 FILED Jul 10 2014 Bronx County Clerk

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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 04

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YAHAIRA ORELLANA,

Plaintiff,

Index No. 308832/10

-against-

DECISION/ORDER

ROBORIS CAB CORP.,

Defendants.

Howard H. Sherman
J.S.C.

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The following papers numbered 1 to 3 read on this motion noticed on March 22, 2013 and duly submitted on the Motion Calendar of July 22, 2013.

	PAPERS NUMBERED	
Notice of Motion - Exhibits and Affirmation Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	

Upon the foregoing papers and after oral argument, plaintiff's motion for reargument of this court's prior decision and order granting summary judgment on the grounds of lack of serious injury is decided as set forth below.

Plaintiff first contends that the court overlooked the facts and misapprehended the controlling authority by finding that defendants' met their *prima facie* burden on the motion despite the fact that defendants' experts make different findings upon Straight Leg Raising testing.[1] Plaintiff argues that

[1] Defendants' orthopedic expert, Dr. Nason, made a finding that SLR was negative to 75 degrees in both seated and supine positions without reference to a "normal" reading, while their neurological expert, Dr. Desrouleaux made a finding that bilateral SLR was "normal at 90 degrees."

this discrepancy is sufficient, in and of itself, to preclude a finding that the movants met their initial burden . It is submitted that on the record here consisting of findings by both experts of full ranges of motion in every plane of both the cervical and lumbar spine as quantified and compared to normal readings, and negative results on all tests conducted, Dr. Nason's finding, is insufficient to raise an issue of material fact that plaintiff did not sustain a serious injury (see, Osbourne v Diaz, 104 A.D. 3d 486, 961 N.Y.S. 2d 117 [1st Dept. 2013]; Paduani v Rodriguez, 101 A.D. 3d 470, 955 N.Y.S. 2d 48 [1st Dept. 2012]; Canelo v Genolg Transit Inc., 82 A.D. 3d 584, 919 N.Y.S. 2d 27 [1st Dept. 2011]; Sone v Qamar, 68 A.D. 3d 566, 889 N.Y.S. 2d 845 [1st Dept. 2009]).

Plaintiff next argues that reargument is warranted upon the court's determination that no material issue of fact was raised in opposition to defendants' prima facie showing.

It is first maintained that the court impermissibly relied upon defendants' experts conclusions despite the fact that these evaluations were conducted without a review of any of plaintiff's medical records, and did not consider the findings of causation rendered by plaintiff's expert based upon his review of the contemporaneous reports.

Concerning the first assertion, defendants' experts are not required to address diagnostic findings in plaintiff's medical records (see, Levinson v Mollah, 105 A.D. 3d 644, 963 N.Y.S. 2d 653; Robinson v Joseph, 99 A.D. 3d 568, 952 N.Y.S. 2d 187 [1st Dept. 2012]; Fuentes v Sanchez, 91 A.D. 3d 418, 419, 936 N.Y.S. 2d 151 [1st Dept. 2012]), and their reports were affirmed, and as such, admissible.

With respect to the second assertion the court was constrained under applicable case law to make such a finding as to probative value of the medical proof submitted by plaintiff . In Laza v Harlem Group, Inc., 89 A.D. 3d 435, 466, 931 N.Y.S. 2d 608 [1st Dept. 2011], the appellate court made the following determination:

> Moreover, since the neurologist who examined plaintiff in response to defendant's motion relied on the treating physician's unsigned report, the conclusions based on those unsworn statements were likewise inadmissible [internal citations omitted].

Dr. Harrison was a non-treating physician who evaluated plaintiff for the first time in response to the threshold motion. The records of the treating physician on which he relied were as noted, also unsigned. Nor were they tendered in support of defendants' motion. Dr. Harrison's conclusions as to causation could not be considered by the court. It is noted as well that in opposition to the motion, plaintiff failed to come forth with any explanation as to why the contemporaneous records could not have been tendered in admissible form.

Finally, plaintiff argues that the court improperly considered the issue of the cessation of treatment only raised by defendants in reply.

It is submitted that on these grounds , re-argument does lie as the court "misapplied a "controlling principle of law" (Foley v Roche, 68 AD2d 558, 567, 418 NYS2d 588 [1979]; see CPLR 2221 [d]), and in dismissing the complaint as against the court improperly relied on the gap-in-treatment argument, which appellants raised for the first time in their reply papers (see McNair v Lee, 24 AD3d 159, 805

NYS2d 67 [2005]). " Tadesse v. Degnich, 81 A.D.3d 570, 917 N.Y.S.2d 569 [1st Dept. 2011].

However, while reargument is appropriate under such circumstances, to the extent that the issue of the cessation of treatment was not determinative of the findings of lack of serious injury, upon reargument, the court adheres to its original determination that defendants have sustained their burden to prove as a matter of law that plaintiff did not sustain serious injury and that in opposition, plaintiff failed to raise a triable issue of material fact that she did.

This constitutes the decision and order of this court.

Dated: July 2, 2014
Bronx, New York

Howard H. Sherman
J.S.C.