

Rivera v Tarabokija

2024 NY Slip Op 32604(U)

July 25, 2024

Supreme Court, Kings County

Docket Number: Index No. 514793/2019

Judge: Ingrid Joseph

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At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of July, 2024.

PRESENT:

HON. INGRID JOSEPH,
Justice.
-----X

MIGUEL ANGEL RIVERA,
Plaintiff,

Index No.: 514793/2019

-against-

JOHN TARABOKIJA and UNITED COACH LINES, INC., **DECISION & ORDER**
Defendants.
-----X

<u>The following e-filed papers read herein:</u>	<u>NYSCEF Doc Nos.</u>
Mot. Seq. No. 4	
Notice of Motion/Affirmation/Exhibits.....	81 – 101, 109
Affirmation in Opposition/Exhibits.....	123
Affirmation in Reply	134
Mot. Seq. No. 5	
Notice of Cross-Motion.....	110
Affirmation in Support.....	111
Affirmation in Opposition/Exhibit.....	126 – 127
Affirmation in Reply.....	130

Upon the foregoing papers, Defendants John Tarabokija and United Coach Lines, Inc. (collectively, “Defendants”) move for an order, pursuant to CPLR 3212(b), granting them summary judgment and dismissing Plaintiff Miguel Angel Rivera’s (“Plaintiff”) complaint on the basis that his alleged injuries do not meet the “serious injury” threshold under Insurance Law § 5102 (d) (Mot. Seq. No. 4). Plaintiff opposes the motion and cross-moves for leave to serve an Amended Bill of Particulars pursuant to CPLR 3025 (b) and 3042 (Mot. Seq. No. 5).

This action arises out of a motor vehicle accident that occurred on October 18, 2018. In his complaint, Plaintiff seeks to recover damages for his personal injuries resulting from the subject accident. Specifically, Plaintiff alleges in his Bill of Particulars that he sustained injuries to his cervical

and lumbar spine.¹ In addition, Plaintiff claims he suffered serious injuries as defined by Insurance Law § 5102 (d) resulting in a (i) permanent consequential limitation of use of a body organ or member; (ii) significant limitation of use of a body function or system; or (iii) medically determined injury or impairment of a non-permanent nature which prevents [him] from performing substantially all of the material acts which constitute [his] usual and customary daily activities for not less than 90 days immediately following the accident.

Defendants now move to dismiss the complaint, arguing that Plaintiff did not sustain a “serious injury” as defined by Insurance Law 5102 (d). First, Defendants aver that Plaintiff’s alleged injuries were pre-existing and that such injuries are identical to the claims he has made in this instant action.² Since Plaintiff denied the existence of prior back or neck conditions to his treating physicians,³ Defendants contend that his physicians’ opinions as to causation are speculative. Moreover, Defendants’ expert Dr. Alan Greenfield performed a film review of Plaintiff’s lumbar spine MRI and found that Plaintiff suffered from a degenerative condition at L5-S1. Dr. Greenfield also compared Plaintiff’s 2017 cervical CT scan and 2019 cervical MRI and opined that the 2019 findings showed no adverse change after the subject accident. Thus, Defendants argue that Plaintiff’s alleged C2-C3 and C4-C5 injuries are not causally related to the accident since they were pre-existing. Second, Defendants contend that Plaintiff’s lumbar and cervical spine injury do not fit into any of the categories of Insurance Law § 5102 (d). According to Defendants, Plaintiff’s injuries were minor and insufficient to satisfy the “serious injury” threshold. Defendants assert that the pre-accident and post-accident imaging studies reflect that there are no significant changes between the two results. As for Plaintiff’s claimed injury of lumbar spine sprain and cervicgia, Defendants argue that neither constitute a serious injury and cervicgia is a subjective diagnosis. With respect to the 90/180 claim, Defendants assert that Plaintiff’s IME reports reflect that Plaintiff did not miss any time from work and continues to perform his regular duties.

In opposition to Defendants’ motion, Plaintiff argues that the motion is procedurally defective because Defendants failed to move for renewal as directed by Justice Lawrence Knipel’s August 24,

¹ According to Plaintiff’s verified bill of particulars dated August 28, 2019, he sustained a herniated nucleus pulposis at L5-S1, requiring surgery; lumbar sprain and radiculopathy; posterior midline herniation at C2-C3; posterior bulges at C4-C5, L1-L2, L2-L3, L3-L4 and L4-L-5; cervicgia; and scarring at surgery site (NY St Cts Elec Filing [NYSCEF] Doc No. 85, at 1-2). In a supplemental BP dated November 15, 2019, Plaintiff alleged that he sustained cervical radiculopathy and C4-5 herniated nucleus pulposis which required surgery (*id.* at 9). In a second supplemental BP dated February 15, 2022, Plaintiff alleged spinal stenosis L5-S1 and herniated nucleus pulposis L5-S1 requiring surgery (*id.* at 18).

² Plaintiff was involved in a motor vehicle accident in 1995 in which he sustained injuries to his cervical, thoracic and lumbar spine (NYSCEF Doc No. 101).

2021 order. Defendants previously moved for an extension of time to file a motion for summary judgment (Mot. Seq. No. 2) and Judge Knipel denied this relief “with leave to renew before the IAS Judge” (NYSCEF Doc No. 88; *Stoopler v O’Leary*, 2023 NY Slip Op 34079[U], *2 [Sup Ct, Kings County 2023] [finding that order “clearly deferred the ruling regarding an extension of time to file a summary judgment” to the IAS judge]). The Note of Issue was filed on July 12, 2021. It is well-settled in Kings County that the summary judgment motions must be made within 60 days of the filing of the note of issue (*see Goldin v NY & Presbyt. Hosp.*, 112 AD3d 578, 579 [2d Dept 2013], citing Kings County Supreme Court Uniform Civil Term Rules, part C, rule 6). This deadline may only be extended by the Court upon good cause shown (CPLR 3212 [a]). According to the Court of Appeals, “‘good cause’ in CPLR 3212.(a) requires a showing of good cause for the delay in making the motion--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial filings, however tardy” (*Brill v City of NY*, 2 NY3d 648, 652 [2004]). Plaintiff is correct in that Defendants’ motion is procedurally defective because Defendants did not explicitly ask for leave to renew their motion to extend the time to file a summary judgment motion. Instead, Defendants merely averred that they have made the requisite showing of “good cause” because the case was prematurely certified, and Plaintiff’s misrepresentations made the identification and production of material records more difficult. By proffering “good cause” explanations, the request for leave to renew is implied in Defendants’ papers. The Court finds that Defendants have shown good cause. To deny Defendants’ motion on procedural grounds would allow Plaintiff to benefit from filing the Note of Issue when discovery was not completed and unfairly penalize Defendants. Thus, the Court will consider the substantive arguments proffered by Plaintiff in opposition to the motion.

First, Plaintiff argues that Defendants failed to meet their prima facie burden. According to Plaintiff, Defendants’ experts did not discuss whether the subject accident activated, aggravated or exacerbated prior conditions. Plaintiff further contends that these experts failed to address Plaintiff’s new injuries. In contrast, Plaintiff notes that his treating surgeon Dr. Timothy Roberts opined that Plaintiff’s injuries were aggravated by this accident and Plaintiff sustained traumatic injuries that were separate and distinct from the pre-existing conditions. In addition, Plaintiff argues that (a) Defendants’ experts failed to address the objective findings of the MRIs, range of motion and nerve testing, (b) Defendants’ neurologist Dr. Saran S. Rosner opined that Plaintiff sustained radiculitis post-accident, and (c) Dr. Rosner’s range of motion testing confirmed lumbar and cervical spine deficits. Turning to the 90/180 claim, Plaintiff contends that Defendants’ motion should be denied since the IME was performed three years after the accident, Dr. Rosner could not, and did not, opine as to whether Plaintiff’s injuries satisfied this category. Moreover, Plaintiff contends that summary judgment is

improper where Defendants' experts proffer conflicting opinions. Here, Plaintiff asserts that Dr. Rosner found that Plaintiff did not suffer any lumbar herniation, but Dr. Greenfield opined that there was an L5-S1 herniation.

In support of his cross-motion, Plaintiff alleges that he sustained severe and disabling traumatic injuries. Plaintiff seeks to amend the bill of particulars to allege activation, aggravation or exacerbation of prior existing lumbar and cervical spinal conditions. Plaintiff's counsel avers that he was only made aware that there might be prior treatment records when Defendants requested the medical authorizations. The records produced in response to these authorizations included a 2013 MRI documenting an L5-S1 herniation and a 2017 CT scan indicating multilevel disc bulges. Moreover, Plaintiff argues that Dr. Roberts found that (i) the herniation and compression at C5-6 and the herniations at C2-3 and C6-7 are traumatic in etiology and (ii) the herniation at L5-S1 was preexistent but was activated, aggravated and exacerbated by the impact of the subject accident. Further, Plaintiff argues that there is no prejudice or surprise to Defendants in allowing the amendment. In support of this contention, Plaintiff claims that Defendants themselves advanced the argument that Plaintiff's injuries were preexisting and Plaintiff suffered no traumatic injury related to the subject accident. Accordingly, Plaintiff argues that he should be allowed to amend the bill of particulars to reflect the records proffered by Defendants that may indicate activation, aggravation and/or exaggeration of prior existing conditions.

In opposition to Plaintiff's cross-motion, Defendants contend that while Plaintiff argues that they are not prejudiced by the amendment, Plaintiff overlooks the timing in which his request is made. Defendants argue that Plaintiff's motion to amend was made after Defendants moved for summary judgment and if Plaintiff's motion is granted, Defendants will be unable to move again to dismiss the complaint. Moreover, Defendants argue that Plaintiff has not provided an explanation as to why he could not retrieve his own medical records of conditions that predated the subject accident prior to Defendants making their motion. In addition, Defendants point out that they served demands in 2019 and 2021 for medical authorizations to obtain records related to Plaintiff's prior 1995 and 2013 injuries. According to Defendants, the 2019 and 2021 demands were served prior to Plaintiff filing his original Bill of Particulars and prior to the filing of the note of issue, respectively. Since the information concerning Plaintiff's prior injuries was known to Plaintiff at the start of the lawsuit, Defendants contend that the motion should be denied.

In his reply, Plaintiff reiterates that Dr. Roberts found that Plaintiff had sustained new injuries, as well as activation, aggravation and exacerbation of prior conditions that were asymptomatic prior to the subject accident. Plaintiff further contends that Defendants' experts' findings that the injuries

were pre-existent are unsupported by the medical evidence and contradicted by the pre- and post-surgical findings of Dr. Roberts. Plaintiff's counsel also explains that he was unaware of the prior complaints and diagnostic studies of the neck and back and Plaintiff testified that he did not recall any prior pain, testing or treatment. Moreover, Plaintiff claims that there can be no prejudice where Defendants continue to seek post-note of issue discovery.

The Court will first address Plaintiff's cross-motion to amend his Bill of Particulars. Under CPLR 3025 (b), a party may amend his pleadings by leave of court and such leave "shall be freely given upon such terms as may be just," such as whether there is an absence of prejudice or surprise to the defendants (CPLR 3025 [b]; *Kirk v Nahon*, 160 AD3d 823, 824 [2d Dept 2018]). An example of prejudice to defendants is where the proposed amendment is "based upon facts that the plaintiff had known since the inception of [the] action" and "sought to add new theories of liability that were not readily discernable from the allegations in the complaint and the original bill of particulars" (*Morris v Queens Long Is. Med. Group, P.C.*, 49 AD3d 827, 828-829 [2d Dept 2008]). The burden on a plaintiff moving to amend his bill of particulars is higher if the note of issue has already been filed (*see Schreiber-Cross v State of NY*, 57 AD3d 881, 884 [2d Dept 2008] [where "discovery has been completed and the case has been certified as ready for trial, the party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances"] [internal citations and quotation marks omitted]). Where there has been an unreasonable delay such as when the note of issue has been filed, the plaintiff "must establish a reasonable excuse for the delay, and submit an affidavit establishing the merits of the proposed amendment with respect to the new theories of liability" (*id.* [internal citations omitted]). Ultimately, if an application is made after the action has "long been certified . . . , judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious" (*Clarkin v Staten Is. Univ. Hosp.*, 242 AD2d 552, 552 [2d Dept 1997] [internal citation omitted]). "In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom" (*Moore v Franklin Hosp. Med. Ctr.-North Shore-Long Is. Jewish Health Sys.*, 155 AD3d 945, 946 [2d Dept 2017]).

Here, it is undisputed that Plaintiff has not moved expeditiously to amend his Bill of Particulars.³ Plaintiff's counsel argues that he was only made aware that there may be prior treatment

³ Plaintiff's cross-motion was filed more than three years since the original Bill of Particulars and more than a year after his Second Supplemental Bill of Particulars was served. In addition, Plaintiff's motion was filed a year and eight months after the Note of Issue was filed.

records when Defendants requested the authorizations, and the records were received post-note of issue. To further excuse the delay, counsel cites to Plaintiff's deposition testimony in which his client testified that he did not recall experiencing prior back and neck pain or receiving treatment prior to the subject accident. Moreover, not only is Plaintiff seeking to assert a new theory of liability (i.e., activation, aggravation and/or exacerbation of prior existing conditions of the lumbar and cervical spines), but he did so only in response to Defendants' motion for summary judgment (*see King v Marwest, LLC*, 192 AD3d 874, 876 [2d Dept 2021]; *Benson v Hall*, 2021 NY Slip Op 33407[U], *6 [Sup Ct, Dutchess County 2021] [finding that even if the defendants' experts indicated that the subject accident exacerbated pre-existing injuries, plaintiff did not proffer any explanation for the delay in seeking to amend bill of particulars]). Thus, the Court finds that Plaintiff has not proffered a reasonable excuse for his delay in seeking leave to amend (*see Lorincz v Castellano*, 208 AD3d 573, 575 [2d Dept 2022] [finding that "plaintiff failed to adequately explain the delay in seeking to add the new injuries"]; *Rodgers v NY City Tr. Auth.*, 109 AD3d 535, 537 [2d Dept 2013]). Nonetheless, a mere delay or the failure to proffer an excuse for the delay, alone, is insufficient to deny a request to amend (*Northbay Constr. Co. v Bauco Constr. Corp.*, 275 AD2d 310, 311-312 [2d Dept 2000]). Consequently, the Court's inquiry now turns to whether Defendants would be prejudiced by the delay (*id.* at 312).

Defendants assert that they are prejudiced by the late amendment because it gives Plaintiff an unfair advantage since he only moved to amend in response to Defendants' motion for summary judgment in an attempt to have the new asserted claim defeat their motion. Consequently, Defendants aver that if Plaintiff is allowed to amend his bill of particulars, Defendants will lose their right to move for summary judgment.

The Second Department has upheld the granting of a motion for leave to amend to add a claim of aggravation and exacerbation of pre-existing injuries where the defendants were aware of plaintiff's prior accident and injury history (*Nociforo v Penna*, 42 AD3d 514 [2d Dept 2007]). In those circumstances, it cannot be said that defendants would be prejudiced or taken by surprise (*id.*; *see also Moore v Franklin Hosp. Med. Ctr.-North Shore-Long Is. Jewish Health Sys.*, 155 AD3d 945, 946 [2d Dept 2017]). In this case, Defendants have been aware of Plaintiff's prior car accident in 1995 and work accident in 2013 since at least prior to his deposition.⁴ That Plaintiff did not recall the 1995 accident or injuring his back in 2013 only goes to his credibility (*Roman v S.T.M. Trucking, Inc.*, 2017 NY Slip Op 30867[U], *5 [Sup Ct, Bronx County 2017]). Defendants moved to dismiss the complaint

⁴ "Q I also have records that you were involved in a car accident in February of 1995, February 21, 1994." (NYSCEF Doc No. 86, Plaintiff tr at 99, line 25; at 100, lines 2-3). "Q I have some other records that indicate that in October of 2013 that you had an injury to your back." (*id.* at 101, lines 18-20).

on the basis that Plaintiff had pre-existing injuries and submitted a report from Dr. Greenfield in which he states that Plaintiff's cervical spine MRI findings did not show any adverse change after the accident when compared to the 2017 CT scan. Courts have found in similar instances that defendants cannot claim prejudice or surprise (*see Benjamin v Desai*, 228 AD2d 764, 766 [3d Dept 1996] [finding that defendants were aware of plaintiff's herniated disc where multiple references to it were included in medical records and where their expert referenced that specific injury and even opined that it was preexisting and not causally related]; *Horvatis v Norfolk W. R.R.*, 133 AD2d 545, 545 [4th Dept 1987] [where plaintiffs sought to amend bill of particulars to include a claim for future institutional care, court found that "Defendants cannot claim prejudice, since plaintiffs' medical reports clearly apprised defendants of [the individual's] deteriorating condition and the possibility of institutional care"]; *Vargas v Willow Run Foods Inc.*, Sup Ct, Bronx County, Sep. 26, 2018, Higgitt, J., index No. 23688/2016E] [finding that "defendants' claim of prejudice or surprise rings hollow, as they explored the prior lumbar injury in discovery and their summary judgment motion addressed the interplay between the prior and current lumbar injuries"]. In *Grande v Peteroy* (39 AD3d 590, 590 [2d Dept 2007]), the Second Department affirmed the trial court's granting of plaintiff's cross-motion for leave to amend her bill of particulars to add a new injury even though defendants' motions for summary judgment on threshold were pending at the time. Defendants' reliance on *Stewart v. Dunkieman* (128 AD3d 1338, 1340 [4th Dept 2015]), where the Fourth Department found that it was an abuse of discretion to grant plaintiff's motion for leave to amend, is unavailing. In that case, the plaintiff, (a) in her original bill of particulars, stated that she was "not presently claiming aggravation;" (b) in her supplemental verified bill of particulars, indicated that she had sustained a prior neck injury but was "not claiming exacerbation;" and (c) at her deposition, testified that she was not seeking damages for exacerbation of spine injuries sustained in a prior car accident (*Stewart*, 128 AD3d at 1340; *see also Barrera v City of NY*, 265 AD2d 516, 518 [2d Dept 1999] [finding that defendants would need to reorient their defense strategy if amendment was allowed since plaintiff initially maintained that prior injuries were irrelevant to present case]). The Court recognizes the issues with Plaintiff's recollection of his prior injuries and treatment; however, Defendants did possess relevant medical records of his past injuries.

The Court's inquiry now turns to whether Plaintiff's proposed claims have merit. In support of their cross-motion, Plaintiff submitted the affirmation of his treating surgeon Dr. Roberts. Plaintiff asserts that his injuries to his cervical spine, specifically C2-3, C4-5, C5-6 and C6-7, were not degenerative or preexisting as Defendants claim; instead, Plaintiff and his expert contend that these injuries were traumatic in etiology. Moreover, with respect to a herniation at L5-S1, Plaintiff's expert

acknowledges that it was preexisting, but asserts that it was activated, aggravated and exacerbated by the subject accident. Thus, the Court finds that Dr. Roberts' affirmation sufficiently established the merits of his proposed new theory that the subject accident aggravated the injuries he previously sustained (*see Barrera*, 265 AD2d at 518).

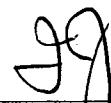
Accordingly, it is hereby

ORDERED, that the Defendants' motion (Mot. Seq. No. 4) is denied without prejudice; and it is further

ORDERED, that Plaintiff's motion for leave to amend the Bill of Particulars (Mot. Seq. No. 5) is granted and the Amended Bill of Particulars dated March 21, 2023, is deemed properly served, nunc pro tunc.

All other issues not addressed are either without merit or moot.

This constitutes the decision and order of the Court.



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**