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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

SHARON WORLEY and SHYASIA L. WORLEY, an infant over the age of 14 years by her mother and natural guardian, Sharon Worley and SHARON WORLEY, individually,

Plaintiff(s),

-against-

JOSE S. CRUZ, ERIKA L. CRUZ and BRIANNE MARTURELLA,

Defendant(s).

ORIGINAL RETURN DATE:12/03/2011
SUBMISSION DATE:01/10/2011
INDEX No.: 019098/09

MOTION SEQUENCE # 3

The following papers read on this motion:

Notice of Motion to Reargue	1
Affirmation in Opposition	2
Reply Affirmation	4

Plaintiff's motion, pursuant to CPLR 2221(d) and CPLR 2221(e), for leave to reargue and renew the order dated July 13, 2011, is denied.

This is a personal injury action arising out of a three-car collision on the Southern State Parkway in Nassau County on May 21, 2009. By an Order dated July 13, 2011, this Court granted defendants' separate motions for summary judgment dismissal of the infant plaintiff, Shyasia Worley's claims on the grounds that her injuries did not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d). This

Court determined that while the defendants had established a *prima facie* case showing that Shyasia Worley did not sustain a "serious injury" within the meaning of the Insurance Law, plaintiff, in opposition, failed to come forward with admissible evidence to overcome the defendants' submissions by demonstrating that a triable issue of fact that a "serious injury" was sustained.
Specifically, this Court determined that in the absence of any evidence substantiating her claim that her injuries satisfied the "fracture," "permanent loss of use" or the "90/180" categories of the serious injury statute, the analysis must be restricted to the remaining two categories alleged by plaintiff, to wit: "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system."

In that regard, this Court noted that plaintiff's admissible evidence consisted of the sworn affidavit of chiropractor, Ronald P. Mazza, D.C., who treated plaintiff from May 22, 2009, until December 17, 2010; the sworn undated affirmation of John T. Rigney, M.D., a board certified radiologist who directed and supervised the MRI examinations of plaintiff's cervical and lumbar spines on June 11, 2009, and read the accompanying reports; the sworn affidavit of the physical therapist, Bienvenido P. Ceballos, Jr., who first "treated" plaintiff on May 26, 2009; and the plaintiff's own affidavit dated February 19, 2011. While admissible, plaintiff's submissions did not present a triable issue of fact.

Specifically, Dr. Mazza's chiropractic examinations of plaintiff on May 22, 2009 and December 17, 2010 which included range of motion testing of her cervical and lumbar spine, was not substantiated with any objective testing and thus did not constitute competent admissible evidence. This Court held that the failure to indicate which objective test was performed to measure the loss of range of motion is contrary to the requirements of *Toure v. Avis Rent a Car Systems*, 98 NY2d 345 [2002], rendering the expert's opinion as to any purported loss worthless (Id; *Powell v. Alade*, 31 AD3d 523 [2d Dept. 2006]). For these same reasons, the affidavit of the physical therapist, Bienvenido P. Ceballos, Jr., and his accompanying treatment notes and

assessments, were found to be equally incompetent. Finally, the affirmed report of radiologist Dr. Rigney was also insufficient to raise an issue of fact with respect to plaintiff's alleged serious injury because Dr. Rigney did not report an opinion as to the causality of the findings anywhere in his reports or in his sworn (albeit undated) affirmation *(Collins v. Stone*, 8 AD3d 321 [2d Dept. 2004]; *Betheil-Spitz v. Linares,* 276 AD2d 732 [2d Dept. 2000]). This Court held therefore that the evidence submitted by plaintiff was insufficient to raise a triable issue of fact.

A motion to reargue is addressed to the discretion of the court and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law (CPLR 2221(d)(2)). It is not designed as a vehicle to afford the unsuccessful party an opportunity to argue once again the very questions previously decided (*Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 AD3d 388 [2d Dept. 2005]). Nor is it designed to provide an opportunity for a party to advance arguments different from those originally tendered (*Amato v. Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2d Dept. 2004]) or argue a new theory of law or raise new questions not previously advanced (*Levi v. Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept. 2004]; *Frisenda v. X Large Enterprises, Inc.*, 280 AD2d 514, 515 [2d Dept. 2001]). Instead, the movants must demonstrate the matters of fact or law that they believe the court has misapprehended or overlooked (*Hoffmann v. Debello-Teheny*, 27 AD3d 743 [2nd Dept. 2006]). Absent a showing of misapprehension or the overlooking of a fact, the court must deny the motion (*Barrett v. Jeannot*, 18 AD3d 679 [2d Dept. 2005]). Further, a motion to reargue is based solely upon the papers submitted in connection with the prior motion. New facts may not be submitted or considered by the court (*James v. Nestor*, 120 AD2d 442 [1st Dept. 1986]; *Philips v. Village of Oriskany*, 57 AD2d 110 [4th Dept. 1997]).

Here, in requesting reargument, plaintiffs attempt to cure the defective affidavit of Dr. Mazza by submitting a new and more recent affidavit dated November 14, 2011 in which Dr. Mazza states that "it is [his] custom and practice to use an arthrodial protractor when taking all range of measurements in [his] office" (Ex. F, ¶3). Indeed

Dr. Mazza's new affidavit also alleges positive findings including Kemp's test and Lindner's sign that were not mentioned in his May 4, 2011, affidavit. Plaintiffs argue that Dr. Mazza "affirmed" his records, including all range of motion measurements within his affidavit of May 4, 2011. These arguments are entirely unsubstantiated and wholly insufficient to warrant a reargument of this Court's prior order.

Specifically, a plain and simple reading of Dr. Mazza's earlier affidavit submitted in conjunction with the underlying opposition to the motions confirms that plaintiffs' bald assertion that Dr. Mazza had attested to the accuracy of his objective findings is entirely meritless and patently untrue. The fact is that Dr. Mazza's affidavit, submitted in opposition to the underlying motions for summary judgment, did not set forth the objective tests that he used to determine his range of motion measurements. Thus, plaintiffs herein fail to establish that the court overlooked or misapprehended the relevant facts. By now submitting another new affidavit by Dr. Mazza, the plaintiffs attempt to cure the deficiency of the chiropractor's earlier affidavit and their otherwise insufficient medical submissions. This is not permissible. New facts may not be submitted or considered by the court on a motion to reargue (*James v. Nestor*, supra; *Philips v. Village of Oriskany*, supra).

Inasmuch as plaintiffs bring an application to renew this Court's prior July 13, 2011, order, said motion is also denied. It is well settled that a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221(e)(3)) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221(e)(3)); *Barnett v. Smith*, 64 AD3d 669 [2d Dept. 2009]; Chernysheva v. Pinchuck, 57 AD3d 936 [2d Dept. 2008]).

Here, plaintiffs attempt to argue that the "inadvertent clerical error which omitted Dr. [sic] Mazza's custom and practice of taking all range of motion measurements with an arthrodial protractor should amount to excusable neglect [and that] [i]n light of this new evidence" their motion to renew should be granted (Aff. in Support, ¶15). By

definition, however, plaintiffs attempt to classify this "error" cannot constitute "new" evidence for the purposes of considering an application to renew this Court's prior Order. By plaintiffs' own theory and argument, Mr. Mazza intended to incorporate the basis of his "objective" findings in his underlying affidavit submitted to this Court. Thus, although this material fact clearly existed at the time the motion was made, plaintiff also cannot claim that they did not then know of it.

Accordingly, plaintiffs' motion for an Order of this Court, pursuant to CPLR 2221(d) and CPLR 2221(e) for leave to reargue and renew the Decision and Order of this Court dated July 13, 2011 is herewith denied.

This decision constitutes the order of this Court.

Date: February 17, 2012

HON THOMAS P. PHELAN

JSC

ENTERED

FEB 22 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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