

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 22

CARMEN MARTE,
 Plaintiff,

 -against-

NEW YORK CITY TRANSIT AUTHORITY,
JOSE CONTRERAS and A. MAGARIN-ADAMES,
 Defendants.

Index No. 7645/05

Motion
Date January 22, 2008

Motion
Cal. No. 16

Motion
Sequence No. C005

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits..... 1-6
Affirmation in Opposition..... 7-12
Reply Affirmation..... 13-14

Upon the foregoing papers it is ordered that plaintiff, Carmen Marte's motion seeking leave to reargue/renew this Court's Order dated June 26, 2007, and upon renewal, denying defendant, A. Margarín-Adames' motion and defendants' New York City Transit Authority and Jose Contreras' ("the NYCTA defendants") cross motion for summary judgment pursuant to CPLR 3212 which Order partially granted defendants' motion and cross motion for summary judgment as to all categories of serious injury except for the injury to the right ankle is hereby decided as follows:

In her moving papers, plaintiff now submits plaintiff's radiologist, Dr. Beinart's, MRI report of the right knee, which it maintains it inadvertently failed to attach during the copying and compilation process of the opposition to the defendants' original motion and cross-motion. Plaintiff states the failure to attach the report was a mere omission, a "slight clerical oversight" and she attaches an affidavit by an employee of plaintiff's counsel, Jaclyn Misita, who states that she inadvertently omitted the report while assembling the motion. Plaintiff asserts that there will be no prejudice to consider the report now, since Dr. Beinart's original affidavit was previously presented to the Court.

Plaintiff further argues that both Drs. Sterlin and Senat were treating physicians of the plaintiff and so their opinions were not based solely upon medical records not before the Court. Plaintiff maintains that since both doctors personally treated plaintiff and conducted independent range of motion testing, they had first-hand knowledge of her injuries and therefore, their assessment of her condition is sufficient to substantiate a claim of serious injury. Plaintiff contends that the Court failed to address plaintiff's restriction in range of motion and states that Dr. Sterlin's affirmation sets forth that there was a restricted range of motion of plaintiff's right knee and both Drs. Sterlin and Senat found decreased range of motion to plaintiff's cervical and lumbar spines. Plaintiff asserts that because both doctors relied upon their own personal examination of the plaintiff, as well as tests and reports prepared by others, they have an objective basis for their findings.

Additionally, while admitting that injuries to plaintiff's lumbosacral spine were not alleged in plaintiff's bill of particulars or complaint plaintiff contends that the Court was in error to not consider the injuries to the lumbosacral spine, since defendants had actual and constructive knowledge of such injuries. Plaintiff wishes to conform the pleadings to the proof or to supplement the Bill of Particulars to reflect said injuries. Plaintiff asserts there is no prejudice in considering the injuries plaintiff suffered, as defendants' own examining doctors observed the injuries, noted them in their reports, and conducted range of motion testing on the plaintiff's lumbar spine, and so there should be no surprise. Additionally, plaintiff asserts that at the 50-h hearing the NYCTA defendants had the opportunity to question plaintiff about injuries to her back, and did actually so.

Finally, plaintiff maintains that there was no gap in treatment because plaintiff states in her affidavit that she continued with home exercises as prescribed by her treating physician, and even if there was a cessation in treatment, there is a reasonable explanation in that she was informed by her treating physician that she had a permanent injury, and was instructed to continue with home therapy exercises.

Defendants contend that plaintiff's motion to reargue is untimely in that it was served beyond the thirty (30) day deadline set forth in the CPLR, which states that a motion to reargue must be made within thirty (30) days after service of a copy of the order determining the prior motion and written notice of its entry. Defendants annex to their opposition papers a copy of the Affirmation of Service indicating that the Order with Notice of Entry was served on plaintiff on July 11, 2007 and they point out that the instant motion was not served until August 22, 2007.

Next, defendants contend that plaintiff's counsel is wrong in his assertion that the Court should have considered the evidence regarding the plaintiff's thoracic and lumbar spines since the defendants had constructive notice of such injuries. While plaintiff argues that at the plaintiff's 50-h hearing there was an opportunity to question the plaintiff regarding these injuries, counsel for defendant A. Margarin-Adames had no such opportunity. Also, defendants allege that it is irrelevant that the Independent Medical Examination physicians observed and reported on the injures since the only conditions that the IME physicians actually assess are those that are alleged in the Bill of Particulars. Defendants maintain that it would be unfair to now conform the pleadings to the proof since the plaintiff was in possession of the medical records that would have substantiated the claim of the lumbar and thoracic spines prior to preparing the Bill of Particulars. Defendants also feel it would be inappropriate to allow plaintiff to supplement the Bill of Particulars since the CPLR does not allow for supplementation based upon new injuries. Defendants argue that the proposed supplemental Bill of Particulars is not signed by anyone and plaintiff has not demonstrated that the information contained therein was unavailable while the underlying motion was pending or that there would be any reasonable excuse for the Court to consider the information now.

Defendants further assert that plaintiff did have a gap in treatment since neither the affidavit of Dr. Sterlin or of Dr. Senat states that the plaintiff should cease treatment.

Additionally, defendants point out that the affidavit of Dr. Senat failed to include any numerical range of motion findings in his affirmation which were either taken contemporaneous with the accident or during his updated examination, and therefore causality cannot be proven.

Finally, defendants state that regarding the plaintiff's submission of the MRI report of Dr. Beinart, the plaintiff has failed to offer any reasonable excuse for failing to submit evidence that was in their possession when the original motion was made, and the report is unsworn and not affirmed.

In their reply papers, plaintiff states that the motion to reargue was not untimely, in that while she was served with the order with notice of entry on July 11, 2007, she was served by mail, and service by mail allows for five additional days to respond pursuant to the CPLR. Plaintiff states that its motion was due on August 15, 2007 and was date stamped by the Court on August 15, 2007, but was rejected by the clerk because it was not made returnable on a Tuesday, a clerical mistake, and so the motion was refiled.

Plaintiff also states that since the Decision of this Court dated June 26, 2007 found that plaintiff met the serious injury threshold regarding her right ankle injury, plaintiff is entitled to recover for all injuries that occurred as a result of the accident, including her right knee and cervical spine, citing *Prieston v. Massaro*, 107 AD2d 742 (2d Dept 1985).

A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (see, *Schneider v. Solowey*, 141 AD2d 813 [2d Dept 1988]; *Rodney v. New York Pyrotechnic Products, Inc.*, 112 AD2d 410 [2d Dept 1985]).

A motion to renew must be based upon new facts that were not offered in the prior motion, and the party must set forth a reasonable justification for the failure to present such facts in the prior motion (see, CPLR 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc.*, 271 AD2d 636, 638 [2d Dept 2000]; *McNeill v. Sandiford*, 270 AD2d 467 [2d Dept 2000]; *Shapiro v. State*, 259 AD2d 753 [2d Dept 1999]).

This Court finds that plaintiff's instant motion to reargue is timely since the plaintiff's motion was date-stamped as received by the Queens County Clerk's Office on August 15, 2007 and since it is undisputed that the Order with Notice of Entry was served upon plaintiff by mail on July 11, 2007 and as service by mail allows for five additional days to be added to the proscribed period pursuant to CPLR 2103(b), plaintiff has timely served the instant motion to reargue within the thirty (30) day period.

Regarding the submission of Dr. Beinart's MRI report of the right knee in the instant motion to renew, the Court is satisfied that the plaintiff has provided a reasonable excuse for her failure to present this report on the prior motion. "It is within the discretion of the trial court 'in the interests of justice to excuse delay or default resulting from law office failure' (CPLR 2005)." (*Brown v. Ryder Truck Rental, Inc.*, 172 AD2d 477 [2d Dept 1991]; see also *Jeune v. O.T. Trans Mix Corp.*, 202 AD2d 640 (2d Dept 1994); *Brann v. City of New York*, 96 AD2d 923 [2d Dept 1983]). Plaintiff's attorney's proffered excuse of law office failure consisting of clerical oversight in the copying and compilation process of the prior motion is corroborated and supported by an affidavit of the employee responsible for the inadvertent omission. As such, a reasonable excuse has been provided, and despite defendant's contentions, the report has been affirmed under the penalties of perjury pursuant to Dr. Clifford Beinart's sworn affirmation dated May 11, 2007. Such MRI report which finds an "oblique tear posterior horn lateral meniscus" is admissible before this Court.

Additionally, that branch of plaintiff's motion which seeks renewal/reargument on the issue of the fact that the Court only considered those portions of proof relating to physical injuries to the right knee, right ankle, and cervical spine only is denied. Said branch of the motion is denied as plaintiff has failed to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (see, *Schneider v. Solowey*, 141 AD2d 813 [2d Dept 1988]; *Rodney v. New York Pyrotechnic Products, Inc.*, 112 AD2d 410 [2d Dept 1985]), or that there were new facts that were not offered in the prior motion, with a reasonable justification for failure to present such facts in the prior motion (see, CPLR 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc.*, 271 AD2d 636, 638 [2d Dept 2000]; *McNeill v. Sandiford*, 270 AD2d 467 [2d Dept 2000]; *Shapiro v. State*, 259 AD2d 753 [2d Dept 1999]). Accordingly, the Court adheres to its prior determination that since in the bill of particulars and the complaint, plaintiff alleges physical injuries to the right knee, right ankle, and cervical spine only, and since plaintiff never moved to amend the bill of particulars, those portions of the proof discussing other parts of the body including the lumbar sacral and thoracic spines will not be considered (see, *Seymour v. Roe*, 301 AD2d 991 [3d Dept 2003]; see also, *Robinson v. Schiavoni*, 249 AD2d 99 [4th Dept 1998]).

Furthermore, regarding plaintiff's request to have the Bill of Particulars supplemented to reflect injuries to plaintiff's lumbosacral spine, such request is denied without prejudice with leave to renew. It is well-established law that leave to amend a bill of particulars is liberally granted in the absence of prejudice and surprise when a plaintiff has not filed a note of issue (see, CPLR 3042; *Lipari v. Babylon Riding Center, Inc.*, 18 AD3d 824 [2d Dept 2005]; *Loadholdt v. Rams Beer & Soda, Inc.*, 273 Ad2d 446 [2d Dept 2000]). While the plaintiff states that she seeks to serve a "supplemental bill of particulars," in reality, she seeks to serve an "amended bill of particulars" since it seeks to add new injuries (ie. those to the lumbosacral spine) (*Kyong Hi Wohn v. County of Suffolk*, 237 AD2d 412 [2d Dept 1997]). "It is clear that when plaintiffs seek to amend bills of particulars by asserting a new injury, they must show reasons for the delay in asserting the injury and include a medical affidavit showing a causal connection between the alleged injury and the original injuries sustained (*Simono v. St. Mary's Hospital of Brooklyn*, 107 AD2d 800 [2d Dept 1985]). In the instant case, plaintiff has provided no reason whatsoever for its delay in seeking to amend the bill of particulars. However, even if no reason for the delay is shown and no affidavit showing a causal connection is proffered, if there is a total lack of prejudice to the defendants, the motion to amend can be granted. (*Id.*). The

Court is unable to determine if there is a total lack of prejudice since neither side has stated whether a note of issue or certificate of readiness has been filed as of yet. (*Id.*, See also, *McLeod v. Duffy*, 53 AD2d 1011 [4th Dept 1976]).

While plaintiff states that since the Decision of this Court dated June 26, 2007 found that plaintiff met the serious injury threshold regarding her right ankle injury, plaintiff is entitled to recover for all injuries that occurred as a result of the accident, including her right knee and cervical spine, citing *Prieston v. Massaro*, 107 AD2d 742 (2d Dept 1985), the Court finds that since the plaintiff has not alleged injuries to the right knee and cervical spine in the Bill of Particulars or the Complaint, the Court cannot automatically allow the injuries to the right knee and cervical spine to go to trial (*see also*, *Bonner v. Hill*, 302 AD2d 544 [2d Dept 2003]).

Moreover, regarding the affirmation of Dr. Sterlin, the Court now finds it admissible and probative since the sworn MRI report partially relied on by Dr. Sterlin has now been provided to the Court. With this affirmation, plaintiff raises an issue of fact. A medical affirmation or affidavit which is based upon a physician's personal examinations and observation of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418, 688 NYS2d 167 [1st Dept. 1980]). The affirmed report submitted by plaintiff's treating physician, Dr. Sterlin sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries to her right knee and cervical spine. He provided specifics of loss of range of motion in plaintiff's right knee and cervical spine. Dr. Sterlin's affirmation details plaintiff's symptoms, including swelling and tenderness to her right knee and her limitation of motion to her right knee, as well as pain, tenderness, and limited range of motion to her neck. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident on November 29, 2004, are permanent in nature, and result in a significant limitation in the plaintiff's range of motion. Clearly, the plaintiff's expert's conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (*DiLeo v. Blumber*, *supra*, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]).

However, regarding the gap in treatment/cessation in treatment issue, as the Court stated in its original Decision dated June 26, 2007, plaintiff has failed to provide any substantiation or corroboration for her failure to pursue any treatment from March 2005 - March 2007. While plaintiff maintains that there is a reasonable explanation in that she was

informed by her treating physician that she had a permanent injury and was instructed to continue with home therapy exercises, plaintiff has failed to submit a doctor's report stating same. Therefore, "[a]bsent such substantiation, the reason proffered by plaintiff for discontinuing treatment remains conclusory and non-probative." (See this Court's Decision dated June 26, 2007).

Accordingly, plaintiff's motion for renewal/reargument is denied and plaintiff's request to have the Bill of Particulars supplemented to reflect injuries to plaintiff's lumbosacral spine is denied without prejudice with leave to renew.

This constitutes the decision and order of the Court.

Dated: March 24, 2008

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Howard G. Lane, J.S.C.