

Rozon v Chavez

2007 NY Slip Op 30278(U)

March 15, 2007

Supreme Court, New York County

Docket Number: 0120145

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH L. LISCHÉ

PART 10

Index Number : 120145/2003

ROZON, NORBERTO

vs

CHAVEZ, VIRGINIO

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 21 2007

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 3/15/07

J.S.C.
HON. JUDITH L. LISCHÉ

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

[* 1]

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
NORBERTO ROZON, MANUEL EMILIO
CASTILLO, and YANKO HAROLD TAVAREZ,

Plaintiffs,

-against-

VIRGINIO CHAVEZ and ALLSTATE
INSURANCE COMPANY,

Defendants.
-----X

Decision/Order

Index No.: 120145/03

Seq. No. : 004, 005

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

	Numbered
<u>Motion Seq 004</u>	
Def Chavez motion [RR] w/MJF affirm in support, exhs	1
Pltff NR opp w/JK affirm, exhs	2
Def Chavez reply w/ MJF affirm	3
 <u>Motion Seq 005</u>	
Def Chavez motion [§3212 against YHT] w/MJF affirm in support, exhs	4
Pltff YHT opp w/JK affirm, exhs	5
Def Chavez reply w/ MJF affirm	6

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action arising from a motor vehicle accident.

The court previously granted the plaintiffs' motion for summary judgment on the issue of liability against defendant Chavez. Order, Gische J., 7/8/05. The court also granted plaintiffs' motion for summary judgment dismissing Chavez's counterclaim against them for apportionment of liability. Plaintiffs previously discontinued their action against Allstate; therefore only the issue of damages remains for trial.

In its decision/order of August 15, 2006, the court denied defendant Virginio Chavez's ("Mr. Chavez") motion for summary judgment dismissing Norberto Rozon's ("Mr. Rozon") claim against him for damages. Although Mr. Chavez had argued that Mr. Rozon had not sustain a "serious injury" as defined under the insurance law, the court decided that there were triable issues of material fact as to whether Mr. Chavez had sustained such injuries. Decision/Order, Gische J., 8/15/06.

Mr. Chavez now seeks to reargue his motion (sequence number 005), and have the court reconsider its decision which allowed Mr. Rozon's claims against him to proceed.

Mr. Chavez has also separately moved (sequence number 004) for summary judgment dismissing the claims against him by plaintiff Yanko Harold Tavarez ("Mr. Tavarez")

For the reasons set forth below, the court will allow reargument of Mr. Chavez's summary judgment motion against Mr. Rozon, but denies Mr. Chavez's motion for summary judgment against Mr. Tavarez as untimely.

Discussion

CPLR § 3212 provides that a motion for summary judgment must be made within 120 days after the note of issue is filed. Mr. Chavez's motion for summary judgment against Mr. Tavarez was brought on August 9, 2006. It is undisputed that plaintiffs filed the note of issue on December 28, 2005 with the attendant certificate of readiness. Mr. Chavez contends that although more than 120 days have passed since the note of issue was filed, the court should grant him leave to bring this late motion because he has "good cause" for why it was not made sooner. Brill v. City of New York, 2 NY3d

648 (2004). His reasons are as follows:

First, Mr. Chavez argues that Mr. Tavaréz was not examined by defendant's orthopedist until January 10, 2006, and that the MRI reviews were not done until June 15, 2006. Thus, Mr. Chavez contends that because this critical information was unavailable to him, he had no foundation for this summary judgment pursuant to 5101 (d) of the insurance law, and could not bring this motion any sooner.

Mr. Chavez next contends that because his motion against Mr. Rozen was made (timely) in February 2006, and this case was remanded to Part 10 from the mediation part, any delay on his part is insignificant or forgivable.

Finally, Mr. Chavez contends that Mr. Tavaréz has no "serious injury" anyway, therefore this threshold motion should be considered because it is meritorious and would dispose of Mr. Tavaréz's claims against him without a trial.

Collectively these arguments echo those made before the Court of Appeals in the case of Brill v. City of New York, 2 NY3d 648 (2004). Brill and other cases that have followed [Miceli v. State Farm Mut. Auto. Ins. Co., 3 N.Y.3d 725 (2004); Perini v. City of New York, 16 AD3d 37 (1st Dept 2005); Brown v. City of New York, 6 Misc3d 1017(a) (Sup Ct 2005)] have made it perfectly clear that the purported merit of an untimely summary judgment motion cannot be considered to constitute "good cause" for the late filing of the motion.

The other reasons articulated by Mr. Chavez for why he did not timely move for summary judgment against Mr. Tavaréz are unavailing. When served with the note of issue and the certificate of readiness, Mr. Chavez did not bring a motion to strike the note of issue because the medical examinations had not, in fact, been done as stated

by plaintiff. It is of no moment that Mr. Chavez had a timely motion for summary judgment against Mr. Rozon, or that it is the subject of reargument before the court. Mr. Chavez's untimely motion for summary judgment against Mr. Tavaréz will not be considered and it is denied.

Mr. Chavez has, however, set forth a basis for reargument of this court's August 15, 2000 decision denying his motion for summary judgment against Mr. Rozon. The court either misapprehended or misapplied the law when it decided that Mr. Rozon had raised triable issues of fact as to whether he had suffered a "serious injury," within the meaning of the insurance Law §5101. CPLR § 2221 (d); Foley v. Roche, 68 AD2d 558, 567 (1st Dept 1979).

In opposition to Mr. Chavez's original motion, Mr. Rozon provided and relied upon unsworn medical reports. Unsworn medical records, however, that are not accompanied by the physician's sworn affirmation lack probative value because they are not in admissible form and cannot defeat a motion for summary judgment. CPLR § 2106; Grasso v. Angerami, 79 NY2d 813 (1991); Shinn v. Catanzaro, 1 AD3d 195 (1st Dept. 2003). Since such unsworn records are inadmissible, Mr. Rozon failed to demonstrate that there are triable issues of fact regarding whether he sustained a serious injury. Charlton v. Almarz, 278 AD2d 145 (1st Dept 2000); Grasso v. Angerami, supra. Consequently, Mr. Chavez is entitled to summary judgment, dismissing the damages claims against him by Mr. Rozon and those claims are hereby severed and dismissed with a directive that the Clerk enter judgment in favor of defendant Virginio Chavez, against plaintiff Norberto Rozon.

Although Mr. Chavez made similar arguments as to why the claims against him

by Mr. Tavaréz should be dismissed, and it appears that the medical records Mr. Tavaréz has submitted in opposition are also unsworn, this decision is not internally inconsistent. Mr. Chávez prevailed on a timely motion to reargue as to Mr. Rozón. The motion against Mr. Tavaréz was, however, untimely and without "good cause" for the delay. The landmark decision in Brill and its progeny encourage parties to timely move, or seek relief at trial. Miceli v. State Farm Mut. Auto. Ins. Co., *supra*; Perini v. City of New York, *supra*; Brown v. City of New York, *supra*. A "good argument" or a "good case" are not reasons to excuse a late motion. There are, therefore, different legal standards applicable to these motions that support the different results.

Conclusion

For the reasons set forth above, defendant Virginio Chávez's motion for summary judgment dismissing the complaint against him as to damages is granted. Mr. Chávez's motion for summary judgment against plaintiff Yanko Harold Tavaréz is, however, untimely and has not been considered.

This case is ready to be tried. Plaintiff shall serve a copy of this order on the office of trial support so that it may be scheduled for trial and assigned.

Accordingly, *It is hereby*

ORDERED that the Clerk shall enter judgment in favor of defendant Virginio Chávez, against plaintiff Norberto Rozón on the issue of damages and that Mr. Chávez's damages claims are hereby severed and dismissed; and it is


ORDERED that plaintiff shall serve a copy of this order on the office of trial support so that the remaining claims may be scheduled for trial and assigned; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby expressly denied;

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
March 15, 2007

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
MAR 21 2007
NEW YORK
COUNTY CLERK'S OFFICE