Ehlers v Byrnes
2017 NY Slip Op 31045(U)
March 29, 2017
Supreme Court, Erie County
Docket Number: I2013-2162
Judge: Matthew J. Murphy

[* 1]

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

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MALLORY C. EHLERS,

Plaintiff

vs.

Index No. I2013-2162

WILLIAM A. BYRNES,
ALL ERECTION AND CRANE RENTAL CORP,
and TAMMY LYNN LEE,

Defendants

DECISION ON MOTION TO RENEW

APPEARANCES:

DANIEL J. CHIACCHIA, ESQ.
Attorney for Plaintiff

BRIAN P. MINEHAN, ESQ.
Attorney for Defendants All Erection and Crane Rental Corp and William A. Byrnes

MURPHY, J.

Plaintiff moves for renewal of argument of Defendants' motion for summary judgment pursuant to CPLR 2221(e) on the grounds that new facts have presented themselves regarding Plaintiff's treatment, diagnosis and prognosis relative to the injuries she sustained in the subject motor vehicle accident that were not offered on the prior motion and that her failure to present these facts was reasonable because they did not exist at the time Defendants' motion was decided.

STATEMENT OF FACTS

The underlying facts were discussed at length in this Court's decision dated June 25, 2015, which is incorporated by reference. Briefly, Plaintiff was involved in a motor vehicle accident on January 4, 2013. She alleged that she injured her neck, upper back and left shoulder in this accident, causing her incessant migraine headaches, neck, upper back and shoulder pain, and tingling numbness in the thumb and first two fingers of her left hand. Following discovery, Defendants moved for summary judgment dismissing the complaint on the ground that Plaintiff did not sustain a "serious injury" under any of the specified categories of Insurance Law 5102(d). This Court concluded that Defendants met their burden of establishing their entitlement to summary judgment and that Plaintiff failed to raise a triable question of material fact sufficient to defeat the motion. Defendants submitted numerous medical reports to support their motion and, while Plaintiff responded with numerous medical reports and affidavits, this Court concluded that certain exhibits submitted by Plaintiff were not in admissible form and thus could not be considered while other exhibits that were in admissible form were insufficient to create a triable question of fact.

Plaintiff appealed, and on February 10, 2017, the Fourth Department affirmed this Court's order dismissing the complaint (*Ehlers v Byrnes*, 147 AD3d 1465 [4th Dept 2017]). The Fourth Department agreed that Defendants met their burden and that Plaintiff failed to raise a triable question of fact. Although the Fourth Department found that this Court erred in declining to consider unsworn medical reports submitted in opposition to Defendants's motion, the appellate court concluded that the evidence submitted by Plaintiff was not sufficient to defeat the motion.

While the appeal was pending, Plaintiff moved to renew argument of the summary judgment motion on the ground that there were new facts under CPLR 2221(e). Plaintiff submitted the Affirmation of Daniel J. Chiaccia, Esq., in support of the motion. Mr. Chiaccia stated that Plaintiff sought additional treatment and consultation with two separate surgeons after this Court's summary judgment decision, which was dated June 25, 2015. According to Mr. Chiaccia, on June 30, 2015, Plaintiff initiated treatment with Dr. Ross Sherban, an orthopedic and spine surgeon. Dr. Sherban's records are attached to the Chiaccia Affirmation at Exhibit B. Dr. Sherban recommended surgery and Plaintiff sought another opinion, this one from Dr. James G. Egnatchik, a neurosurgeon. Dr. Egnatchik's Affirmation is attached as Exhibit C to the Chiaccia Affirmation, and his medical records are attached to his own Affirmation.

According to Mr. Chiaccia, Plaintiff reported symptoms to Dr. Egnatchik that were new, i.e., were not present prior to the accident. Dr. Egnatchik eventually concluded, after examining Plaintiff and three MRI scans of her cervical spine, that she suffered from a symptomatic C5-6 disc herniation, and he further concluded that the injury was not related to prior degenerative spine disease.

On January 12, 2016, Dr. Egnatchik performed a total disc arthroplasty at C5-6. During the surgery, he noted a "central subligamentous herniation." Dr. Egnatchik opined that Plaintiff's cervical and left upper extremity conditions were directly related to the accident of January 4, 2013 and that any degenerative findings or processes in her neck were asymptomatic at the time of the accident and that the cervical disc herniation at C5-6 occurred at the time of the accident.

Mr. Chiaccia also relied on a post-summary judgment IME performed by Dr.

Walter Levy on behalf of the no-fault carrier, wherein Dr. Levy opined that disc replacement surgery at C5-6 was medically necessary (Exhibit D to Chiaccia Affirmation).

Thus, based on the "new" surgery and the "new" medical opinions, Plaintiff sought renewal of this Court's decision granting summary judgment dismissing the complaint. Mr. Chiaccia argued that not only did Plaintiff present new facts but these facts were not available at the time of the original motion.

In opposition to the renewal motion, Defendants submitted the Affirmation of Brian P. Minehan, Esq. Mr. Minehan argued that the "new" facts were not shown to be unavailable at the time of the summary judgment motion, but rather Plaintiff was seeking "to remediate defects in her opposition papers to the original motion by re-addressing the same factual information available with new physician opinion." Nor, according to Mr. Minehan, did Plaintiff provide the Court with a reasonable excuse "as to why the supposed 'new facts' were not addressed during deliberation of the original motion."

First, Mr. Minehan contended that the C5-6 herniation (or "protrusion" as he called it) was before the Court on the original motion. The fact that Plaintiff underwent surgery after the motion was made and decided is of no moment, according to Mr. Minehan, because the underlying medical information was "present more than six months before the Defendants brought their motion."

Second, Mr. Minehan argued that the medical records from Drs. Sherban, Egnatchik, and Levy "consist of opinions as to [Plaintiff's] physical condition prior to the original motion." In that regard, Mr. Minehan has provided an analysis of the "new"

facts submitted by each of the medical professionals, concluding that the basis for surgical intervention, that is, the C5-6 herniation, was present on Plaintiff's 2013 and 2014 MRIs.

Next, Mr. Minehan posited that Plaintiff sought out new physicians after treating with Dr. Cameron Huckell, who did not recommend surgery, and that the "new" treatment began only after summary judgment was granted to Defendants. Mr. Minehan argued that there are no new "facts," only new opinions from new doctors.

In conjunction with Defendants' argument that there are no new facts presented, Mr. Minehan also argued that Plaintiff failed to provide a reasonable justification for her failure to present these new "facts" during the original motion, or for her "unreasonable" delay in attempting to renew the motion.

Finally, Mr. Minehan stated that even if the Court were to consider the "new" facts, Dr. Egnatchik's Affirmation is insufficient to raise an issue of fact as to the serious injury threshold and fails to rule out Plaintiff's pre-existing medical condition because his opinion is based upon unidentified reports and other reports not attached to his Affirmation.

Lisa A. Poch, Esq., submitted a Reply Affirmation in support of the motion to renew. Ms. Poch stated that Plaintiff's appointment with Dr. Sherban was scheduled in advance of this Court's decision on the summary judgment motion. She further stated that Plaintiff tried to see Dr. Egnatchik earlier, but was unable to because of Dr. Egnatchik's schedule. Therefore, according to Ms. Poch, there is no merit to the suggestion that Plaintiff sought additional medical advice only after her complaint was

dismissed by this Court. Further, according to Ms. Poch, Dr. Sherban recommended a repeat MRI of Plaintiff's cervical spine, and that MRI took place on July 28, 2015, after this Court's decision.

CONCLUSIONS OF LAW

A motion for leave to renew is intended to direct the Court's attention to new or additional facts which, although in existence at the time the original motion was made, were unknown to movant and were, therefore, not brought to the Court's attention (see *Garner v Latimer*, 306 AD2d 209 [1st Dept 2003]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992], lv dismissed in part, denied in part 80 NY2d 1005 [1992]). Additionally, the movant seeking renewal must provide a valid excuse "as to why the new information was not previously submitted" (*Matter of Jones v Marcy*, 135 AD2d 887 [3rd Dept 1987]; see *Carota v Wu*, 284 AD2d 614 [3rd Dept 2001]). Renewal, however, is not "a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Rubinstein v Goldman*, 225 AD2d 328, 329 [1st Dept 1996]). Another factor to be considered is the length of the delay in moving to renew the motion (see *Rivera v Ayala*, 95 AD3d 622 [1st Dept 2012] [two year delay without explanation precludes granting the motion]).

In *Rotondi v Horning* (168 AD2d 944 [4th Dept 1990]), the orthopedic surgeon did not forward his report to the plaintiff until 11 days after the court granted the defendant's motion for summary judgment. The plaintiff then applied for leave to renew

and the court denied the motion; the Fourth Department reversed, holding that the surgeon's affidavit, supported by his report, created a material issue of fact on the issue of serious injury (see also *Seifts v Markle*, 211 AD2d 848 [3rd Dept 1995] [facts were not available to the plaintiff at the time of the motion due to the "inadvertance of the examining physician"]).

The Court is aware of those cases holding that the legal requirements for a motion for renewal are "not inflexible and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts known to the movant at the time the original motion was made" (*Garner v Latimer*, supra; see *Liberty Mut. Ins. Co. v Allstate Ins. Co.*, 237 AD2d 260 [2nd Dept 1997]). Thus, even where the legal requirements are not met, renewal may still be granted so as not to "defeat substantive fairness" (*Lambert v Williams*, 218 AD2d 618 [1st Dept 1995]).

Defendants rely on *Henry v Peguero* (72 AD3d 600 [1st Dept 2010]) in support of their position. There, the First Department held that a supplemental medical statement that was submitted in support of a renewal motion was simply an "attempt to remedy a weakness in plaintiff's opposition to defendants' original motion, endeavoring to relate the degenerative changes in plaintiff's spine to the motor vehicle accident." The First Department recognized that while the statutory prescription to present new evidence need not be applied to defeat substantive fairness, "such treatment is available only in a 'rare case'" (id. at 602, quoting *Pinto v Pinto*, 120 AD2d 337, 338 [1st Dept 1986]).

Here, Plaintiff relies on the reports of Drs. Sherban, Egnatchik, and Levy. Dr.

Sherban first saw Plaintiff on June 30, 2015, five days after this Court's decision. Dr. Sherban examined Plaintiff's June 2014 MRI and diagnosed her, with among things, herniations at C3-4 through C6-7, which necessarily included a herniation at C5-6. The "fact" of that herniation thus was available to Plaintiff at the time of the original summary judgment motion. According to Mr. Chiacchia's Affirmation, Dr. Sherban recommended a repeat MRI, which took place on July 28, 2015 and at that time he reviewed surgical and non-surgical options with Plaintiff, who elected, as she had pre-motion, to continue treating conservatively, although Dr. Sherban discussed with her that she may be a candidate for surgery.

Plaintiff then consulted with Dr. Egnatchik, who performed some tests and reviewed Plaintiff's MRIs, including both pre- and post-motion ones, and similarly concluded that Plaintiff had a herniation at C5-6. He ultimately performed surgery on Plaintiff on January 12, 2016. He opined that the herniation "occurred at the time of the accident" and that she "sustained serious and permanent cervical spine injuries and loss as a direct result of the motor vehicle accident of January 4, 2013, including a disc herniation at the C5-6 level resulting in a narrowing of her spinal canal." It was his opinion, to a reasonable degree of medical certainty, that she sustained a permanent consequential limitation of use of her neck as a direct result of the accident.

Finally, Plaintiff relied on the medical report of Dr. Levy, who saw Plaintiff on June 11, 2015. Dr. Levy also concluded, consistent with the other doctors, that the herniation was present on the pre-motion MRIs. The MRIs were referenced in the report of Dr. Daniel A. Castellani, which Defendants relied on in the original motion.

The Court concludes that the "new facts" relied on by Plaintiff are nothing more than new diagnoses from new doctors . These diagnoses certainly were available to Plaintiff at the time of the original motion. Dr. Levy's determination, even as a no-fault IME doctor, simply affirms what other doctors had opined, namely, that Plaintiff was a surgical candidate. The Fourth Department's recent decision affirming this Court's order confirms that Plaintiff failed on the original motion to submit evidence creating a triable question of fact on the question of serious injury. Although the Chiacchia Affirmation discusses the post-motion medical reports and opinions, it fails to discuss why Plaintiff waited until after the motion was decided to see Drs. Sherban and Egnatchik, or why, if appointments with either or both of those doctors were scheduled during the pendency of the original motion, no request was made to adjourn argument of the motion pending the reports of those physicians. Certainly, Plaintiff could have sought an adjournment of the motion based on incomplete discovery.

The Court notes that it does not appear that a Note of Issue and Statement of Readiness were filed in this case; therefore, there was no declaration by either party that discovery was complete and the case trial ready (see generally Siegel, NY Prac §§ 368-371, at 634-640 [5th ed.]).

Plaintiff relies heavily on the report and conclusion of Dr. Levy, presumably because Dr. Levy was performing an IME for the no-fault carrier, and therefore was "objective." Dr. Levy's report, attached to the Chiaccia Affirmation as Exhibit D, includes a history of Plaintiff's treatment with various medical providers and a statement of Dr. Levy's review of radiological studies. Dr. Levy noted that a January 2013 MRI revealed a "[s]mall central disc protrusion[ ] (herniation[ ]) . . . C5-C6." Dr. Levy

concluded that Plaintiff suffered from "Cervical Radiculopathy, Cervical Degenerative Spine Disease" and that, to a reasonable degree of medical certainty, the cervical radiculopathy "is causally related to the event of record [the accident] and the prior degenerative spine disease" and that surgery was reasonable and medically necessary.

There is no question that MRIs taken after the accident and before the submission of the original motion show a herniation at C5-6. In this Court's decision on that motion, it was held that the evidence demonstrated that Plaintiff "suffered from preexisting injuries in the general body parts alleged to have been affected in [the] accident." Notably, Defendants relied on the report of Dr. Daniel A. Castellani in support of that position, and Plaintiff's submission in opposition failed to "adequately address how her [then] current medical problems, in light of her past medical history, are causally related to the subject accident, rather than to her preexisting conditions."

Plaintiff states that the reports and opinions of Drs. Sherban, Egnatchik and Levy were not "in existence" at the time of the original motion. That cannot be disputed. However, because those doctors relied on evidence that was in existence at the time of the original motion, that is, the 2013 and 2014 MRIs, Plaintiff's present contention is without merit. Even if those doctors performed additional testing for items such as range of motion, it was incumbent upon Plaintiff to seek such medical opinions and diagnoses as would, at the very least, create a material issue of fact sufficient to defeat the original summary judgment motion.

This Court does not believe that Plaintiff was doctor-shopping when she sought medical opinions post-decision and credits counsel's statement that the doctor appointments were scheduled before the motion was decided but the actual

appointments did not take place until after the decision was issued. Nevertheless, the purpose of a summary judgment motion is issue finding, not issue determination (see *Saunders v Farm Fans, div. of ffi Corp.*, 24 AD3d 1173 [4th Dept 2005]). Plaintiff could have requested an adjournment of the motion until further medical evidence was available, but did not do so. Granting the motion to renew and denying summary judgment to Defendants would give Plaintiff two bites at the apple, and would seemingly sanction unending litigation where a party continues to treat for injuries and receives new or different diagnoses. This Court cannot countenance such a scenario, particularly where the injured party had numerous examinations and diagnostic tests before the summary judgment motion was made.

Finally, this Court declines to address the alternative argument raised by Defendants that even if this Court granted the motion to renew, it should adhere to its original decision to grant summary judgment to Defendants, on the ground that Plaintiff has failed to raise a material issue of fact with respect to the issue of serious injury.

Accordingly, Plaintiff's motion to renew is hereby denied. This constitutes the Decision and Order of the Court

DATED: March 29, 2017

HON. MATTHEW J. MURPHY
ACTING SUPREME COURT JUDGE

GRANTED

MAR 29 2017

BY: JUDITH A. VACANTI, COURT CLERK