SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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JEANNA SANCHEZ,

Plaintiff,

-against-

BELLAIR LASER CENTER, INC., and
BELLAIR LASER CENTER,

Defendants.

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Index No.: 153872/14

Mot. seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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DeSimone & Assocs., LC
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New York, NY 10007
212-220-6555

For defendants:
Gary R. Greenman, Esq.
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By notice of motion, plaintiff moves pursuant to CPLR 3403 for a trial preference. Defendants oppose.

In this action, plaintiff sues defendants for personal injuries she sustained after receiving from defendants LipoSonix plastic surgery treatment. (NYSCEF 1). In her bill of particulars, she asserts that defendants improperly used the LipoSonix system on her arms, that she thereby sustained various serious injuries, including complex regional pain syndrome, neuropathy, numbness, and hyperalgesia with limited range of motion, edema, and increased pigmentation, and that she experiences pain, swelling, stiffness, spasms and twitching in her hands, burning in her upper extremities, and tightness and decreased sensation in her hands.

At the time of the treatment, plaintiff worked as an administrator for the Jordan Mission to the United Nations, and following the treatment, she missed four days of work. As of

February 2015, she claimed no past or future lost earnings, and was then 45 years old. She lives in the Philippines. (NYSCEF 16).

On July 8, 2015, plaintiff testified at an examination before trial held on July 8, 2015, as follows, in pertinent part: Since 2007 she worked for the Jordanian Mission as the Executive Assistant to the Ambassador, where approximately 95 percent of her job involved typing. For months after the procedure, her hands were swollen and painful, with sensitivity to touch, and she wore either ace bandages or hand braces around her hands and wrists, including while at work. She stopped working for the Mission because of the alleged injuries to her arms, which caused her pain while working. Plaintiff moved back to the Philippines in February 2015. She has not taken medication for her injuries since she moved as she does not have health insurance or the financial means to see a doctor, having not yet found a job in the Philippines, although she is currently seeking employment. Plaintiff's family and friends are unable to help her financially. (NYSCEF 17).

On December 4, 2015, plaintiff filed her note of issue. (NYSCEF 11).

By affidavit dated December 17, 2015, plaintiff states that she cannot currently afford various medical treatments or medications that helped her manage her pain and symptoms, and that she still suffers from numbness, burning sensations, shooting pain and spasms, and heightened sensitivity to touch and temperature. (NYSCEF 12).

By affidavit December 16, 2015, Reuben S. Ingber, MD, plaintiff's treating physician until she left the United States, states that he treated plaintiff for cervical radiculitis/strain and Complex Regional Pain Syndrome Type 1, that due to her medical condition, he recommended that she receive weekly trigger point injections and physical therapy, and that plaintiff suffers

from chronic neuropathic pain which he believes is permanent. Without treatment, Ingber opines that plaintiff's symptoms will continue to worsen and potentially become disabling. (*Id.*).

II. CONTENTIONS

Plaintiff argues that granting her a trial preference in the interests of justice is an appropriate exercise of discretion, as she suffers from a disabling injury and cannot pay for necessary medical treatment. Counsel excuses his one-week delay in moving for a preference as resulting from difficulty in coordinating with plaintiff while she is in the Philippines and from his having been on trial and without the means or time to file the motion until the trial concluded. (NYSCEF 12).

Defendants deny that plaintiff has offered a reasonable excuse for her delay in interposing the motion, and assert that plaintiff has not persuasively shown that she is entitled to a preference absent proof that her injuries are extremely severe and continuing, or that she is unable to afford medical treatment, observing that she purchased a new car when she returned to the Philippines and has traveled at least twice between there and the United States. They observe that plaintiff's treating physician did not state that plaintiff cannot or should not work or that she is disabled. They contend that plaintiff is able to work, having admitted that she is seeking employment in the Philippines, and that plaintiff's alleged disability is undermined by her failure to seek lost earnings here. (NYSCEF 15).

In reply, plaintiff denies that her purchase of car evidences that she has the financial means to pay for medical treatment, and argues that defendants mischaracterize her testimony. She also submits another affidavit, in which she sets forth specific details about her current job search and financial situation. (NYSCEF 23, 24).

By letter dated March 1, 2016, defendants object to the submission of plaintiff's reply affidavit. (NYSCEF 26).

III. ANALYSIS

Pursuant to CPLR 3403(a)(3), certain cases are entitled to a trial preference, including those "in which the interests of justice will be served by an early trial." A notice of motion seeking a preference must be served with the note of issue. Moreover, the court's Uniform Rules provide that a party seeking a preference pursuant to CPLR 3403(a)(3) in an action for personal injuries shall serve in support of the application, whether with the note of issue or subsequent thereto, a copy of various documents relevant to the matter. (22 NYCRR 202.24[b]).

Although plaintiff did not serve her motion timely or comply with the rule, consideration of her motion is not precluded.

A 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." (*Dodumoff v Lyons*, 4 AD2d 626 [1st Dept 1957]). A preference in the interests of justice should be granted only "where the circumstances are sufficiently unusual and extreme to justify the extraordinary privilege." (*La Porta v Fretto Enters.*, 100 AD2d 713 [3d Dept 1984]).

Plaintiff bears the burden of establishing a right to a preference. (*Dodumoff*, 4 AD2d at 628). Whether a preference is granted in the interests of justice rests within the court's discretion. (*Nold v City of Troy*, 94 AD2d 930 [3d Dept 1983]).

Here, although plaintiff claims that she cannot pay for her medical expenses because she is unable to work and that her inability to work results from the injuries caused by defendants, she does not claim to be disabled and is in fact seeking and applying for employment in the

Philippines, and her physician does not indicate that she is disabled or unable to work. That plaintiff is not presently working does not mean that she cannot work.

And, while plaintiff alleges that she left her employment with the Mission because she was unable to do the work required of her, she has not provided any reason for her inability to find work to date, and if once plaintiff obtains employment, she will be able to afford health insurance and/or pay for medical services and medications. This is not a case where the alleged injuries caused by a defendant are of such severity that the plaintiff is disabled from working. Rather, plaintiff's unemployment is temporary. (*See e.g.* 105 NY Jur 2d, Trial § 154 [2016] [preference should not granted without adequate showing of destitution and that plaintiff's alleged incapacity renders him or her incapable of engaging in any income-producing activity]; *compare Kellman v 45 Tiemann Assocs.*, 213 AD2d 151 [1st Dept 1995] [plaintiff submitted uncontroverted evidence that she was rendered paraplegic by accident and is receiving disability payments to help meet financial burdens]; *Sabater v New York City Tr. Auth.*, 102 AD2d 804 [1st Dept 1984] [plaintiff lost leg due to accident and became destitute, unable to work, and recipient of public assistance]).

Moreover, although plaintiff is not currently employed, she has submitted no proof of her financial situation nor has she shown that she is destitute or living on public assistance. (105 NY Jur 2d, Trial § 153 [2016] [mere showing or reduced financial circumstances or proof of inability to work insufficient to warrant granting preference in interests of justice]; *compare McCluskey v County of Suffolk*, 9 Misc 3d 1106[A], 2005 NY Slip Op 51420[U] [Sup Ct, Suffolk County 2005] [preference denied; movant claiming financial hardship must submit documentary proof establishing movant's indigence or complete destitution, as well as medical evidence that

movant's current physical condition renders it impossible to obtain gainful employment], *with Roman v Sullivan Paramedicine, Inc.*, 101 AD3d 443 [1st Dept 2012] [plaintiff established that her disabling lower back injury prevents her from working, and that she exhausted no-fault coverage, receives food stamps, and lacks resources to pay for necessary medical care; proof included affidavits from doctors and documents evidencing monthly household income and expenses]; *Smith v City of New York*, 5 AD3d 759 [2d Dept 2004] [plaintiff proved indigency as she is receives public assistance, food stamps, and medical assistance]; *Hoyt v Kazel*, 265 AD2d 527 [2d Dept 1999] [plaintiff receiving supplemental security income benefits and food stamps]; *Thompson v City of New York*, 140 AD2d 232 [1st Dept 1988] [plaintiff entitled to preference as she demonstrated that she was unable to work due to serious injuries, had exhausted no fault benefits, and was destitute and on welfare]; *Beltran v Borstein*, 32 AD2d 954 [2d Dept 1969] [plaintiff was unable to work since accident and had become welfare recipient]).

I do not consider plaintiff's reply affidavit. (*Am. Transit Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841 [1st Dept 2015] [attempt by plaintiff to cure deficiency in *prima facie* showing by submitting evidence for first time in reply improper]; *Henry v Peguero*, 72 AD3d 600 [1st Dept 2010] [deficiency of proof in moving papers cannot be cured by submitting evidence in reply]). Even if considered, it does not prove that she is unable to work or destitute.

Plaintiff has thus failed to meet her burden of establishing an entitlement to a trial preference in the interests of justice. (*See Geralds v Damiano*, 128 AD3d 550 [1st Dept 2015] [court properly denied request for trial preference as plaintiff submitted no proof supporting claims of destitution and inability to work]; *Betke v Archwood Estates, Inc.*, 266 AD2d 328 [2d Dept 1999] [plaintiff offered insufficient proof of injury that would worsen over time, that he

was unable to work, was indigent, or had obligation as single parent to support dependent]; *Rago v Nationwide Ins. Co.*, 120 AD2d 579 [2d Dept 1986] [plaintiffs failed to show imminent financial destitution or probability of death before trial]; *Bethiel v Saxton*, 55 AD2d 612 [2d Dept 1976] [plaintiff failed to prove indigency and no sufficient reason given for plaintiff's lack of employment]; *Smith v Horn Constr. Co.*, 12 AD2d 739 [1st Dept 1961] [preference denied as plaintiff failed to submit proper medical proof showing inability to work or factual detail showing destitution or indigence]; *cf Cenname v Lindholm*, 69 AD2d 848 [2d Dept 1979] [preference granted in interests of justice upon showing of indigency and inability to work since accident]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for a trial preference is denied.

ENTER:

Barbara Jaffe, JSC

DATED: May 5, 2016
New York, New York