Atkinson v Coleman
2007 NY Slip Op 30275(U)
March 13, 2007
Supreme Court, New York County
Docket Number: 0118117
Judge: Deborah A. Kaplan
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SCANNED ON 3/22/2007

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

PRESENT: **HON. DEBORAH A. KAPLAN** **PART 22**
Justice

MELISSA ATKINSON	INDEX NO.	118117/03
	MOTION DATE	1-17-07
- v -	MOTION SEQ. NO.	002 & ~~003~~
JACQUELYNE R. COLEMAN, CLEVELAND COLEMAN and ROOSEVELT GLENN	MOTION CAL. NO.	~~5~~ 4

KAPLAN, J.:

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). The motion is denied for the reasons set forth below.

At approximately 7:30 p.m. on October 18, 2000, plaintiff Melissa Atkinson, was a passenger in a vehicle operated by defendant Cleveland Coleman and owed by defendant Jacquelyne R. Coleman. On that evening near the intersection of West 141st Street and Amsterdam Avenue, that vehicle was involved in an accident with a vehicle owned and operated by Roosevelt Glenn. As a result of this incident, plaintiff claims to have sustained a serious injury to her cervical and lumbar spines. Defendants Jacquelyne R. and Cleveland Coleman, now move for summary judgment averring that plaintiff has failed to establish a serious injury as defined by Insurance Law §5102, and as such any recovery should be limited to that provided by No-Fault Insurance. Roosevelt Glenn cross moves for summary judgment, on the same grounds, relying solely on the submissions of co-defendant.

FILED MAR 22 2007 NEW YORK COUNTY CLERK'S OFFICE

In support of their motion, the defendants submit the affirmed reports of Dr. Anthony Spartano, a board certified orthopedist and, Dr. C.M. Sharma, board certified in Psychiatry and Neurology. Each of these doctors, who are affiliated with the Professional Evaluation Group, P.C., performed Independent Medical Examinations of the plaintiff on April 20, 2005, at their Hicksville, New York facility.

Dr. Spartano, in his report, discusses various observations of the plaintiff's mobility and flexibility and concludes that she has a "post cervical and lumbar sprain as well as a contusion to her left knee". He concludes that she does not suffer any disability. Dr. Sharma, who also reviewed plaintiff's prior medical records as prepared by her physician Dr. Samuel Melamed, indicates that plaintiff

during her examination can "bend forward and touch her knees...and has a leg elevation on the right side of 30 degrees, as opposed to 10 degrees on the left side." Based on his examination, Dr. Sharma concludes that plaintiff suffers from "subjective pains in the lumbar and left knee region." But concludes her neurological examination to be normal. Neither physician relied upon by the defendants in support of their motion discuss any of the objective test or tests if any administered to the plaintiff in reaching their medical conclusions or what the normal range of motion is, that plaintiff's findings were compared to. In further support of their motion, the defendants also submit a portion of the plaintiff's deposition, discussing her treatment and activities subsequent to the accident.

In opposition to the motion, the plaintiff submits her own affidavit outlining the occurrence of the accident, her course of treatment and the impact of her injuries on her daily activities. The plaintiff also offers the affirmed reports from Dr. Samuel Melamed, her physician who has been involved in the plaintiff's care since the time of the accident in 2000.

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).

"Where a defendant fails to meet his initial burden of establishing a prima facie case that the plaintiff did not sustain a serious injury, it is not necessary to consider whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact." Offman v Singh, 27 AD3d 284, 285 (1st Dept. 2006); see Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985).

However, 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). However, either "an expert's designation of a numeric percentage of a plaintiff's loss of range of motion" or "an expert's qualitative assessment of a plaintiffs' condition" may substantiate a claim of serious injury. See Toure v Avis Rent A Car Systems, supra; Dufel v Green, supra.

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key to summary judgment. See Sillman vTwentieth Century Fox Film Corp., 3 NY2d 395 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of his or her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See Kesselman v Lever House Restaurant, 29 AD3d 302 (1st Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1st Dept. 2004).

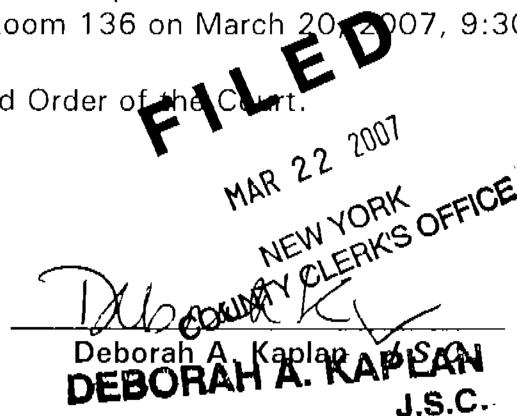
Here, the defendants failed to meet their initial burden by producing evidentiary proof in admissible form sufficient to show the absence of any material issue of fact. See Toure v Avis Rent A Car Systems supra; Gaddy v Eyler, supra. Specifically, the affirmed reports of Dr. Sparato and Dr. Sharma fail to set forth in the objective test or tests relied upon in reaching their conclusions, or what the normal range of motion should be. Madatov v Madatov, 27 AD3d 531 (2d Dept 2006); Vasquez v Reluczo, 28 AD3d 365 (1st Dept. 2006). As such, it is not necessary to consider the plaintiff's proof presented in opposition to the motion. See Facci v Kaminsky, 18 AD3d 806 (2d Dept. 2005).

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is denied in its entirety.

The parties are directed to appear for a pre-trial conference, Part 22, 80 Centre Street, New York, New York, Room 136 on March 20, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.



Dated: March 13, 2007

Deborah A. Kaplan, J.S.C.

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