 FILED Jun 24 2013 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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MIJI KANG,

Plaintiff,

- against -

MARTIN ALMANZAR, S.R.M. MANAGEMENT CORP., and NEW YORK LIVERY LEASING, INC.,

Defendants.

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DECISION AND ORDER

Index No. 303682/2011

PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated May 3, 2013 and the affirmation and exhibits submitted in support thereof; defendants' affirmation in opposition dated May 24, 2013; plaintiff's reply affirmation dated June 10, 2013; and due deliberation; the court finds:

In this personal injury action, plaintiff moves pursuant to CPLR 2221(f) for leave to renew and reargue the decision and order of the undersigned entered March 25, 2013, which granted defendants' motion for summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102.

Renewal to correct a procedural oversight may be granted in the absence of any prejudice to defendants. *See Zhijian Yang v. Alston*, 73 A.D.3d 562, 903 N.Y.S.2d 4 (1st Dep't 2010); *Shaw v. Looking Glass Assocs., LP*, 8 A.D.3d 100, 779 N.Y.S.2d 7 (1st Dep't 2004). Plaintiff contends that, due to a ministerial error, her physician's affirmation was not subscribed before a notary or properly affirmed. The affirmation now contain the requisite language. *See* CPLR 2106. Plaintiff promptly moved for renewal, and defendants have not shown any prejudice from the delay.

Defendants established their entitlement to summary judgment through the affirmed reports of their examining physicians who found no abnormalities in the cervical and lumbar spine MRIs,

degenerative changes in the right shoulder MRI, and no objective evidence of limitations in the affected areas. *See Luetto v. Abreu*, 105 A.D.3d 558, 963 N.Y.S.2d 112 (1st Dep't 2013); *Boateng v. Calle*, 105 A.D.3d 541, 964 N.Y.S.2d 95 (1st Dep't 2013). Plaintiff's allegation in her verified bill of particulars of a one week confinement and her testimony that she missed one week of work refuted her claim that she sustained a medically determined injury or impairment that prevented her from performing substantially all of her customary daily activities within the first ninety days of the accident ("90/180"). *See Phillips v. Tolnep Limo Inc.*, 99 A.D.3d 534, 951 N.Y.S.2d 870 (1st Dep't 2012).

The burden having shifted, plaintiff failed to raise a triable issue of fact in opposition. Dr. Lee addressed causation by attributing plaintiff's shoulder injury to the accident based upon his treatment records and his observations made during surgery. *See Calcano v. Rodriguez*, 103 A.D.3d 490, 962 N.Y.S.2d 37 (1st Dep't 2013); *Winters v. Cruz*, 90 A.D.3d 412, 933 N.Y.S.2d 551 (1st Dep't 2011). He reported range of motion limitations and positive results from objective tests performed both before and after shoulder surgery and opined that plaintiff would suffer permanently from the effects of her injuries. Dr. Lee, though, last examined plaintiff on September 12, 2011. He offered no current range of motion limitations from a more recent examination to rebut defendants' expert finding that plaintiff's injuries had resolved. *See Luetto v. Abreu, supra*; *Winters v. Cruz, supra*. Dr. Lee did not quantify the limitations he observed during the September 2011 examination and his examination notes did compare his findings to the standards for normal range of motion. *See Winters v. Cruz, supra*. As to plaintiff's spine and right ankle, Dr. Lee performed no tests of those areas during his last examination. *See Antonio v. Gear Trans Corp.*, 65 A.D.3d 869, 885 N.Y.S.2d 48 (1st Dep't 2009). Dr. Lee also failed to provide a qualitative assessment of plaintiff's condition by comparing her limitations to the "normal function, purpose and use of the [affected] body part." *Toure v. Avis Rent a Car Sys.*, 98 N.Y.2d 345, 353, 774 N.E.2d 1197, 1201, 746 N.Y.S.2d 865, 869 (2002) (internal citation omitted). His opinion that plaintiff had reached her maximum level of recovery and that further treatment would be palliative

is refuted by his September 2011 examination note directing plaintiff to return for further evaluation and treatment. *See DeSouza v. Hamilton*, 55 A.D.3d 352, 866 N.Y.S.2d 20 (1st Dep't 2008). Plaintiff's submissions were also insufficient to substantiate her "permanent loss of use" and 90/180 claims. *See Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 751 N.E.2d 457, 727 N.Y.S.2d 378 (2001); *Phillips v. Tolnep Limo Inc.*, *supra*.

A motion for leave to reargue is addressed to the discretion of the court upon a showing that the court misapprehended relevant fact or law. *See William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 588 N.Y.S.2d 8 (1st Dep't 1992). Plaintiff contends she suffered a permanent injury and was not obligated to submit to a "more recent examination" after defendants' expert IME. Plaintiff is correct in stating that none of the cases cited in the prior decision mandate that plaintiff's treating physician perform a "more recent examination." However, caselaw indicates that defendants' expert finding of resolved injuries must be rebutted by some proof of plaintiff's current range of motion limitations or qualified limitations. *See Luetto v. Abreu, supra*; *Brand v. Evangelista*, 103 A.D.3d 539, 962 N.Y.S.2d 52 (1st Dep't 2013); *Vega v. MTA Bus Co.*, 96 A.D.3d 506, 946 N.Y.S.2d 162 (1st Dep't 2012); *Martinez v. Goldmag Hacking Corp.*, 95 A.D.3d 682, 944 N.Y.S.2d 555 (1st Dep't 2012); *Williams v. Horman*, 95 A.D.3d 650, 944 N.Y.S.2d 135 (1st Dep't 2012); *Zambrana v. Timothy*, 95 A.D.3d 422, 943 N.Y.S.2d 92 (1st Dep't 2012); *Winters v. Cruz, supra*; *Shu Chi Lam v. Dong*, 84 A.D.3d 515, 922 N.Y.S.2d 381 (1st Dep't 2011); *Townes v. Harlem Group, Inc.*, 82 A.D.3d 583, 920 N.Y.S.2d 21 (1st Dep't 2011). Dr. Lee last assessed plaintiff's condition ten months before defendants' expert examination, and it cannot be said that the September 2011 examination qualifies as a recent examination. *See Martinez v. Goldmag Hacking Corp.*, *supra*. Plaintiff's contention that a treating physician need not compare his findings to a defined normal range of motion is not supported. *See Mickens v. Khalid*, 62 A.D.3d 597, 879 N.Y.S.2d 138 (1st Dep't 2009). Dr. Lee's affirmation lacks any reference to a review of the records generated by Chee Gap Kim, M.D. The prior decision also made

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no mention whether a gap or cessation of medical treatment was dispositive, and the argument was not raised in defendants' initial moving papers.

Accordingly, it is

ORDERED, that plaintiff's motion seeking leave to renew and reargue is granted to the extent of granting only renewal; and it is further

ORDERED, that upon granting renewal, the court adheres to its prior decision and order entered March 25, 2013.

This constitutes the decision and order of the court.

Dated: June 18, 2013

Lucindo Suarez, J.S.C.