

Sall v Walsh

2008 NY Slip Op 30590(U)

February 12, 2008

Supreme Court, New York County

Docket Number: 0111514/2005

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

CISSE SALL

INDEX NO. 111514-2005

MOTION DATE 11/21/07

MOTION SEQ. NO. 004

MOTION CAL. NO. 112

- v -

PETER WALSH

The following papers, numbered 1 to 2 were read on this motion to vacate court order dated April 19, 2007 and to decide defendant's motion for summary judgment (sequence number 003) on the merits.

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

Answering Affidavits - Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

PAPERS NUMBERED
1
2
FILED
FEB 26 2008
NEW YORK COUNTY CLERK'S OFFICE

I. Factual and Procedural Background

The complaint alleges that on August 26, 2004, a BMW being driven by defendant Peter Walsh collided with a Mercedes taxi being driven by plaintiff Cisse Sall, which was stopped at a red traffic light at the intersection of Ninth Avenue and West 40th Street in Manhattan. At his deposition, the 46-year-old plaintiff testified that upon being struck by the defendant, his chest hit the steering wheel and the back of his head hit the headrest. He was able to drive his car from the scene. The next day, he sought treatment from Dr. Hong, a chiropractor. Dr. Hong administered heat and acupuncture therapy three times per week over a period of three months. The plaintiff testified that he still experiences pain when bending over to pick something up, or sitting for a long period of time. After the accident, he stayed home for one month. He now works a reduced schedule of driving.

The plaintiff commenced the instant action claiming, *inter alia*, that he sustained serious injuries as defined by Insurance Law § 5102(d) - i.e. "permanent consequential limitation of use of a body function or system" and a "medically determined injury or impairment of a non-permanent nature which prevented [him] from performing substantially all of the material acts which constitute his usual and customary daily activities for at least 90 days during the 180 days immediately following the occurrence of the injury or impairment." His Bill of Particulars alleges - central posterior disc herniations at L4-L5, cervical and lumbosacral radiculopathy, and cervical and lumbosacral sprain/strain."

On April 16, 2007 defendant moved for summary judgment dismissing the complaint, contending that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d). The motion was granted without opposition by Court order dated April 19, 2007. Plaintiff now moves to vacate the default and have the summary judgment motion decided on the merits.

II. The Motion to Vacate the Default Judgment

In support of his motion to vacate the default, plaintiff claims law office failure. It is well settled that in appropriate circumstances, law office failure is sufficient to excuse a default. Mutual Marine Office, Inc. v. Joy Const. Corp., 39 A.D.3d 417 (1 Dept. 2007); Goldman v. Cotter, 10 A.D.3d 289 (1 Dept. 2004); Solowij v. Otis Elevator Co., 260 A.D.2d 226 (1 Dept. 1999). In support, plaintiff proffers an affidavit from his calender clerk, which states that the original summary judgment motion was not properly entered in the office calender. In addition, plaintiff also demonstrates a meritorious defense. The policy of the Court is to adjudicate matters on the merits. Here where the defaulting party presents both a meritorious defense and reasonable excuse, (Koutrakos v. Vernon Sutton Realty, 40 A.D.3d 355 (1 Dept. 2007); Estrella v. Herrera, 23 A.D.3d 320 (1 Dept. 2005)) the default is vacated.

III. The Motion for Summary Judgment on "Serious Injury"

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. See Kosson v. Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Where, as here, a defendant seeks summary judgment on the threshold "serious injury" issue under "No-Fault threshold" issue (Insurance Law § 5102[d]), he or she bears the initial burden of establishing the absence of a "serious injury" as a matter of law. This is because, in enacting Insurance Law §5102(d), the Legislature intended to weed out frivolous claims and limit recovery to significant injuries arising from motor vehicle accidents. See Pommells v Perez, 4 NY3d 566 (2005); Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Licari v Elliot, 57 NY2d 230 (1982).

If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, *supra*; Alvarez v Prospect Hospital, *supra*; Winegrad v New York Univ. Med Ctr., *supra*; Zuckerman v City of New York, *supra*. The party opposing a motion for summary judgment on the threshold "serious injury" issue must come forward with objective proof of his or her injury to raise a triable issue. See Toure v Avis Rent A Car Systems, *supra*; Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyler, 79 NY2d 955 (1992).

"Although a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law 5102(d), a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration." Monette v Keller, 281 AD2d 523 (2nd Dept. 2001); see Pommels v Perez, 4 NY3d 566 (2005). The plaintiff's medical submissions must show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiffs' limitations were significant. See Milazzo v Gesner, 33 AD3d 317 (1st Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1st Dept. 2006).

In this case, the defendants have produced evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. Specifically, they produced the pleadings, the deposition testimony of the plaintiff as set forth above, and the affirmed reports of *Dr. Robert Israel*, a board certified orthopedic surgeon and *Dr. Robert April*, a board certified neurologist, both of whom examined the plaintiff, and *Dr. David Fisher*, a board certified radiologist, who reviewed the plaintiff's MRI films.

In his report, Dr. Israel concludes that "from an orthopedic point of view, the [plaintiff] has no causally related disability as a result of the accident." Dr. Israel's testing indicated no restrictions or deficits in range of motion, muscle strength, symmetry or sensation. His impression was "resolved sprains of the lumbar and cervical spine."

In his report, Dr. April concludes that "there are no objective neurological findings" and that the accident "did not produce a neurological diagnosis, limitation, disability or need for neurological intervention." Dr. April's report further states that he conducted neurological, cranial nerve, motor, mechanical and sensory tests, and all showed normal functioning and no deficits.

In addition to a narrative report of Dr. Hong, Dr. April also reviewed a report of Dr. Aordkian, a chiropractor, dated November 23, 2004, a report from Pinpoint Acupuncture, dated November 18, 2004, and a chiropractic report of Dr. Fred Rudin, dated November 19, 2004.

In his report, Dr. Fisher finds only "degenerative changes at L4/5 and L5/S1 with accompanying disc bulge and herniation." Dr. Fisher reviewed an MRI report of Dr. Jacob Lichy, dated February 11, 2004, and found a "herniation of the L4/L5 and L5/S1 discs." Dr. Fisher states that "there is clear evidence of degenerative changes at the L4/5 and L5/S1 levels" and that "these changes are highly unlikely to have developed in the short interval between the accident and the [MRI] study and in my opinion represent a preexisting condition. The disc herniation at L4/5 and the disc bulge at L5/S1 are compatible with the amount of degenerative change present. There is no radiographic evidence of traumatic or causally related injury to the lumbar spine."

The defendant's proof entitles him to judgment as a matter of law on the threshold issue of "serious injury", thereby shifting the burden to the plaintiff. In

opposition, the plaintiff submits the reports of Dr. Aric Hausknecht, a board certified neurologist, the affidavit and reports of Dr. Tae Y. Hong, a chiropractor and unaffirmed MRI reports by Dr. Miklos Weinberger, a radiologist. Unaffirmed medical reports are not admissible (Grasso v. Angerami, 79 N.Y.2d 813 (1991); Pagano v. Kinsbury, 182 A.D.2d 268 (2nd Dep't 1992); CPLR 2106), however, as defendant's expert, Dr. Israel references the unaffirmed reports, the reports are properly before the Court. Bent v. Jackson, 15 A.D.3d 46 (1st Dept. 2005); Brown v. Achy, 9 A.D.3d 30 (1st Dept. 2004).

Dr. Hong conducted a physical examination of plaintiff on September 9, 2004 including range of motion tests of his cervical and thoracolumbar spine. He found restrictions of ranges of motion in his cervical spine, flexion decreased from 60 degrees to 40 degrees, extension decreased from 50 degrees to 30 degrees, right and left lateral flexion decreased from 40 degrees to 20 degrees and right and left rotation decreased from 80 degrees to 60 degrees. His thoracolumbar spine flexion decreased from 90 degrees to 60 degrees, extension decreased from 30 degrees to 15 degrees, right and left lateral flexion decreased from 30 degrees to 15 degrees and right and left rotation decreased from 20 degrees to 10 degrees. Dr. Hong diagnosed plaintiff with, *inter alia*, a cervical and lumbar sprain/strain, a disc herniation at L4/L5 and a disc bulge at L5/S1, which he causally relates to the subject accident and states are permanent. Dr. Hong advised Sall to undergo a comprehensive rehabilitation program and states that he was limited in his ability to perform his daily activities. Dr. Hong also explains that plaintiff ceased treatment once he reached the maximum medical benefit and his no-fault benefits had terminated.

Dr. Hausknecht examined plaintiff on May 22, 2007 and reviewed his medical reports including his MRI films. During the examination plaintiff informed Dr. Hausknecht that he was in a prior motor vehicle accident in 2003 and had adequately recovered. After conducting several objective tests including range of motion tests, which are described in his report, Dr. Hausknecht concludes that plaintiff has a "significant restriction of mobility" of his lumbosacral spine. In addition, he concludes that plaintiff sustained a cervical and lumbosacral derangement with L4/L5 and L5/S1 disc herniations as well as an aggravation of degenerative joint disease. Dr. Hausknecht opines that plaintiff has suffered a permanent partial disability which is causally related to the subject accident.

On October 5, 2004, Dr. Weinberger conducted an MRI study on plaintiff's cervical and lumbosacral spine where he found, *inter alia*, a disc herniation at L4/L5 and a bulge at L5/S1.

In addition, plaintiff provides a reasonable explanation for his cessation of treatment. See Pommels v Perez, *supra*; Milazzo v Gesner, *supra*. Plaintiff states in his affidavit that he could no longer afford medical treatment after his no-fault benefits terminated, which is substantiated by Dr. Hong's affidavit. Defendant

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avers that this claim was created only in response to this motion citing plaintiff's testimony that he ceased treatment because he "was feeling different." Here, the plaintiff and the defendant have presented alternative theories as to the cessation of treatment. As such there are issues of fact for a jury to consider.

IV. Conclusion

For these reasons, and upon the foregoing papers, it is,

ORDERED that the branch of plaintiff's motion to vacate the Court's order dated April 19, 2007 is granted, and it is further ordered that the case be restored to active status. Pre-trial conference on March 15, 2008
Rm. 136, 80 Centre St. 459 E.A.N.

ORDERED that the defendant's motion for summary judgment (sequence number 003) dismissing the complaint on the ground that the plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is denied.

This constitutes the Decision and Order of this Court.

FILED
FEB 26 2008
NEW YORK
COUNTY CLERK'S OFFICE

Enter:

Dated: February 12, 2008

Deborah Kaplan

Deborah A. Kaplan
DEBORAH A. KAPLAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST