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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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SVETLANA V. LOVERDE, STEVEN LOVERDE, and ANASTASIA BERESTOVA,

Plaintiff(s),

Index No. 50/10

Motion Submitted: 3/14/12
Motion Sequence: 003

-against-

DANISH A. GILL and TIRIQ MAHMUD,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Plaintiff Berestova moves this Court for an Order granting leave to renew her opposition to defendants' cross-motion for summary judgment, which was granted by Decision and Order of this Court dated September 30, 2011. Should this Court grant plaintiff Berestova's renewal motion, plaintiff seeks an Order denying defendants' cross-motion for summary judgment. Defendants oppose the requested relief.

This action arises out of a motor vehicle accident that occurred on December 19, 2008, at approximately 2:36 p.m., at the intersection of Post Avenue and Stone Hill Road in Nassau County, New York. At the time of the accident, plaintiff Svetlana Loverde was traveling northbound on Post Avenue through a green traffic light controlling the intersection when the Gill vehicle, traveling west on Stone Hill Road, admittedly slid westbound into the intersection controlled by a red traffic light. Plaintiff, Anastasia Berestova, was a passenger in the car being operated by her mother, Svetlana Loverde.

CPLR § 2221(e) provides in pertinent part that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion."

The Court also recognizes that it has the discretion to grant renewal upon facts known to the movant at the time of the original motion (***Huma v. Patel***, 68 A.D.3d 821, 822, 890 N.Y.S.2d 639 [2d Dept., 2009]). Nonetheless, a motion for leave to renew is "not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (*see* ***Sobin v. Tylutki***, 59 A.D.3d 701, 702, 873 N.Y.S.2d 743 (2d Dept., 2009), *quoting* ***Rubinstein v. Goldman***, 225 A.D.2d 328, 329, 638 N.Y.S.2d 469 (1st Dept., 1996); *see also* ***Renna v. Gullo***, 19 A.D.3d 472, 473, 797 N.Y.S.2d 115 [2d Dept., 2005]).

In this case, the Court issued a Certification Order on February 17, 2011. The Note of Issue was filed on March 9, 2011. Defendants' cross-motion for summary judgment concerning the serious injury threshold requirement of Insurance Law § 5102(d) as it pertains to Berestova was made in April 2011. The motion was returnable May 20, 2011. Thereafter, the motion was adjourned four times until it was fully submitted to the Court on August 1, 2011. The Court's Decision and Order granting defendants' cross-motion for summary judgment is dated September 30, 2011.

The "new facts" offered upon the instant renewal motion are contained in the affirmation of J.R. Alluri, M.D., which affirmation is dated December 15, 2011. The instant motion was served on January 23, 2012.

According to Dr. Alluri's affirmation, he/she is a physician licensed to practice medicine in New York. Dr. Alluri does not state what, if any, medical specialty he/she practices. In any event, according to the affirmation, he/she treated Berestova for five months, from January 22, 2009 until May 3, 2009. Dr. Alluri does not state how he/she treated Berestova, but affirms, *inter alia*, that he/she examined her on at least four occasions during the aforementioned time period.

Plaintiff Berestova now claims that Dr. Alluri's affirmation was "not available" at the time the opposition to defendants' cross-motion was submitted to this Court for consideration.

It is undisputed that Dr. Alluri's treatment of Berestova commenced and ceased in the first half of 2009. This action was not commenced until 2010. Thus, all of the information that Dr. Alluri had to offer regarding Berestova's treatment was available at the time Berestova opposed the original cross-motion in 2011.

Plaintiff's attempt to provide reasonable justification for the failure to present the affirmation on the prior motion is insufficient. Specifically, plaintiff's counsel avers that he "prepared the affirmation on Dr. Alluri's behalf for submission in opposition to the cross-motion, however, despite repeated pleas from my office, Dr. Alluri failed to return an original signed affirmation on a timely basis so that the affirmation could be submitted with the opposition submitted."

Aside from this bare statement, plaintiff's counsel has not stated when the affirmation was prepared and sent to Dr. Alluri, nor has counsel even enumerated when and how the "repeated pleas" were made to Dr. Alluri. There is also no correspondence provided, in any form, regarding the "repeated pleas."

Dr. Alluri's office is located in Queens County, New York, and counsel's office is located in Suffolk County, New York. The distance between their respective offices is hardly insurmountable, especially in light of the fact that this action is brought in Nassau County, which is contiguous to each of those two counties.

Thus, the Court has determined that plaintiff has failed to offer a reasonable justification for her failure to present the evidence offered in support of renewal, in her opposition to defendants' original cross-motion for summary judgment (***Abrams v. Berelson***, 2012 N.Y. Slip Op. 2618, 2012 N.Y. App. Div. LEXIS 2637 (2d Dept., 2012); ***Burgos v. Rateb***, 64 A.D.3d 530, 883 N.Y.S.2d 115 (2d Dept., 2009); ***Savin v. Brooklyn Marine Park Development Corp.***, 61 A.D.3d 954, 878 N.Y.S.2d 178 (2d Dept., 2009); ***Lardo v. Rivlab Transportation Corp.***, 46 A.D.3d 759, 848 N.Y.S.2d 337 (2d Dept., 2007); ***Beyl v. Franchini***, 37 A.D.3d 505, 829 N.Y.S.2d 699 (2d Dept., 2007); ***Donnelly v. Kurlander***, 220 A.D.2d 716, 633 N.Y.S.2d 342 [2d Dept., 1995]).

Accordingly, plaintiff's motion for leave to renew is denied.

In any event, even if plaintiff Berestova had demonstrated the requisite reasonable justification, denial of the motion is warranted because the allegedly new facts offered would not have changed the prior determination.

Dr. Alluri's affirmation dated December 15, 2011 does not raise any triable issue of fact. The affirmation fails to set forth what objective testing was used to determine Berestova's alleged restrictions of motion in her cervical and lumbar spine areas. In fact, Dr. Alluri does not even set forth range of motion measurements at all; yet, he/she makes the statement that, "[Berestova's] cervical and lumbar spine is not functioning normally and has

resulted in a very significant limitation of her cervical and lumbar function."[1] Dr. Alluri also alludes to having conducted "standard orthopedic testing," but fails to set forth precisely what testing was performed. When Dr. Alluri states that he/she conducted the Straight Leg Raising test and obtained degree measurements for Berestova, Dr. Alluri fails to compare the measurements obtained to "normal." Thus, the Court would be forced to speculate as to the meaning of Dr. Alluri's findings.

Failure to indicate which objective test was performed to measure the loss of range of motion is contrary to the requirements of ***Toure v. Avis Rent a Car Systems*** (98 N.Y.2d 345, 353, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002]). It renders the expert's opinion as to any purported loss insufficient, and the Court can not consider such (***Id.***; ***Powell v. Alade***, 31 A.D.3d 523, 818 N.Y.S.2d 600 [2d Dept., 2006]).

For all the foregoing reasons, Dr. Alluri's affirmation does not constitute competent evidence, and will not be considered by this Court. Thus, the "new facts" offered in Dr. Alluri's affirmation do not raise a triable issue of fact as to Berestova's claim that she sustained a serious injury within the meaning of the Insurance Law, and they would not have changed the prior determination of this Court. On this basis as well, Berestova's renewal motion is denied.

Accordingly, the court adheres to its original determinations contained in its Decision and Order dated September 30, 2011, and plaintiff Berestova's motion to renew is denied in its entirety.

The foregoing constitutes the Order of this Court.

Dated: May 1, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.

[1]Paragraphs 8, 12, 16, 21, and 26 of Dr. Alluri's affirmation.