Brandon v Blowers
2013 NY Slip Op 34221(U)
June 11, 2013
Supreme Court, New York County
Docket Number: 101138/09
Judge: George J. Silver

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver PART 22

Justice

FILED

JUN 12 2013

NEW YORK
COUNTY CLERK'S OFFICE

BRANDON, TERRI

-v-

BLOWERS, KARI A.

INDEX NO. 101138/09

MOTION DATE

MOTION SEQ. NO. 004

The following papers, numbered 1 to 4, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits	No(s). 1, 2
Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). 3
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 4

Upon the foregoing papers, it is ordered that the motion is

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident on May 31, 2008, Plaintiff Cheryl Brandon ("Plaintiff") moves to renew and reargue the defendants original motion for summary judgment, which was granted by this court. Plaintiff argues that the court erred in making its determination that Plaintiff did not sustain a serious injury under permanent consequential limitation and significant limitation and argues that this portion of the courts decision be vacated.

In Plaintiff's motion to renew and reargue, Plaintiff includes an affirmation by Dr. Stanley Liebowitz ("Exhibit C") addressing a mistake in his original report which states that his affirmation is based on the file maintained on "Ms. Terry Brandon" in paragraph two of his findings, rather than Plaintiff Cheryl Brandon. In his new affirmation, Dr. Liebowitz states "my entire affirmation dated November 2, 2011 is regarding the treatment and my findings as to Ms. Cheryl Brandon." Upon correcting this mistake, Dr. Leibowitz's report confirms plaintiff's multiple herniations and bulges coupled with range of motion restrictions. Plaintiff argues that the court relied on Dr. Stanley Liebowitz's original mistaken affirmation in its decision to grant defendant's summary judgment, and as such, the original decision placed no probative value on Dr. Leibowitz's report. Thus, the court concluded that Plaintiff failed to rebut defendant's *prima facie* case as to serious injury. Plaintiff avers that by submitting a corrected affirmation by Dr. Leibowitz, Plaintiff establishes a triable issue of fact for the jury, thus defeating defendants motion for summary judgment.

Defendant avers that plaintiff's motion to renew and reargue should be denied as fatally defective, as plaintiff failed to attach the pleadings and underlying motions to its motion to renew and reargue. Additionally, Defendant argues that Plaintiff has failed to show that the court overlooked or misapprehended the facts or law and that Plaintiff, in a motion to reargue, is not afforded the opportunity to raise new questions which were not previously raised. Defendants argue that the new affirmation by Dr. Leibowitz should have been provided in the opposition papers to the defendants original motion for summary judgement. Lastly, Defendant's contend that Plaintiff did not sustain a serious injury and as such the court did not originally overlook or misunderstand the facts in granting defendants motion for summary judgment.

Plaintiff's designate this motion as a motion to renew and reargue, but it is more appropriately an application solely for leave to renew. An application for leave to renew must be based upon additional

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION

2. Check as appropriate: MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER

3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court (*Elson v Defren*, 283 AD2d 109 [1st Dept 2001]). This requirement, however, is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made (*Liberty Mut. Ins. Co. v Allstate Ins. Co.*, 237 AD2d 260 [2d Dept 1997]; *Vayser v Waldbaum*, 225 AD2d 760 [2d Dept 1996]). The Appellate Division, First Department has held that even if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to "'defeat substantive fairness'" (*Metcalfe v City of New York*, 223 AD2d 410, 411 [1st Dept 1996] quoting *Lambert v Williams*, 218 AD2d 618, 621 [1st Dept 1995]). Plaintiff has included Dr. Leibowitz's new affirmation and effectively cured the defect of the original affirmation upon which the court relied. As such, Plaintiff has the right to make her application for leave to renew the motion.

The court now turns to Defendant's motion for summary judgment to dismiss Plaintiff's complaint on the grounds that Plaintiff did not sustain a serious injury. A "serious injury" under New York Insurance Law §5102(d) is defined as 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 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.

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v. Wright*, 268 AD2d, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v. Pomilla*, 59 AD3d 184 [1st Dept. 2009]).

Plaintiff alleges in her Verified Bill of Particulars that, as a result of the accident, she sustained a serious injury including cervical and lumbosacral radiculopathy, bilateral muscle spasms in lumbar area radiating to both legs and generalized anxiety. Plaintiff's Supplemental Bill of Particulars alleges injuries including Grade I anterolisthesis of L4 on L5, L3-L4 and L4-L5 disc bulges, L5-S1 disc herniation, C3-C4 and C4-C5 through C6-C7 disc bulges. In support of this motion, Defendant submits the expert reports of Dr. R.C. Krishna, Dr. S.W. Bleifer and Dr. Sheldon Feit. Dr. Krishna performed a neurological examination of Plaintiff on June 9, 2010. He conducted range of motion testing using an inclinometer and found no limitations in Plaintiff's range of motion for her cervical and thoracolumbar spine. Dr. Krishna concluded that Plaintiff may have sustained a cervical and lumbar strain injury, but that those injuries had resolved. He did not find any neurological indication for disability. Dr. Bleifer conducted an orthopedic examination of Plaintiff on June 8, 2010. He performed range of motion testing and found no limitations in Plaintiff's range of motion for her cervical spine, shoulders and lumbar spine. Dr. Bleifer concluded that Plaintiff had sustained a cervical and lumbosacral sprain, both of which had resolved. Dr. Feit reviewed Plaintiff's cervical spine MRI film. He identified bulging discs at C3-C4, C4-C5, C5-C6 and C6-C7, degenerative spondylosis and no evidence of herniations. Dr. Feit reported that the bulging discs are not posttraumatic, but degenerative in nature. Dr. Feit also reviewed Plaintiff's lumbar spine MRI films and concluded that the two MRIs revealed pre-existing degenerative changes. Further, he specified that the disc bulges identified at L4-L5 and L5-S1 are degenerative in nature. Defendants have satisfied their burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab*

Corp, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]).

In opposition, Plaintiff submits the expert reports of Dr. Stanley Liebowitz and Dr. Ronald Wagner. Dr. Liebowitz's cured affirmation states that he performed a physical examination of Plaintiff which revealed that she suffered from restrictions of motion in her neck and back. Dr. Liebowitz found paraspinal tenderness with limited range of motion and finds that the pain radiates to her upper extremities with periodic numbness in the upper extremities and fingers. Dr. Leibowitz performed his range of motion tests on Plaintiff's cervical spine using a goniometer and observed the following deficiencies: a 71% restriction in flexion, a 42% restriction in extension, a 60% restriction for right lateral bending, and a 60% restriction for left lateral bending. Additionally, Dr. Liebowitz performed a range of motion test using a goniometer on Plaintiff's lumbar spine and found the following deficiencies: an 85% restriction for flexion and a 71% restriction for extension. Based on such findings, Dr. Liebowitz placed Plaintiff on a physical therapy program at Restoration Sports and Spine Center 3 times a week, gradually decreasing the therapy to one time per week over the course of two years. Dr. Liebowitz examines Plaintiff again on October 10, 2011 and found continued tenderness, muscle spasms, and range of motion restrictions of the cervical and lumbar spine which he found are causally related to the accident. Dr. Leibowitz recommended that Plaintiff have surgery on her spine and that surgery is the only medical treatment that will significantly improve her condition. Plaintiff also went for an MRI of her cervical and lumbar spine on July 6, 2008, which was performed and reviewed by Dr. Ronald Wagner, the report of which was reviewed by Dr. Liebowitz. Dr. Wagner reported posterior disc bulges from C4-C5 through C6-C7 and C3-C4. Dr. Wagner also found posterior disc bulges at L3-L4 and L4-5, L5-S1 disc herniation and straightening of the normal lumbar lordosis. Additionally, Dr. Wagner reviewed Plaintiff's June 29, 2011 lumbar spine MRI film. He reported L3-L4 disc bulge without interval change, new L4-L5 disc herniation, and foraminal disc bulge at L4-L5. Dr. Wagner further noted that the previously identified L5-S1 disc herniation had resolved.

Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] *quoting John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Further, to qualify under the "consequential" or "significant" injury definition, the injury must be more than minor or slight (*Gaddy v Eyler*, 79 NY2d 955 [1992]). Dr. Liebowitz provided objective evidence of Plaintiff's injuries both contemporaneous with the accident and based on a recent examination. Though Defendants' have sufficiently raised arguments as to a lack of permanency and consequential limitations, Plaintiff has adequately rebut Defendant's *prima facie* case through Dr. Liebowitz's affirmation and review of Dr. Wagner's MRI reports.

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez, 63 A.D.3d 520 [1st Dept 2009])*. Plaintiff's Verified Bill of Particulars states that she was confined to bed and home for one week and that she was incapacitated from working for one week. Though Plaintiff testified regarding activities that she can no longer engage in, Plaintiff has not sufficiently shown that her curtailment of these activities was medically determined (see *Antonio v Gear Trans Corp.*, 2009 NY Slip Op 6370 [treating physician's statements that they were "medically disabled," and were to refrain from any work or activities that caused pain were too general to raise the inference that plaintiff's confinement to bed and home was medically required]; *see Gorden v Tibulcio*, 50 AD3d 460, 463, 855 N.Y.S.2d 515 [2008]). Accordingly, Defendants' summary judgment motion as to Plaintiff's 90/180 claim under New York Insurance Law §5102(d) is granted.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to renew and reargue is granted; and it is further

ORDERED that Defendants' motion and Co-defendants' cross motion for summary judgment is denied as to Plaintiff's claim under permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Defendants' motion and Co-defendants' cross motion for summary judgment is granted as to Plaintiff's claim under 90/180 category of Insurance Law §5102(d)

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry upon all parties, within 30 days, and upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in caption herein.

This constitutes the decision and order of the court.

Dated: JUN 11 2013

New York County

George J. Silver, J.S.C.

GEORGE J. SILVER