Peter-Gaye v Hossain
2013 NY Slip Op 33799(U)
July 31, 2013
Supreme Court, Bronx County
Docket Number: 307406-10
Judge: Robert E. Torres
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 29 X
PETER-GAYE, HENRY,

DECISION AND ORDER

Plaintiff,

Index No. 307406-10

- against -

MOHAMMED A. HOSSAIN; ZIVA CAB CORP. and MICHAEL SACCHETTI,

Defendants.
X

Torres, Robert E., J.:

This is an action for personal injuries allegedly sustained by the plaintiff Peter-Gaye Henry (Henry or the plaintiff) in a car accident that occurred on July 19, 2010 in Manhattan. The parties have completed discovery, and the note of issue and certificate of readiness were filed on November 29, 2011. The defendant Michael Sacchetti (Sacchetti or the defendant) now moves for an order granting summary judgment, pursuant to CPLR 3212, and dismissing the complaint on the ground that the plaintiff has failed to satisfy the "serious injury" threshold requirement of Insurance Law 5102 (d).

In opposition, the plaintiff contends that the motion for summary judgment, filed on June 14, 2012, is untimely. The parties entered into a stipulation, which was "so ordered" by the court, that, among other things, required the defendant to file a summary judgment motion on or before May 31, 2012.

Defendant's motion for summary judgment is denied in its entirety as set forth below.

I. BACKGROUND

The car accident took place at the intersection of Second Avenue and East 76th Street, and it involved a taxi cab owned by the defendant Ziva Cab Corporation, and operated by the defendant Mohammed A. Hossain, and another vehicle owned and operated by Sacchetti, at approximately 12:45 p.m. Henry, who was employed as a home health aide, was a passenger in the back seat of the taxi cab. She was riding with an elderly patient, and they were

en route to a near-by hospital. At the time of the accident, Henry was approximately 19 years old.

In Henry's Verified Bill of Particulars, she claims a serious injury under the following categories: (1) a fracture; (2) permanent consequential limitation of use of a body organ or system; (3) significant limitation of use of a body function or member; and (4) 90/180-day category (*see* defendant's Notice of Motion, exhibit C, Verified Bill of Particulars, at 5, ¶ 16).[1]

In opposition to the summary judgment motion, Henry contends that the motion should be dismissed as untimely. Henry claims that the motion was filed on June 14, 2012, almost two weeks past the agreed upon deadline. Next, Henry contends that the defendant's moving papers are insufficient, as a matter of law, to establish the absence of a serious injury. More importantly, Henry contends that her evidence creates genuine issues of material fact.

In opposing the motion, Henry submits her attorney's affirmation; her own affidavit; an affirmation and examination report of her expert witness, Jerry A. Lubliner, M.D. (Dr. Lubliner), who completed an orthopedic evaluation of her on April 12, 2012; her sworn deposition testimony; signed, but unsworn copies of Bronx-Lebanon Hospital Center medical records, including those of her treating orthopedic doctor, Peter Lesniewski, M.D.; an MRI taken of her right wrist on October 12, 2010 and the affirmation of Ronald Wagner, M.D. (Dr. Wagner)[2] who read the MRI, and the unsworn office/treatment records of her physical therapist, Nicola (Nick) Roselli (Roselli), OTR, CHT.

Sacchetti, however, insists that the motion for summary judgment was filed on June 1, 2012, one day after it was due, and that Henry was not prejudiced by the delay. Sacchetti's attorney states that her law firm "failed to properly diary the Court's deadline of May 31, 2012 for service of summary judgment motions" (reply affirmation of Kunina-Malladi, at 2, ¶ 3). However, once the error was realized, the motion was immediately served. As such, the defendant requests that the motion be considered on its

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[1] Four of the nine definitions, i.e., "death," "dismemberment," "significant disfigurement," and "loss of a fetus," are inapplicable to the facts of the case.

[2] While Henry claimed that the MRI was annexed to exhibit G, only the first page of Dr. Wagner's affirmation was submitted to the court. The remaining pages and MRI were both missing.

merits.

In support of his motion, Sacchetti submits an attorney affirmation; an unaffirmed Bronx-Lebanon Hospital Emergency Room radiology report prepared on July 20, 2010 (*see* affirmation of Kunina-Malladi, exhibit D); an unaffirmed MRI report also from Bronx-Lebanon Hospital of plaintiff's right wrist taken on October 13, 2010 (*id.*, exhibit E); a Workers' Compensation Board decision,[3] which was filed on November 12, 2010 (*id.*, exhibit F, Proposed Decision); and the plaintiff's own sworn examination before trial testimony (*id.*, exhibit G, Deposition Transcript [Tr.], dated June 13, 2011).

II. DISCUSSION

Normally, in the absence of a court order or rule to the contrary, a motion for summary judgment must be made "no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (CPLR 3212 [a]). In a stipulation so-ordered by the court, the parties clearly agreed that any motion for summary judgment was to be served and filed by May 31, 2012. Sacchetti did not file his summary judgment motion before that date, but instead, filed the motion on June 14, 2012.

CPLR 2004 gives courts the discretion to "extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just upon good cause shown" (*see Gonzalez v 98 Mag Leasing Corp.*, 95 NY 2d 124, 128-129 [2000]; *Grant v City of New York*, 17 AD3d 215, 217 [1st Dept 2005]). Thus, courts may consider an untimely summary judgment motion when the movant demonstrates "good cause" for his delay, which the New York Court of Appeals has deemed to entail "a satisfactory explanation for the untimeliness" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; *see also Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 [2004]; *Levy v Deer Trans. Corp.*, 27 AD3d 279, 279 [1st Dept 2006], "rather than simply permitting meritorious, non-prejudicial filings, however tardy" (*Brill v City of New York*, 2 NY3d at 652). Stated another way, "[w]hether there is merit to the late motion for summary judgment is not a relevant consideration" (*Czernicki v Lawniczak*, 25 AD3d 581, 581 [2d Dept 2006]; *see also Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d at 727). A motion for summary judgment that is just one day late

[3] The Workers' Compensation Board decision, however, is not based upon a medical examination.

still requires "good cause" for the delay (*see Milano v George*, 17 AD3d 644, 645 [2d Dept 2005]).

In addressing the issue of timeliness, defendant's counsel claims good cause based upon law office failure. Specifically, she claims that her office failed to properly diary the court's deadline of May 31. Once that error was realized, however, the attorney served the motion one day later, on June 1, 2012. Accordingly, Sacchetti claims that his motion was served only one day late, but that is not the issue. The deadline of May 31, 2012 applied to the filing of the motion, not the service of the motion (*see Corchado v City of New York*, 64 AD3d 429, 429-430 [1st Dept 2009]). Thus, Sacchetti filed his motion on June 14, 2012, and consequently, his motion was at least two weeks late.

The next issue pertains to whether "good cause" for the delay was demonstrated. As presented by the defendant's counsel, the court acknowledges that law office failure may be accepted as an excuse under CPLR 2004 (*see Tewari v Tsoutsouras*, 75 NY2d 1, 12-13 [1989]). While CPLR 3212 (a) and CPLR 2004 both employ the phrase "good cause," the case law interpreting CPLR 2004, and the term "good cause", instructs courts to consider such factors as the length of the delay, the reason given for the delay, any prejudice to the opposing party caused by the delay, whether the moving party was in default before seeking the extension, and whether an affidavit of merit was proffered (*see e.g., Tewari v Tsoutsouras*, 75 NY2d at 12; *Matter of Estate of Burkich*, 12 AD3d 755, 756 [3d Dept 2004]; *Saha v Record*, 307 AD2d 550, 551 [3d Dept 2003]).

Recently, New York courts, however, have been taking a stricter approach to the enforcement of deadlines (*see Brill v City of New York*, 2 NY3d at 652; *see also see also Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d at 727; *Farkas v Farkas*, 40 AD3d 207, 211 [1st Dept 2007], *affd in part, revd in part on other grounds* 11 NY3d 300 [2008]), "necessarily impl[ying] that law office failure cannot generally be deemed to constitute 'good cause'..." (*Farkas v Farkas*, 40 AD3d at 212), particularly regarding untimely summary judgment motions (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d at 726; *see also Brill v City of New York*, 2 NY3d at 652-653; *Breiding v Giladi*, 15 AD3d 435, 435 [2d Dept 2005] ["defendants' perfunctory claims of unspecified clerical inadvertence and reassignment of counsel were insufficient to constitute good cause for the delay" in making their summary judgment motion]).

CPLR 2005, which provides that New York courts may exercise their discretion "to excuse delay or default resulting from law

office failure," generally applies, by its express terms, only to applications to extend time to appear or plead under CPLR 3012 (d) and to motions for relief from a judgment or order under CPLR 5015 (a). Since neither application is at issue here, CPLR 2005 is not applicable.

Moreover, not every law office failure will justify an exercise of discretion in favor of the delinquent attorney's client (*see Grosso v Hauck*, 99 AD2d 750, 750 [2d Dept 1984]; *see also Incorporated Village of Hempstead v Jablonsky*, 283 AD2d 553, 553-554 [2d Dept 2001] [CPLR 2005 was not intended to authorize routine forgiveness of defaults]. Assertions concerning law office failure, pursuant to CPLR 2005, must be supported by factual detail (*see People's United Bank v Latini Tuxedo Mgt., LLC*, 95 AD3d 1285, 1286 [2d Dept 2012] [reliance upon law office failure requires "a detailed and credible explanation of the default"]; *Piton v Cribb*, 38 AD3d 741, 742 [2d Dept 2007] ["a conclusory and unsubstantiated claim of law office failure will not rise to the level of a reasonable excuse"]; *see also Nieves v 331 East 109th Street Corp.*, 112 AD2d 59, 61 [1st Dept 1985] [insufficient excuse where law office failure based on counsel's illness was not supported by physician's affidavit]).

"In the absence of a showing of good cause for the delay in filing a motion for summary judgment, the court has no discretion to entertain even a meritorious nonprejudicial motion..." (*Greenpoint Props, Inc. v Carter*, 82 AD3d 1157, 1158 [2d Dept 2011], *quoting John P. Krupski & Bros., Inc. v Town Bd. of Southold*, 54 AD3d 899, 901 [2d Dept 2008]). Sacchetti's attorney's explanation for the delay in filing the motion is inadequate to excuse her untimely filing. As the New York Court of Appeals has repeatedly emphasized, the state's court system is dependent on all parties abiding by the rules of proper practice. "[S]tatutory time frames-like court-ordered time frames-are not options, they are requirements, to be taken seriously by the parties [internal citation omitted]" (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d at 726 [following *Brill*]). While the attorney insists that the delay did not prejudice Henry, it negatively impacted these judicial proceedings. The summary judgment motion was filed one and one half years after the note of issue was filed. Further, conclusory assertions of law office failure are insufficient to establish a reasonable excuse. In addition, the defendant's attorney never moved for an extension of time, and no further order of this court extended the deadline for making her summary judgment motion (*see Rahman v Domber*, 45 AD3d 497, 497 [1st Dept 2007]). Accordingly, the court will, in its discretion, deny as untimely the defendant's motion for summary judgment.

Even if this court determined that good cause for the delay could be found, the defendant's motion for summary judgment would, nevertheless, be denied, inasmuch as there is a bona fide triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]), to wit, whether Henry sustained a right wrist fracture.

Under the state's "No-Fault" law, to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (*see Licari v Elliot*, 57 NY2d 230, 235 [1982]). "'The proponent of a summary judgment motion 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'" (*Shapiro v 350 E. 78th St. Tenants Corp.*, 85 AD3d 601, 608 [1st Dept 2011], *quoting Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see also* CPLR 3212 [b]; *Shaw v Looking Glass Assoc., LP*, 8 AD3d 100, 102 [1st Dept 2004]). "If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). However, "[o]nce this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact" (*Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 927 [1st Dept 2010]; *see also Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Rubensccastro v Alfaro*, 29 AD3d 436, 437 [1st Dept 2006]; *Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]).

In order to satisfy the statutory "serious injury" threshold, objective proof of the plaintiff's injury is required (*see Toure v Rent-A-Car Sys.*, 98 NY2d 345, 350 [2002]). "[A] defendant can establish that [a] plaintiff's injuries are not serious ... by submitting the affidavits or affirmations[4] of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d at 83-84). A defendant can also satisfy his initial burden by relying on the plaintiff's sworn testimony or the plaintiff's unsworn physician's records (*see Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]; *Nelson v Distant*, 308 AD2d 338, 339 [1st Dept 2003]).

A medical affirmation or affidavit that is based on a physician's personal examination and observation of the plaintiff provides objective and admissible proof to support the

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[4] CPLR 2106 requires that a physician's statement be affirmed or sworn to be true under the penalties of perjury.

plaintiff's argument. The medical proof must be based both on medical findings that were contemporaneous with the accident, that show what quantitative restrictions the plaintiff was afflicted with (*see Lazarus v Perez*, 73 AD3d 528, 528 [1st Dept 2010]; *Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]), and on a recent examination of plaintiff (*see Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]; *Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]). In addition, the plaintiff is required to present expert evidence that the injury was causally related to the accident (*see Perl v Meher*, 18 NY3d 208, 219 [2011]; *Valentin v Pomilla*, 59 AD3d 184, 186 [1st Dept 2009]).

On this record, a fact issue as to whether or not the evidence establishes that Henry suffered a fracture is presented. Henry was treated at Bronx-Lebanon Hospital Center's Emergency Room on January 20, 2010, one day after the accident. She underwent an x-ray of her right wrist. According to the hospital's records presented by the defendant, there was no evidence of a fracture (*see* defendant's exhibit D). Similarly, the October 2010 MRI did not show a fracture.

On the other hand, Henry testified at an examination before trial(*see* plaintiff's exhibit G), that prior to this accident, she had never injured her right arm or right wrist, and never had tendonitis (*Tr.* at 47). She also testified that at her initial orthopedic appointment with Dr. Lesniewski of Bronx-Lebanon Hospital's Orthopedics Clinic, he placed her arm in a cast which she wore for six weeks (*Tr.* at 35). Henry further testified that she went to occupational therapy for her wrist with Roselli two or three times per week for approximately four months (*Tr.* at 38). During the time that she wore the cast, Henry had difficulty showering, cooking, cleaning and grocery shopping on her own. When the cast was taken off her arm, Henry's right arm was placed in a brace which she allegedly continues to wear (*Tr.* at 38). Henry further testified that although she continued to feel pain in her right wrist, she stopped going to physical therapy because she could no longer afford it (*Tr.* at 41).

The Bronx-Lebanon Hospital records of Dr. Lesniewski show that she was treated for a fracture, and that her arm was placed in a cast.

In addition, the plaintiff's expert, Dr. Lubliner, in his affirmation and accompanying report (*see* plaintiff's exhibits D and E), unequivocally asserts that based upon his examination of the plaintiff's medical records and his own physical examination and x-ray of the plaintiff on April 17, 2012, Henry sustained a wrist fracture as a result of the car accident. With respect to

the x-ray performed on April 17, 2012, Dr. Lubliner states that the x-ray showed a healed scaphoid fracture.

In response, Sacchetti maintains that all of Henry's submissions are inadmissible for a number of reasons. First, Sacchetti contends that Henry mostly submitted unsworn, and unaffirmed, medical reports and records. Next, he argues that although Dr. Lubliner's affidavit is sworn, he relied on unsworn and unattached medical reports. Lastly, Sacchetti contends that Dr. Lubliner's medical report fails to provide findings contemporaneous with the accident (*see Brackenbury v Franklin*, 93 AD3d 423, 423 [1st Dept 2012] [doctor's equivocal observation of a "probable" healed fracture in x-ray taken a year and a half after car accident was insufficient to establish a fracture]).

Unaffirmed or uncertified medical reports and records are normally inadmissible on a motion for summary judgment (*see* CPLR 2106; *Grasso v Angerami*, 79 NY2d 813, 814 [1991]). However, a reference to plaintiff's unsworn or unaffirmed reports in the defendants' moving papers or by the defendants' medical experts, is sufficient to place such records before the court and to permit the plaintiff to rely upon these reports in opposition to the motion (*see Kearse v New York City Tr. Auth.*, 16 AD3d 45, 47 [2d Dept 2005]; *see also Ayzen v Melendez*, 299 AD2d 381, 381 [2d Dept 2002]).

While Henry's expert, Dr. Lubliner, reviewed the plaintiff's pertinent medical records prior to examining her, he did not rely solely on the work of other doctors in formulating his medical opinion. His report indicates that he also took an x-ray of Henry's wrist. Therefore, "[t]o the extent the expert incorporated into [their] affirmation several unsworn reports of other doctors who examined [the] plaintiff, these unsworn reports were not the only evidence submitted by [the] plaintiff in opposition to the motion, and may be considered to deny a motion for summary judgment" (*Rivera Super Star Leasing, Inc.* , 57 AD3d 288, 288 [1st Dept 2008], citing *Largotta v Recife Realty Co.*, 254 AD2d 225, 225 [1st Dept 1998]). Therefore, the affirmed report of Dr. Lubliner is admissible even though it relied in part on the unsworn reports of other doctors. Thus, Sacchetti's argument related to unattached and unsworn reports is without merit.

The evidence from the parties on the issue of whether or not Henry suffered a fracture is evenly balanced. However, the defendant bears the burden of proof on this motion. Considering the evidence in the light most favorable to the plaintiff (*see Kesselman v Lever House Restaurant*, 29 AD3d 302, 304 [1st Dept

2006]), the court concludes that Henry has raised a triable issue of fact that precludes summary judgment. At a minimum, the sworn testimony of Henry, coupled with Lubliner's report and the Bronx-Lebanon Hospital records create a genuine dispute about whether Henry suffered a serious injury, i.e. fracture, within the meaning of Insurance Law 5102 [d]. Accordingly, summary judgment with respect to the category of fracture is denied.

The court concludes, however, that Sacchetti sustained his burden of establishing that Henry did not suffer a serious injury under the categories of permanent consequential loss, significant loss or the 90/180 day category. Dr. Lubliner's medical report was not contemporaneous with the accident, and did not causally establish that the accident caused a significant or permanent limitation on the normal function and use of a body part. Nor was there any admissible proof that Henry was unable to perform substantially all her usual and customary daily activities for not less than 90 days following her injury.

III. CONCLUSION

For these reasons, it is hereby

ORDERED that the defendant Michael Sacchetti's motion for summary judgment, pursuant to CPLR 3212, is denied; and it is further

ORDERED that the defendant shall serve a copy of this order, with notice of entry, upon the plaintiff, within 45 days from the date of this order.

Dated: July 31, 2013

ENTER:

ROBERT E. TORRES J.S.C.