SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA23A

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Catherine Curtis,

Index No.: 21058/2011E

Plaintiff,

Decision and Order

-against-

JFT Corporation and Fernando Lopez,

Defendants.

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HON. ALEXANDER W. HUNTER, JR.

The motion by plaintiff for an order granting a preference for trial pursuant to C.P.L.R. §3403(a)(3) on the ground that plaintiff is indigent, is denied. The cross-motion by defendants for an order compelling plaintiff to submit to an examination by a vocational rehabilitation expert is also denied.

The cause of action is for personal injuries sustained by plaintiff in a rear-end collision that occurred on April 17, 2009. Plaintiff asserts that she was driving her vehicle on the "on-ramp" to the Cross Bronx Expressway at Webster Avenue in Bronx County. She was stopped in traffic and was struck in the rear by a vehicle operated by defendant Fernando Lopez and owned by defendant JFT Corporation.

Plaintiff asserts that the injuries she suffered in the subject accident required multiple surgeries and forced her to leave her job as a medical technician. A previous summary judgment motion filed by plaintiff on the issue of liability was granted by this court in a decision and order dated February 24, 2012. Plaintiff now moves for trial preference in the interests of justice pursuant to C.P.L.R. §3403(a)(3).

Plaintiff contends that the trial court has discretion to grant a plaintiff trial preference in the interests of justice, such as when a plaintiff faces financial hardship. Plaintiff herein asserts that she is a widow with two (2) thirteen year-old girls. Prior to the accident, plaintiff was working as a medical technician earning $27,000.00 per year. She is currently "jobless." Plaintiff has exhausted her no-fault benefits and is unable to work or afford medical insurance. She was required to undergo an in-patient surgical procedure without the benefit of insurance and is now faced with approximately $175,000.00 in outstanding medical bills, many of which are now in collections. Plaintiff annexes copies of her medical bills to the moving papers as Exhibit E. Plaintiff contends that she is unable to afford further medical treatment that is necessary for her knee and back, such as physical therapy. Plaintiff further asserts that in order for her to avoid the need to declare bankruptcy, she has negotiated monthly installment payments. However, the monthly installments are forcing her to incur debt that exceeds her income. As such, she requires a prompt resolution of this matter so that she will not have to depend on public social services.

Plaintiff itemizes a list of her fixed monthly expenses as follows: rent - $842.00; medical bills - $450.00; car payment - $587.00; , car insurance - $462.00; cell phones for her and her children - $242.00; health insurance for her children - $60.00; groceries - $900.00; pharmacy expenses - $150.00; her daughters' hair - $200.00; her mother's hair - $150.00; her daughters'

clothing and other expenses - $200.00. The total amount of her fixed monthly expenses is $4,255.00. As a result of her husband's death, plaintiff receives social security survivor benefits in the amount of $1,377.00 per month for herself and her two children, for a monthly total of $4,131.00. Plaintiff avers that her monthly expenses exceed her monthly income by $124.00 mostly due to the medical bills she has incurred as a result of the subject accident. Moreover, plaintiff has outstanding revolving credit card debt in the amount of $1,100.00 which will increase if she is forced to rely on her credit cards to meet her monthly needs. (Exhibit F). Accordingly, plaintiff requests a trial preference.

Defendants oppose the motion for trial preference and cross-move to compel plaintiff to submit to an examination to be conducted by a vocational rehabilitation expert on behalf of the defendant.

Defendants assert that plaintiff's request for trial preference should be denied. First, defendants argue that the motion is untimely as plaintiff filed her Note of Issue with the Bronx County Clerk on April 11, 2012 and the Notice of Motion is dated April 20, 2012.

Defendants next cite to case law which has established that if the plaintiff is able to establish that he or she is indigent, is on the welfare rolls, has completely exhausted his or her savings, has no income and no family member to offer financial assistance, a preference is appropriate. Defendants argue that it is incumbent upon plaintiff to demonstrate indigency and an inability to work caused by injuries sustained in the accident and that same requires more than a self-serving affidavit prepared by plaintiff's counsel and signed by plaintiff. Defendants assert that the "most glaring" insufficiency in plaintiff's moving papers is the absence of an affidavit from a physician providing an opinion that plaintiff is unable to work. Without such an affidavit, defendants argue that it would be an abuse of this court's discretion to grant the motion.

Defendants further contend that plaintiff's self-serving affidavit cannot make up for the failure to submit medical proof establishing an inability to work. Moreover, the only reference to employment which plaintiff makes in her affidavit is in paragraph 7 wherein she states that she had been employed as a medical technician and because of the accident, she is unable to stand or walk for significant periods of time. However, defendants assert that the affidavit does not state that plaintiff is unable to hold any job at all which, in an of itself, is a sufficient basis to deny the motion.

Next, defendants argue that plaintiff's affidavit is misleading in that it omits several facts. Specifically, plaintiff claims that she is the mother of two (2) 13 year-old daughters but she has two (2) other adult children and "it is quite likely" that one or both of them provide financial assistance. Moreover, plaintiff claims that she spends $150.00 per month on her mother's hair but it is unknown if her mother resides with her and contributes in any way to plaintiff's income.

Finally, defendants point out that several of plaintiff's monthly expenses as listed by her are "questionable." First, plaintiff asserts that her car payment is $587.00 for a Toyota Camry but defendants argue that there are many less expensive and used cars that plaintiff could have obtained at a lower cost. Defendants take issue with the total amount of $242.00 per month plaintiff pays for cell phones for her and her children, hair expenses for her daughters totaling $200.00 per month and hair expenses for plaintiff's mother totaling $150.00 per month. Defendants argue that eliminating one of those expenses would eliminate plaintiff's monthly shortfall.

Defendants further cross-move for an order compelling plaintiff to submit to an examination by a vocational rehabilitation expert on behalf of defendants. Defendants argue that at plaintiff's deposition, she testified that she was unable to perform her duties as a medical assistant at St. John's Hospital from the date of the accident until April, 2010. She returned to work in April 2010 but had to stop working two (2) months later because of recurring and worsening pain in her left knee and has not returned to work since then. Plaintiff also testified that her primary care physician told her she could not return to work because she was unstable on her feet. Defendants cite to several cases wherein courts determined that defendants were entitled to have plaintiff appear for a vocational rehabilitation examination and they contend that plaintiff's testimony at her deposition mandate that a vocational rehabilitation examination be conducted by defendants.

In reply, plaintiff asserts that defendants offer no reason to deny her application for a special preference. Plaintiff contends that her medical bills alone, which total $175,000.00, are reason enough to grant the instant application. Plaintiff further asserts that the cross-motion to compel her to submit to an examination by a vocational rehabilitation expert must be denied because the request is "grossly untimely"and in violation of the court's preliminary and compliance conference orders. Plaintiff refers to the compliance conference order which states that any physical examination by an expert of defendant's choosing was to be completed within 60 days of the plaintiff's deposition. Defendant's failed to do so. Moreover, the Note of Issue was already filed and defendants have not moved to vacate same even though they had 20 days to do so.

Additionally, plaintiff, in reply, avers that it is improper for defendants to request a physical exam at this late date when defendants have failed to attach the requisite Affirmation of Good Faith. Plaintiff asserts that defendants' motion is in violation of 22 NYCRR §202.7 and the failure to have attached the affirmation of good faith is fatal to defendants' application. Plaintiff cites to case law wherein the Appellate Division, First Department affirmed a trial court's denial of a motion to compel discovery where the movant failed to attach an affirmation of good faith. Thus, plaintiff asserts that the cross-motion to compel defendant to submit to an examination by a vocational rehabilitation expert should be denied.

C.P.L.R. §3403(a)(3), states, "...the following shall be entitled to a preference...an action in which the interest of justice will be served by an early trial. It has been determined that the granting of trial preference in the interests of justice is within the court's discretion. **Wolf v. Wolf, 232 A.D.2d 330 (1st Dept. 1996)**. Moreover, it has been established that trial preference, "...is never to be lightly granted, for the granting of a preference represents a favoring of one case over the many other cases awaiting trial on a calendar heavy with accident jury cases..." (citations omitted). **Dodumoff v. Lyons, 4 A.D. 2d 626 (1st Dept. 1957)**.

Trial preference has been granted to a plaintiff who demonstrates that he/she is indigent and unable to work. **Thompson v. City of New York, 140 A.D.2d 232 (1st Dept. 1988)**. In **Thompson**, the Appellate Division reversed an order from the trial court denying plaintiff trial preference. **Id.** The Appellate Division, held that trial preference should have been granted to the plaintiff who was gainfully employed until the day of her accident, she had exhausted all of her "no fault" benefits and was on welfare. In **Patterson v. Anderson Ave. Associates, 242 A.D.2d 430 (1st Dept. 1997)**, the Appellate Division also reversed an order of the trial court denying plaintiff trial preference in the interests of justice. Plaintiff was seriously injured, unable to work and was the single parent of four children ages four (4) to twelve (12) and was receiving approximately $1,000 per month in Social Security disability benefits.

In **Sabater v. New York City Transit Authority, 102 A.D.2d 804 (1st Dept. 1984)**, the Appellate Division held that plaintiff's application for special preference should have been granted where plaintiff who had been self-employed, suffered the loss of his left leg after being struck by a subway train and five (5) months later, became destitute, was unable to work and became a recipient of public assistance. **See also, Kellman v. 45 Tiemann Associates, 213 A.D.2d 151 (1st Dept. 1995)**, where the court held that it was not an abuse of the court's discretion to grant plaintiff a trial preference where plaintiff was rendered paraplegic as a result of the accident at defendant's premises and was receiving Social Security disability benefits to help meet her financial needs.

In the case at bar, plaintiff claims that she is no longer able to work as a medical technician due to her inability to stand or walk for significant periods of time. However, unlike the plaintiff in the cases previously cited, plaintiff herein does not aver that she is unable to work at any job. She does not submit any medical documentation to support her claim that she cannot work at any job, even a sedentary one, due to the injuries she sustained in the subject accident. Moreover, she receives monthly income in the amount of $4,131.00 to support herself and her two daughters. Although she has a shortfall of approximately $124.00 mostly due to having to pay medical bills incurred in the accident, she is not destitute. She is not a recipient of public assistance or food stamps and based upon her monthly income and her monthly expenses, this court does not find that plaintiff has met her burden of establishing her right to a special preference. Accordingly, the motion for a special preference is denied.

Likewise, defendants' cross-motion to compel plaintiff to submit to an examination by a vocational rehabilitation expert, is denied as untimely. Plaintiff's examination before trial took place on or about March 30, 2012. Pursuant to the compliance conference order issued by Judge Laura Douglas, defendants were to have designated a physician in writing within thirty (30) days after plaintiff's examination before trial. Moreover, the physical examination was ordered to be held within sixty (60) days after plaintiff's examination before trial. Defendants failed to timely designate a physician and direct that plaintiff undergo a physical examination within the time frame ordered by Judge Douglas. Furthermore, plaintiff filed her Note of Issue on or about April 11, 2012 and defendants failed to move to vacate the Note of Issue.

Finally, as plaintiff points out, defendants failed to annex an Affirmation of Good Faith in accordance with 22 NYCRR §202.7 which requires that a motion relating to disclosure shall be accompanied by, "...an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." Courts have routinely denied motions to compel discovery without such an affirmation of good faith. **Pezhman v. Department of Education of the City of New York, 79 A.D.3d 543 (1st Dept. 2010)**. Accordingly, defendants' cross-motion is denied.

This constitutes the decision and order of this court.

Dated: August 10, 2012

J.S.C.
ALEXANDER W. HUNTER JR