

Kolker v Almanzar

2009 NY Slip Op 33203(U)

December 30, 2009

Supreme Court, New York County

Docket Number: 107246/2007

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

STEVEN KOLKER,

Plaintiff,

- against -

JUAN B. ALMANZAR

Defendant.

INDEX NO. 107246/2007
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 2, were read on this motion by defendant for summary judgment on the threshold "serious injury" issue.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

FILED
JAN 22 2010
NEW YORK COUNTY CLERK'S OFFICE
PAPERS NUMBERED
1
2

Cross-Motion: Yes No

On November 3, 2006, plaintiff Steven Kolker ("plaintiff") was involved in a motor vehicle accident with a vehicle owned and operated by defendant Juan B. Almanzar ("defendant"). The accident occurred near the intersection of East 49th Street and 1st Avenue in New York County, New York. Plaintiff commenced this action to recover damages for alleged personal injuries suffered as a result of the subject motor vehicle accident. The parties completed discovery and a Note of Issue was filed on March 14, 2008. Defendant now moves for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint on the threshold issue of "serious injury," pursuant to Insurance Law § 5102 (d).

SERIOUS INJURY THRESHOLD

Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101 *et seq.* - the "No-Fault Law"), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at

least one of the nine categories of "serious injury" as set forth in Insurance Law § 5102 (d) (see *Licari v Elliott*, 57 NY2d 230 [1982]). "Serious injury" is a threshold issue, and thus, a necessary element of a plaintiff's prima facie case (*id.* at 235; Insurance Law § 5104 [a]).

Insurance Law § 5102 (d) defines "serious injury" as:

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 loss"]; permanent consequential limitation of use of a body organ or member ["permanent consequential limitation"]; significant limitation of use of a body function or system ["significant limitation"]; 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 ["90/180-day"].

Plaintiff claims that the motor vehicle accident resulted in permanent injuries to his back, neck and left shoulder, which include herniated discs, radiculopathy and left shoulder synovitis and subacromial impingement syndrome requiring arthroscopic surgery (see defendant's motion, exhibit D, bill of particulars at ¶ 11). Plaintiff alleges a "serious injury" under the following relevant categories: (1) significant disfigurement; (2) permanent loss; (3) permanent consequential limitation; (4) significant limitation; and (5) 90/180-day (*id.* at ¶ 20). The Court must determine whether, as a matter of law, plaintiff has sustained a "serious injury" under at least one of the claimed categories.

DISCUSSION

As an initial matter, plaintiff argues that defendant's summary judgment motion should not be considered on its merits as the motion is untimely since it was filed almost one month after the Court's deadline for the filing of summary judgment motions and defendant has failed to offer sufficient "good cause" for the late filing (see plaintiff's affirmation in opposition at ¶¶ 5-20). The Court agrees (see CPLR 3212 [a]).

The Court of Appeals has made it abundantly clear that “statutory time frames - like court-ordered time frames - are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored” (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-27 [2004] [citation omitted]).

Accordingly, under the standard announced in *Brill v City of New York*, 2 NY3d 648 [2004], leave to file a late motion for summary judgment under CPLR 3212 (a) requires a satisfactory showing of “good cause” for the delay in filing (*see Miceli*, 3 NY3d at 726 [“summary judgment motions should be timely made, or good cause shown”]; *Glasser v. Abramovitz*, 37 AD3d 194, 194 [1st Dept 2007] [statute applies to court imposed deadlines shorter than the statutory 120-day period]; *Chechile v Magee*, 66 AD3d 625, 625 [2d Dept 2009]). “No excuse at all, or a perfunctory excuse, cannot be ‘good cause’” (*Brill*, 2 NY3d at 652).

In the absence of a satisfactory showing of good cause, “a late summary judgment motion may not be considered, even if it appears to have merit and the delay has not prejudiced the adversary” (*Dettmann v Page*, 18 AD3d 422, 422 [2d Dept 2005]; *see also John P. Krupski & Bros., Inc. v. Town Board of Town of Southold*, 54 AD3d 899, 901 [2d Dept 2008] [“In the absence of such a good cause showing, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment”]; *Azcona v Salem*, 49 AD3d 343, 343 [1st Dept 2008]).

Here, the Note of Issue was filed on March 14, 2008, well within the time frame set forth in the Case Scheduling Order. A compliance conference was thereafter held on May 2, 2008, at which the Court ordered an outstanding orthopedic independent medical examination (“IME”) of plaintiff to be completed by June 30, 2008, as well as granted defendant permission to move for summary judgment within 60 days of completion of the subject IME. At a subsequent

compliance conference on July 11, 2008, the time for completion of the IME was extended until August 11, 2008, without changing the summary judgment deadline. The IME was conducted on July 15, 2008. Defendant, therefore, had until September 13, 2008 to timely move for summary judgment. Defendant's motion is dated October 10, 2008, which is almost one month after the Court's 60-day deadline for the filing of summary judgment motions.

Defendant has offered no "good cause" for the late filing (*see Brill*, 2 NY3d at 652-53; *Miceli*, 3 NY3d at 727). To the contrary, defendant has effectively conceded the absence of "good cause" by disregarding CPLR 3212 (a) and arguing: "No 'good cause' should be shown to entertain the motion" (defendant's affirmation in support at ¶ 7). Moreover, rather than providing any explanation for the late filing, defendant asserts that the motion is not late because the Note of Issue should be deemed a legal nullity since plaintiff filed the Note of Issue with a Certificate of Readiness representing that discovery was complete or waived when, in fact, plaintiff's orthopedic IME was still outstanding (*see id.* at ¶¶ 5-7). Plaintiff responds that defendant's arguments are irrelevant because defendant never moved to vacate the Note of Issue, and the Court's two compliance conference orders granting additional time superseded the Note of Issue (*see* plaintiff's affirmation in opposition at ¶ 5-20)

The Court is unpersuaded by defendant's attempt to circumvent the "good cause" requirement by arguing that the Note of Issue is void. Therefore, since defendant has failed to make a satisfactory showing of "good cause" for the late filing, this Court lacks discretion to consider the motion on its merits (*see DiBenedetto v Lowe's Home Centers, Inc.*, 43 AD3d 853 [2d Dept 2007] [summary judgment motion was properly denied as untimely without consideration of the merits where the motion was made over three months after Note of Issue was filed, contrary to a preliminary conference order requiring such motions to be made within 60 days of the filing of the Note of Issue, and the third-party defendant failed to present evidence of legitimate good cause for the delay]; *Giudice v. Green 292 Madison, LLC*, 50 AD3d

506 [1st Dept 2008] [summary judgment motions were properly denied as untimely where preliminary and compliance conference orders set deadlines for filing of summary judgment motions and good cause for untimely filing was not shown]; *see also Brill*, 2 NY3d at 652-53; *Miceli*, 3 NY3d at 727; *Chechile*, 66 AD3d at 625.

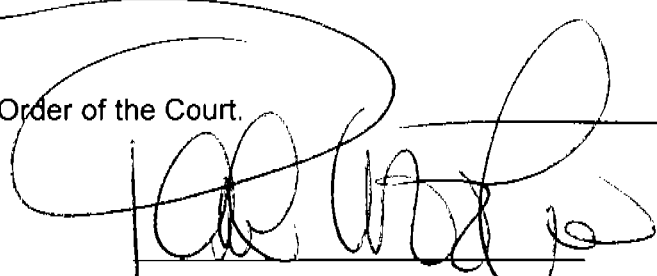
For these reasons and upon the foregoing papers, it is,

ORDERED that defendant's motion for summary judgment is denied as untimely filed; and it is further,

ORDERED that defendant shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: December 30, 2009


Paul Wooten J.S.C. Paul Wooten J.S.C.

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