

Schnurman v Diallo

2014 NY Slip Op 33965(U)

November 21, 2014

Supreme Court, New York County

Docket Number: 109297/11

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22**

Judith Schnurman and Alan Schnurman,

Index No.: 109297/11
Motion Seq: 003

Plaintiffs,

-against-

**Ousmane Diallo, Lelio Bresier, Abdelhak Dougadir
and Apart Cab Corp.,**

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Plaintiffs' motion for leave to reargue and renew this Court's February 5, 2014 decision and order which granted defendants' motion for summary judgment dismissing this action on the grounds that plaintiff Judith Schnurman did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is denied in its entirety.

In this action, plaintiff Judith Schnurman ("plaintiff"), who was 63 at the time of this accident, alleges she sustained personal injuries on May 17, 2011 when she was a passenger in a taxi which was hit in the rear. In her Verified Bill of Particulars annexed to the underlying motion, plaintiff claimed neck, back, arm and hand injuries as well as pain in the buttock and right shoulder (exh B to moving papers, para. 11). Alan Schnurman asserts only a derivative claim.

FILED

NOV 26 2014

In its February 5, 2014 decision and order, the Court held that plaintiff failed to submit medical evidence in proper form to contest the findings of defendant's experts regarding plaintiff's physical condition. Specifically, and as pointed out in the reply, because plaintiff failed to address the radiologist's detailed findings that (1) there was extensive degeneration in plaintiff's cervical and lumbar spine, and (2) there was no evidence of a traumatic injury, plaintiff did not raise an issue of fact sufficient to defeat defendants' motion for summary

CLERK'S OFFICE
NEW YORK

judgment. In its decision, the Court did not consider Dr. Harrison's unsigned letter report, submitted in opposition to the summary judgment motion.

Reargument

Plaintiff has not demonstrated that the Court overlooked or misapprehended any issue of law or fact. It was not error for the Court to disregard Dr. Harrison's unsigned letter report submitted in opposition to defendants' summary judgment motion; nor was it error for the Court to refuse to accept an unauthorized, post-submission letter from plaintiff's attorney, asking the Court to consider a signed copy of Dr. Harrison's letter report. Accordingly, the branch of this motion seeking leave to reargue is denied.

Renewal

In support of this branch of the motion, plaintiff asks the Court to "consider two new pieces of evidence which were not previously before the court, i.e. the signed affirmation of Leonard Harrison, MD and the Supplemental Bill of Particulars dated August 10, 2012" (aff., para. 11).

Procedural history

In the Verified Bill of Particulars dated December 22, 2011, plaintiff claimed she injured her cervical and lumbar spine, and experienced right shoulder pain and numbness in both arms and hands; there was no mention of exacerbation or aggravation of any pre-existing condition.

At her May 9, 2012 deposition, plaintiff testified about (1) a 2002 motor vehicle accident in which she hurt the same body parts as claimed here (exh B, T. at 32-33), and (2) treatment she underwent for neck pain 5 or 6 years before the 2002 accident (exh B, T. at 34-35).

On June 6, 2012, Dr. Eisenstadt, defendants' radiologist, reviewed plaintiff's cervical and

lumbar MRIs taken 3 weeks after the accident. Dr. Eisenstadt stated that she saw evidence of long-standing degenerative disease, but no evidence of recent or acute post-traumatic injury in either area. On June 18, 2012, Dr. Nason, an orthopedist, examined plaintiff on behalf of defendants. In her affirmed report, Dr. Nason stated that she reviewed the 12/22/11 Bill of Particulars, found no range of motion restrictions in plaintiff's cervical or lumbar spine or right shoulder, and concluded that any injuries had resolved. On July 25, 2012, Dr. Shanon, a neurologist, examined plaintiff on behalf of defendants. In his affirmed report, Dr. Shanon stated that he reviewed the 12/22/11 Bill of Particulars; he found no range of motion restrictions in plaintiff's cervical or lumbar spine, and that any strains had resolved.

The Underlying Motion

On December 3, 2012 defendants Diallo and Bresier moved for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury¹. In paragraph 6 of the moving affirmation, defendants' counsel listed some of the injuries that plaintiff alleged in the Verified Bill of Particulars, which was also annexed as exhibit B.

In opposition to the underlying motion, **plaintiff never mentioned any Supplemental Bill of Particulars**. The opposition, dated February 8, 2013, was written as if the August 10, 2012 Supplemental Bill of Particulars, now presented here, never existed.

In reply, defendants' counsel pointed out that Dr. Harrison's letter report was not signed and thus not admissible. In the alternative, defendants' counsel argued that even if Dr. Harrison's letter were considered, his diagnosis of exacerbation of pre-existing cervical and

¹Although plaintiff annexes the cross-motion of defendants Apart Cab Corp. and Dougadir seeking the same relief, that cross-motion was apparently never submitted to the Court, and is not in the County Clerk's file.

lumbar conditions was never alleged in the Bill of Particulars, and as such, need not have been addressed by defendants' medical experts or considered by the Court.

The Instant Motion

In support of the branch of this motion seeking renewal, plaintiff has not offered any explanation as to why she never mentioned the Supplemental Bill of Particulars in opposition to the underlying motion— or in the unauthorized, post-submission letter or at oral argument of the motion. If a supplemental or amended bill of particulars did exist, and defendants moved under an original bill of particulars, then plaintiff certainly should have raised this in its opposition to the underlying motion. It would have been an excellent reason for the Court to deny the motion on the grounds that defendants did not meet their prima facie burden. *See Pero v Transervice Logistics, Inc.*, 83 AD3d 681, 920 NYS2d 364 (2d Dept 2011). If plaintiff's counsel looked in the file and saw that a Supplemental Bill of Particulars had been drafted but never served² or filed, counsel should have raised this in the opposition as well. Significantly, plaintiff gives no reason whatsoever why she did not mention a Supplemental Bill of Particulars until after the Court granted defendants' motion dismissing her case.

The Court notes that if plaintiff had served a Supplemental Bill of Particulars alleging aggravation/exacerbation of a previous condition two years ago (in August 2012), defendants would have been entitled to request another deposition of plaintiff and/or additional exams by their doctors.

²The Court has reviewed the Supplemental Bill of Particulars annexed as exhibit G to the moving papers. In her affidavit of service, Stephany Jones swears that she mailed this document to counsel for defendants on August 10, 2012; plaintiff's counsel notarized her signature. However, the verification shows that plaintiff signed the verification in front of Stephany Jones on August 14, 2012, *four days after it was mailed*. No explanation has been offered for this.

Standard for Renewal

CPLR 2221[e] provides that a motion for leave to renew “[2] 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 [3] shall contain reasonable justification for the failure to present such facts on the prior motion.”

The Supplemental Bill of Particulars dated August 10, 2012 is not “new”, and plaintiff offers no reasonable justification why she did not mention it anywhere in opposition to the underlying motion to dismiss her case; certainly, plaintiff should have raised this in the first paragraph of her opposition, and the Supplemental Bill of Particulars should have been annexed as Exhibit A. Thus, because plaintiff has failed to offer a reasonable justification for not presenting the alleged new facts on the underlying motion, her motion for leave to renew is denied. *See Tribeca Lending Corp. v Bartlett*, 121 AD3d 613, 994 NYS2d 306 (1st Dept 2014).

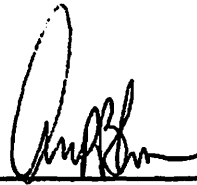
Moreover, without a properly asserted claim of aggravation/exacerbation in a bill of particulars, Dr. Harrison’s opinion, that the accident aggravated pre-existing degenerative changes in plaintiff’s cervical and lumbar spine, would not have raised an issue of fact sufficient to defeat summary judgment any more than his opinion that plaintiff sustained a broken nose in the accident would have; that is because plaintiff did not claim any of these injuries in a bill of particulars. Thus, even though plaintiff offers a reasonable justification (through the affidavit of a paralegal) for not submitting a signed copy of Dr. Harrison’s letter report on the underlying motion, the signed copy now presented would not change the Court’s prior determination of the underlying motion.

Accordingly, it is

ORDERED that plaintiffs' motion for renewal and reargument is denied in its entirety. The Court's decision and order dated February 5, 2014, which granted defendants' motion for summary judgment and dismissed this action, stands; the complaint is dismissed.

This is the Decision and Order of the Court.

Dated: November 21, 2014
New York, New York



HON. ARLENE P. BLUTH, JSC

FILED

NOV 26 2014

COUNTY CLERK'S OFFICE
NEW YORK