SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------x

NAKIA ECCLESTON,

Plaintiff(s),

- against -

NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, MANHATTAN & BRONX SURFACE TRANSIT OPERATING AUTHORITY AND JIMMY TALIC PEGUES,

Defendant(s).
----------x

DECISION AND ORDER

Index No: 301041/14

In this action for alleged negligence arising from a motor vehicle accident, plaintiff moves seeking an order pursuant to CPLR § 2221(d) rearguing and clarifying this Court's Decision and Order dated October 19, 2016, which granted defendants' motion for summary judgment, in part. Saliently, plaintiff contends that to the extent the decision is silent on whether her claim that her injuries constitute a "significant limitation of use of a body function or system" under to Insurance Law § 5102(d), the Court ought to clarify the same. The instant motion is unopposed.

For the reasons that follow hereinafter, plaintiff's motion is denied.[1]

---

[1] While CPLR § 2221(a) requires that a motion to renew or reargue "shall be made, on notice, to the judge who signed the [underlying] order," it also states that the foregoing is only true if "he or she [the original judge] is for any reason unable to hear it." Thus, while except under "exceptional circumstances" (*Willard v Willard*, 194 AD 123, 125 [2d Dept 1920]), "one judge should not

According to the complaint and bill of particulars, the instant action is for alleged personal injuries sustained by plaintiff on July 21, 2013, when plaintiff's vehicle came into contact with a vehicle owned and operated by the defendants at the intersection of White Plains Road and Cross Bronx Service Road, Bronx, NY. Plaintiff alleges that defendants were negligent in the operation of the vehicle, said negligence causing the accident and injuries resulting therefrom. Plaintiff alleges that she sustained a host of injuries, the most serious being a disc herniation at C5-C6. Plaintiff also alleges that the foregoing injury is serious under the Insurance Law the Insurance Law in that she, *inter alia*, sustained a (1) permanent consequential limitation of use of a body organ or member; (2) significant limitation of use of a body function or system; and/or (3) a medically determined injury or impairment of a non-permanent nature which prevented her from

---

vacate an order made by a court held by another judge" (*id.*; *see also Spahn v Griffith*, 101 AD2d 1011, 1011 [4th Dept 1984]), it is nevertheless well settled that one judge of concurrent jurisdiction can review and vacate an order of another (*Scelzo v Acklinis Realty Holding LLC*, 101 AD3d 468, 468 [1st Dept 2012] ["Justice Torres properly granted the motions for leave to reargue, as the Justice who signed the order on the prior motions failed to address defendants' assertion that the defect which caused plaintiff's accident was trivial."]; *Billings v Berkshire Mut. Ins. Co.*, 133 AD2d 919, 919-920 [3d Dept 1987] ["Here, the motion was before the second Justice because of the implementation of the individual assignment system which contemplates that all motions are to be made returnable before the Justice charged with overseeing the case."]). Here, Judge Salman issued the order from which reargument is sought, but he retired on January 1, 2017, during the pendency of the instant motion. Thus, the motion has been randomly reassigned to this Court

performing all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following her accident.

On October 19, 2016, pursuant to a motion by defendants, this Court granted summary judgment in favor of the defendants solely to the extent of dismissing plaintiff's claim that her injuries were serious under the 90/180 category of serious injury. To be sure, the Court, after noting that defendants established prima facie entitlement to summary judgment on the 90/180 claim, stated that

> Plaintiff's opposition fails to raise an issue of fact with respect to injury under the 90/180 category sufficient to preclude summary judgment because she fails to submit any evidence establishing that as a result of her injuries her activities of daily living were substantially curtailed for at least 90 days during the first 180 days after this accident.

However, with regard to all other categories of serious injury, which the Court termed as "the permanent category of injury," the Court denied defendants' motion for summary judgment noting that

> Plaintiff's opposition raises an issue of fact sufficient to preclude summary judgment with regard to her claim of permanent injury.

Plaintiff's motion seeking reargument and clarification is denied insofar as the Court's decision makes it clear that by denying defendants' motion for summary judgment with respect to the permanent category of serious injury, plaintiff's claim that her

injuries caused a "significant limitation of use of a body function or system," survived.

CPLR § 2221(d)(1), authorizes the reargument of a prior decision on the merits and states that such motion

> shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.

Accordingly,

> [a] motion for reargument, addressed to the discretion of the Court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principal of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided

(*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see also*, *Fosdick v Town of Hemstead*, 126 NY 651, 652 [1891]; *Vaughn v Veolia Transp., Inc.*, 117 AD3d 939, 939 [2d Dept 2014]). Thus, because reargument is not a vehicle by which a party can get a second bite at the same apple, a motion for reargument preludes a litigant from advancing new arguments or taking new positions which were not previously raised in the original motion (*Foley* at 567).

A motion for clarification is merely a motion to reargue which the court chooses to grant (*Arbor Realty Funding LLC v E. 51st St. Dev. Co., LLC*, 67 AD3d 559, 559 [1st Dept 2009]; *Gillingham v*

Robinson, 45 AD3d 467, 468 [1st Dept 2007]).

A motion to reargue, must be made within 30 days after service of a copy of the underlying order with notice of entry (CPLR § 2221[d][3]; *Perez v Davis*, 8 AD3d 1086, 1087 [4th Dept 2004]; *Pearson v Goord*, 290 AD2d 910, 910 [3rd Dept 2002]).

Here, there is no ambiguity in this Court's prior decision warranting reargument. To be sure, it is well settled that for purposes of proving injury, the relevant inquiry on any claim under 5102(d) of the Insurance Law where it is claimed that the injuries sustained are serious insofar as they constitute a (1) permanent consequential limitation of use of a body organ or member; and/or (2) a significant limitation of use of a body function or system is the same. Indeed to establish injury under the foregoing categories a plaintiff must establish that the injuries alleged are the result of the accident claimed and that the limitations alleged are the result of those injuries (*Noble v Ackerman*, 252 AD2d 392, 394-395 [1st Dept 1998]). Plaintiff's proof establishing serious injury, medical or otherwise, must not only be admissible, but it must also be objective (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350 [2002]; *Grasso v Angerami*, 79 NY2d 813, 814-815 [1991]; *Blackmon v Dinstuhl*, 27 AD3d 241, 242 [1st Dept 2006]; *Thompson v Abassi*, 15 AD3d 95, 97 [1st Dept 2005]; *Shinn* at 198; *Andrews v Slimbaugh*, 238 AD2d 866, 867-868 [2d Dept 1997]; *Zoldas v Louise Cab Corporation*, 108 AD2d 378, 382 [1st Dept 1985]).

Plaintiff's proof must also demonstrate the existence of a serious injury contemporaneous with the accident alleged (*Blackmon* at 242; *Thompson* at 98 [Court held that the failure by plaintiff's doctor to provide objective proof of injury contemporaneous with the accident was fatal and was not cured by same doctor's finding of injury, with objective evidence, two and one half years later.]; *Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]; *Pajda v Pedone*, 303 AD2d 729, 730 [2d Dept 2003]; *Jimenez v Kambli*, 272 AD2d 581, 583 [2d Dept 2000]). Additionally, in order to raise an issue of fact as to the existence of a serious injury the medical evidence presented must include a recent examination of the plaintiff at which the injuries are objectively established (*Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Thomson v Abassi*, 15 AD3d 95, 97 [1st Dept 2005]; *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]).

Thus, when this Court denied defendants' motion with respect to the permanent category of injury, it was clear that this included any claim that plaintiff's injuries resulted in a "significant limitation of use of a body function or system."

ORDERED that defendants serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

Dated : March 22, 2017
Bronx, New York

Ben Barbato, SJC