

Lewis v MTA Bus Co.
2019 NY Slip Op 30452(U)
February 22, 2019
Supreme Court, New York County
Docket Number: 160053/2014
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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HAJI LEWIS,

Plaintiff,

- v -

MTA BUS COMPANY, ANTHONY GIRON, TYREE BURNS, and
TOBY BURNS

Defendants.

INDEX NO. 160053/2014

MOTION SEQ. NO. 004

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123

were read on this motion for REARGUMENT and RENEWAL

Upon the foregoing documents, it is ordered that the motion is **denied**.

In this personal injury action, plaintiff Haji Lewis (“Lewis”) moves, pursuant to CPLR 2221(d) and 2221(e), for leave to reargue and renew his summary judgment motion on the issue of liability (motion sequence 002) (*see* Doc. 45). In a prior decision and order rendered on September 20, 2017, this Court: (1) denied Lewis’s motion; (2) granted defendant MTA Bus Company’s (“the MTA”) cross-motion as well as defendant Tyree Burns’s (“Burns”) motion for summary judgment dismissing the complaint (motion sequence 003); and (3) granted defendant Anthony Giron (“Giron”) summary judgment dismissing the complaint. (Doc. 109 at 17.) Defendants MTA and Burns oppose the instant motion. After oral argument, and after a review of the parties’ papers and the relevant statutes and caselaw, it is ordered that the motion is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

The facts of this case have been set forth in the prior decision and order of this Court rendered on September 20, 2017. (Doc. 109 at 7–18.) On October 14, 2013, plaintiff Lewis was a passenger on an MTA bus that was being operated by defendant Giron. (*Id.* at 8.) Lewis purportedly sustained injuries when the bus struck a vehicle being driven at the time by defendant Burns. (*Id.*) Lewis thereafter commenced this action against the captioned defendants by filing a summons and complaint on October 6, 2014.¹ (Doc. 114 at 12–19.)

On October 21, 2013, Lewis underwent an initial examination performed by Dr. David Capiola (“Dr. Capiola”) (Doc. 109 at 25), who found that Lewis had a five-degree reduction in the range of motion in his right knee (*id.* at 11). However, in a later examination that occurred on February 3, 2017, Dr. Capiola determined that Lewis’s right knee had suffered a thirty-degree reduction in the range of motion. (Doc. 109 at 12.) In the interim, at his independent medical examination (“IME”) performed by Dr. Stephen Renzoni (“Dr. Renzoni”) on November 9, 2016, Dr. Renzoni concluded that Lewis displayed a ten-degree reduction in the range of motion, “or a roughly 6.67% reduction” (*id.* at 15), in both knees (*see id.* at 12, 15).

In the prior decision, this Court denied Lewis’ summary judgment motion on the issue of liability because he had not shown that he suffered a “serious injury” within the purview of New York Insurance Law §5102(d), which is a threshold matter that must be determined before the issue of fault. (*Id.* at 14.) Through his bill of particulars, Lewis had essentially limited his injuries to “a permanent consequential limitation of a body organ or member, significant limitation of use of a body function or system, and a non-permanent injury preventing him from performing his usual activities for 90 days within 180 days of the accident.” (*Id.*)

¹ The caption names Toby Burns as a defendant. However, Toby Burns is deceased, and Lewis’s claims were discontinued by stipulation entered on November 18, 2015. (Doc. 109 at 8.)

In light of the medical reports and Lewis's testimony, this Court determined that defendants MTA and Burns were entitled to summary judgment dismissing Lewis's complaint because a "6.67% loss of range of motion is insufficient to establish a significant or permanent consequential limitation of use." (*Id.* at 15.) Moreover, because Lewis had returned to work less than three months after his accident (*id.*), he could not show that he was prevented "from performing his usual activities for 90 days within 180 days of the accident." (*See id.* at 14–15.)

This Court further reasoned that Lewis had failed to raise a material issue of fact in opposition to the MTA's and Burns's motions for summary judgment dismissing his complaint because of "conflicting findings" (*see id.* at 16) in Dr. Capiola's evaluations. Although Dr. Capiola had found a nearly thirty-degree reduction in Lewis's range of motion in February of 2017, he had observed only a mere five-degree reduction in Lewis's range of motion in the examination that happened just a week after the accident. (*Id.*) Because neither "Lewis nor Dr. Capiola offer[ed] any explanation for this discrepancy over the more than three-year gap between examinations" (*id.*), this Court held that no material issue of fact was raised by Lewis. This Court therefore: (1) denied Lewis's motion for summary judgment on the issue of liability (motion sequence 002); (2) granted the MTA's cross-motion, as well as Burns's motion for summary judgment dismissing the complaint (motion sequence 003); and (3) granted defendant Giron summary judgment dismissing the complaint. (*Id.* at 17.)

Lewis now moves, pursuant to CPLR 2221(d) and 2221(e), for reargument and renewal of the prior decision and order. In support of his motion, Lewis submits an affidavit (*id.* at 19–23), wherein he attempts to explain the discrepancy for the changes in loss of his range of motion between his initial examination with Dr. Capiola in October of 2013 and his last examination by Dr. Capiola in February of 2017. He avers that, despite his bad knee, he was forced to return to

work so that he could support his family and that, as a result of the delay in medically repairing his knee, his condition worsened over time. (*See id.*) Dr. Capiola likewise submits an affidavit in support of Lewis's reargument and renewal motion (*id.* at 24–27), stating that, in his medical opinion, the discrepancy was “a result of the continuing damage to [Lewis's] right knee as a result of the delay in surgical intervention” (*id.* at 26).

Defendants Burns and the MTA oppose the motion. (Docs. 111; 117.)

LEGAL CONCLUSIONS:

The purpose of a motion for leave for reargument pursuant to CPLR 2221(d) is to afford a party an opportunity to demonstrate that, in issuing a prior order, the court overlooked relevant facts or that it misapplied a controlling principle of law. (*See Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979].) “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted.” (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] (citations omitted).) Thus, the motion is not to be used as a vehicle for rehashing what was already argued or for raising new questions. (*See Simpson v Loehmann*, 21 NY2d 990, 990 [1968].)

On a motion for leave for renewal pursuant to CPLR 2221(e), however, a court may consider “new facts not offered on the prior motion that would change the prior determination” (CPLR 2221[e][2].) The motion to renew is “intended to direct the court’s attention to new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court’s attention.” (*Garner v Latimer*, 306 AD2d 209, 209 [1st Dept 2003].) A party moving for renewal must present the court with justification for failing to submit the new evidence with the initial motion. (*See Onglingswan*

v Chase Home Fin., LLC, 104 AD3d 543, 544 [1st Dept 2013].) Although renewal is granted sparingly, (see *Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010] (citations omitted)), a court may nonetheless grant such relief so as not to defeat substantive fairness (see *Garner*, 306 AD2d at 210 (citations omitted)).

Here, this Court finds that the portion of Lewis's motion for reargument should be denied. As defendants correctly point out (Docs. 111 at 5; 117 at 3), Lewis's papers in support—his attorney's affirmation, Lewis's own affidavit, and Dr. Capiola's affirmation—do not even allege that this Court overlooked a relevant fact or that it misapplied a controlling principle of law in issuing the prior decision. Similarly, the portion of plaintiff's motion for renewal must be denied, since plaintiff does not provide this Court with any justification as to why Dr. Capiola failed—in the underlying motion for summary judgment—to explain the discrepancy between his findings of a five-degree limitation in the range of Lewis's knee only a week after the accident and the thirty-degree limitation that Dr. Capiola had measured in the knee three years later. (See *Henry v Peguero*, 72 AD3d 600, 603 [1st Dept 2010] (renewal not proper where physician's addendum was based on medical information previously available to him and could have been included in his original affidavit).)

For the foregoing reasons, it is hereby:

ORDERED that plaintiff Haji Lewis's motion for leave for reargument and renewal as to defendants MTA Bus Company's cross-motion as well as defendant Tyree Burns's motion for

summary judgment dismissing the complaint, and as to Lewis's summary judgment motion on the issue of liability, is denied; and it is further

ORDERED that this Court adheres to its original decision; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this order with notice of entry upon all parties within 30 days of entry; and it is further

ORDERED that this constitutes the decision and order of this Court.

2/22/2019

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

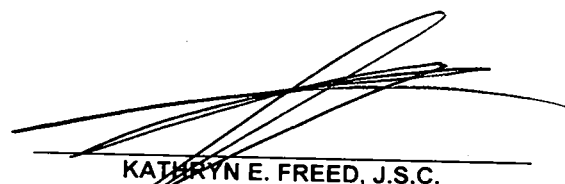
SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE


KATHRYN E. FREED, J.S.C.