

**Lesser v Shenandoah Express, Inc.**

2007 NY Slip Op 30949(U)

April 16, 2007

Supreme Court, New York County

Docket Number: 0114572/2004

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

HENRIETTA LESSER

INDEX NO. 114572-2004

MOTION DATE 2-28-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 63

SHENANDOAH EXPRESS, INC. and  
MOHAMMED A. YOUSSEF

**FILED**  
- v -  
APR 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

KAPLAN, J.:

In this personal injury action, the defendants Shenandoah Express, Inc. and Mohammed A. Youssef move for summary judgment dismissing the complaint on the ground that the plaintiff Henrietta Lesser did not sustain a "serious injury" within the meaning of Insurance Law §5102(d). The plaintiff Henrietta Lesser cross-moves for summary judgment on the issue of liability as against both defendants.

It is undisputed that in the early afternoon of September 27, 2003, plaintiff Henrietta Lesser was a passenger in a taxi cab owned by defendant Shenandoah Express, Inc. and operated by defendant Mohammed A. Youssef. That vehicle while traveling southbound on East End Avenue in Manhattan struck a stopped vehicle in the rear near the intersection of East 89<sup>th</sup> Street. As a result of this incident, plaintiff claims to have sustained a serious head injury resulting in a vestibular disorder which impairs her ability to walk in a straight line, a permanent disfigurement to her face from swelling over her eye and that she was unable to perform virtually any of her usual and customary activities for a period of at least ninety of the one hundred and eighty days following the accident. Defendants Shenandoah and Youssef, 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 report of Dr. Burton Diamond, a board certified neurologist, the plaintiff's deposition, as well as the medical reports of her own physician Dr. S. Robert Rozbruch, a board certified orthopedist. The defendant's also proffer a color photograph of Ms. Lesser, which they argue clearly shows no disfigurement to her face. The defendants further argue that plaintiff's treatment history indicates a series of falls, unrelated to this accident which occurred shortly before the September 2003 accident, and to which they contend caused any impairments or claimed injuries.

Dr. Diamond, who performed his medical examination on November 10, 2005 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. Although his

findings do indicate a somewhat decreased range of motion in both the cervical and lumbar spines he stresses that there “are no corroborative objective findings noted.” After noting plaintiff can successfully perform all objective tests administered, he concludes that any restrictions are “self-imposed”. Dr. Diamond also indicates that Ms. Lesser has a good gait, with only a slight veer to the right and that she can perform normal heel to toe walking. Dr. Diamond 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. In further support of their motion, the defendants submit the plaintiff’s deposition, discussing her treatment and activities subsequent to the accident.

In opposition to the motion, the plaintiff submits the correction sheet she completed in regard to her deposition testimony, which indicates that she was unable to perform her customary duties and was confined to home for a period of four months rather than an uncertain matter of weeks as stated in the portion of the deposition testimony provided by defendant. She also offers her affidavit, as well as those of her son Rick Allen and Jean Krosner, a colleague who served with plaintiff on the Board of the National Council of Jewish Women, which support her claim of home confinement for a minimum of four months.

The plaintiff also has submitted a xerox copy of a series of black and white photographs taken on September 27, 2003 in support of her permanent disfigurement claim. Additionally, she offers the affirmed medical report of her physician Dr. Jerry Nagler detailing her injuries and current condition, as well as his directive that she restrict her activities after the accident. Finally, she offers the unaffirmed medical reports of Dr. Mark Horwich, a neurologist who she saw on November 4, 2003 and Dr. Mark Schwartz, a plastic surgeon who examined her in September of 2003.

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 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 Eyer, *supra*. However, plaintiff has failed to fully satisfy her burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact on either the permanent disfigurement claim or the permanent loss of use claim. Garner v Tong, 27 AD3d 401 (1<sup>st</sup> Dept. 2006); Priviteria v Brown, 28 AD3d 733 (2<sup>d</sup> Dept. 2006); Şecore 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 unaffirmed 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 photographs are not persuasive. They are of such poor quality that one cannot even discern what they depict. Further, Dr. Nagler fails to explain how he determined that plaintiff’s claim of a walking impairment was diagnosed, or casually related to the motor vehicle accident, as opposed to her falls. Chan v Garcia, 24 AD3d 159 (1<sup>st</sup> Dept. 2005).

However, the submission of the Dr. Nagler’s affirmation as well as the affidavits and corrected deposition testimony, which sharply contrasts the deposition testimony proffered by the defendant, coupled with the reliance of defendant’s physician on reports of the plaintiff’s providers Dr. Rozbruch, Dr. Schwartz, Dr. Horwich as well as her physical therapy reports does create a triable issue of fact with regard to plaintiff’s ninety day claim. Pugh v. DeSantis, 37 AD3d 1026 (3<sup>d</sup> Dept. 2007); Garner v Tong 27 AD3d 401 (1<sup>st</sup> Dept. 2006).

With regard to the plaintiff’s cross motion on liability, it is well settled law that the driver of a motor vehicle must maintain a safe distance between his vehicle and the one in front of him, and that a rear end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver who strikes the vehicle in front unless the operator of the rear vehicle can come forth with an adequate, non-negligent explanation for the collision. *See Francisco v*

Schoepfer, 30 AD3d 275 (1<sup>st</sup> Dept. 2006); Garcia v Bakemark Ingredients (East) Inc., 19 AD3d 224 (1<sup>st</sup> Dept. 2005); Grimes v Carroll, 13 AD3d 125 (1<sup>st</sup> Dept. 2004).

Here, the plaintiff established her prima facie entitlement to judgment as a matter of law as against defendants on the issue of liability. However, the defendants, who have declined to submit any opposition to this cross motion wholly fail to raise any triable issues of fact.

For these reasons and upon the foregoing papers, it is

ORDERED, that the defendants motion for summary judgment on ground that plaintiff has failed to establish a serious injury as required under Insurance Law §5102(d) is granted in part and denied in part as indicated, and it is further

ORDERED, that the plaintiffs motion for summary judgment on liability is granted in its entirety.

The parties are directed to appear on May 14, 2007, Med-2, 80 Centre Street at 9:30 a.m., for their scheduled mediation.

This constitutes the Decision and Order of the Court.

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

Dated: April 16, 2007

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

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Check if appropriate:  DO NOT POST