

Frempong v Arnold

2017 NY Slip Op 30931(U)

April 7, 2017

Supreme Court, Bronx County

Docket Number: 306556/13

Judge: Ben R. Barbato

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----x

MARGARET SEFAH FREMPONG,

Plaintiff(s),

- against -

KEVIN M. ARNOLD,

Defendant(s).

-----x

DECISION AND ORDER

Index No: 306556/13

In this action for personal injuries arising from the negligent operation of a motor vehicle, plaintiff seeks an order rearguing this Court's Decision and Order dated November 15, 2016, which, *inter alia*, granted defendant's motion for summary judgment on grounds that defendant's demonstrated that plaintiff did not sustain a serious injury as defined by the Insurance Law. Saliently, plaintiff avers that the Court misapplied the law when it granted defendant's motion on grounds that on the record before it, plaintiff failed to explain an almost three year gap in treatment. Defendant opposes the instant motion, asserting, *inter alia*, that the Court did not misapply the law nor misapprehend any facts.

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

Plaintiff's motion to reargue is denied insofar as the Court

did not misapply prevailing law when it found that summary judgment was warranted because, *inter alia*, plaintiff failed to explain an almost three year gap in medical treatment. To be sure, an unexplained gap in medical treatment between treatment received shortly after the accident and treatment received long thereafter, warrants dismissal of plaintiff's case (*Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Brown v City of New York*, 29 AD3d 447, 448 [1st Dept 2006]; *Vasquez v Reluzco*, 28 AD3d 365, 366 [1st Dept 2006]; *Taylor v Terrigno*, 27 AD3d 316, 316-317 [1st Dept 2006]; *Rivera v Benaroti*, 29 AD3d 340, 342 [1st Dept 2006]; *Milazzo v Gesner*, 33 AD3d 317, 318 [1st Dept 2006]; *Colon v Kempner*, 20 AD3d 372, 374 [1st Dept 2005]). Thus, when defendant establishes that existence of a gap in medical treatment, to avoid summary judgment, a plaintiff must offer a reasonable explanation for the gap in treatment (*Pommells* at 574; *Brown* at 448; *Vasquez* at 366; *Taylor* at 316-317; *Rivera* at 342; *Milazzo* at 318; *Colon* at 374). Generally, if the explanation for the gap in medical treatment is medical, plaintiff must proffer medical evidence (*Mercado-Arif v Garcia*, 74 AD3d 446, 447 [1st Dept 2010] [gap in treatment explained by "chiropractor's affidavit, stating that plaintiff had reached maximum medical improvement and that any further treatment would be palliative."]; *Crespo v Aparicio*, 59 AD3d 384, 385 [2d Dept 2009] ["Dr. Perez also adequately explained any significant gaps in the plaintiffs' respective treatment histories, stating that the

plaintiffs stopped treatment when they did because both had reached their maximum medical benefit from their treatments at those times” (internal citations omitted).]; *Faroze v Kamran*, 22 AD3d 458, 459 [2d Dept 2005]; *Ali v Vasquez*, 19 AD3d 520, 520 [2d Dept 2005]; *Hernandez v Taub*, 19 AD3d 368, 368 [2d Dept 2005]). Alternatively, when the explanation for the gap in treatment is non-medical, such as the cessation of no-fault benefits, can be established by the plaintiff (*Mercado-Arif* at 447; *Jules v Barbecho*, 55 AD3d 548, 549 [2d Dept 2008]; *Francovig v Senekis Cab Corp.*, 41 AD3d 643, 644 [2d Dept 2007]; *Black v Robinson*, 305 AD2d 438, 439-440 [2d Dept 2003]). A gap in treatment is not relevant to nor dispositive in an action concerning serious injury under the 90/180 category (*Gonzalez v Ceesay*, 19 Misc 3d 136(A) [App Term 2008]; *Gomez v Ford Motor Credit Co.*, 10 Misc 3d 900, 904 [Sup Ct 2005]).

Here, to the extent that plaintiff avers that defendant’s failure to raise plaintiff’s gap in treatment as a basis for summary judgment precluded the Court from considering the same, such claim lacks merit. It is true that generally, a court is limited to the issues and defenses that are the subject of a motion, such that when a party fails to raise an issue on a motion, the court is proscribed from *sua sponte* doing so (*Midfirst Bank v Agho*, 121 AD3d 343, 352 [2d Dept 2014]; *Rosenblatt v St. George Health and Racquetball Assoc., LLC*, 119 AD3d 45, 52 [2d Dept 2014];

Baron v Brown, 101 AD3d 915, 916-917 [2d Dept 2012]; see, *Dunham v Hilco Const. Co., Inc.*, 89 NY2d 425, 429 [1996]). However, here, a plaintiff's failure to explain a gap in medical treatment is the failure to establish a serious injury such that it falls within the ambit of the overarching relief sought by defendant - summary judgment for failure to establish a serious injury. In fact, the absence of a gap in treatment is an essential element of a cause of action where serious injury must be established. Thus, the Court properly noted the existence of the gap as well as plaintiff's failure to explain it.

Plaintiff's contention that notwithstanding the foregoing, her gap in treatment was nevertheless explained within Albert Villafuerte's (Villafuerte) affirmation, a medical doctor, who first saw plaintiff on February 16, 2016, almost three years after her accident and indeed almost three years after she ceased treating, is unavailing. Significantly, here, the only explanation for the foregoing gap is that asserted by counsel, namely that plaintiff treated at home by doing therapy thereat. This is, of course, an attempt to medically explain the gap, which as noted above, requires that such explanation come from a doctor (*Mercado-Arif v Garcia* at 447; *Crespo* at 385; *Farozes* at 459; *Ali* at 520; *Hernandez* at 368). Contrary to plaintiff's counsel's assertion, that Villafuerte notes in his report that plaintiff asserted that she was doing exercises at home is a far cry from a

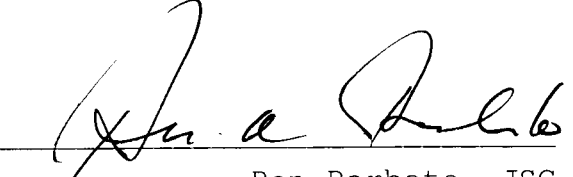
medical explanation for the almost three year gap in treatment.

The Court has considered plaintiff's remaining arguments and finds them unavailing. It is hereby

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

This constitutes this Court's decision and Order.

Dated : April 7, 2017
Bronx, New York


Ben Barbato, JSC