Windisch v Fasano
2012 NY Slip Op 31485(U)
May 22, 2012
Sup Ct, Nassau County
Docket Number: 298/10
Judge: Joel K. Asarch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 13

---x

MICHELE WINDISCH,

Plaintiff,

- against -

DECISION AND ORDER

Index No: 298/10

ANNA G. FASANO,

Motion Sequence No: 003
Original Return Date: 03-15-12

Defendant.

---x

PRESENT:

HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 4 were submitted on this Notice of Motion on April 12, 2012:

	Papers numbered
Notice of Motion and Affirmation in Support	1-2
Affirmation in Opposition	3
Reply Affirmation	4

Plaintiff, Michele Windisch, moves for an Order of this Court pursuant to CPLR 2221(f) for leave to reargue and renew the Decision and Order of this Court dated November 25, 2011. The motion is determined as set forth below.

This action stems from a motor vehicle accident that occurred on September 25, 2009 at the intersection of Jerusalem Avenue and Alken Avenue in the Village of Seaford, Nassau County. By Decision and Order dated November 25, 2011, this Court granted the motion by defendant, Anna G. Fasano, for summary judgment dismissal of the plaintiff's complaint on the grounds that her injuries did not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d). In

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doing so, this Court also denied, as moot, the motion by the plaintiff for an Order granting her summary judgment on the issue of liability.

This Court determined while the defendant had established a *prima facie* case showing that Michele Windisch did not sustain a "serious injury" within the meaning of the Insurance Law, the plaintiff, in opposition, failed to come forward with admissible evidence to overcome the defendant's 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 "permanent loss of use," "significant disfigurement" or the "90/180" categories of the serious injury statute, the analysis must be restricted to the remaining two categories alleged by the 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 the defendant's admissible evidence consisted of the plaintiff's emergency room report from New Island Hospital and the affirmation of Dr. John C. Killian, M.D. This Court rejected the defendant's submission of the affirmed report of Dr. Jessica F. Berkowitz, M.D., a diagnostic and consultative radiologist who "reviewed the radiological examination" of the plaintiff chiefly on the grounds that Dr. Berkowitz neither reported an opinion as to causation nor performed her own physical examination of the plaintiff so as to pair her findings with the reading of the "radiological examination." Despite rejecting Dr. Berkowitz's report, this Court nonetheless determined that the defendant's remaining proof established her prima facie entitlement to judgment as a matter of law.

However, this Court held that in opposition, the plaintiff had failed to present any admissible evidence demonstrating a triable issue of fact that a "serious injury" was sustained. This Court noted

that plaintiff's submissions, to wit: the affirmed reports of Dr. Philip M. Rafiy, M.D., the affirmed report of Dr. M. Cohen, M.D., and the affirmed report of Dr. William A. Weiner, D.O., insufficiently demonstrated that plaintiff had any initial limitations of her cervical spine or left shoulder. Specifically, plaintiff had annexed eight reports of Dr. Rafiy, of which the only range of motion measurements set forth were for the left shoulder abduction and flexion. Further, it was not until the fifth evaluation that Dr. Rafiy performed range of motion testing on plaintiff's cervical spine. In addition, none of the range of motions were compared to normals, nor did Dr. Rafiy ever identify any objective tests he performed to ascertain the range of motion limitations. Based on this, this Court found "all of Dr. Rafiy's opinions, as to any purported loss are unfounded, and the Court will not consider such." Similarly, this Court found that Dr. Cohen's evaluation was performed nearly one and a half years after the accident and thus was not contemporaneous with the accident. As to Dr. Weiner's report, this Court noted that it fell short of raising a triable issue of fact because he failed to, *inter alia*, report an opinion as to the causality of his findings.

In sum, this Court held that the evidence submitted by the plaintiff was insufficient to raise a triable issue of fact.

In an attempt to reverse this Court's determination, plaintiff moves, pursuant to CPLR 2221(f), for leave to reargue and renew this Court's Decision and Order dated November 25, 2011.

Procedurally, it is noteworthy that the CPLR requires that, when a movant submits a single motion that seeks to both renew and reargue, the movant must take special care to identify and support each individual item of relief separately (CPLR 2221 [f]). Here, the plaintiff submits that the renewal motion is based on a change in the law as enunciated by the Court of Appeals in *Perl v. Meher*, 18 NY3d 208 [November 22, 2011], decided three days before this Court's Decision and

Order. Reargument is based upon facts submitted in the previous record that the plaintiff argues the Court either overlooked or misinterpreted.

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][2]) 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 [2nd Dept. 2009]; *Chernysheva v. Pinchuck*, 57 AD3d 936 [2nd Dept. 2008]). Although the Court of Appeals' decision in *Perl v. Meher*, supra, clarified the general law relevant to the serious injury threshold issue, it does not change the original determination of the prior motion in this action.

Plaintiff claims that due to the decision in *Perl v. Meher*, supra, plaintiff's proof offered in opposition is in fact sufficient to defeat defendant's motion for summary judgment because "the requirement for a contemporaneous recitation of loss in range of motion has been abrogated by the Court of Appeals" and thus the reports of Drs. Cohen and Rafiy sufficiently establish that there were questions of fact sufficient to defeat the defendant's motion for summary judgment under the current standard.

While this Court agrees with the plaintiff that the requirement that contemporaneous findings be expressed quantitatively to constitute competent proof of serious injury has been eliminated by *Perl v. Meher*, the need for a qualitative medical assessment made contemporaneous with the accident nonetheless stands. *Perl v. Meher* must be read in conjunction with other seminal Court of Appeals' decisins.

In 2002, the Court of Appeals in *Toure v. Avis Rent A Car Sys.*, 98 NY2d 345, 353, held that in order to satisfy the statutory "serious injury" threshold of the Insurance Law, the legislature

requires objective proof of a plaintiff's injury, such as MRI and CT scan tests. Indeed, to meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the Court of Appeals noted that the law required that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Licari v. Elliot*, 57 NY2d 230 [1982]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). Thus, the Court of Appeals held that when a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable. In addition, the Court of Appeals held that an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system.

Subsequently, in 2005, the Court of Appeals in *Pommels v. Perez*, 4 NY3d 566, clarified that even where there is ample objective proof of plaintiff's injury, certain factors, such as such a gap in treatment, an intervening medical problem, or a preexisting condition, may override a plaintiff's objective medical proof of limitations and nonetheless permit dismissal of plaintiff's complaint because said factors interrupt the chain of causation between the accident and the claimed injury. The Court held in *Pommels v. Perez* that while "the law surely does not require a record for needless treatment in order to survive summary judgment, where there has been a gap in treatment or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment

or cessation of treatment." It was in *Pommels v. Perez* that the Court of Appeals held that to succeed in proving that they sustained a serious injury, plaintiffs claiming restrictions in range of motion must make evidentiary showings based on findings that are both contemporaneous to the accident and recent in relation to the judicial proceeding (*see also Felix v New York City Transit Authority*, 32 AD3d 527 [2nd Dept. 2006]; *Ramirez v Parache*, 31 AD3d 415 [2nd Dept. 2006]).

All of these decisions, however, must be read in conjunction with the Court of Appeals' decision in *Perl v Meher*, supra, where the Court held that a plaintiff can raise a triable issue of fact regarding whether he or she sustained a "serious injury" by submitting evidence of a qualitative medical assessment made shortly after the accident and a later quantitative assessment of the severity of plaintiff's injuries. The Court of Appeals in *Perl v. Meher*, supra, did not eliminate the necessity for any contemporaneous findings to show that the plaintiff has limitations in motion or function of a significant nature, as indeed the Court recognized that such findings are critical to the issue of causation. Rather, the stated intent of the Court's decision in *Perl v. Meher*, supra, was to eliminate the requirement that contemporaneous findings be expressed quantitatively to constitute competent proof of "serious injury."

Here, neither Dr. Rafiy nor Dr. Cohen offers any objective medical evidence of limitations of motion or function of a significant nature contemporaneous with the subject accident. Specifically, of the eight reports submitted by Dr. Rafiy, only four of those reports were contemporaneous with the accident, and none of the four contained any objective medical evidence sufficient to create an issue of fact. Of these four reports, not one contains any mention of any injury to plaintiff's cervical spine, let alone any objective medical tests performed on her cervical spine. Further, in these four reports, Dr. Rafiy does not set forth any objective findings with respect to plaintiff's left shoulder.

In light of Dr. Rafiy or Dr. Cohen's failure to set forth any objective medical findings, even in qualitative terms, contemporaneous with the subject accident to show that the plaintiff has permanent or significant limitations in movement or function of her cervical spine, or left shoulder, this Court finds that the plaintiff's proof, despite the Court of Appeals' holding in *Perl v. Meher*, supra, is nonetheless insufficient to present an issue of fact.

Accordingly, inasmuch as plaintiff seeks to renew the prior Decision and Order of this Court, said application is **granted, and upon renewal, this Court adheres to its original determination**.

The plaintiff's motion to reargue the prior Decision and Order is **denied**.

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 [2nd 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 [2nd 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 [2nd Dept. 2001]). Instead, the movant must demonstrate the matters of fact or law that she believes 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 [2nd Dept. 2005]).

Here, in requesting reargument, plaintiff claims that this Court "overlooked or

misinterpreted" the facts submitted in the previous record. Specifically, plaintiff claims that this Court erred in deciding that Dr. Weiner's affirmed report was inadmissible; that this Court overlooked plaintiff's claimed limitations and the fact that she claimed she returned to work at light duty; and that the Court raised issues that were not in dispute.

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 this Court's prior Order confirms that this Court held that "[e]ven if this Court were to assume that Dr. Weiner, in fact, reviewed the plaintiff's actual MRI films, in the absence of any opinion as to the causality of his findings in either report * * * neither [of Dr. Weiner's] report[s] [are] sufficient to raise an issue of fact as to plaintiff's serious injury." Plaintiff does not address this fact on her instant motion.

Plaintiff's claim that this Court overlooked her alleged complaints with regard to her limitations for the purposes of satisfying the 90/180 category of the Insurance Law are also unfounded. While counsel for the plaintiff goes to great lengths to quote the plaintiff's testimony in his affirmation in support, no where does counsel argue, much less demonstrate, that the plaintiff was curtailed in her usual activities "to a great extent rather than some slight curtailment" (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]; *see also Sands v. Stark*, 299 AD2d 642 [2nd Dept. 2002]) or that she was "medically", i.e., advised by a doctor, impaired from performing any of her daily activities (*Monk v. Dupuis*, 287 AD2d 187, 191 [3rd Dept. 2001]).

To prevail under the "medically 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" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non permanent nature" (Insurance Law §5102[d]) "which would have caused the alleged limitations on the plaintiff's daily activities" (*Monk v. Dupuis*, supra), and, furthermore, a curtailment of the plaintiff's usual activities "to a great extent rather than some slight curtailment" (*Licari v. Elliott*, supra; *Sands v. Stark*, supra). Plaintiff's continuing subjective complaints of recurrent pain, as expressed in her examination before trial, without any evidence of a "great" or otherwise medical impairment, are insufficient to raise a triable issue of fact.

Finally, plaintiff's claim that because the Court "raised such issues as a gap in treatment, intervening medical problems, and pre-existing conditions" her motion for reargument should be granted, is equally meritless. This Court in its prior Decision and Order merely stated that these three issues were "certain factors that may override a plaintiff's objective medical proof of limitations and nonetheless permit dismissal of the plaintiff's complaint." At no point did this Court state that these issues were raised or considered when making its determination.

Accordingly, inasmuch as plaintiff seeks to reargue this Court's prior Decision and Order, said application is also denied.

This shall constitute the Decision and Order of this Court.

Dated: Mineola, New York
May 22, 2012

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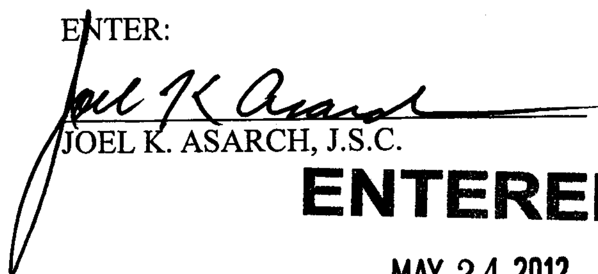

JOEL K. ASARCH, J.S.C.

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