

Golan v Eisner

2008 NY Slip Op 31619(U)

May 30, 2008

Supreme Court, Nassau County

Docket Number: 4458-05/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

MICHELE GOLAN,

Plaintiff,

- against -

SHARON EISNER and EVAN GOODMAN,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 14458/05

Motion Sequence No. 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff moves for an order granting the plaintiff vacatur of the default in appearing on the motion for summary judgment on the ground the plaintiff has sufficiently shown a meritorious claim and excusable default in this matter pursuant to CPLR 5015 (a), and upon such vacatur for denial of the motion based on the plaintiff's medical evidence, and for leave to renew the defendants' prior motion for summary judgment which was granted against the plaintiff by default pursuant to CPLR 2221 (e) based on the medical evidence that was not offered on the prior motion, and based on the reasonable justification for the failure to present such facts on the prior motion, and upon such leave that such vacatur and renewal then and there proceed, and that upon such vacatur and renewal, the Court issue an order vacating and setting aside the decision and order granting summary

judgment on default dated December 3, 2007, and vacating and setting aside the default against the plaintiff, and relieving the plaintiff from it, and upon granting such vacatur or renewal, the Court enter an order denying the defendants' motion for summary judgment on the grounds the plaintiff has met the burden of establishing a serious injury within the meaning of the no-fault Insurance Law. The defendants oppose the plaintiff's motion, and initially indicate the Court's order was not based upon default rather it was founded upon the Court's review and consideration of defense submissions on the motion for summary judgment, including the plaintiff's treatment records and objective diagnostic test results from tests performed by the plaintiff's physicians. The plaintiff sued the defendants to recover damages for an automobile accident on September 24, 2004, where the plaintiff was a passenger in the vehicle struck in the rear by an automobile owned and operated by the defendants.

The plaintiff's attorney points, in a supporting affirmation dated January 15, 2008, to an affirmation dated January 7, 2008, by Dr. Irving Friedman, a neurologist which demonstrates the plaintiff suffered, and continues to suffer from "multiple neuro-spinal deficits which are permanent in nature and casually related to the subject motor vehicle on September 24, 2004. The plaintiff's attorney asserts, despite repeated efforts by the plaintiff and the attorney for the plaintiff, through no fault of the plaintiff, the neurologist's sworn statement was unavailable until the first week of January 2008. The plaintiff's attorney avers the plaintiff is simply seeking a review of the issues in the case on the merits, and not by default.

The plaintiff's attorney states the defendants moved by notice of motion dated August 10, 2007, for summary judgment on the ground the plaintiff failed to meet the burden of demonstrating a serious injury within the meaning of the Insurance Law. The plaintiff's attorney details the subsequent motion scheduling, the troubles faced by the plaintiff and the attorney for the plaintiff, and contends these circumstances present an excusable default. The plaintiff's attorney points out, although the plaintiff resides in the State of New York, the plaintiff also maintains a residence in the state of Israel spending extended time there during the year, and during 2007, the plaintiff was in Israel from June 2007 to August 17, 2007. The plaintiff's attorney states, during that period, the plaintiff's counsel was out of the office recuperating from surgery, and did not return to the office on a full time basis until late August 2007. The plaintiff's attorney concedes, the plaintiff's medical records indicated the plaintiff was last seen by the treating neurologist, Dr. John Kefalos on August 12, 2005, and commenced treatment by Dr. Kefalos' medical group, LKBN Neurology Associates, on December 8, 2004, under the initial care of Dr. Jeffrey Behar. The plaintiff's attorney asserts, in order to obtain a medical affirmation for the plaintiff's current condition it became necessary for Dr. Kefalos to reexamine the patient, so, under Dr. Kefalos's direction, an EMG was performed on the plaintiff on October 16, 2007. The plaintiff's attorney claims an associate of the law called the defense counsel on October 4, 2007, to request consent for a further adjournment of the defense motion for summary judgment returnable the following day, but the plaintiff's attorney states, pointing to Kirk P. Tzanides' affirmation dated January 15, 2007, the defense counsel did not

consent to the adjournment, and the motion was marked submitted for consideration and decision by the Court. The plaintiff's attorney avers, after confirming the plaintiff underwent the EMG on October 16, 2007, the counsel for the plaintiff sought a sworn statement from Dr. Kefalos detailing the plaintiff's medical history, treatment, cause of the injuries, and current conditions, but despite these attempts the report, although promised on several occasions was never forwarded by Dr. Kefalos. The plaintiff's attorney maintains, in the face of that circumstance, plaintiff's counsel scheduled an appointment for the plaintiff to be seen by Dr. Friedman on January 7, 2008, which happened, and that doctor furnished plaintiff's counsel with an affirmation dated January 7, 2008, which is annexed to these moving papers.

The plaintiff's attorney contends the plaintiff has a meritorious claim. The plaintiff's attorney points to Dr. Friedman's affirmation which clearly demonstrates the plaintiff sustained a serious injury within the meaning of the Insurance Law. The plaintiff's attorney observes Dr. Friedman's opinions are based upon an examination of the plaintiff, the medical history elicited from the plaintiff, and the physician's personal review of the various films of the MRI's performed on this patient. The plaintiff's attorney comments that the doctor's examination included various objective tests, including range of motion testing of the cervical and lumbar spine, to wit the plaintiff has significant limitations in the range of motion of those regions of the spine. The plaintiff's attorney specifically details Dr. Friedman's findings, and notes the doctor concludes the plaintiff has significant and painful multi-level disability at present, and three years after the subject accident, the

plaintiff remains grossly symptomatic with localized spasm and limitation of range of motion. The plaintiff's attorney reports the doctor opines these deficits are directly and causally related to the plaintiff's injuries sustained on September 24, 2004, the plaintiff's prognosis is poor in view of the chronicity of the plaintiff's symptoms and multiple clinical and radiographic findings and these deficits are permanent. The plaintiff's attorney asserts, with respect to treatment, it appears from Dr. Friedman's affirmation the only treatment the plaintiff can undergo to possibly ease the symptoms, other than medications which are currently being taken, are trigger point, facet block or epidural injections, but the plaintiff is extremely hesitant to undergo any type of invasive procedures now, and the plaintiff's attorney opines that circumstance would account for the hiatus between visits to Dr. Kefalos, to wit the only treatment options left are invasive, and the plaintiff is unwilling to take the risk. The plaintiff's attorney avers, taking the sworn statements of Dr. Friedman and the plaintiff together, the plaintiff has a medically determined injury or impairment of a non-permanent nature which prevents the plaintiff from performing substantially all of the material acts which constitute the usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment. The plaintiff's attorney states the plaintiff cannot resume work as an occupational therapist because of the lifting and movement, and the most mundane of daily tasks trigger crippling pain and spasm.

The defense attorney asserts the plaintiff's counsel misconstrues the court order dated December 3, 2007, as granted by default, rather that determination was based upon

the merits. The defense attorney argues threshold motions require defendants meet an initial burden of proof, and the defense met that burden on the merits. The defense attorney notes the plaintiff seeks to vacate that prior court order by offering an excuse that the plaintiff was unable to get one of the treating doctors to affirm the plaintiff sustained a serious injury notwithstanding the plaintiff had some 80 days to do so. The defense attorney points out, with respect to the delay issue, several factual inaccuracies in the affirmations of the plaintiff's attorneys, to wit the motion time periods. The defense attorney submits the plaintiff's inability to oppose the defense motion within 80 days is clearly based upon the lack of evidence of serious injury contemporaneous with the plaintiff's treatment, and that is the reason why the plaintiff was unable to obtain an affirmation from one of the plaintiff's several treating physicians, but that is not a reasonable excuse for the delay. The defense attorney also notes the lack of effort with respect to examination for treatment in the intervening two plus years, and no effort toward obtaining a narrative report closer in time to the plaintiff's treatment are indicated in the plaintiff's instant motion. The defense attorney avers there is no explanation offered for the delay between August 2005 and October 9, 2007, with regard to having the plaintiff examined by Dr. Kefalos, and no explanation with regard to why none of the other four physicians in that group were approached for an appointment or affirmation. The defense attorney delineates the plaintiff's various examinations and treatment commencing with Dr. Behar of that group on December 22, 2004, and points out, the while the plaintiff's counsel attempts to blame Dr. Kefalos for not opposing the defense motion, the plaintiff counsel's affirmation refers to the

extended time spent by the plaintiff in Israel, but this circumstance was no surprise to plaintiff's counsel because the plaintiff testified, at a November 2006 deposition about a residence in Tel Aviv. The defense attorney states the plaintiff has gone to Israel for some time each summer since the date of the accident, and while the plaintiff's affidavit is devoid of any details on this issue, plaintiff's counsel concedes the plaintiff returned some three weeks before the original return date of the defense motion, so it is a stretch to argue this circumstance constitutes a basis for a reasonable excuse.

The defense attorney points out Dr. Friedman causally relates the plaintiff's subjective complaints in conclusory, boilerplate language, and the doctor's opinion is wholly lacking in credibility inasmuch as it rests on an incomplete review of treatment records, overlooks one of the plaintiff's prior accidents, and fails to address why the plaintiff stopped treating nearly 2 ½ years before Dr. Friedman examined the plaintiff. The defense attorney again submits the comprehensive reports of Dr. Vishnubhakat and Dr. Sultan as consistent with the plaintiff's treatment records, and in support of the prior court order that a serious injury as defined by law was not sustained by the plaintiff. The defense attorney remarks, contrary to the plaintiff counsel's arguments and the plaintiff's subjective complaints, the claim the plaintiff's case pierces the 90/180 day branch of the serious injury threshold definition is not supported by contemporaneous objective medical evidence nor by Dr. Friedman's affirmation dated January 7, 2008, since neither of these sources speak to the issue of the plaintiff's daily activities. The defense attorney submits, in the event the plaintiff's failure to oppose the defense summary judgment motion is excused, the plaintiff

has not produced sufficient, credible, objective medical evidence to defeat summary judgment which would establish a meritorious cause of action to vacate the prior court order.

The plaintiff's counsel states, in a reply affirmation dated February 19, 2008, the defense motion was decided solely upon evidence and arguments proffered by the defendants, so the situation certainly represented a *de facto* default, if not a *de jure* default. The plaintiff's counsel states, with respect to the length of the adjournments requested by the plaintiff, the defense counsel fails to mention the reason why this affirmant made that request. The plaintiff's counsel points out he had extensive surgery on June 28, 2007, and did not return to the office until late August 2007, and there was an enormous backlog of work engendered by his absence. The plaintiff's counsel reports he was faced with the procrastination of the plaintiff's treating physician in furnishing a medical affirmation which is detailed in the supporting affirmation to this motion. The plaintiff's counsel asserts, as to an explanation about why an affirmation was not sought from some of the other physicians in Dr. Kefalos' practice group, the simple answer is Dr. Kefalos was the plaintiff's treating physician, and the last one to examine the plaintiff. The plaintiff's counsel avers, as to the merits of the plaintiff's case, it is clear from the medical evidence submitted as part of the plaintiff's motion papers, the plaintiff sustained a serious injury within the meaning of the Insurance Law, and the gap in treatment between August 2005 and October 9, 2007, is explained by Dr. Friedman, to wit the only treatment options available to the plaintiff are invasive procedures which the plaintiff is extremely hesitant to

undergo, so there is no need for useless and costly medical appointments.

The Court has carefully reviewed and considered all of the papers submitted by the parties with respect to this motion.

Whether there is a reasonable excuse for a default is a discretionary, *sui generis* determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits

Harczark v. Drive Variety, Inc., 21 A.D.3d 876, 876-877, 800 N.Y.S.2d 613 [2nd Dept, 2005].

This Court has examined all of the relevant factors here, including the delay, any prejudice to the defense, and any willfulness by the plaintiff or plaintiff's counsel, and determines the plaintiff has not met the burden necessary by showing a reasonable excuse for the default.

Insurance Law § 5102 (d) provides:

“Serious injury” means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

“The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Royal v. Brooklyn Union Gas Co.*, 122 A.D.2d 132, 504 N.Y.S.2d 519 [2nd Dept, 1986]). Here, the defense made a prima facie showing of

entitlement to judgment as a matter of law. The Court of Appeals has held:

Summary judgment has been termed a drastic measure, however, since it deprives a party of his day in court and will normally have res judicata effects (*see* Siegel, New York Practice, § 287). Thus, it may be granted without a trial only if no genuine, triable issue of fact is presented (*Werfel v Zivnostenska Banka*, 287 NY 91; CPLR 3212, subds [b], [c])

Ugarriza v. Schmieder, 46 N.Y.2d 471, 475, 414 N.Y.S.2d 304 [1979].

To establish that she sustained an injury that falls within either of these categories of serious injury, the plaintiff was required to show the duration of the alleged injury and the extent or degree of the limitations associated therewith (*see Lee v Fischer*, 244 AD2d 389 [1997]; *Beckett v Conte*, 176 AD2d 774 [1991]). While the plaintiff submitted evidence of a recent examination in which significant limitations in cervical and lumbar ranges of motion were noted by her treating osteopath, she failed to proffer competent medical evidence of any range-of-motion limitations in her spine that were contemporaneous with the subject accident (*see D'Onofrio v Floton, Inc.*, 45 AD3d 525 [2007]; *Morales v Daves*, 43 AD3d 1118 [2007]; *Rodriguez v Cesar*, 40 AD3d 731 [2007]; *Borgella v D & L Taxi Corp.*, 38 AD3d 701 [2007]). Thus, in the absence of contemporaneous findings of range-of-motion limitations in her spine, the plaintiff was unable to establish the duration of the injury

Ferraro v. Ridge Car Service, 49 A.D.3d 498, 854 N.Y.S.2d 408 [2nd Dept, 2008].

This Court determines the plaintiff, effectively in opposition to the previous defense request for summary judgment, has submitted evidence insufficient to raise a triable issue of fact as to whether the plaintiff sustained a “serious injury” under the permanent, consequential, and significant limitation of use sections of Insurance Law § 5102 (d) to the cervical and/or lumbar regions of the plaintiff spine as a result of the September 24, 2004 accident (*see Kasel v. Szczecina*, --- N.Y.S.2d ----, 2008 WL 2132348 [2nd Dept. 2008]).

Moreover, the Second Department also stated, in an analogous case: [N]either the plaintiff nor her treating osteopath adequately explained the significant gap in treatment between May 2005, when, based on the plaintiff’s

assertions, she was last treated by a chiropractor and March 2007, when she was examined by her treating osteopath in direct response to the defendants' motion for summary judgment (*see Siegel v Sumaliyev*, 46 AD3d 666 [2007]; *Yudkovich v Boguslavsky*, 11 AD3d 607 [2004]) *Ferraro v. Ridge Car Service, supra*, at 498-499.

Here, the plaintiff has not adequately explained the significant gap in treatment.

Accordingly, the motion is denied.

So ordered.

Dated: **May 30, 2008**

ENTER:



ENTERED

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

JUN 06 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**