

<b>Davila-Guzman v Caridi</b>
2007 NY Slip Op 30346(U)
March 16, 2007
Supreme Court, New York County
Docket Number: 0102684
Judge: Deborah A. Kaplan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBORAH A. KAPLAN  
*Justice*

PART 22

ANA M. DAVILA-GUZMAN

INDEX NO. 102684-2005

**FILED**

MOTION DATE 1-17-07

- v -

MOTION SEQ. NO. 001

MAR 27 2007

EDWARD CARIDI and JEFFREY H. ASH

MOTION CAL. NO. 23

**NEW YORK  
COUNTY CLERK'S OFFICE**

KAPLAN, J.:

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

At approximately 1:00 p.m. on November 20, 2004, plaintiff avers that as she sat in her double-parked vehicle on Pitt Street, near the corner of Delancey Street, she was struck in the rear by a vehicle operated by defendant Edward Cardiri and owned by defendant Jeffrey H. Ash. As a result of this incident, plaintiff claims to have sustained a serious injury to her left shoulder, cervical and lumbar spines. Defendants Cardiri and Ash, 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.

In support of their motion, the defendants submit the affirmed reports of Dr. Daniel Feurer, a board certified neurologist, Dr. Robert Israel, an orthopedic surgeon and Dr. Joseph Pediri, a chiropractor. Defendants also proffer the deposition testimony of the plaintiff, the defendant Caridiri and that of Heather Ash a passenger in their vehicle, as well as the complaint and various other filings. Each of these doctors, performed a Independent Medical Exam (IME) on the plaintiff as part of this litigation. The defendants also argue that plaintiff's treatment history indicates a significant, unexplained gap in treatment.

Dr. Feurer, who performed his medical examination on June 26, 2006, discusses in his report, various observations of the plaintiff's mobility and flexibility and concludes that her neurological exam is within normal limits. He concludes that she does not suffer any objective neurological disability or neurological permanency, casually related to the accident. Dr. Israel, indicates that plaintiff during her examination on June 30, 2006, exhibits a full and normal range of

motion with regard to her upper and lower extremities. Dr. Israel provides not only the a numeric calculation of the plaintiff's range of motion, but details the norm as well as the objective tests that he employed in making his determination that the plaintiff lacks a "casually related disability as a result of the accident of record." Dr. Pediri who examined Ms. Davila- Guzman on March 7, 2005, details his examination as well as listing six objective tests he employed in making his determination that all of her ranges of motion were normal and that she does not suffer from any disability. In further support of their motion, the defendants also submit the plaintiff's deposition, discussing her treatment and activities subsequent to the accident.

In opposition to the motion, the plaintiff submits her deposition testimony and her affidavit as an affirmed report of Dr. Arthur Eisenstein, who has examined the plaintiff on November 20, 2006, un- affirmed medical reports of her prior treatment, unaffirmed MRI's and other medical reports upon which he relies in making his evaluation. The report by Dr. Eisenstein finds a deficit in the plaintiff's movement of her lumbar spine as compared to the stated normal. Dr. Eisenstein proposes that after reviewing the unaffirmed reports of her prior physicians as well as the unaffirmed MRI reports that she was not benefitting from further treatment and as such ceased continued care. He concludes that it is his professional opinion, that plaintiff has suffered "a permanent, partial disability" and causally relates them to the incident which is the subject of the instant matter.

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 (1<sup>st</sup> 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 Eyer, 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 plaintiff's 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 v Twentieth 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 (1<sup>st</sup> Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1<sup>st</sup> Dept. 2004).

Here, the defendants have met 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 Eyer, supra. However, plaintiff has failed to satisfy her burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact on the significant limitation issue. Garner v Tong, 27 AD3d 401 (1<sup>st</sup> Dept. 2006); Priviteria v Brown, 28 AD3d 733 (2<sup>d</sup> Dept. 2006); Secore v Allen, 27 AD3d 825 (3<sup>rd</sup> Dept. 2006); DeJesus-Martinez v Singh, 2007 NY Slip Op 50256U, 2007 N.Y. Misc. Lexis 373 (App. Term 1<sup>st</sup> Dept. 2007); Martin v Marquez, 2007 NY Slip Op 50214U, 2007 N.Y. Misc. Lexis 333 (App. Term 1<sup>st</sup> Dept. 2007). Plaintiff's un-affirmed medical reports as well as unsworn medical records lack any probative value. Hernandez v Ramirez, 19 AD3d 192 (1<sup>st</sup> Dept. 2005); Zeigler v Ramadhan, 5 AD3d 1080 (4<sup>th</sup> Dept. 2004); James v Yoen Wah Rental, Inc., et al., (1<sup>st</sup> Dept. 2003). Finally, plaintiff's argument that defendant's experts relied upon these unsworn records, making them now admissible by her is without merit and belied by a review of the submissions.

Plaintiff has also failed to sufficiently address the gap in her course of treatment by offering contradictory and unsupported claims by her attorney in his affirmation which assert that the lack of treatment was the result of a cessation of medical benefits, which is in turn contradicted by both plaintiff's deposition in which she indicates that she was indeed covered and the submission of her medical expert, Dr. Eisenstein which proffers a lack of medical benefit as the cause for the gap. See Pommells v Perez, Brown, Dunlap, Carasco v Mendez, 4 NY3d 566

(2005); Baez v. Rahamatali, 24 AD3d 256 (1<sup>st</sup> Dept. 2005), affd. 6 NY3d 868 (2006), Garner v Tong, supra; Neuberger v Gill, 19 AD3d 561 (2d Dept. 2005).

For these reasons and upon the foregoing papers, it is

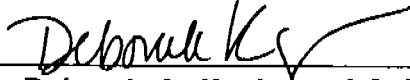
ORDERED that the defendants' motion for summary judgment is granted in its entirety and the complaint of Ana M. Davila-Guzman is dismissed in its entirety, is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

**FILED**  
MAR 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: March 16, 2007

  
Deborah A. Kaplan J.S.C.  
**DEBORAH A. KAPLAN**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST