

Bassallo v Javed

2017 NY Slip Op 30153(U)

January 24, 2017

Supreme Court, New York County

Docket Number: 157514/14

Judge: Leticia M. Ramirez

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

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MARIA BASSALLO,

Plaintiff,

Index #: 157514/14
Motion Seq. 03

-against-

DECISION/ORDER
HON. LETICIA M. RAMIREZ

AKHTAR JAVED,

Defendant.

-----X

Plaintiff's motion, pursuant to CPLR §2221, for leave to renew and/or reargue the grant of defendant's motion seeking summary judgment on the basis that plaintiff did not sustain a serious injury in accordance with Insurance Law §5102(d) is decided as follows:

By Decision and Order dated August 29, 2016, the Court granted defendant's summary judgment motion on the basis that plaintiff failed to submit competent objective medical evidence of a contemporaneous physical examination and a recent physical examination, in which a doctor either specified plaintiff's actual limitations compared to normal ranges of motion and identified the objective tests used to measure said limitations or provided a qualitative assessment of plaintiff's limitation, including an objective basis and a comparison of plaintiff's limitations to the normal function, purpose and use of the affected body function or system during the relevant time period. *Toure v Avis Rent-A-Car Systems, Inc.*, 98 N.Y.2d 345 (2002); *Soho v Konate*, 85 A.D.3d 522 (1st Dept. 2011); *Rosa v Mejia*, 95 A.D.3d 402 (1st Dept. 2012); *Mompremier v N.Y.C.T.A.*, 43 Misc.3d 1206A (Sup. Ct. N.Y. 2014).

More specifically, in opposition to defendant's motion, plaintiff submitted, *inter alia*, the affirmed report of Dr. Jessica Gallina dated December 15, 2015, in which Dr. Gallina failed to identify the tests that she utilized in measuring the ranges of motion of plaintiff's left ankle during her examination of the plaintiff's left foot and left ankle on December 15, 2015. As such, the Court found that Dr. Gallina's report had no probative value and, thus, could not support plaintiff's claim of sustaining a "significant" and/or a "permanent consequential" limitation of her left ankle as a result of the subject accident. *Toure v Avis Rent-A-Car Systems, Inc.*, *supra*.

Additionally, plaintiff submitted the affirmations of Dr. Joyce Goldenberg and Dr. Nirmal Patel to support her claims of sustaining a "significant" and/or a "permanent consequential"

limitation of her cervical and lumbar spine as a result of the subject accident. However, in their affirmations, Dr. Joyce Goldenberg and Dr. Nirmal Patel do not affirm, under CPLR §2106, that the contents of their annexed medical reports are true under the penalties of perjury. Instead, they certify their annexed reports as business records. The Court found that, since said reports contained medical opinions and/or diagnoses, they could not be admitted as business records under CPLR §4518. Accordingly, the Court found that said reports had no probative value and, thus, could not support plaintiff's claim of sustaining a "significant" and/or a "permanent consequential" limitation of her left ankle as a result of the subject accident. *Rickert v Diaz*, 112 A.D.3d 451 (1st Dept. 2013).

"A motion to reargue, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts or misapplied any controlling principles of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." *Mangine v Keller*, 182 A.D.2d 476 (1st Dept. 1992).

Here, plaintiff failed to sufficiently demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principles of law. As such, plaintiff's request for leave to reargue is denied. *Mangine v Keller*, 182 A.D.2d 476 (1st Dept. 1992); *Fosdick v Town of Hempstead*, 126 N.Y. 651 (1891).

However, plaintiff's request for leave to renew is granted. A motion to renew should generally be based upon new facts not offered on the prior motion that would change the prior determination and state a reasonable justification for failing to submit such facts on the prior motion; or demonstrate that there has been a change in the law that would change the prior determination. *CPLR §2221(e)*.

Here, plaintiff now submits proper affirmations from Dr. Joyce Goldenberg and Dr. Nirmal Patel and states a reasonable justification for failing to submit proper affirmations from Dr. Joyce Goldenberg and Dr. Nirmal Patel on the prior motion, to wit: law office failure. *CPLR §2221(e)*. See also, *Green v Canada Dry Bottling Company of New York, L.P.*, 133 A.D.3d 566 (2nd Dept. 2015). As such, leave to renew is granted. Upon such renewal, defendant's motion is granted in part and denied in part, as explained herein.

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of a triable issue of fact or if there is even arguably such an issue. *Hourigan v McGarry*, 106 A.D.2d 845, appeal dismissed 65 N.Y.2d 637 (1985); *Andre v Pomeroy*, 35 N.Y.2d 361 (1974). The function of the court in deciding a summary judgment motion is to determine whether any issues of fact exist that preclude summary resolution of the dispute between the parties on the merits. *Consolidated Edison Co. v Zebler*, 40 Misc.3d 1230A (Sup. Ct. N.Y. 2013); *Menzel v Plotnick*, 202 A.D.2d 558 (2nd Dept. 1994). In deciding motions for summary judgment, the Court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad*, 237 A.D.2d 123 (1st Dept. 1997); *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept. 1989).

Proof of radiculopathy may be sufficient to establish a "serious injury." However, such proof must be supported by additional competent objective medical evidence demonstrating a significant physical limitation resulting therefrom. *Cruz v Lugo*, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); *Shvartsman v Vildman*, 47 A.D.3d 700 (2nd Dept. 2008); *Tobias v Chupenko*, 41 A.D.3d 583 (2nd Dept. 2007).

In this action, plaintiff sufficiently raised triable issues of fact as to whether she sustained, *inter alia*, bilateral L5 lumbar radiculopathy as a result of the subject accident on March 10, 2013 and whether she sustained a "significant limitation" of her lumbar spine as a result of the subject accident with the affirmed Lower EMG & Nerve Conduction Study Report dated May 22, 2013 from Dr. Joyce Goldenberg, the affirmed report from Dr. Joyce Goldenberg dated April 29, 2013, the affirmed report of Dr. Joyce Goldenberg dated March 6, 2014 and Dr. Joyce Goldenberg's affirmation dated December 6, 2016. *Ugarriza v. Schmider*, 46 N.Y.2d 471 (1979); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974); *Moreno v. Chemtob*, 706 N.Y.S.2d 150 (2nd Dept. 2000).

Accordingly, those portions of defendant's motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "significant limitation" category is denied. *Hourigan v. McGarry*, 106 A.D.2d 845, appeal dismissed 65 N.Y.2d 637 (1985); *Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974).

This Court need not evaluate the remainder of plaintiff's claimed injuries to determine

whether they meet the "serious injury" threshold, since if plaintiff is able to establish a "serious injury" at trial, plaintiff may recover for all injuries sustained in the subject accident. *McClelland v Estevez*, 77 A.D.3d 403 (1st Dept. 2010).

Finally, that portion of defendants' motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is granted. Plaintiff failed to establish that she was prevented from performing substantially all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident in accordance with the Insurance Law. Plaintiff only missed one week from school and one day from work as a result of the subject accident. As such, plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is dismissed.

The Court has considered the parties remaining arguments and finds them unavailing.

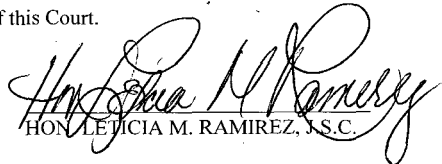
Accordingly, defendant's motion is granted in part and denied in part, as explained herein.

All parties are directed to appear for a DCM Status Conference on February 27, 2017.

Plaintiff is directed to serve a copy of this Decision/Order, with Notice of Entry, upon all parties within 20 days of this Decision/Order.

This constitutes the Decision and Order of this Court.

Dated: January 24, 2017
New York, New York



HON. LETICIA M. RAMIREZ, J.S.C.