

<b>Mitchell v Hertz Vehs., LLC</b>
2007 NY Slip Op 31942(U)
July 2, 2007
Supreme Court, Richmond County
Docket Number: 0100135/2005
Judge: Philip G. Minardo
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

-----x **DCM Part 6**

**TERRY MITCHELL,**

**Present:**

**Plaintiff,**

**HON. PHILIP G. MINARDO**

**v.**

**HERTZ VEHICLES, LLC, and VIVIAN KUO,**

**DECISION and ORDER**

**Defendants.**

**Index No.: 100135/05**

-----x **Motion No.: 004**

The following papers numbered 1 to 2 were used on this motion on the 15<sup>th</sup> day of June, 2007:

	Papers Numbered
Notion of Motion.....	1
Affirmation in Opposition.....	2

Plaintiff Terry Mitchell seeks to renew and reargue the prior order of this court, dated February 8, 2007, granting the defendants summary judgment dismissing the complaint on the grounds that the injuries sustained by the plaintiff fail to meet the statutory threshold of serious injury as defined in Insurance Law §5102 (d).

On July 31, 2004, plaintiff's vehicle was struck by defendant Vivian Kuo's vehicle after it ran a stop sign at the intersection of Tompkins Avenue and St. John's Avenue, Staten Island, New York. As a result, plaintiff claims to have sustained "serious" personal injuries, i.e., " permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent nature which

prevented plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for more than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" (Plaintiff's February 3, 2006 Verified Bill of Particulars, para 23(d)). More specifically, plaintiff claims to have sustained, *inter alia*, "posterior bulging disc at L5-S1 right-sided radiculopathy confirmed by abnormal EMG results at the L5-S1 level; straightening of the cervical spine, and numbness and tingling in the right forearm, hand and fingers" (*id.*, para 6). Consequently, plaintiff missed approximately nine months of work immediately following the accident. On September 10, 2005, plaintiff re-injured her spine, right arm and right leg in a work-related accident.

On March 16, 2007, this court granted the defendants' motion for summary judgment and dismissed the plaintiff's action for failing to meet her burden demonstrating the existence of a triable issue of fact that she had suffered a causally related serious injury as a result of the 2004 accident. In opposition to the defendant's summary judgment motion, the plaintiff offered an affirmation of her treating chiropractor, Dr. Piazza, allegedly due to a secretarial oversight, and now offers this same report in affidavit form.

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 in the prior motion" (CPLR §2221 (e)(2) and (3)). In the interest of justice, a court may grant renewal upon facts known to the movant at the time of the original motion, however the movant must offer a reasonable excuse for his failure to submit the additional evidence on the original motion (Segall v. Heyer, 161 A.D.2d 471, 473 [1<sup>st</sup> Dept. 1990]). In support of her application to renew, the plaintiff merely submitted an affidavit

of a chiropractor (Dr. Piazza) which was identical to the prior affirmations submitted by the same witness in plaintiff's opposition papers (*see* Doumanis v. Conzo, 265 A.D.2d 296, 297 [2<sup>nd</sup> Dept. 1999]; Matter of Brooklyn Welding Corp. V. Chin, 236 A.D.2d 392 [2<sup>nd</sup> Dept. 1997]; Taylor v. Brooklyn Hosp., 187 A.D.2d 714 [2<sup>nd</sup> Dept. 1992]; Echeverri v. Flushing Hosp. & Med. Ctr., 123 A.D.2d 818 [2<sup>nd</sup> Dept. 1986]). Plaintiff's attorney submitted an affidavit of his secretary who admitted to mistakenly labeling the chiropractor's affidavit as an affirmation due to her unfamiliarity with legal requirements. Since this evidence was not newly discovered and this court finds plaintiff's explanation for her failure to submit a proper affidavit inadequate, plaintiff's motion for renewal is denied.

In support of plaintiff's motion to reargue, plaintiff alleges that this court overlooked matters of law and fact. Specifically, that the defendant has failed to meet its initial burden of establishing a *prima facie* case because (1) the defendant's physician conducted his examination of the plaintiff approximately two years after the date of the accident, (2) the defendant's physician does not address the issue of the ninety days during the first one hundred and eighty days category of non-permanent injury or impairment which prevents the individual from performing substantially all of the person's usual and customary daily activities. In opposition, the defendant alleges that the plaintiff's motion to reargue does not comply with CPLR §2221 (d)(2) and applicable case law because matters of fact or law have not been overlooked or misapprehended by the Court in determining the prior motion.

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)). The plaintiff contends

the defendant's motion papers did not adequately address plaintiff's claim, as clearly set forth in her bill of particulars, that she sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary activities for not less than 90 days during the 180 days immediately following the accident (Thai v. Butt, 34 A.D.3d 447, 448 [2<sup>nd</sup> Dept. 2006]). The court overlooked this matter when it was clear from the plaintiff's deposition that she missed approximately nine months of work, she experienced pain from the neck down to the waist, was unable to perform household tasks i.e. cleaning, laundry, food-shopping and vacuuming, and was unable to engage in social activities such as shopping and going to the movies. Therefore, the plaintiff argues since the defendants failed to meet their initial burden of establishing a *prima facie* case, it is unnecessary to consider where plaintiff's papers submitted in opposition to the defendants' motion were sufficient to raise a triable issue of fact (D'Onofrio v. Arsenault, 35 A.D.3d 646, 647 [2<sup>nd</sup> Dept. 2006]).

Accordingly, it is

**ORDERED** that the plaintiff's motion to renew this court's decision granting the defendants' motion for summary judgment is denied; and it is further

**ORDERED** that plaintiff's motion to reargue this court's order granting defendant's motion for summary judgment is granted. Upon re-argument, and after reconsideration, this court hereby vacates its prior order dated February 8, 2007 and denies the defendants motion for summary judgment for defendant's failure to meet their initial burden of establishing a *prima facie* case of plaintiff's lack of a serious injury.

This shall constitute the decision and order of the court.

E N T E R,

Dated: July 2, 2007

s/ Philip G. Minardo  
Justice of the Supreme Court