

Nanez v Pow

2018 NY Slip Op 34276(U)

January 25, 2018

Supreme Court, Nassau County

Docket Number: Index No. 609582/2016

Judge: John M. Galasso

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

DIOMAR NANEZ,

Plaintiff,

- against -

ROBERT POW and MARJORIE POW,

Defendants.

Index No. 609582/2016
Sequence #s 003, 004, 005

003: MD

Part 18
11/27/17

004: M

005: MD

Notices of Motion (Seq. #s 003, 004, 005).....	1-3
Affirmations in Opposition.....	4-7
Affirmations in Reply.....	8-10

Upon the foregoing papers, the motions of the plaintiff, Diomar Nanez, for an Order precluding the defendants from offering any testimony at trial concerning the injuries sustained by plaintiff pursuant to CPLR § 3126 (**Seq. #003**); for leave to renew its prior application for summary judgment pursuant to CPLR § 2221, and upon renewal, granted summary judgment on the issue of liability pursuant to CPLR § 3212 (**Seq. #004**); and for summary judgment on the issue of threshold pursuant to CPLR § 3212 (**Seq. #005**) are determined as set forth below.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, as a result of a motor vehicle accident which occurred on December 5, 2016 on Hillside Avenue at its intersection with Lakeville Road, New Hyde Park, New York. Plaintiff, a pedestrian, alleges that she was struck by a motor vehicle owned by defendant Robert Pow and operated by defendant Marjorie Pow, while said vehicle was making a left turn from Lakeville Road onto Hillside Avenue. As a result of said accident the plaintiff alleges to have sustained serious personal injuries.

Motion to preclude Seq. #003

This Court on October 11, 2017, signed a Certification Order which required the plaintiff to file the Note of Issue within 90 days of the date of said Order. Pursuant to that directive the Note of Issue was filed on or before January 9, 2018. At the time of the Certification Conference the plaintiff and defendants entered into a stipulation regarding outstanding discovery. The plaintiff filed the Note of Issue on or about November 20, 2017 and subsequent to the filing of the instant application.

Counsel for the plaintiff asserts that defendant has failed to provide the outstanding discovery related to plaintiff's neuropsychological testing and outlined in the stipulation as "test booklets, scoring protocol and raw data gathered by Dr. Richard DeBenedetto during his 8/1/17 exam of plaintiff to the extent available and appropriate". Plaintiff contends this information is material and necessary for the prosecution of her case.

In opposition, defendants' counsel asserts that the scoring protocol was provided as set forth in the previously furnished report of Dr. Richard DeBenedetto, PhD (hereinafter "Dr. DeBenedetto"). Regarding plaintiff's demand for raw data consisting of test booklets and score sheets, defendants contend that they agreed to provide same, however, pursuant to Dr. DeBenedetto's own practice, said doctor will only release the raw data to another treating or expert psychologist/neuropsychologist retained by plaintiff.

While defense counsel sets forth the agreement to turn over its expert's raw data and scoring sheets, there is no reasoning offered for not releasing such information to anyone but another licensed psychologist/neuropsychologist other than this doctor's custom and practice. In as much as the instant application occurred prior to plaintiff's filing of the note of issue, and the parties previously stipulated and agreed that the scoring protocol and raw data generated from defendant's neuropsychological assessment performed on plaintiff by Dr. DeBenedetto would "not be released to any third party outside plaintiff counsel's office other than to a licensed psychologist and/or neuropsychologist," plaintiff's application is granted to the extent that Dr. DeBenedetto's raw data consisting of test booklets and score sheets, associated with his examination of plaintiff, shall be provided to plaintiff's counsel in accordance with the parties' executed stipulation, dated October 23, 2017, and attached to the instant motion papers, within thirty (30) days of the date of this Order.

Motion to renew and upon renewal, summary judgment on the issue of liability Seq. #004

Plaintiff seeks renewal of its summary judgment motion, contending new facts not offered in the plaintiff's prior application - in the form of plaintiff and defendant Marjorie Pow's deposition testimony - establishes that plaintiff was not negligent and that defendant was negligent *per se* for violation of Vehicle and Traffic Law §§ 1146 and §1152(a). In support of its application for renewal, plaintiff submits, *inter alia*, a copy of its original motion papers, the deposition transcripts of the testimony of plaintiff and defendant Marjorie Pow and this defendant's affidavit in opposition to plaintiff's prior motion.

A motion to renew pursuant to CPLR 2221(e) "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination," and it "shall contain

reasonable justification for the failure to present such facts on the prior motion” (*CPLR 2221[e][2], [3]*; see *Hatzioannides v. City of New York*, 39 A.D.3d 706, 708, 833 N.Y.S.2d 630). “Leave to renew is not warranted where the factual material adduced in connection with the subsequent motion is merely cumulative with respect to the factual material submitted in connection with the original motion” (*Stone v. Bridgehampton Race Circuit*, 244 A.D.2d 403, 403, 665 N.Y.S.2d 554; see *Yerushalmi v. Yerushalmi*, 82 A.D.3d 1217, 1217–1218, 919 N.Y.S.2d 374; *Matter of Orange & Rockland Util. v. Assessor of Town of Haverstraw*, 304 A.D.2d 668, 669, 758 N.Y.S.2d 151). *Varela v. Clark*, 134 A.D.3d 925, 21 N.Y.S.3d 331 [2d Dept. 2015].

Applied herein, the facts presented in the deposition testimony are essentially the same in that plaintiff’s version of the events, testifying that she was in the crosswalk at the time of the accident conflict with defendant’s version of the events, wherein she testifies that plaintiff was outside of the crosswalk when the impact took place. Any other discrepancies of facts as presented in the affidavit and deposition testimony of defendant, can be addressed at trial.

In as much as the no new facts have been offered on the prior motion that would change this Court’s prior determination, the present application for leave to renew is denied.

Motion for summary judgment on issue of threshold Seq. #005

Plaintiff seeks summary judgment on the issue of threshold, contending that plaintiff suffered a serious injury as set forth in Section 5102(d) of the New York State Insurance Law, based upon multiple injuries, including a fractured pelvis and lumbar spine. In support of the motion, defendant submits, *inter alia*, copies of the pleadings, the deposition testimony transcript of defendant, the affirmed medical examination report of orthopedist P. Leo Varriale, M.D., dated August 22, 2017, the medical records of Winthrop University Hospital, and the affirmed medical examination report of orthopedic surgeon Maxim Tyorkin, M.D., dated January 18, 2017.

Defendant submits the report of Dr. P. Leo Varriale, an orthopedist who examined plaintiff on August 22, 2017. Dr. Varriale examined the plaintiff, performed range of motion testing on the plaintiff using a goniometer and compared those findings to normal findings. Dr. Varriale found that plaintiff had normal ranges of motion in her cervical, lumbar and thoracic spine, shoulders, elbows, wrists, right hip, knees, ankles and right thumb. Dr. Varriale’ report reveals findings that are not within normal range of motion for plaintiff’s left hip and diagnoses a healed fracture of the pelvis with resolved strain to both knees, cervical and lumbosacral strain and strain to the right thumb and left shoulder. Dr. Varriale concludes, based upon his physical examination and review of the medical records, that although plaintiff shows that no disability, no residuals and no permanency exists with regard to her injuries, said injuries are causally related to the accident of December 5, 2016.

In addition to Dr. Varriale's sworn report, the plaintiff also submits the affirmation of Dr. Maxim Tyorkin M.D. an orthopedic surgeon. Dr. Tyorkin examined plaintiff and reviewed plaintiff's medical records for CT scans of her thoracic spine and abdomen/pelvis, performed in the hospital on the date of the accident, December 5, 2016. Dr. Tyorkin's report concludes that based upon his review of plaintiff's records and examination, her pelvic fracture and lumbar radiculopathy were caused by the subject accident.

In opposition, defendant contends that plaintiff's evidence is insufficient to establish summary judgment on the serious injury threshold issue. Defendant asserts that the physician report of Dr. Varriale and the affirmation of Dr. Tyorkin rely upon unsworn medical reports such as a review of x-ray/MRI films performed by other physicians and uncertified medical records. Defendants contend that the medical records included and reviewed are inadmissible without a physician attesting to the truth and validity of the information contained therein.

While the examination report of Dr. Varriale set forth objective findings of plaintiff's decreased range of motion in her right hip, an issue of fact is raised by the defendant regarding the evidentiary admissibility of the medical records and data utilized for review of and determination of plaintiff's fractured right hip. Although defendant does not dispute plaintiff's fracture, plaintiff fails to include evidence of the plaintiff's fracture from a treating physician. Despite Dr. Tyorkin's stating that he performed range of motion testing, there is no objective evidence set forth in his report wherein his conclusions of plaintiff's fracture are based solely upon a review of medical records and reports. The task of the court regarding a motion for summary judgment is "issue finding rather than issue determination... Since summary judgment is the procedural equivalent of a trial, any doubt as to the existence of a triable issue, or where the material issue of fact is arguable the motion should be denied." (*Matter of Cuttitto Family Trust v. Fanara*, 10 A.D.3d 656, 657, 781 N.Y.S.2d 696 [2nd Dept. 2004]).

Accordingly, plaintiff's motion for summary judgment on the issue of threshold is denied.

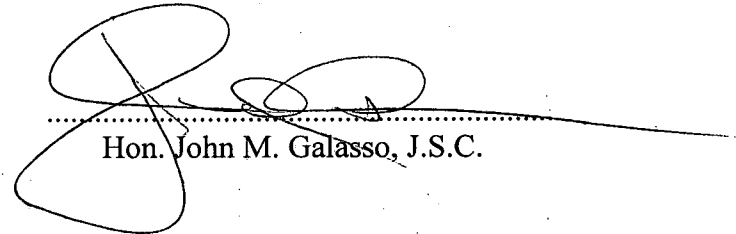
The motion of the plaintiff, Diomar Nanez, (Seq. #003) for an Order precluding the defendants from offering any testimony at trial concerning the injuries sustained by plaintiff pursuant to CPLR § 3126 is granted to the extent that Dr. DeBenedetto's raw data consisting of test booklets and score sheets, associated with his examination of plaintiff, shall be provided to plaintiff's counsel in accordance with the parties' executed stipulation, dated October 23, 2017, and attached to the instant motion papers, within thirty (30) days of the date of this Order.

The motion of the plaintiff, Diomar Nanez, (Seq. #004) for leave to renew its prior application for summary judgment pursuant to CPLR § 2221, and upon renewal, granting summary judgment on the issue of liability pursuant to CPLR § 3212 is denied.

The motion of the plaintiff, Diomar Nanez, for an Order (Seq. #005); and for summary judgment on the issue of threshold pursuant to CPLR § 3212 is denied.

This constitutes the decision and Order of this Court. Any relief not expressly granted herein is denied.

January 25, 2018



Hon. John M. Galasso, J.S.C.

ENTERED

FEB 08 2018

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**