

Chelebi v Adam

2010 NY Slip Op 31313(U)

May 17, 2010

Supreme Court, Nassau County

Docket Number: 5159/09

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
SHAHAN CHELEBI,

TRIAL TERM PART: 45

Plaintiff,

-against-

**TIMOTHY G. ADAM and VALCO ENERGY
SYSTEMS, INC.,**

Defendants.

-----x

INDEX NO.: 5159/09

**MOTION DATE: 4-8-10
SUBMIT DATE: 5-6-10
SEQ. NUMBER - 001**

**MOTION DATE: 5-6-10
SUBMIT DATE: 5-6-10
SEQ. NUMBER - 002**

The following papers have been read on this motion:

- Notice of Motion, dated 3-4-10.....1**
- Notice of Cross Motion, dated 4-29-10.....2**
- Reply Affirmation, dated 5-5-10.....3**

This motion by the defendants pursuant to CPLR 3212, CPLR 3211 and Insurance Law § 5104 for summary judgment dismissing the complaint on the ground that the plaintiff has not sustained a “serious injury” as that term is defined by Insurance Law § 5102(d) is denied. Plaintiff’s cross motion for sanctions is denied.

This is an action for personal injuries allegedly sustained by the plaintiff as a result of a pedestrian “knock down” accident that occurred on February 26, 2007. The defendants now move for summary judgment on the ground that the plaintiff did not sustain a “serious injury” under the Insurance Law as a result of such accident.

The motion must be denied as untimely. According to the electronic records of the Clerk, the note of issue in this case was filed by the plaintiff on December 10, 2009. Pursuant to the certification order of this Court dated December 9, 2009, any summary judgment motion had to have been filed within 90 days of the filing of the note of issue. In this case, that final day was March 10, 2010. The instant motion was served on March 12, 2010 and filed on March 15, 2010. There is no affirmation or affidavit seeking leave of court to make the late motion, for good cause shown. CPLR 3212(a).

Although denying the present motion on this ground appears harsh, our Appellate Division has made it clear that even this brief delay can be fatal. *See, Mohen v Stepanov*, 59 AD3d 502, 503 (2d Dept. 2009) [serving motion one day after final day to do so renders motion untimely]. Plaintiff correctly notes that under *Mohen* the fact that he served a copy of the note of issue by mail on December 10, 2009 is irrelevant, as it does not add any time to a movant's period to act. Under the terms of the certification order, it is the date of filing of the note of issue that triggers the running of the 90-day period, not service of a copy on the adversary.

The motion would have been denied in any event.

“Serious injury” is defined by § 5102(d) of the New York Insurance Law as follows:

“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 one hundred and eighty days immediately following the occurrence of the injury or impairment.”

In his bill of particulars, the plaintiff alleged significant disfigurement; 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; "and/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 one hundred and eighty days immediately following the occurrence of the injury or impairment.

This in turn is based on a series of alleged injuries, which include the following: disc herniations of the cervical and lumbar spine, disc bulges of the lumbar spine; aggravation of a mass in the right foot requiring a surgical resection; acute sprain and strain of the cervical, thoracic and lumbar spine, with pain and restrictions on movement; acute sprain and strain of the right foot and right shoulder, with pain and restrictions on movement; physiogenic and psychogenic shock; post concussion syndrome; and aggravation and exacerbation of latent pre-existing conditions to all previously noted areas, including future osteoarthritic changes.

In support of their motion, defendants point out that the plaintiff states in his bill of particulars that he was confined to a hospital for one day, to bed for one week and to home for two weeks. In that pleading plaintiff also stated that he is employed as a mechanic, but is not making a claim for lost wages.

In his examination before trial, however, the plaintiff testified that as a result of the accident he was confined to bed and home for approximately three weeks, and was out

of work for a month. He also stated that as of the date of the deposition (August 13, 2009) he was doing light work at his job, and cannot perform certain tasks because of pain, such as putting wheels on SUVs and twisting and turning as required to work on vehicles. The plaintiff further testified that he could no longer engage in certain athletic activities.

The defendants also present the affirmed reports of physicians who examined the plaintiff on their behalf.

On October 29, plaintiff was examined by Stuart J. Hershon, M.D., an orthopedist. Dr. Hershon reviewed the pleadings and medical records generated by plaintiff's treating physicians, medical groups, hospitals, and the operative note by the podiatrist who performed surgery on the plaintiff's foot. He also examined MRI reports dating from April and June of 2007.

He performed a physical examination of the plaintiff, including range of motion testing of the cervical spine and right shoulder. However, there was no range of motion testing noted of the thoracic and lumbar spines, especially the latter, regarding which plaintiff alleges disc herniations, bulges and restrictions on movement. Further, in his report he did not compare his findings to what is normal. Absent these comparisons, it cannot be concluded that the delineated ranges of motion fall within the normal range or that any limitations are mild, minor or slight so as to be considered insignificant within the meaning of the no-fault statute. *McLaughlin v Rizzo*, 38 AD3d 856, 857(2d Dept. 2007); *Mirochnik v Ostrovskiy*, 35 AD3d 413 (2d Dept. 2006); *Mondi v Keahon*, 32 AD3d

506, 507 (2d Dept.. 2006); *Sullivan v Dawes*, 28 AD3d 472 (2d Dept.. 2006); *Kennedy v Brown*, 23 AD3d 625, 626 (2d Dept. 2005). Defendants' other medical expert, Erik J. Entin, M.D., a neurologist, performed no range of motion testing.

Accordingly, given the allegations made in plaintiff's bill of particulars regarding restrictions on motion of and the concomitant reference to the "serious injury" threshold categories of "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system", the Court finds that the defendants have not made out their *prima facie* showing of entitlement to judgment as a matter of law. Where the defendant fails to meet the initial burden of establishing *prima facie* entitlement to judgment as a matter of law, the Court need not consider whether the opposition papers are sufficient to raise a factual issue. *Kouros v Mendez*, 41 AD3d 786, 788 (2d Dept. 2007); *Nembhard v Delatorre*, 16 AD3d 390, 391 (2d Dept. 2005); *McDowall v Abreu*, 11 AD3d 590 (2d Dept. 2004). Therefore, even had the defendants' motion been timely made, it would have been denied.

The cross motion for sanctions is also denied. This is based on plaintiff's assertion that by counsel he had informed defendants' attorney that under *Mohen v Stepanov*, 59 AD3d 502, *supra*, the motion was untimely and should be withdrawn on that basis. However, pursuant to CPLR 2215, service of a cross motion must be made at least seven days prior to the time the motion is noticed to be heard, and if service of the cross motion is made by ordinary mail (as it was in this case), three days must be added to that period. As this motion, after a stipulated adjournment, was returnable on May 6, 2010, the cross

motion had to have been served no later than April 26, 2010. It was made on April 29, 2010. Since the cross motion was not properly noticed, the request for sanctions based on the untimely summary judgment motion must itself be denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: May 17, 2010

Daniel Palmieri
HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED
MAY 19 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE