

Choudhry v Dym

2007 NY Slip Op 30672(U)

April 5, 2007

Supreme Court, New York County

Docket Number: 0116855/2005

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

KHALEED CHOUDHRY

INDEX NO. 116855-2005

MOTION DATE 2-14-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 27

JACK DYM and JONES SAM LIM

FILED
APR 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 3 were read on this motion for summary judgment - Notice of Motion by defendants Dym and Lim Summary Judgment dismissing the complaint on the threshold issue of whether the plaintiff sustained "serious injury" as defined by Insurance Law 5102(d), Affirmation in Opposition of Plaintiffs and Reply Affirmation of Defendants.

Cross-Motion: Yes No

In this action to recover damages for injuries arising from a motor vehicle accident, the undisputed facts establish that the parties were involved in a April 14, 2003 collision at approximately 11:00 a.m., on the Central Park Traverse near 81st Street, New York, New York. Plaintiff's vehicle, was stopped at a red traffic signal when it was struck in the rear by a vehicle driven by defendant Dym and owned by defendant Lim. After the collision, plaintiff was transported to Columbia Presbyterian Hospital for treatment.

Plaintiff commenced the instant action claiming, *inter alia*, that he sustained serious injuries as defined by Insurance Law § 5102(d). In his Bill of Particulars, he alleges injuries to his lumbar and cervical spine, including but not limited to herniated discs, cervical sprain/strain, exaggerated cervical lordosis and Tempo Mandibular Joint Syndrome (TMJ).

In support of their motion, the defendants submit the affirmed report of Dr. Edward Weiland, a board certified neurologist and the unaffirmed report of Dr. John Esposito, a doctor of Dentistry. Each of these doctors performed an Independent Medical Exam (IME) on the plaintiff as part of this litigation. Dr. Weiland, who examined the plaintiff on July 20, 2006, discusses in his report the results of

numerous tests performed as well as his observations of the plaintiff's mobility and flexibility and concludes that his neurological exam is within normal limits. He discusses both the plaintiff's prior and subsequent car accidents as well. Further, he finds that plaintiff exhibited a full and normal range of motion, detailing his findings as compared to the norm. He concludes that Mr. Choudhry has resolved cervical, lumbrosacral and thoracic sprains/strains and has a normal neurological examination with no permanent disabilities. Dr. Esposito examined the plaintiff on July 13, 2006, finding no evidence of TMJ or any other dental disability. In further support of their motion the movant submits portions of the plaintiff's deposition in which he indicates that he missed only two weeks of work as a result of this accident and details his subsequent activities.

In opposition, the plaintiff submits the affirmed report of Dr. Shams Qureshi, Director of the Spine Orthopedic and Sports Rehabilitation Center in New Jersey, who has treated Mr. Choudhary for each of his three accidents. In his report, the doctor discusses the prior accident and discounts its relation to the instant case. While he indicates that plaintiff has herniated discs and pain as a result of this accident he fails to detail any tests administered to support his findings (other than the initial MRI of 2003) or any specific limitations in mobility as compared to the norm. While he concludes that plaintiff has suffered a "consequential permanent impairment with a significant loss of function", his report is simply devoid of any evidence to substantiate that conclusion. Plaintiff also submits the affirmed report of Dr. Mark Shapiro, who concludes that an MRI taken of Mr. Choudhry shortly after the accident four years ago indicated the presence of herniated discs. The plaintiff has failed to submit any proof as to his claim of TMJ and related dental injuries to support the assertions presented in his earlier papers.

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 this case, defendants have produced 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. Specifically, they produced the affirmed report of Dr. Weiland, a board certified neurologist, and plaintiff's deposition testimony.

In opposition, the plaintiff failed to come forward with objective proof of his injury to raise any factual issue requiring a trial. He submits merely the affirmed reports of Dr. Qureshi and Dr. Shapiro. Although Dr. Qureshi details the plaintiff's recurring discomfort and reports of pain, these subjective complaints alone are not sufficient, he was required to come forward some objective proof of his injury to raise a triable issue. See Toure v Avis Rent A Car Systems, *supra*; Dufel v Green, *supra*; Gaddy v Eyler, *supra*. The submissions tendered fail to meet this evidentiary burden.

As previously noted, while Dr. Qureshi finds herniated discs and a restriction of motion for the plaintiff he fails to state how he makes that determination, what tests if any he employed, what the range of motion actually is and how it compares to the norm. It is well settled that "[a]lthough 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 (2nd Dept. 2001); see Pommells v Perez, 4 NY3d 566 (2005); Mejia v DeRose, 35 AD3d 407 (2nd Dept. 2006); Kearse v New York City Transit

Authority, 16 AD3d 45 (2nd Dept. 2005); Diaz v Turner, 306 AD2d 241 (2nd Dept. 2003). Thus, Dr. Qureshi's affidavit fails to adequately address the range of motion deficits claimed therein. Moreover, the plaintiff's proof fails to establish any causal connection between the bulging disc condition shown in the MRI and the accident. Thus, the plaintiff's assertion that the disc bulge and herniation were caused by the accident is nothing more than sheer speculation. See Bycinthe v Kombos, 29 AD3d 845 (2006).

Accordingly, the motion of defendants Jack Dym and Jong Sam Lim for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) are granted, and the complaint is dismissed.

For these reasons and upon the foregoing papers, it is,

ORDERED that the motion of defendants Jack Dym and Jong Sam Lim for summary judgment dismissing the complaint are granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 5, 2007

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