SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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Terrell Brannon,

Plaintiff,

-against-

Thomas O'Neill,

Defendant.

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Motion Seq 06

Index No. 157048/12

DECISION AND ORDER

Hon. ARLENE P. BLUTH, JSC

Plaintiff's motion to renew the Court's March 25, 2015 decision and order, which granted defendant's cross-motion for summary judgment dismissing the complaint on the ground that plaintiff did not demonstrate that he sustained a serious injury within the meaning of Insurance Law §5102(d), is denied.

Procedural history

By decision and order dated March 25, 2015, this Court found, inter alia, that plaintiff failed to submit any admissible medical report from a doctor who examined him shortly after the subject motor vehicle accident. Accordingly, the Court held that plaintiff's opposition failed to establish that any of his physical conditions[1] were caused by the subject accident and did not raise an issue of fact sufficient to defeat defendant's cross-motion for summary judgment. The Court also denied plaintiff's motion for partial summary judgment on the issue of liability as moot.

[1]In his verified bill of particulars, plaintiff claimed that he sustained injuries to his back, neck and left knee as a result of the subject motor vehicle accident.

One year later, by decision and order dated March 25, 2016, this Court denied plaintiff's first motion to renew on the ground that plaintiff had failed to annex the Court's March 25, 2015 order and/or any of the original motion papers. In his reply, plaintiff asserted that CPLR §2005 permitted the Court to excuse or overlook deficiencies in plaintiff's papers "in the interests of justice".

This is plaintiff's second motion to renew. Plaintiff now seeks to have the Court consider the records of DHD Medical, the facility where plaintiff sought treatment after the accident, claiming these are new facts within the meaning of CPLR §2221(e). Plaintiff asserts that these records should be considered and will create an issue sufficient to defeat defendant's cross-motion for summary judgment dismissing the action.

Requirements of CPLR §2221(e)

CPLR §2221(e) states that a motion for leave to renew:

2. ***shall*** be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; ***and***

3. ***shall*** contain reasonable justification for the failure to present such facts on the prior motion (emphasis supplied).

As noted by defendant in opposition to this motion, the DHD Medical records are not new facts because plaintiff's counsel was in possession of these records before summary judgment motion practice began, and plaintiff could have submitted these

records in opposition to defendant's initial cross-motion. Thus, because plaintiff failed to establish that the DHD Medical records were new facts unknown to him at the time the motion was initially made, he has not satisfied CPLR §2221(e)(2), and his motion to renew is denied. *See Singh-Mehta v Drylewski*, 107 AD3d 478, 968 NYS2d 14 (1st Dept 2013).

Nor has plaintiff set forth reasonable justification for not presenting the DHD Medical records on the prior motion as required by CPLR §2221(e)(3). Plaintiff's counsel simply states that he somehow thought that the DHD Medical records were already before the Court. This is not a reasonable excuse; a cursory review of plaintiff's own opposition papers would have shown that the DHD Medical records were not annexed to his opposition to defendant's cross-motion or any other documents submitted in connection with motion practice. Therefore, because plaintiff has not set forth a reasonable excuse for failing to submit the DHD Medical records as required by CPLR §2221(e)(3), his motion to renew is denied. See *Abu Dhabi Commercial Bank, P.J.S.C. v Credit Suisse Sec. (USA) LLC,* 114 AD3d 432, 979 NYS2d 571 (1ST Dept 2014).

Law Office Failure

Because plaintiff first raised "law office failure" in his reply to the first motion to renew, defendant did not have an opportunity to address the merits of this argument on the prior motion. Here, in his opposition to the second motion to renew, defendant correctly states that on a motion to renew, CPLR §2005 can never provide a basis for a losing party to supply evidence that was omitted from his/her opposition to a cross-

motion for summary judgment. As defendant indicates, CPLR §2005, by its express terms, only applies to motions made pursuant to CPLR §3012(d) (motions for extension of time to appear or plead) or CPLR Rule 5015(a) (motions to vacate a default judgment). Here, plaintiff does not seek relief under either of these sections; instead, he wants to correct a deficiency in his opposition to defendant's threshold cross-motion. However, a party's failure to successfully oppose a motion (or a cross-motion) is not a default; thus, CPLR §2005 is inapplicable.

In any event, CPLR §2005 provides only that a court has discretion to accept law office failure as an excuse for a default; it is not a guarantee that the court will accept such excuse. *See Siegel, NY Prac* §231, at 397 [5th ed]. Moreover, as defendant points out, courts can bail out attorneys based on "law office failure" only when the movant submits a detailed explanation with supporting facts to explain and justify an inadvertent default or mis-calendared date. Here, plaintiff's counsel failed to give a detailed explanation of the alleged "law office failure"; and as previously stated, there was no default.

Finally, plaintiff submits, for the first time, an April 3, 2015 supplemental report from Dr. Leon Reyfman. This report, created nine (9) days after the Court granted defendant's cross-motion for summary judgment, will not be considered by the Court on this second motion to renew. *See Matter of Taylor*, 81 AD3d 529, 916 NYS2d 595 (1st Dept 2011).

Conclusion

In *Colletti v Schiff*, 98 AD3d 887, 951 NYS2d 139 (1st Dept 2012) the Appellate Division, First Department denied a motion to renew where plaintiff's submission in support was "responsive to the portion of the motion court's prior order...". In other words, a decision explaining why a party did not successfully oppose a summary judgment motion is not an invitation to the losing party to move to renew on those very same grounds. That is not fair to the prevailing party. *See Pierre v Young*, 39 Misc.2d 1218(A), 972 NYS2d 146 (Sup Ct, Kings Co. 2013).

Accordingly, plaintiff's motion to renew this Court's decision and order dated March 25, 2015 is denied.

This is the Decision and Order of the Court.

ARLENE P. BLUTH
J.S.C.

Dated: August 18, 2016
New York, New York

HON. ARLENE P. BLUTH, JSC