

**Adimola v County of Suffolk**

2007 NY Slip Op 34097(U)

December 14, 2007

Supreme Court, Suffolk County

Docket Number: 0014136/2004

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
 CALENDAR CONTROL PART - SUFFOLK COUNTY

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**PRESENT:**

**HON. PAUL J. BAISLEY, JR., J.S.C.**

INDEX NO. : 14136/2004  
 CALENDAR NO.: 200602289MV

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 LORD ADIMOLA,

Plaintiff,

MOTION DATE: 9/19/2007  
 ADJ. DATE: 10/16/2007  
 MOT NO.: 005 MG

-against-

COUNTY OF SUFFOLK, SUFFOLK COUNTY  
 POLICE DEPARTMENT and MICHAEL  
 CAMPBELL,

Defendants.

**PLAINTIFF'S ATTORNEYS:**  
 FERRO, KUBA, MANGANO, SKLYAR,  
 GACOVINO & LAKE, P.C.  
 350 Motor Parkway, Suite 200  
 Hauppauge, New York 11788

-----X  
 DANNETTE ROSS,

Plaintiff

GRUENBERG & KELLY, P.C.  
 3275 Veterans Memorial Hwy., Suite B-9  
 Ronkonkoma, New York 11779

-against-

LORD ADIMOLA, MICHAEL CAMPBELL and  
 COUNTY OF SUFFOLK

Defendants.

**DEFENDANT'S ATTORNEYS:**  
 CHRISTINE MALAFI, ESQ.  
 Suffolk County Attorney  
 100 Veterans Memorial Highway  
 P.O. Box 6100  
 Hauppauge, New York 11788

-----X

BRIAN J. McGOVERN, ESQ.  
 167 Franklin Turnpike  
 Waldwick, New Jersey 97463

Upon the following papers numbered 1 to 37 read on this motion to vacate an order: Notice of Motion/ Order to Show Cause and supporting papers 1- 6; 18-32; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 13-14 ; 33-35; Replying Affidavits and supporting papers 16-17 ; 36-37; Other \_\_\_\_\_; (~~and after hearing~~ counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by the plaintiff in action no. 2 to vacate in the interests of justice an order of this court which dismissed the claim of the plaintiff, Dannette Ross, as against the County of Suffolk and Michael Campbell because of her failure to attend a General Municipal Law 50-H hearing is considered under CPLR 5015(a)(1) and is granted.

The prior order of the court found that the 50-h hearing had been scheduled for September 8, 2003 and that it had been adjourned at the plaintiff's request until September 15, 2003. Although plaintiff filed opposition to the County's motion to dismiss, she did not address this issue. Plaintiff now seeks to vacate the order due to an excusable default to wit: law office failure. The court will excuse plaintiff's failure to address this issue and consider her opposition (*Valure v. Century 21 Grand*, 35 A.D.3d 591, 826 N.Y.S.2d 418).

Essentially plaintiff states that her default was not willful in that she was not aware of the adjourned date for the hearing and that neither her attorney nor the county attorney realized that the

hearing had not been conducted until this action was ready for trial. The complaint which was filed in July 2004 alleges that on September 8, 2003, plaintiff appeared for a 50-h hearing and the verified answer of the County denies it on information and belief and asserts an affirmative defense of failure to comply with the General Municipal Law 50-h. In its opposition to this motion, the County states that it has a small post it note attached to the entry date of September 8<sup>th</sup> stating “adjourned September 15, 2003.” Otherwise, there is apparently no correspondence concerning the new date or any notation in the County’s records regarding what happened on September 15, 2003.

The statute provides that dismissal is required only if a claimant fails to appear for a hearing, or adjourns a scheduled examination to a time more than ninety days after service upon the claimant of a demand for an examination ( *see*, General Municipal Law § 50-h[1], [5]; *McCormack v. Port Washington Union Free School Dist.*, 214 A.D.2d 546, 625 N.Y.S.2d 57). In applying the statute, the courts make a sui generis determination regarding whether or not the failure of the claimant to attend may be excused. The Appellate Division, Second Department in *McCormack*, supra held that if the claimant does not seek to adjourn beyond the 90 days then the onus is on the municipality to reschedule. However, in *Scalzo v. County of Suffolk*, 306 A.D.2d 397, 760 N.Y.S.2d 879, the Second Department found it was the plaintiff’s burden to reschedule after an adjournment at the plaintiff’s request. The First Department, Appellate Division in *Belton v. Liberty Lines Transit, Inc.*, 3 A.D.3d 334, 769 N.Y.S.2d 885, held that it was the responsibility of the municipality to set an adjourned date after a single adjournment by the plaintiff.

Here it appears as if plaintiff’s counsel was under the impression that the 50-h hearing had in fact been held. However he was put on notice by the County’s affirmative defense that this may not in fact have been the case. The facts do not support a finding that the default was anything but inadvertent. The County has no information as to the circumstances under which the September 15 date was set or that it was in fact communicated to the plaintiff. Neither does the County state that they were prepared to go forward on the 15<sup>th</sup> or noted anywhere in its records that the plaintiff failed to appear. Both sides dropped the proverbial ball and since the default was not willful, the order is vacated and the complaint is reinstated as against the County of Suffolk and Michael Campbell.

In their prior motion, the County and Michael Campbell also sought dismissal of the complaint of Dannette Ross because she failed to meet the serious injury threshold. This issue was not previously determined because the complaint had been dismissed as noted above. Accordingly that issue is now before the court.

The accident took place on April 30, 2003. Plaintiff, Dannette Ross, was taken from the scene by ambulance to an emergency room where she complained of neck and back injuries. X-rays were taken and she was released. She sought the care of Dr. Gary R. Laux, a chiropractor, who treated her from May 2, 2003 until October 17, 2003. She stopped treating because she felt that her progress had leveled off. Mrs. Ross was a nurse and Dr. Laux determined that she was disabled from working from April 30, 2003 until July 8, 2003. Dr. Laux sent her for MRIs of the cervical and lumbar spine. The MRI reports are not part of the record before the court. Dr. Laux reviewed the reports which showed herniations at C4-5, C5-6 and L5-S1. He states in his sworn report that the herniations were causally related to the accident. He then reexamined her on February 22, 2007 finding a permanent loss of range of motion.

Plaintiff claims that she suffered a significant limitation of the use of a body function or system; a permanent loss of the use of a body, organ, member, function or system; and that she was

unable to perform her daily activities for at least 90 of the first 180 days immediately following the accident.

Under the law in an action to recover for personal injuries resulting from an automobile accident, plaintiff has the burden to set forth a prima facie showing of serious injury within the meaning of the Insurance Law §5102 (d). Whether the burden has been met is initially a matter of law for determination by the court (*Licari v. Elliott* 57 N.Y.2d 230, 455 N.Y.S.2d 570). As the moving party, a defendant has the initial burden to establish that plaintiff did not sustain a serious injury within the meaning of the statute.

Defendants submit the report of an orthopedic surgeon, who examined the plaintiff on April 6, 2005. He reviewed the MRI reports and noted the herniations. He also noted that he reviewed the report of Dr. Chernoff dated June 11, 2003 and that he attributed the herniations to the accident as well as the report of Dr. Mehrahtu dated September 8, 2003 which also attributed her “symptomatic lumbrocacral radiculopathy to the herniated disc noted L5-S1. He physically examined the plaintiff and noted a 30% of normal range of motion in the cervical spine based on the patients indication of pain and an 80% of normal range of motion in the lumbar spine. His diagnosis is resolved cervical and lumbosacral strain secondary to the accident.

Plaintiff was also examined at the request of the defendants by Dr. Bernhang, an orthopedist, on May 15, 2006. Although he found reduced range of motion in the cervical and lumbar spine, he states that his findings as to reduced range of motion were inconsistent with other observations. He concludes that the complaints of pain are subjective and do not correlate with any objective finding.

Finally plaintiff was examined by defendants’ neurologist, Dr. Howard R. Reiser, on June 23, 2006. His impression was that her ongoing complaints of left lower back pain radiating into the left lower extremity and occasional pain in her neck are subjective and that even though he notes the MRI evidence of herniations, he states that his neurological examination reveals no objective deficit.

Soft tissue injury involving complaints of pain in the neck and back due to strain/sprain do not generally meet the threshold for serious injury (*Georgia v. Ramautar*, 180 AD2d 713, 579 NYS2d 743). However such injuries may constitute a serious injury if certain proof is submitted. The case law requires objective proof of both the pain and the limitation of movement. Proof of a disc herniation alone without objective proof of limitation of movement is insufficient to meet the threshold (*Uber v. Heffron*, 286 A.D.2d 729, 730 N.Y.S.2d 174; *Descovich v. Blika*, 279 A.D.2d 499, 718 N.Y.S.2d 870); as is a doctor’s observations of pain accompanying by reduced flexion unless accompanied by objective proof such as x- rays, MRIs, straight-leg or Laseque tests, and any other similarly recognized tests or quantitative results based on a neurological examination (*Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233).

Here defendants’ proof is insufficient to meet their initial burden. Although the orthopedic surgeon’s report is based on a qualitative assessment of Mrs. Ross’s condition (*Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 1197), he fails to quantify the normal range of motion and instead relies on his subjective statement that it is 30% of normal for the cervical spine and 80% of normal for the lumbar spine. This is inadequate to shift the burden of proof (*Gerson v. C.L.S. Transp., Inc.* 37 A.D.3d 530, 829 N.Y.S.2d 688; *Mirochnik v. Ostrovskiy*, 35 A.D.3d 413, 825 N.Y.S.2d 721). In any case, he notes that the MRI reports show herniations which

have been attributed to the accident while observing a reduced range of motion. This is sufficient to raise an issue of fact that the plaintiff did in fact suffer a serious injury. The more recent orthopedic examination by Dr. Bernhang also found a reduced range of motion which he quantified with a goniometer. He noted the MRIs but his reading was: "MRI of the cervical spine...reveals a subligamentous disc bulge at C5-6 which does not touch the cord. MRI of the lumbosacral spine...shows bulging L4 disc with desiccation but no evidence of disc herniation." Again this raises an issue of fact. As noted the actual MRI reports have not been included. Defendants' neurologist concludes that the MRI evidence of herniation is not an objective finding to corroborate her ongoing pain. Defendants have failed to meet their burden to show that plaintiff does not suffer with a reduced range of motion and/or that there is no objective proof to support such a finding of limitation.

Accordingly, upon consideration of the motion of the defendants, County of Suffolk and Michael Campbell, for summary judgment for failure to meet the serious injury threshold, it is denied.

Date: 12/14/07

RON. PAUL J. BAISLEY, JR.  
J.S.C.

           FINAL DISPOSITION   X   NON-FINAL DISPOSITION