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SHORT FORM ORDER

INDEX No. 06-34164
CAL No. 09-01453OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 12-22-10
ADJ. DATE 1-5-11
Mot. Seq. # 005 - MotD

ANTHONY PERSICO,	:	LITE & RUSSELL, ESQS.
	:	Attorney for Plaintiff
Plaintiff,	:	212 Higbie Lane
	:	West Islip, New York 11795
- against -	:	
	:	JONES GARNEAU, LLP
95 INC.,	:	Attorney for Defendant
	:	670 White Plains Road
Defendant.	:	Scarsdale, New York 10583

Upon the following papers numbered 1 to 9 read on this motion to renew and reargue : Notice of Motion/ Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5 - 7 ; Replying Affidavits and supporting papers 8 - 9 ; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (005) by defendant pursuant to CPLR 2221(d) for leave to reargue and renew its prior motion which resulted in the Order of this Court dated June 9, 2010 (Spinner, J.), which denied defendant's motion for partial summary judgment, is granted, and upon reargument and renewal, the motion is denied.

In the instant action plaintiff seeks to recover damages for injuries he allegedly sustained on November 9, 2005, while cleaning auto parts with a cleaner supplied by defendant 95 Inc. during the course of his employment as an automotive teacher at Eastern Suffolk BOCES School in Oakdale, New York. The record reveals that three types of cleaners were used in the auto shop. The first cleaner was a kerosene base called Naptha which was kept in a red thirty-gallon drum with a pump. The second cleaner was a water based aqueous solution stored in a blue three to four gallon container on a rolling cart. The third cleaner was an immersion cleaner called Oakite which was kept in a sealed red drum and

contained approximately 15 gallons. Each cleaner could be identified by its container. Rick DiVuittono, the general manager of 95 Inc., a waste transporting company, stated in his deposition that he was aware that one of the drivers, John Winder, placed the wrong cleaner in the aqueous machine on or before the date of the exposure. He further stated that the company returned to the site to clean the affected area.

In the bill of particulars, plaintiff alleges that his injuries were caused by his exposure and contact with acid-based chemicals and/or other chemicals and/or fumes. Plaintiff further alleges that he sustained the following injuries: airway inflammation, pain in his middle back, coughing, blood tinged sputum, chronic chemical conjunctivitis, irritated and burning eyes, a growth under his left lower eyelid, dry eye syndrome, burning sensation from the throat to the ears, and nerve damage to both hands. Plaintiff also alleges that he "is now highly susceptible to all kinds of irritants." In the second further supplemental bill of particulars, dated February 12, 2010, plaintiff alleges that he suffers from reactive airway dysfunction syndrome as a result of the exposure on November 9, 2005.

The defendant moved for partial summary judgment dismissing the allegation that the plaintiff "is now highly susceptible to all kinds of irritants". In an order dated June 9, 2010 (Spinner, J.), this Court denied the motion as untimely. In addition, the Court deemed the supplemental bill of particulars to be an amended bill and directed plaintiff to appear at an independent medical examination and a deposition on the newly alleged injury.

The defendant now moves to reargue and renew the prior motion.

A motion for reargument addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (CPLR 2221[d]). The purpose is not to permit the unsuccessful party to reargue the very questions previously decided (***Fosdick v Hempstead***, 126 NY 651, 1891 NY LEXIS 1714 [1891]; ***Foley v Roche***, 68 AD2d 558, 418 NYS2d 588 [1979]). Defendant contends that its prior motion for partial summary judgment was timely, inasmuch as the 120th day after the filing of the note of issue fell on a Saturday and the motion was served on the following Monday. Defendant's contention is correct, and, thus, the motion to reargue is granted.

Upon reargument, defendant's motion for partial summary judgment is denied. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see*, ***Zuckerman v New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404, 165 NYS2d 498 [1950]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Greenberg v Manlon Realty***, 43 AD2d 968, 969, 352 NYS2d 494 [1974]). Upon reargument, defendant contends that plaintiff's claim in the bill of particulars that he "is now highly susceptible to all kinds of irritants" amounts to multiple chemical sensitivity, an unrecognized entity in the general medical community. Therefore, according to defendant, the allegation should be dismissed.

In support of the motion, defendant submits, *inter alia*, the pleadings, the bill of particulars, the supplemental bill of particulars, the second supplemental bill of particulars, the plaintiff's deposition testimony, a copy of the prior order, and the affidavit of Howard M. Sandler, M.D.

Plaintiff testified in his deposition that the above-mentioned cleaning solutions were regularly changed by defendant on a monthly basis. He believed that all of the units had just been serviced on the day of the incident. Defendant's employee driver would take the drums out to the delivery truck and bring in a new drum. Plaintiff stated that he had not witnessed the deliveries, which have usually taken place at times when class is not in session. Plaintiff stated that his injury occurred at approximately 2:00 p.m. on November 9, 2005. He placed auto parts into the soap and water solution and immediately noticed the tips of his fingers were tingling and starting to burn. Then he noticed a strong smell. His eyes and throat also started burning and he felt chest congestion and began coughing. He immediately ran to the sink and began rinsing his arms, face and eyes. He recalled wearing safety glasses, but inasmuch as he was using what he thought was warm soapy water, he did not use rubber gloves. He went to Stony Brook University Medical Center emergency room for treatment. However, the staff there could not treat his exposure because they did not have a material data safety sheet that identified the chemical. To this day, his finger tips and his face are very sensitive to changes in heat and cold. In certain situations, his nasal passages, eye lids and chest burn as they did on the date of the incident.

Dr. Sandler avers that he is duly licensed to practice medicine in the State of Maryland and that his specialty is occupational and environmental medicine. The Court accepts this expert's statement inasmuch as it was submitted in affidavit form (CPLR 2106). Dr. Sandler opines that he conducted an independent medical examination on October 14, 2008. Dr. Sandler opines that although plaintiff did not use the specific term "multiple chemical sensitivity" or "MCS," the type of plaintiff's complaints, the continuing nature of his symptoms, reported reactions to myriad incidents and plaintiff's allegation in the bill of particulars that he suffers from a "high susceptibility to all kinds of irritants" all are consistent with the unrecognized entity referred to as MCS.

MCS is the hypothesis that exposure to all types of chemicals can produce a future "sensitivity" to chemicals, foods, and even electromagnetic fields. He states that MCS is not a generally accepted medical entity and has not been shown to be a chemically related health outcome. He further states that plaintiff's "susceptibility to all kinds of irritants" cannot be shown to be causally related to the alleged November 9, 2005 incident which forms the basis of this lawsuit.

The Court finds that defendant has failed to demonstrate its prima facie entitlement to judgment as a matter of law (***Zuckerman v New York***, *supra*). Nowhere in the bill of particulars does plaintiff allege that he sustained MCS. In any event, plaintiff has not designated an expert who would testify on the subject. Accordingly, the defendant's motion for partial summary judgment is denied.

Turning to the renewal portion of the motion, it is well settled that a motion for leave to renew must be supported by new or additional facts which, although in existence at the time of the prior motion, were not known to the party seeking renewal, and consequently, not made known to the court (*see*, CPLR 2221[e]; ***Rappaport v North Shore Univ. Hosp.***, 60 AD3d 1029, 876 NYS2d 125 [2d

Dept 2009]; ***Chunqi Liu v Wong***, 46 AD3d 735, 849 NYS2d 84 [2d Dept 2007]). Defendant asserts that new facts have arisen from plaintiff's deposition which demonstrate that he was not diagnosed with RADS prior to the time of the original motion for partial summary judgment. Inasmuch as the Court granted additional discovery in the prior order, renewal is granted.

Upon renewal, defendant's motion for summary judgment dismissing the complaint is denied. Counsel for defendant affirms that upon conducting plaintiff's further deposition regarding his new allegation that he suffers from reactive airway dysfunction syndrome ("RADS"), that plaintiff denied receiving treatment for any respiratory problems. In support, defendant submits, *inter alia*, a new affidavit by Dr. Sandler and plaintiff's deposition.

In lieu of a recent medical examination, Dr. Sandler avers that plaintiff's alleged incident, ensuing clinical complaints, diagnosis and treatment, and evaluation do not meet the criteria necessary to establish the diagnosis of RADS related to the November 9, 2005 chemical event. He states that there was no qualifying exposure. He refers to the Stony Brook Hospital emergency room record and notes that there were no respiratory complaints or any onset of asthmatic symptoms within 24 hours of the event. In addition, two pulmonary function tests from February and May 2007 showed normal pulmonary function. Dr. Sandler relies upon the examination he conducted on December 10, 2008, and opines that plaintiff's history of gastro-esophageal reflux disease and sinusitis are causing his symptoms.

Plaintiff testified at his deposition on August 10, 2010, that he had not been diagnosed with asthma or bronchitis, and that he underwent pulmonary function tests. In general, plaintiff did not recall what treatment was provided to him for the subject chemical exposure. The Court notes, however, that plaintiff is not qualified to render medical opinions, and finds that his testimony is not probative on the issue regarding whether he was diagnosed with RADS (*see*, ***Armstrong v Wolfe***, 133 AD2d 957, 520 NYS2d 466 [3d Dept 1987]).

Defendant has demonstrated, *prima facie*, its entitlement to judgment as a matter of law that plaintiff did not suffer from RADS (*see*, ***Zuckerman v New York***, *supra*). In opposition, plaintiff submits sworn reports by Carl B. Friedman, M.D., John Folan, M.D., L. Cocchiarella, M.D., and Sidney Martin, M.D. Dr. Friedman states in a report dated December 18, 2009, that plaintiff suffered from mild reactive airway dysfunction syndrome. He opines that plaintiff's exposure on November 9, 2005 may have been the initiating inhalation exposure that caused his airway inflammation resulting in RADS, which is supported by pulmonary function testing. Dr. Cocchiarella states in her affirmed report dated February 17, 2010, that she has treated plaintiff since his exposure at work on November 9, 2005, for respiratory work-related problems including a chronic cough, most likely due to RADS, as well as pharyngitis and vasomotor rhinitis. Dr. Folan states in his affirmation dated February 19, 2010, that he has treated plaintiff's recurrent allergic type reactions since his initial toxic exposure on November 9, 2005. He diagnosed plaintiff as having sustained RADS. In addition, Sidney Martin, M.D., in his affirmation dated February 17, 2010, stated that he treated plaintiff subsequent to his inhalation and ingestion of a toxic chemical on November 9, 2005. He observed plaintiff suffer subsequent recurrent allergic type reactions when exposed to certain contaminants in the air since his incident. Dr. Martin has treated plaintiff for these symptoms which, he states, are causally related to the initial toxic exposure.

He opines plaintiff's symptoms are properly diagnosed as some form or manifestation of the condition known as reactive airway dysfunction syndrome.

Therefore, in view of the foregoing, issues of credibility exist which cannot be determined on a motion for summary judgment (***Combs v Freeport***, 139 AD2d 688, 527 NYS2d 443 [2d Dept 1988]; ***S.J. Capelin Associates, Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]; ***Zulferino v State Farm Auto. Ins. Co.***,123 AD2d 432, 506 NYS2d 736 [2d Dept 1986]).

Dated: MAR 16 2011

J.S.C.
HON. JEFFREY ARLEN SPINNER

__FINAL DISPOSITION __X__NON-FINAL DISPOSITION