

**Swinton v Moussa**

2007 NY Slip Op 30537(U)

March 19, 2007

Supreme Court, New York County

Docket Number: 0107693/2005

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN  
*Justice*

PART 22

JOANNA SWINTON

**FILED**  
APR 05 2007  
NEW YORK  
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MOTION DATE 1-31-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 110

KEITA MOUSSA and JOHN DOES

KAPLAN, J.:

In this personal injury action, the defendant Keita Moussa moves for summary judgment dismissing the complaint on the ground that the plaintiff Joanna Swinton 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 2:05 a.m. on April 28, 2003, plaintiff Joanna Swinton, involved in a collision with a vehicle owned and operated by defendant Keita Moussa, on the southbound Franklin Delano Roosevelt Drive near the East 96<sup>th</sup> Street entrance. Another unidentified vehicle was also involved in the accident. As a result of this incident, plaintiff claims to have sustained a serious injury to her cervical and lumbar spines resulting in severe and permanent bodily injury. Defendant Keita Moussa, now moves 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. Iqbal Merchant, a board certified neurologist and Roger A. Berg, a radiologist, who reviewed and interpreted plaintiff's MRI films. Each of these doctors, performed a Independent Medical Exam (IME) on the plaintiff as part of this litigation.

Dr. Merchant, who reviewed plaintiff's prior medical records, prior to performing his examination on October 19, 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 is not disabled and diagnoses a resolved "thoracic and lumbar spine sprain/strain. Dr. Berg, who also reviewed plaintiff's MRI films finds a "normal alignment of the spinal column" with a minimal disc bulge.

In opposition to the motion, the plaintiff submits two unaffirmed physiatry reports from Dr. Jidong Sun, dated June 25, 2003 and September 9, 2003; an unaffirmed chiropractic report from Dr. George Cluen, dated September 28, 2003 and a recent report from Dr. Edward Dector, an orthopedic surgeon, dated November 11, 2006. The earlier reports indicated that plaintiff suffers from herniated discs, and radiculopathy, and suffered "mildly painful spasms of the paravertebral musculature" and that movement in

her lumbosacral spine were "moderately restricted." The most recent exam by Dr. Dector indicates, among his findings that plaintiff shows "signs of left cervical radicular symptomology, and has sustained a herniated disc." Dr. Dector also finds Ms. Swinton has a normal flexibility and reflexes. He does not note any decrease in plaintiff's range of motion as a result of the collision. While he indicates that she has a "neck problem" he notably fails to diagnosis what that problem is or how it has resulted in a permanent impairment. Further, the report discusses her normal reflexes and range of motion.

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 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 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 Eyler, supra. However, plaintiff has failed to satisfy her burden by presenting sufficient admissible medical evidence which would establishes a 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 ( 2d 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). While it is well settled law that "a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law 5102(d), a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration." Monette v Keller, 281 AD2d 523 (2<sup>nd</sup> Dept. 2001); see Pommels v Perez, 4 NY3d 566 (2005); Meija v DeRose, 35 AD3d 407(2d Dept. 2006); Kearse v New York city Transit Authority, 16 AD3d 45 (2d Dept. 2005); Silkowski v Alvarez, 19AD3d 476 (2d Dep't. 2005). Here plaintiff's submissions are devoid of such proof.

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 against defendant Keita Moussa is dismissed in its entirety, and it is further

ORDERED that the Clerk of the court is to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

**FILED**  
APR 05 2007  
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Dated: March 19, 2007

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

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