

Andujar v Yinan

2007 NY Slip Op 30616(U)

March 22, 2007

Supreme Court, New York County

Docket Number: 0103454/2004

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

EVELYN ANDUJAR and URSULA CUEVAS

INDEX NO. 103454/04

FILED

NOTICE DATE 1-31-07

- v -

APR 10 2007

MOTION SEQ. NO. 002

ILASZ YINAN

MOTION CAL. NO. 4

**COUNTY CLERK'S OFFICE
NEW YORK**

The following papers, numbered 1 to 3, were read on this motion by the defendant for summary judgment dismissing the complaint on the ground that the plaintiffs did not meet the serious injury threshold requirement of Insurance Law § 5102(d).

NUMBERED

PAPERS

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits (Memo) _____

2

Replying Affidavits (Reply Memo) _____

3

Cross-Motion: Yes No

On November 3, 2002, as plaintiffs were driving on 9th Avenue near the corner of West 41st Street in Manhattan, they were struck by a vehicle operated by defendant. According to plaintiffs' verified bill of particulars, the impact caused Evelyn Andujar to sustain a C5-6 cervical disc herniation, straightening and reversal of the normal cervical lordosis, cervical strain/sprain, internal derangement of the cervical spine, cervical radiculopathy, loss of range of motion of the cervical spine and traumatic arthritis of the cervical spine. Ursula Cuevas sustained straightening and reversal of the normal cervical lordosis, cervical strain/sprain, internal derangement of the cervical spine, cervical radiculopathy, loss of range of motion of the cervical spine and traumatic arthritis of the cervical spine, straightening and reversal of the normal lumbar lordosis, lumbar strain/sprain, internal derangement of the lumbar spine, lumbar radiculopathy and traumatic arthritis of the lumbar spine.

The plaintiffs commenced the instant action seeking damages for the injuries allegedly sustained in the accident. The defendant moves for summary judgment dismissing the complaint in its entirety on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d). In opposition, the plaintiffs argue that they met this threshold requirement in that Evelyn Andujar sustained "a significant limitation of a body function or system", and Ursula Cuevas, received "a permanent consequential limitation or use of a body organ or

member and a significant limitation of use of a body function or system", both of which constitute a "serious injury" as defined by Insurance Law § 5102(d).

It is settled law that 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).

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).

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 (1st Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1st Dept. 2004).

In support of their motion, defendant provides three affirmed reports of Dr. Michael Katz, Dr. Robert April and Dr. Stephen Lasting, all of whom conducted independent medical exams of Evelyn Andujar. In his report Dr. Katz, a board certified orthopedic surgeon concludes that Evelyn Andujar had no tenderness of the cervical spine and normal range of motion. Dr. April, a neurologist states "there are no objective neurological findings and the range of motion were all normal except for her voluntary limitation of neck and low back movement." Dr. Lasting, a board certified radiologist states that Evelyn Andujar had multi-level degenerative

disc disease.

The defendant also provides affirmed reports of two independent medical examinations of plaintiff Ursula Cuevas. In his report, Dr. Katz opines that both the cervical strain and lumbosacral strain of this plaintiff have resolved and there are no signs or symptoms of permanence relative to the musculoskeletal system. Dr. April also found "no objective neurological findings" and that "all range of motion was normal for someone of this age."

Accordingly, the defendant met his initial burden on this motion as to both plaintiffs.

In opposition, the plaintiffs submit affirmed reports of Dr. Jeffrey Rosen, a board certified physician affiliated with the NYU Hospital for Joint Diseases Spine Center. Dr. Rosen examined both plaintiffs for the first time on January 5, 2007, although they had been treated by other physicians at this facility previously. After conducting a physical examination and reviewing medical records, including the MRI report, Dr. Rosen concludes that plaintiff Evelyn Andujar sustained a cervical herniation at C5-6 and cervical radiculopathy due to the instant accident. Dr. Rosen further concludes that plaintiff Evelyn Andujar has a significant loss of range of motion which has lead to a chronic condition of permanent disability. He conducted objective range of motion tests which revealed that neck range of motion "was significantly restricted as follows: 45 of 50 degrees, rotation to the right was 40 of 80 degrees, rotation to the left was 55 of 80 degrees."

As to plaintiff Ursula Cuevas, Dr. Rosen states that on January 5, 2007, she complained of severe pain including, neck, back pain and bilateral shoulder pain. Based upon his review of certified records and his physical exam of this plaintiff, Dr. Rosen opines that she sustained a permanent impairment in her cervical and lumbar spine which are causally related to the instant accident. However, in his report, Dr. Rosen failed to state which, if any, qualitative tests he used or state which, if any, MRIs or other objective medical evidence he relied upon to reach his conclusion. Nor does he provide or describe specific limitations in this plaintiff's range of motion. Compare Garner v. Tong, 27 A.D.3d 401 (1 Dept., 2006); Arrowood v Lowinger, 294 AD2d 315 (1st Dept. 2002). Rather, his reported findings appear to be based largely on plaintiff's subjective complaints of pain, which, alone, are insufficient to defeat a motion for summary judgment. See Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyler, *supra*.

It is well settled that a plaintiff may establish a "serious injury" by providing "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*. Plaintiff Evelyn Andujar has met this standard by the

submission of Dr. Rosen's range of motion tests. While it cannot be said the "alleged limitations of plaintiff's back and neck are so 'minor, mild or slight' as to be considered insignificant within the meaning of Insurance Law § 5102 (d)", it is well settled that the doctor's opinion must be supported by objective medical evidence. See Toure v Avis Rent A Car Systems, supra. Dr. Rosen has failed to provide a sufficient qualitative assessment of plaintiff Ursula Cuevas's condition to substantiate her claim of a serious injury.

Therefore, plaintiff Evelyn Andujar presented sufficient proof to establish a triable issue as to whether she sustained a serious injury within the meaning of Insurance Law § 5102(d). However, plaintiff Ursula Cuevas failed to sustain her burden.

For these reasons and upon the foregoing papers, it is

ORDERED that the defendant's motion for summary judgment as against plaintiff Evelyn Andujar is denied, and it is further,

ORDERED that the defendant's motion for summary judgment as against plaintiff Ursula Cuevas is granted, and it is further,

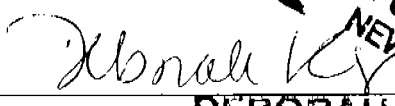
ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant, dismissing the complaint as to plaintiff, Ursula Cuevas, with costs and disbursements to defendant as taxed by the Clerk, and it is further,

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that defendant shall serve a copy of this order, with notice of entry, upon the plaintiffs.

This constitutes the Decision and Order of the Court.

Dated: March 22, 2007

FILED
 APR 10 2007
 COUNTY CLERK'S OFFICE
 NEW YORK

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

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