Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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NOURA MOHAMED,

Plaintiff(s),

- against -

ROCKAWAY CAR SERVICE and TEJINDER KAUR,

Defendant(s).

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Index No.: 711248/17

Motion Date: 6/29/21

Motion Cal. No.: 12

Motion Seq. No.: 03

The following papers numbered 1 - 9 read on this motion by plaintiff, pursuant to CPLR 2221 (d), for leave to reargue the prior motion and cross-motion, and upon granting leave, denying summary judgment dismissing the complaint, and on this cross-motion by defendant Tejinder Kaur, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Notice of Cross-Motion-Affirmation-Service.....	5 - 7
Affirmation in Opposition-Service.....	8 - 9

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

In this personal injury action arising from a July 26, 2015 automobile collision plaintiff allegegly sustained multiple injuries satisfying the statutory threshold, including, *inter alia*, that she was unable to perform substantially all of the material acts comprising her usual and customary daily activities for 90 of the first 180 days after the accident, *i.e.* "the 90/180 category" (*see* Ins § 5102 [d])

By decision and order dated and entered October 1, 2020, this court, *inter alia*, awarded summary judgment to defendant Tejinder Kaur, and dismissed the complaint, finding that Kaur established that plaintiff had not sustained a serious injury under the No-

Fault Law.[1] Plaintiff now moves for leave to reargue solely that portion of the motions which resulted in the granting of summary judgment dismissing her complaint.

CPLR 2221 (d) (2) provides, in pertinent part, that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion ... ." The determination of whether to grant leave is committed to the court's discretion, and the motion is "not designed to provide [] successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.*, 178 AD3d 772, 773 [2d Dept 2019] [internal quotation marks and citations omitted]).

Plaintiff argues that on the prior motion practice, this court overlooked that in her complaint and bill of particulars ("BP"), she alleged that the injuries sustained in the subject accident qualified under "the 90/180 category." She also contends that defendant failed to make a *prima facie* showing to the contrary, as his motion papers actually presented evidence of her inability to work for at least 90 out of the first 180 days after the accident. It is noted that this court's October 1, 2020 decision and order did not identify the specific serious injury categories claimed by plaintiff, nor did it discuss how defendant's submissions specifically negated the applicability of any particular category. In addition, defendant's arguments in favor of summary judgment were largely based on the conclusions of his orthopaedic expert that plaintiff's claimed injuries had resolved, and, as discussed below, his papers made only passing, conclusory reference to the applicability of the 90/180 category. The court, thus, grants leave to reargue, and will determine whether defendant made his *prima facie* showing with regard to the specific serious injury at issue on this motion, *i.e.* the 90/180 category.

A defendant moving for summary judgment in this context bears the "prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident" (*Luque v Flovictov Cab Corp.*, 168 AD3d 922, 923 [2d Dept 2019]). In his original moving papers, defendant largely relied upon the affirmed report of orthopaedic expert, Joseph C. Elfenbein, M.D., who performed an independent medical examination ("IME") of plaintiff on February 13, 2020. Dr. Elfenbein stated that he reviewed only plaintiff's BP, and that his

[1]In its October 1, 2020 order, the court stated that it denied defendant Kaur's cross-motion as improper on the ground that defendant Rockaway Car Service was the original movant. This was error, as the record shows that plaintiff, and not Rockaway, was the original movant; Kaur's cross-motion was, thus, proper. As Rockaway has not appeared in this action, it is evident that the court actually considered and granted Kaur's cross-motion.

examination revealed that all of her claimed injuries had resolved; he did not opine as to whether the claimed injuries had been caused by the accident. It is well-settled that the serious injury categories are to be read in the disjunctive (*see Estrella v GEICO Ins. Co.*, 102 AD3d 730, 731-732 [2d Dept 2013]; *Decker v Rassaert*, 131 AD2d 626, 627 [2d Dept 1987]). Hence, although Dr. Elfenbein's conclusion that plaintiff's injuries had resolved may have negated, *prima facie*, application of those serious injury categories claimed by plaintiff which require a finding of permanency, it does not necessarily foreclose applicability of those for which permanency is irrelevant, such as the 90/180 category. Moreover, Dr. Elfenbein examined plaintiff only once, nearly five years after the accident, and did not review any of her medical records, much less those which were contemporaneous to the accident. As such, he did not proffer an opinion on whether plaintiff was unable to perform substantially all of the material acts comprising her usual and customary daily activities for 90 of the first 180 days after the accident (*see e.g. Kapeleris v Riordan*, 89 AD3d 903, 904 [2d Dept 2011] [summary judgment denied where IME was held years after the accident and the defense expert failed to relate findings to the 90/180 category during the applicable time period]; *Reynolds v Wai Sang Leung*, 78 AD3d 919, 920 [2d Dept 2010] [same]; *Smith v Quicci*, 62 AD3d 858, 859 [2d Dept 2009] [same]). Defendant, therefore, failed to submit objective proof establishing that plaintiff's claimed injuries do not qualify under the 90/180 category.

The showing made in defendant's original motion papers-in-chief regarding the inapplicability of the 90/180 category was based solely on the statement in Dr. Elfenbein's report that plaintiff "denies missing anytime [*sic*] from work." However, at her deposition held several months before the IME with Dr. Elfenbein, plaintiff testified that her injuries had caused her to miss several months from work after the July 26, 2015 accident, she never returned to the home health care aid position she held at the time of the accident, and her next job was working for the Board of Elections, which she started in July of the following year. This testimony raises a triable factual issue as to whether plaintiff was unable to perform substantially all of the material acts comprising her usual and customary daily activities for 90 of the first 180 days after the accident. Since defendant included the transcript of plaintiff's deposition with his motion papers-in-chief, he necessarily failed to eliminate all triable issues of fact regarding applicability of the 90/180 category. Defendant's failure to make his *prima facie* showing requires denial of summary judgment regardless of the sufficiency of plaintiff's opposition (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Penoro v Firshing*, 70 AD3d 659, 660 [2d Dept 2010]; *Powell v Prego*, 59 AD3d 417, 419 [2d Dept 2009]).

Accordingly, the above-referenced motion by plaintiff for is granted to the extent that it is

ORDERED that plaintiff's motion for leave to reargue the prior motions resulting in this court's October 1, 2020 order is **GRANTED**; and it is further

ORDERED that upon the granting of leave to reargue, defendant's prior cross-motion for summary judgment dismissing the complaint is **DENIED**; and it is further

ORDERED that the complaint is reinstated, and this action is restored to active status.

The foregoing shall constitute the decision and order of this court.

Dated: July 14, 2021

JANICE A. TAYLOR, J.S.C.

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