SHORT FORM ORDER

INDEX No. 09-16786
CAL. No. 10-02405MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 4-12-11
ADJ. DATE 9-1-11
Mot. Seq. # 002 - MotD

LUIS M. OROPEZA-MARTINEZ, CAROLINA MORILLO ROJAS and GEORGINA ROJAS, Plaintiffs, - against - JACQUELINE A. MARCO, Defendant.	CANNON & ACOSTA, LLP Attorney for Plaintiffs 1923 New York Avenue Huntington Station, New York 11746 NICOLINI, PARADISE, FERRETTI & SABELLA Attorney for Defendant 114 Old Country Road, Suite 500, P.O. Box 9006 Mineola, New York 11501-9006

Upon the following papers numbered 1 to 8 read on this motion to RRRR ; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 8 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers __ ; Replying Affidavits and supporting papers ___; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by the plaintiffs, Luis M. Oropeza-Martinez and Carolina Morillo Rojas, for an order granting renewal and/or reargument of motion (001), which was brought by the defendant Jacqueline A. Marco, pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint as asserted by the plaintiffs, Luis M. Oropeza-Martinez and Carolina Morillo Rojas, on the basis that they failed to meet the serious injury threshold, and which motion was granted, is granted only as to renewal, and upon renewal, motion (001) is granted and the complaint as asserted by Luis M. Oropeza-Martinez and Carolina Morillo Rojas is dismissed with prejudice and severed from the action.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiffs, Luis M. Oropeza-Martinez, Carolina Morillo Rojas, and Georgina Rojas, when they were involved in a motor vehicle accident on November 27, 2008, on eastbound Route 347, at or near Pond Path, Setauket, New York. Carolina Morillo Rojas and Georgina Rojas were passengers in the vehicle operated by Luis M. Oropeza-Martinez when it came into contact with the vehicle operated by Jacqueline A. Marco.

Motion (001) was served on April 12, 2011 and was returnable on May 5, 2011. By decision dated May 31, 2011, this court dismissed the action as asserted by Carolina Morillo Rojas and Luis M. Oropeza-Martinez on the basis that the defendant established prima facie that the aforementioned plaintiffs

did not sustain a serious injury within the definition of Insurance Law § 5102 (d), and that the plaintiffs, who did not oppose the motion, failed to raise a factual issue to preclude summary judgment. Counsel for the plaintiff now seeks reargument and renewal of motion (001) on the basis that the matter was adjourned on consent to June 9, 2011 and that the motion was decided May 31, 2011. However, counsel for the plaintiff submits no proof of the same. Additionally, the Court's computer indicates that there was no adjournment of the motion from May 5, 2011 to June 9, 2011. The plaintiffs now seek an order granting reargument and renewal of motion (001).

CPLR 2221 (d) (2) provides a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion. It is a basic principle that a movant on reargument must show that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (***Bolos v Staten Island Hosp.,*** 217 AD2d 643, 629 NYS2d 809 [2d Dept 1995]). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided (***Pahl Equipment Corp. v Kassis,*** 182 AD2d 22, 588 NYS2d 8 [1st Dept 1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (***Giovanniello v Carolona Wholesale Office Machine Co., Inc.***, 29 AD3d 737, 815 NYS2d 248 [2d Dept 2006]). CPLR 2221 (d) (3) provides that a motion to reargue shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. Here, the plaintiffs have not submitted a copy of the order with notice of entry to demonstrate to this court that this application was served within thirty days of the same, and thus, the plaintiff's have not demonstrated entitlement to an order granting reargument.

Pursuant to CPLR 2221(e)(2) a motion for leave to renew shall be based upon new facts not offered on the prior motion that would have changed the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. Pursuant to CPLR 2221 (e) (3) a motion for leave to renew shall contain reasonable justification for the failure to present such facts on the prior motion. "A motion for renewal is properly made to the motion court...to draw its attention to material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court. Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation," (***Beiny v Trustees of the Trust Created by Elizabeth N.F. Weinberg, as Grantor,*** 132 AD2d 190, 522 NYS2d 511[1st Dept 1987]). In that this court did not receive the application to adjourn motion (001) to June 9, 2011, the plaintiff's application for an order granting renewal to permit the court to consider the papers served in opposition to defendant's motion (001) is granted.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of

the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102(d), " '[s]erious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medical determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

In support of motion (001), the defendant submitted, inter alia, an attorney's affirmation; an uncertified copy of the DMV accident report; a copy of the summons and complaint and defendant's

answer, a copy of plaintiffs' bill of particulars; unsigned copies of the transcripts of the examinations before trial of Luis M. Oropeza-Martinez dated April 22, 2010 and Carolina Morillo Rojas dated June 30, 2010; and the sworn reports of Michael J. Katz, M.D. dated September 21, 2010 and August 24, 2010, respectively, concerning his independent orthopedic examination of the plaintiffs Luis Oropeza-Martinez and Carolina Morillo Rojas; and the sworn report of Maria Audrie DeJesus, M.D. concerning her independent neurology examination of Carolina Morillo Rojas. The unsigned and uncertified copies of the deposition transcripts are not in admissible form as required by CPLR 3212 (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), are not accompanied by an affidavit pursuant to CPLR 3116, and are not considered on this motion.

CAROLINA MORILLO ROJAS

By her bill of particulars, Carolina Morillo (Morillo) Rojas alleges that as a result of the accident she sustained cervical radiculopathy, cervical spine sprain/strain, lumbar spine sprain/strain, numbness of both hands, right hip pain, right chest pain, headaches, neuralgia, post head contusion, post traumatic headaches, internal derangement of the right and left shoulder, and lumbar radiculopathy.

Dr. Maria Audrie DeJesus has set forth in her report that she conducted an independent neurological examination of "Carolina Morillo-Rojas." Upon examination, with range of motion measurements determined by goniometer, she found no deficits in the ranges of motion of the plaintiff's cervical and lumbar spine. Other relevant cervical and lumbar testing were reported as negative or normal. Sensory and motor examinations, evaluation of the higher mental functions and cranial nerves were conducted with no deficits found. Reflex testing of the deep tendons was symmetric in the upper and lower extremities. Dr. DeJesus' diagnosis was that of status post-cervical and lumbar spine sprains/strains, and post traumatic headaches.

Dr. Michael J. Katz has set forth in his report that he conducted an orthopedic examination of "Carolina Morillo-Rojas," who was a seatbelted passenger seated in the rear of the Oropeza-Martinez vehicle during the subject accident. Based upon his examination of Morillo Rojas, he has found no signs or symptoms of permanence relative to the musculoskeletal system. He states that she is not disabled, and is capable of employment as a quality assurance worker. He continues that she is capable of her activities of daily living and pre-loss activities without restrictions. Using a goniometer to determine the ranges of motion of the plaintiff's cervical spine, lumbosacral spine, right shoulder, left shoulder, right hand, left hand, and right hip, Dr. Katz set forth his range of motion findings and compared those findings to the normal ranges of motion. He found no range of motion deficits. His examination of her chest was negative. He notes that she is pregnant. His diagnosis was that of cervical strain with radiculitis, resolved; lumbosacral strain with radiculitis, resolved; right hip contusion, resolved; bilateral shoulder contusion, resolved; and chest contusion, resolved.

It is determined that the defendant has demonstrated, by the reports and examinations of Dr. Katz and Dr. DeJesus, prima facie entitlement to summary judgment dismissing the complaint on the basis that Carolina Morillo Rojas did not suffer a serious injury within the meaning of Insurance Law §5102(d).

In opposing this part of defendant's motion on behalf of Carolina Morillo Rojas, the plaintiff has

submitted, inter alia, an attorney's affirmation; a certified copy of the ultrasound of the cervical spine dated February 19, 2009; and the affirmation of Nicholas Martin, D.C. dated June 6, 2011.

In his certified ultrasound radiology report of February 19, 2009, Dr. Rothpearl, M.D. provides the impression of hypoechoic pattern compatible with edema/inflammation of the right paraspinal musculature at C2, C3, and C4, which he suggests be correlated clinically. Dr. Nicholas Martin indicates in his report that he is a chiropractor who first saw Carolina Morillo Rojas on January 7, 2009, following the accident of November 27, 2008, for complaints of pain at C3 through C6, and L3 to L6 bilaterally. Dr. Martin states he performed cervical and lumbar range of motion tests and set forth the deficits he found at that first visit. He further examined her again on March 3, 2009 for both cervical and lumbar range of motion, and set forth the deficits he found. She treated with him until August 4, 2009, at which time he states, she improved to the maximum medical degree likely and was discharged to return on an as needed basis. On January 20, 2010, he applied medical traction to her lower back and some "palliative treatment" on February 3, 2010, April 14, 2010, and May 18, 2010. On April 15, 2011, he re-examined her and found limitations, as set forth in his report, in cervical and lumbar range of motion testing, as well as positive findings for the cervical compression, Kemp, and Soto Hall tests. He continues that the injuries and symptomology displayed by her are a direct result of the trauma she received in the motor vehicle accident of November 27, 2008.

Based upon the foregoing, it is determined that Carolina Morillo Rojas has not raised a factual issue to preclude summary judgment dismissing the complaint on the basis that she did not sustain a serious injury as defined by Insurance Law §5102 (d). In Dr. Martin's report concerning his examination of the plaintiff, he failed to set forth the objective method employed to obtain such range of motion measurements of the plaintiff's cervical and lumbar spine, such as the goniometer, inclinometer or arthroidal protractor (*see*, ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Supreme Court, Nassau County 2008]), leaving it to this court to speculate as to how he determined such ranges of motions when examining the plaintiff. He gives no basis for his conclusory opinion that the injuries and symptomology displayed by her are a direct result of the trauma she received in the motor vehicle accident of November 27, 2008. There were no reports of electrodiagnostic studies to demonstrate that she suffered radicular injury. Dr. Martin does not comment on the injuries claimed by the plaintiff to her shoulders, right hip, hands, chest or headaches. Dr. Martin does not indicate the nature of his "palliative treatment" of the plaintiff, leaving it to this court to speculate as to what treatment was actually provided. Although he states positive findings for the cervical compression, Kemp test, and Soto Hall tests, he does not indicate the significance, if, any, of such testing. Based upon the foregoing, the plaintiff has not demonstrated that she suffered a serious injury within the meaning of Insurance Law §5102 (d).

Accordingly, upon renewal, that part of defendants' motion (001), which sought dismissal of Carolina Morillo Rojas's claim is granted and that part of the complaint asserted on behalf of Ms. Rojas is dismissed as asserted against the defendant and is severed from the action.

LUIS M. OROPEZA-MARTINEZ

By his bill of particulars, Luis M. Oropeza-Martinez has claimed that he sustained the following injuries: bilateral L5 spondylolysis, lumbar myofacial derangement, and lumbar strain/sprain.

Michael J. Katz, M.D. has set forth that he performed an independent orthopedic examination of Luis M. Oropeza-Martinez who was the seatbelted driver involved in the subject accident. He states that Oropeza-Martinez shows no signs or symptoms of permanence relative to the musculoskeletal system, has no disability, is capable of gainful employment as a construction worker, and is working full time in construction. His diagnosis is that of lumbosacral strain, resolved. Dr. Katz has set forth his findings relative to his examination of the plaintiff's lumbar spine, and has compared his range of motion findings, measured with a goniometer, to the normal range of motion for the lumbar spine. He has found no deficits. He also sets forth his findings with regard to sensory examination and reflex testing. Based upon the foregoing, it is determined that the defendant has established prima facie that Luis M. Oropeza-Martinez did not suffer a serious injury within the meaning of Insurance Law §5102(d).

In opposing that part of defendant's motion which seeks dismissal of Luis Oropeza-Martinez's claim, the plaintiff has submitted an attorney's affirmation; a copy of an ultrasound report dated February 5, 2009 of the plaintiff's lumbar spine certified by Dr. Allen Rothpearl; and the report of Nicholas Martin, D.C.

In the ultrasound report of February 5, 2009, Dr. Rothperal set forth his impression of an increased echo pattern compatible with muscle spasm of the right paraspinal musculature at L4 and L5, which should be correlated clinically.

Dr. Martin examined Mr. Oropeza-Martinez on January 7, 2009, following the accident of November 27, 2008, for spasticity of the lumbar paraspinal muscles bilaterally and performed orthopedic and neurological testing. He indicates that there were positive tests results of the Bragards sign bilaterally, the heel walk test and the toe walk test. He performed range of motion testing and compared his findings to the normal lumbar range of motion values and set forth the deficits found. He indicates that he treated Mr. Oropeza-Martinez on a "regular basis" until March 5, 2009. On April 28, 2010, he was experiencing some improvement in his lumbar spine, but still had pain in the L3-6 musculature for which traction was provided. He was examined about a year later on April 25, 2011. Range of motion values upon examination of the lumbar spine were determined and compared to the normal values, and deficits were set forth. The Kemps test was positive on that date. Dr. Martin states that Mr. Oropeza-Martinez suffers lumbar derangement and that he believes the symptomology he continues to display is a direct result of the trauma received in the motor vehicle accident of November 27, 2008.

Based upon the foregoing, it is determined that Luis Oropeza-Martinez has not raised a factual issue to preclude summary judgment dismissing the complaint on the basis that he did not sustain a serious injury as defined by Insurance Law §5102 (d). In Dr. Martin's report concerning his examination of the plaintiff, he failed to set forth the objective method employed to obtain such range of motion measurements of the plaintiff's lumbar spine, such as the goniometer, inclinometer or arthroidal protractor (*see*, ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Sup Ct, Nassau County 2008]), leaving it to the court to speculate as to how he determined such ranges of motion when examining the plaintiff. He gives no basis for his conclusory opinion that the injuries and symptomology displayed by Mr. Oropeza-Martinez are a direct result of the trauma he received in the motor vehicle accident of November 27, 2008. There were no reports of further diagnostic studies to demonstrate the lumbar derangement diagnosed by Dr. Martin, or the bilateral L5 spondylolysis claimed in the bill of particulars to support his opinion as to causation. Although Dr. Martin states there were positive findings for the Kemp test, he does not indicate the significance, if, any, of such

testing.

Accordingly, upon reargument, that part of motion (001) which seeks summary judgment dismissing the complaint as asserted by Luis M. Oropeza-Martinez is granted and the complaint as asserted on his behalf is dismissed and is severed from the action.

Dated: 11/30/12

A.J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION