

Fehmian v Hoffman
2016 NY Slip Op 30395(U)
February 24, 2016
Supreme Court, New York County
Docket Number: 100997/11
Judge: Arlene P. Bluth
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2/26/16
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 100997/2011
FEHMIAN, CAROL
vs.
HOFFMAN, KATE HYUN
SEQUENCE NUMBER : 005
RENEWAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

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

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
FEB 26 2016
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
FEB 23 2016
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 2/24/16

Arlene P. Bluth, J.S.C.
ARLENE P. BLUTH

1. CHECK ONE: CASE DISPOSED ~~NON-FINAL DISPOSITION~~ **J.S.C.**
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED 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**

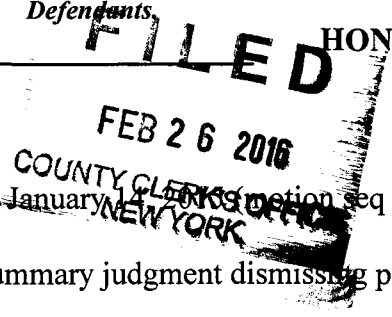
Index No.: 100997/11
Motion Seq. 05

Carol Fehmian and John Caruso,
Plaintiffs,
-against-

Kate Hyun Hoffman and Michael Hoffman,
Defendants,

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC



By decision and order dated January 14, 2015 (motion seq 04), the Court granted the branch of defendants' motion for summary judgment dismissing plaintiff Fehmian's claims on the grounds that she did not demonstrate that she met the serious injury threshold. The Court reviewed all Fehmian's submission in seriatim, explained why none of the exhibits was in admissible form and therefore failed to raise an issue of fact, and dismissed Fehmian's claims.

Fehmian now moves to renew and reargue the January 14, 2015 order. As pointed out by defendants in their opposition, this motion is procedurally defective because Fehmian did not (1) include copies of the motion papers submitted on the underlying threshold motion, and/or (2) present reasonable justification for failing to provide admissible records on the prior motion. Nevertheless, the Court will overlook the procedural deficiencies in Fehmian's motion papers. After considering the newly-submitted evidence on the merits, the Court finds that Fehmian has still not raised an issue of fact which would permit her claims to go forward.

In her bill of particulars, Fehmian claimed she sustained neck sprain, right knee contusion and a cervical disc protrusion in the subject February 1, 2008 motor vehicle accident.

In support of their underlying threshold motion, defendants submitted the affirmed report of Dr. Hershon who stated that in February 2012 Fehmian had a normal orthopedic exam and full

ranges of motion in her cervical spine, lumbar spine and right knee. Additionally, defendants cited to Fehmian's deposition testimony wherein she stated that she missed only 3 days of work after the subject accident. Thus, defendants made their prima facie case to dismiss, and the burden shifted to Fehmian to oppose.

In opposition, Fehmian submits the records of St. Luke's Emergency Room from the date of the accident (exh D). Plaintiff was discharged from the ER with a diagnosis of "back pain"; the plaintiff only made complaints of upper back pain, left elbow and knee pain. These records were not certified in Fehmian's opposition to the prior motion; Fehmian has now submitted a 5/2/14 certification. Still, the ER records do not raise an issue of fact regarding serious injury.

Exhibit E, Dr. Volpe's unaffirmed exam notes from 2/5/08, four days after the accident, and from 6/23/08, approximately 5 months later, even if admissible, do not raise an issue of fact. Dr. Volpe noted on 6/23/08, "(t)he patient does complain of fatigue and also claims she is much better with neck pain after physical therapy post MVA. Otherwise, she feels well overall and is without other complaints".

Fehmian now submits the affirmation of Dr. Kirzner (in place of his unaffirmed reports submitted on the prior motion). Dr. Kirzner read plaintiff's cervical spine CT film and cervical spine x-ray, which were both taken 17 days after the subject accident, and states that the cervical CT "revealed mild disc protrusion at C5-C6 and scattered areas of mild degenerative facet changes" and the cervical x-ray showed "equivocal minimal narrowing of the C5-C6 disc space and scattered areas of mild degenerative facet changes" (exh F). Dr. Kirzner did not say anything about evidence of a traumatic injury, and he did not causally relate any of Fehmian's conditions to the subject accident; his affirmation is insufficient to raise an issue of fact.

Plaintiff now submits the affirmation of Dr. Lerner (exh G) in place of his unsigned letters submitted on the prior motion. However, Dr. Lerner cannot affirm pursuant to CPLR 2106 because he states that he is licensed in Jersey. Even if Dr. Lerner had submitted an affidavit with a certificate of conformity, he still would not have raised an issue of fact. Dr. Lerner first examined Fehmian 3 weeks after the accident (on 2/21/08). Dr. Lerner re-examined Fehmian approximately 3 months after the accident (on 4/10/08) at which time he noted that Fehmian stated “that other than occasional lower back pain with prolonged sitting, she has been doing well.”

Exhibit H contains records for Kessler Rehabilitation Center for the period February 27 through April 16, 2008, approximately 3 months after the accident with a certification. Even if these records were admissible, they do not raise an issue of fact sufficient to defeat defendants’ motion. The March 12, 2008 physical therapy note contains a notation “Pt. stated I’m much better my neck pain is 1-2/10 and my knee doesn’t even hurt when I press on it.” The April 16, 2008 discharge note said “Based on this patient’s clinical presentation, it is my professional opinion that the patient’s prognosis at time of discharge is good. Pt pain level is 0/10. Pt has completed program and has achieved all goals. Upon discharge pt’s posture was much improved.”

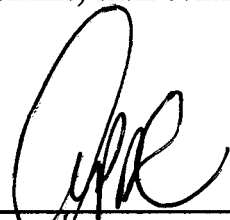
Finally, Fehmian submits the April 8, 2014 amended report of Dr. Wujciak, a New Jersey orthopedist who examined Fehmian on May 30, 2012 (exh I). However, as noted by defendants in their opposition, Dr. Wujciak cannot affirm pursuant to CPLR 2106 because he states only that he is licensed to practice medicine in New Jersey. Dr. Wujciak’s report is the only proof of a recent medical exam to contest Dr. Hershon’s February 2012 findings that Fehmian had a normal orthopedic exam. While it is true that a Court may consider inadmissible evidence if it is not the

sole basis for plaintiff's opposition, [see *Amed v Cannon*, 129 AD3d 645, 12 NYS3d 88 (1st Dept 2015)], here it is the only medical submission to contest Dr. Hershon. Therefore, Dr. Wujciak's inadmissible report does not raise an issue of fact sufficient to defeat summary judgment.

Accordingly, plaintiff Fehmian's motion is denied in its entirety and her claims remain dismissed. The balance of this action (plaintiff Caruso's claims) shall continue.

This is the Decision and Order of the Court.

Dated: February 24, 2016
New York, New York



HON. ARLENE P. BLUTH, JSC

FILED
FEB 26 2016
COUNTY CLERK'S OFFICE
NEW YORK