

Lindsay v Alvarez
2024 NY Slip Op 35717(U)
October 7, 2024
Supreme Court, Bronx County
Docket Number: Index No. 804900/2022E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 8**

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SHENEE SHANNAY LINDSAY,
Plaintiff.

Index №. 804900/2022E

-against-

Hon. BIANKA PEREZ

JUAN P. FLORES ALVAREZ.

Justice Supreme Court

Defendant.

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The following were read on these motions (Mot. Seq. 2) to **RENEW** submitted on **April 18, 2024**.

Notice of Motion - Exhibits and Affidavits Annexed	NYSCEF No(s). 36-38
Answering Affidavit and Exhibits	NYSCEF No(s). 39
Reply Affidavit and Exhibits	NYSCEF No(s). N/A

Upon the foregoing papers, plaintiff moves for an Order pursuant to CPLR §2221(e) granting the renewal of the summary judgment motion of defendant on the issue of serious injury threshold and upon renewal denying summary judgment to defendant, reinstating plaintiff's claims and restoring this case to the trial calendar. Defendant opposes.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident on December 20, 2021, which occurred on Mickle Avenue at or near the intersection with East Gun Hill Road in the County of Bronx, City and State of New York. This Court issued an Order on March 11, 2024, granting defendant's summary judgment motion on the issue of serious injury threshold and dismissed the Complaint. Plaintiff now moves for renewal of defendant's previous motion for summary judgment as against plaintiff for her failure to satisfy the "serious injury" threshold as defined by New York Insurance Law §5102(d).

Motion to Renew

A motion seeking leave to reargue, 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 and shall be filed within 30 days of service of the prior order with notice of its entry (see CPLR 2221[d]). A motion to reargue is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (see *Queens Unit Venture LLC v. Tyson Court Owners Corp.*, 111 A.D.3d 552 [1st Dept 2013]).

A motion to renew under CPLR 2221, on the other hand, is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention (*Beiny v Wynyard*, 132 AD2d 190 [1st Dept 1987], *lv dismissed* 71 NY2d 994). Judged by these standards, the Court finds this motion to be a motion to renew.

The moving plaintiff argues that defendant was previously granted summary judgment on the issue of serious injury threshold due to her failure to submit any affirmed medical records. Plaintiff now seeks renewal as she has an affirmed medical report from her treating physician, Dr. Albert Graziosa, M.D., which, plaintiff says she was not able to obtain before the return date of the prior motion due to delays in Dr. Graziosa's office.

The moving party must show "new facts not offered on the prior motion that would change the prior determination," pursuant to CPLR Section 2221(d) and (e). Here, the moving plaintiff annexes the affirmed medical report of Dr. Graziosa, annexed as Exhibit A.

After a review of the Court's prior decision, the current motion and opposition, the Court grants renewal and upon renewal modifies its March 11, 2024, decision to the extent below and grants plaintiff's motion to reinstate plaintiff's claims and restore this case to the trial calendar.

Threshold Motion for Summary Judgment

When a defendant seeks summary judgment alleging that a plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Plameri*, 1 N.Y.3d 536 [2003]). "Such evidence includes 'affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim'" (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept. 2011])[internal quotations omitted]. A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (*see Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]). Plaintiff has annexed the affirmed medical report of Dr. Graziosa, from a recent exam, in which he opines within a reasonable degree of medical certainty that plaintiff's injuries were causally related to the subject accident. He further states that her right shoulder "will continue to be problematic" and that plaintiff "may continue to have some pain and discomfort in her right knee," (NYSCEF Doc. #38). In opposition, defendant argues that the facts have not changed since the matter was decided by this Court in the March 11, 2024, Order, and that the affirmed report submitted still relies on uncertified MRI records from plaintiff's papers annexed in the prior motion.

In this case defendant established that plaintiff's alleged injuries were not permanent or significant in nature. In the prior motion, defendant accomplished this by submitting reports of defendant's radiologist, who opined that the MRIs those body parts showed conditions longstanding with "no posttraumatic changes causally related" to the subject accident (*see Massillon v. Regalado*, 176 A.D.3d 600 [1st Dept 2019] and *Auquilla v Singh*, 162 AD3d 463, 463 [1st Dept 2018])(NYSCEF Doc. #22, Exh. E).

In opposition to the motion, plaintiff raised a triable issue of fact as to whether she sustained a "permanent consequential" or "significant" limitation of use of her right shoulder. Plaintiff submitted an affirmed narrative

report of Dr. Graziosa, in which he reported that she had MRIs, complained of pain, and had significant range-of-motion limitations in her right shoulder and right knee shortly after the accident and at more recent examinations. Dr. Graziosa further states that plaintiff was "indicated for surgical intervention based on both her MRI findings and continued discomfort," and that, "the right shoulder ... will continue to be problematic based on the fact that surgical management was required," (NYSCEF Doc. #38). Dr. Graziosa concluded, within a reasonable degree of medical certainty, that plaintiff's injuries are causally related to the subject motor vehicle accident (see *Windham v New York City Tr. Auth.*, 115 AD3d 597, 598 [1st Dept 2014]).

The above submissions are sufficient to raise fact issues as to whether plaintiff sustained a "permanent consequential" or "significant" limitation of use of her right shoulder and right knee as a result of this accident (*Encarnacion v. Castillo*, 146 A.D.3d 600, 601 [1st Dept. 2017]). Since there remain issues of fact as to whether plaintiff sustained serious injuries to her right shoulder and right knee she may recover for any other injury sustained in the accident, even though they did not meet the "serious injury" threshold (see, e.g., *Bonilla v. Vargas-Nunez*, 147 A.D.3d 461, 462 [1st Dept. 2017]).

As to defendants' branch of the motion, which argues that the proof rules out a serious injury based on the 90/180-day claim, the Court finds that defendant has not established their entitlement to summary judgment as to the 90/180-day claim. Plaintiff alleged in her Bill of Particulars that after the accident that she was only confined to bed or home for fourteen (14) days following her cervical spine surgery and twenty days following her right shoulder surgery, which is usually fatal to a "90/180 day" injury claim (NYSCEF Doc. #20, Exh. C); (see *Newell v. Javier*, 220 A.D.3d 487 [1st Dept. 2023]). However, Plaintiff raised a question of fact when she stated in her deposition that she missed about six (6) months from work at the direction of her pain management doctor and that she did not work for about nine (9) months in total after the accident (NYSCEF Doc. #23, Exh. F, Pg. 112-113, 115); (*Kaakyire v. Soto*, 151 NYS 3d 891 [1st Dept 2021]). This was corroborated by her treatment records which stated that Plaintiff was unable to return to work as of May 6, 2022 (NYSCEF Doc. #31, Pg. 173); (see *Damas v. Valdes*, 84 A.D.3d 87, 93 [2d 2011]). Additionally, defendants' motion is based on insufficient proof as defendants' medical expert, who examined plaintiff almost two (2) years after the accident, failed to address plaintiff's condition or limitations within the first 180 days following the accident which is necessary to foreclose the 90/180 day category (see *Harris v. Vogler*, 187 AD3d 1392 [3rd Dept 2020]; see also *Kaakyire v. Soto*, 151 NYS 3d 891 [1st Dept 2021]; *Lazzari v. Qualcon Constr., LLC*, 162 AD3d 440, 441-442 [1st Dept 2018]; *Martinez v Goldmag Hacking Corp.*, 95 AD3d 682, 683 [1st Dept 2012]).

Finally, there is no evidence on this record that plaintiff sustained a "permanent loss of use" of any body part - which requires a "total" loss of use (*Swift v. New York City Transit Authority*, 115 A.D.3d 507, 509 [1st Dept. 2014]).

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED, the Plaintiff's motion for renewal is granted, and it is further

ORDERED, that upon renewal plaintiff's claims as to "permanent consequential," "significant" limitation," and "90/180 day" injury are reinstated and this case is restored to the trial calendar, and it is further

ORDERED, that the Court's March 11, 2024 Order is modified to grant defendant's motion ONLY to the extent of dismissing plaintiff's "permanent loss of use" claim and it is further

ORDERED, that the Clerk of the Court is directed to restore the matter to the active calendar and transfer the matter to Part 14.

This constitutes the Decision and Order of this Court.

Dated: October 7, 2024

Hon. 
BIANKA PEREZ, J.S.C.

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| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY | ☒ CASE STILL ACTIVE |
| 2. MOTION IS..... | ☒ GRANTED | ☐ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 3. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER | ☐ SUBMIT ORDER ☒ TRANSFER |
| | ☐ FIDUCIARY APPOINTMENT | ☐ REFEREE APPOINTMENT |