

Sutliff v Qadar

2013 NY Slip Op 32419(U)

October 3, 2013

Supreme Court, New York County

Docket Number: 107610/10

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE _____
Justice

PART 12

Index Number : 107610/2010
SUTLIFF, KYLE
vs
QADAR, GHULAM
Sequence Number : 003
REARGUMENT/RECONSIDERATION

INDEX NO. 107610/10
MOTION DATE _____
MOTION SEQ. NO. 003

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2, 3</u>
Replying Affidavits _____	No(s). <u>4, 5</u>

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

OCT 10 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/3/13

[Signature], J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
KYLE SUTLIFF,

Plaintiff,

-against-

Index No. 107610/10

Motion seq. no. 003

DECISION & ORDER

GHULAM QADAR, THE CITY OF NEW YORK, and
POLICE OFFICER JOHN MALONE,

Defendants.
-----X

BARBARA JAFFE, JSC:

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By notice of motion, plaintiff moves for an order granting him leave to renew and reargue the decision and order dated March 30, 2012, in which I granted defendants' motions for summary judgment and dismissed the complaint.

FILED

OCT 10 2013

I. PRIOR DECISION

As pertinent here, I found that:

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NEW YORK

[D]efendants established, *prima facie*, through [Doctor] Montalbano's affirmed medical report and plaintiff's deposition testimony, that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 . . .

While [Doctor] Gregorace found that plaintiff had limited ranges of motion in his left and right shoulders, by June 30, 2010 he determined that plaintiff had normal ranges of motion in two of the three areas tested and all of the other tests were negative. Moreover, plaintiff submits no evidence based on a more recent examination, and thus has not rebutted Montalbano's finding that he had normal ranges of motion in both shoulders . . .

As to plaintiff's 90/180 day claim, I held that:

Although it is undisputed that plaintiff missed four months of work, absent proof that his injuries were caused by the accident or any objective medical evidence showing that his daily activities were substantially curtailed, his [] claim fails.

II. MOTION TO RENEW

A. Contentions

Plaintiff argues that he inadvertently failed to submit a September 30, 2011 report by Dr. Gregorace due to law office failure, and observes that as he referenced the report in his opposition papers, defendants are not prejudiced by my consideration of it. He also moves for leave to renew based on recent decisions of the Appellate Division, First Department, which he contends establish that defendants are not entitled to summary dismissal. (Affirmation of Frank Braunstein, Esq., dated May 12, 2012 [Braunstein Aff.]).

In the report, Gregorace states that when he examined plaintiff on September 30, 2011, plaintiff's right shoulder had normal ranges of motion and all tests were negative, and that his left shoulder had limited ranges of motion to the following extent: forward flexion was 140 out of 150 degrees; extension was 50 out of 60 degrees; abduction was 140 out of 150 degrees; internal rotation was 70 out of 80 degrees; and external rotation was 50 out of 90 degrees. Only one of the three tests he performed on plaintiff's left shoulder was positive, and he found that the strength of the shoulder was a four to a four plus out of five through all planes of motion. He diagnosed plaintiff with left shoulder impairment, following his left shoulder surgery. (*Id.*, Exh. G).

B. Analysis

Pursuant to CPLR 2221(e), a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate

that there has been a change in the law that would change the prior determination” and “shall contain reasonable justification for the failure to present such facts on the prior motion.”

1. Gregorace’s report

As plaintiff adequately explains his omission of the report, and as defendants were aware of its existence, leave to renew is granted. (*See Cruz v Castanos*, 10 AD3d 277 [1st Dept 2004] [plaintiff’s omission of exhibits from opposition to defendant’s summary judgment motion warranted renewal of order granting motion as omission was inadvertent, supported by reasonable excuse of law office failure, and did not prejudice defendant]).

2. Subsequent decisions

While plaintiff cites three decisions rendered by the Appellate Division, First Department, after my decision was issued, *Correa v Saifuddin*, 95 AD3d 407 (2012), *Vaughan v Leon*, 94 AD3d 646 (2012), and *Thompkins v Ortiz*, 95 AD3d 418 (2012), they effect no change in the law nor do they clarify prior law. (*See Cives Corp. v Hunt Constr. Group, Inc.*, 91 AD3d 1178 [3d Dept 2012] [decision made after denial of earlier motion did not change law and thus renewal should have been denied]; *Jackson v Westminster House Owners Inc.*, 52 AD3d 404 [1st Dept 2008] [as later case did not constitute new law or clarify prior law, it did not serve as basis for renewal]; *compare Matter of Martin v City of New York*, 103 AD3d 412 [while later decision did not change law, it undermined primary basis for denying earlier motion]). Thus, the motion for leave to renew on this ground is denied.

III. MOTION TO REARGUE

A. Defendant’s *prima facie* burden

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.” (CPLR 2221[d][2]). Whether to grant re-argument is committed to the sound discretion of the court, and a motion to re-argue may not “serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.” (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]).

As plaintiff has not established that I overlooked or misapprehended any matter of fact or law in determining the prior motion, leave to reargue is denied.

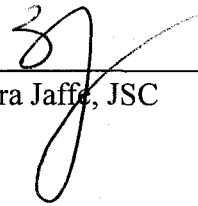
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff’s motion for leave to renew is granted and upon renewal, I adhere to my prior determination granting defendants’ motions for summary judgment; and it is further

ORDERED, that plaintiff’s motion for leave to reargue is denied.

ENTER:



Barbara Jaffe, JSC

FILED

OCT 10 2013

**COUNTY CLERK'S OFFICE
NEW YORK**

DATED: October 3, 2013
 New York, New York