SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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CRUZ MENJIVAR and JORGE CASTILLO,

Plaintiffs,

-against-

RODNEY CAPERS and ABRAM DARD,

Defendants.

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IAS Part 12
Index No. 603720/2017
Motion Seq. No. 005

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law submitted by the parties, have been reviewed in preparing this Decision and Order:

Defendants' Notice of Motion, Affirmation & Exhibits.....1
Plaintiffs' Notice of Cross-Motion, Affirmation & Exhibits.....2
Defendants' Affirmation in Opposition and Reply & Exhibit.....3
Plaintiffs' Reply Affirmation.....4

In this action, plaintiffs seek to recover for injuries they allegedly sustained as a result of a car accident. By Order dated April 20, 2020 (hereinafter the "prior order"), this court granted defendants' motion for summary judgment finding plaintiffs did not sustain injuries sufficient to satisfy the No-Fault threshold set forth in Insurance Law Article 51. Plaintiffs' cross-motion for summary judgment on the issues of liability and threshold was denied. Plaintiffs now seeks leave to reargue this court's prior order. Defendants oppose the application.

Pursuant to CPLR § 2221(d), 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). A motion to reargue is addressed to "the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law, or for some reason mistakenly arrived at its

earlier decision." *Beverage Marketing USA, Inc. v. South Beverage Co., Inc.* 58 A.D.3d 657 (2d Dept. 2009); CPLR § 2221.

Plaintiffs claim that this court "overlooked" two main issues in defendants' evidence when determining defendants met their *prima facie* burden on summary judgment: 1) purported inadequacies in Dr. Fitzpatrick's radiological review of Menjivar's lumbar spine MRI; and 2) positive findings upon Dr. Jay Eneman's orthopedic examination of Menjivar and Cruz. With respect to Dr. Fitzpatrick's radiological review, this court found that Dr. Fitzpatrick proffered a sufficient explanation in support of his opinion that the findings of Menjivar's lumbar MRI were degenerative in nature and had no traumatic basis. Plaintiffs failed to rebut defendants' showing that Menjivar's injuries were age-related and degenerative through competent medical evidence. And of course, plaintiffs' counsel's opinion is insufficient to rebut the opinion of a medical expert. This court also did not overlook or misapprehend any aspect of Dr. Eneman's independent orthopedic examinations of plaintiffs. In fact, this court noted that insignificant limitations were reported by Dr. Eneman for both plaintiffs.

Plaintiffs also contend that issues of fact were created in opposition to defendants' motion for summary judgment that this court overlooked. First, plaintiffs contend that their medical records were proffered in admissible form and were sufficient to create an issue of fact as to whether they sustained serious injury. Plaintiffs are correct in that this court did not reference two affidavits of Dr. Levano, both dated October 29, 2019, attached as the last pages of compilations of medical records submitted for Menjivar and Castillo, respectively. In each affidavit, Dr. Levano attests that his medical records, along with "physical therapy notes" and "acupuncture notes" of other providers, are the work product of his office and were made and kept in the regular course of business by his office. Dr. Levano also affirms that the contents of such notes and reports are "true." However, it is unclear how Dr. Levano could have generated the notes of other physicians. And certainly Dr. Levano cannot affirm the veracity of another treating physician's report. *Irizarry v. Lindor,* 110 A.D.3d 846 (2d Dept. 2013). Putting aside questions of credibility and probative value, this court noted in its prior order that Dr. Levano's reports and records were still considered. Contrary to plaintiffs' contention, it remains clear that Dr. Levano failed to indicate what guidelines were

used to determine normal range of motion measurements in his *initial* examination reports of plaintiffs.[1] Dr. Levano only referenced the AMA Guidelines, 5th Edition, in his final narrative reports. It was significant to this court that the normal range of motion values referenced in Dr. Levano's final report differed from those utilized in his initial evaluations of plaintiffs. As such, this court found that plaintiffs failed to proffer competent objective medical evidence revealing the existence of range of motion limitation contemporaneous with the subject accident. *Sutton v. Yener*, 65 A.D.3d 625 (2d Dept. 2009).

Second, plaintiffs contend that there existed an issue of fact with respect to whether Menjivar satisfied the 90/180 category of the serious injury statute but pose the same arguments as those in their opposition and cross-motion that were already addressed in the prior order.

Lastly, in its prior order this court noted, parenthetically, plaintiffs' gap in treatment. Regarding Menjivar, while it is true that Dr. Levano states in his final report that she reached a "permanent and stationary plateau," there is no indication this is the reason that Menivar ceased treatment two years prior.[2] Further, despite counsel's contention, Menjivar only testified to the cesation of insurance coverage as it related to spinal injections. The record is devoid of any indication as to when her no-fault benefits were terminated. And when asked why he stopped treating only 3 months after this accident, Castillo testified that "the doctors from the insurance told me to no longer go." There was no explanation proffered for why these doctors allegedly told Castillo to cease treatment. Nevertheless, even if plaintiffs continued treatment or provided an adequate explanation for their gap in treatment, the court's ultimate determination would remain the same -- plaintiffs failed to create an issue of fact as to whether they sustained a serious injury as a result of the subject accident.

[1] Dr. Philip M. Rafty, Castillo's orthopedic surgeon, also failed to site what guidelines he utilized to determine normal range of motion values for his examination of Castillo on November 14, 2019. So, for the same reason, this examination was insufficient to create an issue of fact that Castillo suffered significant limitations in range of motion.

[2] Although Menjivar testified she ceased treatment 6 months following the accident, certain medical records reveal some treatment as late as December 2017.

Based on the foregoing, plaintiffs' application to reargue is granted and upon reargument the motion is denied.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: October 6, 2020
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.
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ENTERED
Oct 13 2020
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COUNTY CLERK'S OFFICE