

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT**

Lazarus v. Perez

73 A.D.3d 528 (N.Y. App. Div. 1st Dep't 2010) · Decided May 13, 2010

SUMMARY

The Appellate Division affirmed the denial of the plaintiffs' motion to renew an order granting defendants summary judgment. The court held that the plaintiffs failed to present new facts warranting renewal and, in any event, failed to submit contemporaneous objective medical evidence establishing a serious injury under New York's no-fault Insurance Law, including the 90/180-day category.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Andrias, J.P.; Saxe, J.; Sweeny, J.; Moskowitz, J.; Abdus-Salaam, J.
JURISDICTION	New York
DECIDED	May 13, 2010
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiffs appealed from an order denying their motion to renew a prior order that had granted defendants Perez and Best Auto summary judgment dismissing the complaint.
STANDARD OF REVIEW	The denial of a motion for renewal was reviewed for compliance with CPLR 2221(e); the court also considered the underlying summary judgment merits.
PRECEDENTIAL VALUE	published appellate decision
PARTIES	Lazarus v. Perez, Best Auto

TOPICS

summary judgment personal injury civil procedure evidence

PRACTICE AREAS

civil procedure personal injury motor vehicle accident litigation New York serious-injury threshold

QUESTIONS PRESENTED

1. Whether plaintiffs established grounds for renewal under CPLR 2221(e) by presenting new facts not offered on the prior motion that might have changed the result.
2. Whether plaintiff submitted objective medical evidence sufficient to satisfy New York's serious-injury threshold.
3. Whether plaintiff established a serious injury under the 90/180-day category of Insurance Law § 5102(d).

HOLDINGS

1. A motion to renew was properly denied because plaintiffs did not present new facts not offered on the prior motion that might have led to a different result.
2. Contemporaneous, objective medical proof of injury, including a quantitative assessment of loss of range of motion or the extent of physical limitation, is necessary to satisfy the statutory serious-injury threshold; plaintiff's medical submissions did not satisfy that requirement.
3. Plaintiff failed to establish a 90/180-day serious injury because she submitted no medical evidence showing that she was unable to perform substantially all of the material acts constituting her usual and customary daily activities for at least 90 of the first 180 days after the accident.

KEY QUOTATIONS

“In the absence of new facts not offered on the prior motion that might have led to a different result (CPLR 2221 [e]), plaintiffs motion for renewal was properly denied” (528)

“It is well settled that contemporaneous, objective proof of injury, such as an expert’s designation of a numeric percentage loss of range of motion or the extent or degree of physical limitation, is necessary to satisfy the statutory serious injury threshold” (528)

“she failed to submit medical evidence to show that she could not perform “substantially all of the material acts which constitute [her] usual and customary daily activities”” (529)

FACTUAL BACKGROUND

Plaintiff claimed injuries arising from an accident and relied on contemporaneous medical records and reports from South Africa. The records were not certified or sworn, but defendants had referred to them in support of their summary judgment motion. The doctors found no significant abnormalities and described plaintiff as free of neurological signs; the records also lacked quantitative assessments of restricted motion or other serious abnormalities. Plaintiff further claimed that she missed time from college but submitted no medical evidence showing that she could not perform substantially all customary daily activities for at least 90 of the first 180 days after the accident.

PROCEDURAL HISTORY

Supreme Court, Bronx County, entered an order on or about May 22, 2008, denying plaintiffs' motion to renew the prior summary judgment order. The Appellate Division unanimously affirmed, without costs, holding that

renewal was properly denied and that plaintiffs' arguments also failed on the merits.

DISPOSITION

affirmed

CASES CITED

- Rosado v. Edmundo Castillo Inc., 54 A.D.3d 278, 279 (N.Y. App. Div. 2008)
- Franchini v. Palmieri, 1 N.Y.3d 536, 537 (2003)
- Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345, 350-351 (2002)

OPINION

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PER CURIAM.

Order, Supreme Court, Bronx County (Nelson S. Román, J.), entered on or about May 22, 2008, which, to the extent appeal-able, denied plaintiffs motion to renew a prior order granting the motion by defendants Perez and Best Auto for summary judgment dismissing the complaint, unanimously affirmed, without costs. In the absence of new facts not offered on the prior motion that might have led to a different result (CPLR 2221 [e]), plaintiffs motion for renewal was properly denied (see *Rosado v Edmundo Castillo Inc.*, 54 AD3d 278, 279 [2008]). Even were we to consider the merits, we would find plaintiffs argument without substance. Although plaintiffs contemporaneous medical records and reports from South Africa were neither certified nor sworn, plaintiff could rely upon them because defendants referred to these documents in support of their motion for summary judgment. Nevertheless, these doctors discerned no significant abnormalities and found plaintiff to be “free of any neurological signs.” Nor do plaintiffs medical records contain any quantitative assessment of a loss of range of motion, spinal defects or other serious abnormalities. It is well settled that contemporaneous, objective proof of injury, such as an expert’s designation of a numeric percentage loss of range of motion or the extent or degree of physical limitation, is necessary to satisfy the statutory serious injury threshold (see *Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Plaintiff’s argument with regard to the 90/180 rule (Insurance Law § 5102 [d]) is similarly unavailing. Despite plaintiffs contention that she missed some time from college as a result of her accident, she failed to submit medical evidence to show that she could not perform “substantially all of the material acts which constitute [her] usual and customary daily activities” (id.) for not less than 90 of the first 180 days following the ac*529cident. Concur—Andrias, J.P., Saxe, Sweeny, Moskowitz and Abdus-Salaam, JJ.