In *Brill*, the Court of Appeals indicated that late-filed summary judgment motions are “another example of sloppy practice threatening our judicial system” (2 NY3d at 652, 781 NYS2d 261, 814 NE2d 431, emphasis added), and pointed to its earlier decision, *Kihl v. Pfeffer*, 94 NY2d 118 [1999], which affirmed dismissal of the complaint because the plaintiff failed to respond to a court order within the court-ordered time frame. *Brill* reiterates *Kihl's* statement that, “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (2 NY3d at 652-653, 781 NYS2d 261, 814 NE2d 431) quoting *Kihl v. Pfeffer*, 94 NY2d at 123).

In the case at bar, the plaintiff filed the Note of Issue and Certificate of Readiness for Trial (“Note of Issue”) on March 11, 2022. (As such, 120-day deadline to file a motion for summary judgment expired on July 11, 2022.) Thereafter, on May 11, 2022, the defendant filed the instant motion for summary judgment based upon plaintiff’s alleged failure to meet the threshold limits set by New York State Insurance Law, § 5102(d). Afterwards, on October 21, 2022, the plaintiff filed the instant cross motion for summary judgment on the issue of liability. It is well settled law that while the cross motion made more than 120 days after the note of issue was filed and, therefore, was untimely (*see Brill v. City of New York*, 2 NY3d 648 [2004]), “an untimely cross for summary judgment may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds” (*Homeland Ins. Co. of New York v. National Grange Mut. Ins. Co.*, 84 AD3d 737 [2d Dept 2011] citing *Grande v. Peteroy*, 39 AD3d 590 [2d Dept 2007]; *White v. City of New York*, 79 AD3d 858 [2d Dept 2010]; *Lennard v. Khan*,

69 AD3d 812 [2d Dept 2010]; *Bressingham v. Jamaica Hosp. Medical Ct.*, 17 AD3d 496 [2d Dept 2005]). Here, the court finds that the plaintiff's cross motion was made months after the deadline imposed by the court had elapsed, and the plaintiff offered no explanation for the delay. Moreover, the plaintiff's cross motion did not raise nearly identical issues as the defendant's timely motion, which had a different factual basis (i.e., threshold pursuant to New York's No-Fault Insurance Law § 5102(d)). (*Sheng Hai Tong v. K and K 7619, Inc.*, 144 AD3d 887 [2d Dept 2016]; *Dojce v. 1302 Realty Company, LLC*, 199 AD3d 647 [2d Dept 2021]).

Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment, pursuant to CPLR § 3212, is denied, in its entirety; and it is further,

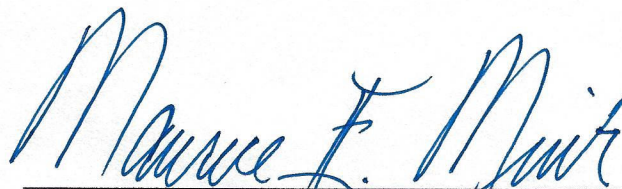
ORDERED that the plaintiff's cross motion for summary judgment, on the issue of liability, pursuant to CPLR § 3212, is denied; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the defendant, via certified mail and NYSCEF, on or before August 31, 2023.

The foregoing constitutes the Decision and Order of the court.

Dated: July 28, 2023

Long Island City, NY


MAURICE E. MUIR, J.S.C.

