SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

ANTHONY G. TONER,

Plaintiff,

- against -

APURBA K. BASAK, JESUS R. VASQUEZ and FELIZ RISO SOLIS,

Defendants.

- x

Index No.: 3183/2010

Motion Date: 07/05/12

Motion No.: 20

Motion Seq.: 4

The following papers numbered 1 to 17 were read on this motion by plaintiff, for an order pursuant to CPLR 2221(a) granting leave to renew and reargue the prior order of this court, dated January 4, 2012, which granted the motion of defendant, Apurba K. Basak, for summary judgment and dismissed the plaintiff's complaint on the ground that plaintiff failed to raise a triable issue of fact as to whether he sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 8
Affirmation in Opposition-Affidavits-Exhibits	9 - 13
Reply Affirmation	14 - 17

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is a personal injury action stemming from a motor vehicle accident. Defendant, Apurba K. Basak, moved for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

By decision dated January 4, 2012, this Court held that the proof submitted by the defendant, including the affirmed medical reports of Drs. Sultan and Ross and the deposition testimony of the plaintiff were sufficient for defendant to meet its prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler,79 NY2d 955 [1992]).

This Court also held that in opposition, the plaintiff failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 006]). This Court found that the plaintiff failed to submit competent medical evidence that revealed the existence of a significant limitation in his cervical and/or lumbar spine that was contemporaneous with the subject accident 2010]; Camacho v John H. Dwelle, 54 AD3d 706 [2d Dept. 2008]). Dr. Cushner's narrative report dated June 16, 2011, submitted by the plaintiff in opposition to the motion did not provide the date of his initial evaluation and only stated that he saw the plaintiff on October 19, 2010, one year after the accident and again on March 30, 2011. Dr. Radner's report indicated that he first examined the plaintiff on February 23, 2010, approximately five months after the accident.

In support of the motion to reargue, counsel, citing the Court of Appeals decision in Perl v Meher, 18 NY 3d 208 [11/22/11], which was decided prior to this Court's decision in the instant matter, contends that "the case law requiring contemporaneous measurement of loss of range of motion was explicitly abrogated by the Court of Appeals in Perl v Meher, 18 NY 3d 208[11/22/11])." Counsel argues that because of the change in the law, this court's prior order and judgment must be vacated and defendant's underlying motion for summary judgment denied.

In addition, the plaintiff submits a revised report from Dr. Cushner, plaintiff's treating orthopedist, dated February 16, 2012, which was revised solely to clarify the dates of his examinations. In the revised report he states that his initial evaluation and treatment took place on November 4, 2009 which was seven weeks after the accident of September 17, 2009. Dr. Cushner states that on November 4, 2009, his examination revealed that the plaintiff had significant range of motion limitations of the cervical and thoracolumbar spine. At the plaintiff's final visit on March 30, 2011, the defendant still suffered from significant range of motion limitations of the neck and thoracolumbar spine. Dr. Cushner opined that the plaintiff's injuries were causally related to the accident of September, 2009. Dr. Radna, another treating physician, examined the plaintiff on July 22, 2011 and

found significant limitations of range of motion of the cervical and lumbar spine and opined that the disability was total.

The plaintiff also submits an affidavit in which he states that he began physical therapy in October 2009 and began treating with Dr. Cushner in November 2009.

In opposition, defendant argues that the motion, served on May 31, 2012 is untimely having been made more than 30 days after the filing of the decision with notice of entry on February 13, 2012. In addition, defendant argues that Perl v Meher, supra., although eliminating the requirement for contemporaneous quantitative range of motion testing, did not abrogate the requirement for a showing of a qualitative assessment of injuries soon after the accident. Counsel also argues that Dr. Cushner's revised report adds a date that was known to the plaintiff at the time of the original motion. Counsel argues that the motion to renew is only appropriate when based upon facts not known at the time of the original motion.

Upon review and consideration of the plaintiff's motion to reargue and renew, defendant's affirmation in opposition and the plaintiff's reply thereto, this court finds that the motion to reargue and renew is granted and upon reargument the initial decision of this court dated January 4, 2012 is vacated and the defendant's motion for summary judgment on the issue of serious injury is denied.

As stated above, the proof submitted by the defendant, was sufficient for defendant to meet its prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. However, based upon the revised report of Dr. Cushner stating that he initially treated the plaintiff on November 4, 2009, seven weeks after the accident, as well as the affirmed report of Dr. Radner, this court finds that the plaintiff has raised triable issues of fact by submitting evidence attesting to the fact that the plaintiff had significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and resulted from trauma causally related to the accident (see Dixon v Fuller, 79 AD3d 94 [2d Dept. 2010]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury of his cervical and lumbosacral spine under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a

result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]).

This Court finds that the motion to reargue is timely as the appeal taken from this Court's order was still pending and unperfected as of the time the motion for reargument was made (see Terio v Spodek, 63 AD3d 719 [2d Dept. 2009]; Itzkowitz v King Kullen Grocery, Co., 22 Ad3d 636 [2d Dept. 2005]).

This Court finds that it did not overlook the controlling law as set forth in Perl v Meher, supra. As stated by the Appellate Division, First Judicial Department, "while the Court of Appeals in Perl rejected a rule that would make contemporaneous quantitative assessments a prerequisite to recovery...Perl did not abrogate the need for at least a qualitative assessment of injuries soon after the accident (see Rosa v Mejia, 95 AD3d 402 [1st Dept. 2012]). Thus, Perl "confirmed the necessity of some type of contemporaneous treatment to establish that a plaintiff's injuries were causally related to the incident in question" [Rosa v Mejia, supra]).

Here, although Dr. Cushner's original report provided the findings of the initial examination it omitted the date of the examination. As a result this Court did not have before it evidence of contemporaneous treatment for the plaintiff's accident. The revised report submitted with the motion to reargue includes the date of the initial examination which is sufficient to show that the plaintiff had an injury associated with the accident seven weeks thereafter. Although the date of the initial examination was known to the plaintiff prior to the submission of the motion, where there is an inadvertent omission and a showing of lack of prejudice to the defendant, the court may accept facts which were known at the time of the original motion (see Joseph v Board of Educ. of the City of New York, 91 AD3d 528 [1st dept. 2012]; Wilder v. May Dep't Stores Co., 23 AD3d 646 [2d Dept. 2005]; Telep v Republic Elevator Corp., 267 AD2d 57 [1st Det. 1999][a court has broad discretion to grant renewal even where the newly submitted facts were known at the time of the original motion, provided that the movant has a reasonable excuse for failing to submit the material originally]). Dr. Cushner's omission of the date of plaintiff's initial examination in his report was inadvertent and defendant was not prejudiced having been provided with an authorization to obtain all of Dr. Cushner's records.

In addition, the plaintiff adequately explained the gap in treatment by testifying that he could not afford to continue paying for physical therapy sessions out-of-pocket(see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

Accordingly, based upon the foregoing, it is hereby

ORDERED, that plaintiff's motion for an order granting renewal and reargument is granted and upon renewal the prior order of this Court dated January 4, 2012 is vacated and defendant's motion to dismiss the plaintiff's complaint is denied, and it is further,

ORDERED, that upon service of a copy of this order the Clerk of Court shall restore this matter to the trial calendar.

Dated: September 21, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.