Espinal v Martin
2014 NY Slip Op 30471(U)
February 27, 2014
Sup Ct, New York County
Docket Number: 100308/11
Judge: Arlene P. Bluth

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH Justice PART 22

Index Number : 100308/2011
ESPINAL, JULIANA
vs.
MARTIN, HIDALGO
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to 3, were read on this motion to/for RR

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1
Answering Affidavits — Exhibits | No(s). 2
Replying Affidavits | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

MAR 03 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/27/14

HON. ARLENE P. BLUTH, J.S.C.

1. CHECK ONE: ..... X CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.: 100308/11
Motion Seq. 03

Juliana Espinal,

Plaintiff,

-against-

Hidalgo Martin and Laureano Castillo,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Hidalgo Martin and Laureano Castillo,

Third-party plaintiffs,

-against-

Pedro Vasquez,

Third-party defendant.

Plaintiff moves for leave to renew and reargue this Court's May 30, 2013 decision and order which granted defendants/third-party plaintiffs' motion for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d). For the following reasons, leave to renew and reargue are granted, and upon renewal and reargument the Court adheres to its original decision; case dismissed.

In this action, plaintiff alleges that on May 8, 2010 she sustained personal injuries when she was a passenger in a vehicle owned and operated by her husband, the third-party defendant, which was hit in the rear by the vehicle owned by defendant Hidalgo and operated by defendant Castillo.

Plaintiff does not take issue with the basic law regarding serious injury motions as set forth in the original decision. That is, the defendant has the initial burden of presenting competent evidence showing that the plaintiff has not suffered a "serious injury". Assuming that

burden is fulfilled, then the burden shifts to plaintiff to demonstrate, also by presenting competent evidence, that a triable issue of fact exists as to whether he or she sustained a serious injury. (See original decision for citations related to the foregoing law.)

The scope of the injuries is limited to what is contained in the bill of particulars (and any amendments or supplements). In this case, the verified bill of particulars claims injuries to three body parts - plaintiff's right wrist and cervical and lumbar spine. Specifically, she claimed disc herniations at C3-4, C4-5 and L5-S1, disc bulges at C5-6 and C6-7, cervical radiculopathy and nerve entrapment due to carpal tunnel syndrome in her right wrist (exh D to moving papers, para. 11).

The Underlying Motion

Defendants, through the affirmed reports of Dr. Desrouleaux, a neurologist, and Dr. Nason, an orthopedist, stated that plaintiff had a normal examination within their specialty and full ranges of motion in her cervical and lumbar spine and right wrist. Additionally, defendants submitted the affirmed reports of Dr. Fisher, a radiologist, who reviewed MRIs of plaintiff's cervical and lumbar spine. He described degenerative changes in both areas, but found no evidence of a traumatic injury casually related to a motor vehicle accident. Finally, defendants cited to plaintiff's deposition testimony (exh H, T at 66-67) wherein she testified that she was confined to her bed for several days and confined to her home for less than two weeks. The Court held that defendants made their prima facie case on their motion and the burden shifted to plaintiff to oppose. After considering the opposition, the Court granted the motion because plaintiff did not submit admissible evidence in opposition (as argued by defendants in their reply

to the underlying motion) and thus did not raise a triable issue of fact.

The Instant Motion

Plaintiff argues that contrary to the Court's May 30, 2013 decision and order, the evidence submitted was admissible. Specifically, (1) the two sets of hospital records were admissible and (2) the records of Dr. Rozbruch, Dr. Rosenbaum and the chiropractor were admissible. In addition, presumably for renewal, plaintiff submits a new affirmation from Dr. Rosenbaum and wants the Court to consider it. After defendants, in their opposition, challenged the admissibility of this new "affirmation", plaintiff submitted what she claims is a purported cure in the reply. These arguments will be addressed in seriatim.

Hospital Records

The plaintiff is correct and the Court erred in not considering the May 8, 2010 emergency room records of New York-Presbyterian Hospital (opp., exh C) and the May 11, 2010 certified records of Holy Name Medical Center (opp., exh D). They are admissible as proof of contemporaneous examinations and support plaintiff's claim of causation. They do not, however, address the issue of serious injury as those records do not show, for example, a fracture, death or loss of a fetus.

Records of Medical Providers

The Court was correct in finding that the records of the other medical providers were not admissible.

Dr. Rozbruch did not submit an affirmed narrative report. Instead, he affirmed a

"Records Certification" (exh E); this did not make his office records admissible. (These records consist of notes, in several different handwritings, on East 72nd Street Orthopaedic Surgery Specialists, P.C. letterhead, an unaffirmed report of a radiologist and Dr. Rozbruch's dictated, but unsigned operative report from 2004, six years before this accident). Exhibit E was not and is not admissible for at least two reasons. First, "(o)nly hospital records, and not physician office records, are admissible by certification (see CPLR 4518 [c]; 2306 [a]; Matter of Damon J., 144 AD2d 467 [1988])." *Bronstein-Becher v. Becher* 25 A.D.3d 796, 809 NYS2d 140 (2d Dept 2006). Second, this document is not a medical affirmation because he did not indicate that the content of the statements contained therein were true and accurate pursuant to the penalties of perjury. *See Niazov v Corleon Cab Corp.*, 71 AD3d 749, 899 NYS2d 242 (2d Dept 2010). Dr. Rozbruch affirmed only that (1) he is the owner of the medical office of Jacob Rozbruch, M.D. located at 420 East 72nd Street, (2) the medical records which were attached pertained to plaintiff, and (3) the exhibit contained "true and accurate copies of the complete medical records of [plaintiff] made and kept in the regular course of business". Thus, the Court properly found that said records were inadmissible. Besides, even if they were admissible, there is no affirmed medical diagnosis, report or opinion which referenced the records; certainly it is not the Court's role to scrutinize assorted records, independently determine what those medical records mean and that they present an issue of fact.

The Court also properly determined that the records of plaintiff's chiropractor, David Podell, (exh F) were inadmissible by his certification. As stated previously, only hospital records, and not physician office records, are admissible by certification. Moreover, David Podell is not a physician; and because a chiropractor cannot affirm pursuant to CPLR 2106, he/she must submit an affidavit. Even if he were a NY chiropractor (he lists his office in New

Jersey), he would still need to set forth his findings in an affidavit. *See Shinn v Catanzaro*, 1 AD3d 195 (1st Dept 2003); *Sanchez v Romano*, 292 AD2d 202, 203 (1st Dept 2002). For all these reasons, the Court properly determined that the records of plaintiff's chiropractor (exh F) were inadmissible.

Finally, the Court did not err in not considering Dr. Rosenbaum's October 27, 2010 report and records (exh H). As stated previously, only hospital records, and not physician office records, are admissible by certification. All Dr. Rosenbaum stated in the "Records Certification" dated December 7, 2012 was that (1) he is a neurologist at Allied Neurology in Englewood, New Jersey, (2) the medical records which were attached pertained to plaintiff and (3) the exhibit contained "true and accurate copies of the complete medical records of [plaintiff] made and kept in the regular course of business". Dr. Rosenbaum's "Records Certification" is inadmissible for the same reasons Dr. Rozbruch's "Records Certification" was inadmissible. Thus, the Court properly found that Dr. Rosenbaum's report and records (exh H) were inadmissible.

Dr. Rosenbaum also submitted a report dated January 12, 2013 in support of the underlying motion (exh I) that was not affirmed and was not considered. Of course, the December 7, 2012 "certification" from exhibit H could not have covered the January 12, 2013 report.

Instant Renewal Motion

In an attempt to turn Dr. Rosenbaum's January 12, 2013 narrative report into an admissible document, plaintiff offers exhibit 5 to the instant motion and an affidavit from a paralegal in plaintiff's attorney's office (exhibit 6) to say that she forgot to include the "affirmation page" when she assembled the underlying opposition papers. Assuming arguendo

that this explanation satisfies the standard for renewal, this new submission signed by Dr. Rosenbaum (exh 5) does not transform his January 12, 2013 report into an admissible document because he does not state that he is licensed to practice medicine in New York, as defendants pointed out in their opposition to the instant motion. In fact, Dr. Rosenbaum apparently signed the document in New Jersey (see upper left corner) and stated only that he is licensed in New Jersey. After receiving the opposition, plaintiff's counsel in reply attempted to submit yet another affirmation from Dr. Rosenbaum in which he states that he is licensed in both New Jersey and New York. This document still fails to transform his January 12, 2103 narrative into an admissible document for several reasons.

First, it was executed on October 15, 2013 and does not attach Dr. Rosenbaum's underlying January 12, 2013 report or even reference it. He simply says that he is licensed in two states. The only reference that may be to a report is that "the statements contained herein are, to the best of my knowledge, true and accurate". Wherein? There is nothing attached or referred to, *i.e.* by description, date or exhibit number. The only thing "herein" is that Dr. Rosenbaum is licensed to practice in New York. He does not state that his January 12, 2013 report is true and accurate.

Additionally, plaintiff's attempt to remedy a mistake in her moving papers (which was pointed out in defendants' opposition) by submitting a new "affirmation" in her reply is improper. *See Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404, 405, 812 NYS2d 874 (1st Dept 2006). To support this motion to renew, plaintiff submitted proof of law office failure (his paralegal's affidavit) for her failure to include exhibit 5. But even if the paralegal had included exhibit 5 in opposition to the underlying motion, the decision would have been the same because Dr. Rosenbaum never stated that he was licensed in New York and thus his report was not

affirmed.

In summary, plaintiff failed three times to make Dr. Rosenbaum's January 12, 2013 report admissible. First, in the underlying motion, she failed to include any affirmation at all. Second, in the instant moving papers, plaintiff submitted a page referencing the report but failing to show Dr, Rosenbaum was qualified to make an affirmation in New York. Third, in the reply, plaintiff submitted an affirmation where Dr. Rosenbaum affirms that he is licensed in both New York and New Jersey; there is absolutely no indication that he is attempting to affirm to the truth of the contents of any report because he does not refer to any report.

Finally, because Dr. Rosenbaum's January 12, 2013 report was not affirmed and thus not admissible, defendants did not have an opportunity to evaluate the report on its merits, as defendant had no reason to challenge the merits of an obviously inadmissible document. Given the opportunity, perhaps defendants would have noted that Dr. Rosenbaum failed to specifically state his measurements of plaintiff's ranges of motion and/or normal values, or that he discussed a migraine headache disorder which is not part of this case as it is not asserted in the bill of particulars. For these reasons, it would be highly prejudicial to defendants for the Court to consider a document, submitted for the first time in the reply on a renewal motion, which might have made Dr. Rosenbaum's January 12, 2103 report admissible if he had specifically referenced the report and affirmed the truth of its contents. *See Gumbs v Flushing Town Ctr. III, L.P., et. al.*, __AD3d__, __NYS2d__, NY Slip Op 01267 (1st Dept 2014) (it is improper to permit a movant to introduce new material in the reply because that deprives the opponent of the motion of an opportunity to respond).

In conclusion, the only admissible medical records submitted by plaintiff in opposition to the underlying serious injury motion were the May 8, 2010 emergency room records of New

York-Presbyterian Hospital (opp., exh C) and the May 11, 2010 certified records of Holy Name Medical Center (opp., exh D). Other than records which demonstrate that plaintiff suffered, for example, a fracture, death or miscarriage as a result of the accident, contemporaneous records standing alone cannot raise an issue of fact sufficient to defeat defendants' serious injury motion. And even upon renewal, Dr. Rosenbaum's January 12, 2103 report was still inadmissible.

Accordingly, plaintiff's motion for leave to renew and reargue this Court's May 30, 2013 decision and order which granted defendants/third-party plaintiffs' motion for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is granted. Upon renewal and reargument, the Court adheres to its original decision granting defendants Martin and Castillo's motion for summary judgment dismissing the complaint and the third-party complaint on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d); case dismissed.

This is the Decision and Order of the Court.

Dated: February 27, 2014
New York, New York

HON. ARLENE P. BLUTH, JSC