

Sall v Walsh

2007 NY Slip Op 30980(U)

March 9, 2007

Supreme Court, New York County

Docket Number: 0111514/2005

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

CISSE SALL

INDEX NO. 11151405

- v -

FILED

MOTION DATE 4-16-07

APR 30 2007

MOTION SEQ. NO. 003

PETER WALSH

NEW YORK COUNTY CLERK'S OFFICE

MOTION CAL. NO. 102

The Notice of Motion, with Affidavits and Exhibits, was read on this motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain "serious injury" as defined by Insurance Law 5102(d). No opposition papers were submitted.

Cross-Motion: Yes No

In this action to recover damages for injuries sustained in a motor vehicle accident, the defendant moves for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain "serious injury" as defined by Insurance Law § 5102(d). The motion is granted.

The complaint alleges that on August 26, 2004, a BMW being driven by defendant Peter Walsh collided with a Mercedes taxi being driven by plaintiff Cisse Sall, which was stopped at a red traffic light at the intersection of Ninth Avenue and West 40th Street in Manhattan. At his deposition, the 46-year-old plaintiff testified that upon being struck by the defendant, his chest hit the steering wheel and the back of his head hit the headrest. However, his airbags did not deploy and he drove his car from the scene. The next day, he took the car for repairs and took himself to the office of a chiropractor, Dr. Hong, with complaints of back pain. Dr. Hong administered heat and acupuncture therapy three times per week for three months. The plaintiff stopped treatment because he felt better. Sometime in 2005, he went to a clinic, which gave some type of pills. He had no future appointments. The plaintiff testified that he still sometimes experiences pain when bending over to pick something up, or sitting for a long period of time. After the accident, he stayed home from work for one month. He now drives a taxi five rather than six days, five hours each day. He testified that he was involved in another accident in December 2003, and suffered neck pain after that.

The plaintiff commenced the instant action claiming, *inter alia*, that he sustained serious injuries as defined by Insurance Law § 5102(d) - i.e. "permanent consequential limitation of use of a body function or system" by reason of injuries to his spine and back. His Bill of Particulars alleges - central posterior disc herniations at L4-L5, cervical and lumbosacral radiculopathy, and cervical and lumbosacral sprain/strain."

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).

"Although 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). The plaintiff's medical submissions must show when the tests were performed, the objective nature of the tests, what the

normal range of motion should be and whether the plaintiffs' limitations were significant. See Milazzo v Gesner, 33 AD3d 317 (1st Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1st Dept. 2006).

In this case, the 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 pleadings, the deposition testimony of the plaintiff as set forth above, and the affirmed reports of *Dr. Robert Israel*, a board certified orthopedic surgeon and *Dr. Robert April*, a board certified neurologist, both of whom examined the plaintiff, and *Dr. David Fisher*, a board certified radiologist, who reviewed the plaintiff's MRI films.

In his report, Dr. Israel concludes that "from an orthopedic point of view, the [plaintiff] has no causally related disability as a result of the accident." Dr. Israel's testing indicated no restrictions or deficits in range of motion, muscle strength, symmetry or sensation. His impression was "resolved sprains of the lumbar and cervical spine."

In his report, Dr. April concludes that "there are no objective neurological findings" and that the accident "did not produce a neurological diagnosis, limitation, disability or need for neurological intervention." Dr. April's report further states that he conducted neurological, cranial nerve, motor, mechanical and sensory tests, and all showed normal functioning and no deficits.

In addition to a narrative report of Dr. Hong, Dr. April also reviewed a report of Dr. Aordkian, a chiropractor, dated November 23, 2004, and observed that "this neurological examination was negative;" a narrative report from Pinpoint Acupuncture, dated November 18, 2004, and found "no objective disability"; a chiropractic report of Dr. Fred Rudin, dated November 19, 2004, stating that his neurological examinations of the plaintiff were all normal.

In his report, Dr. Fisher finds only "degenerative changes at L4/5 and L5/S1 with accompanying disc bulge and herniation." Dr. Fisher reviewed an MRI report of Dr. Jacob Lichy made to a Dr. Landesberg, dated February 11, 2004, and found a "herniation of the L4/L5 and L5/S1 discs." Dr. Fisher states that "there is clear evidence of degenerative changes at the L4/5 and L5/S1 levels" and that "these changes are highly unlikely to have developed in the short interval between the

accident and the [MRI] study and in my opinion represent a preexisting condition. The disc herniation at L4/5 and the disc bulge at L5/S1 are compatible with the amount of degenerative change present. There is no radiographic evidence of traumatic or causally related injury to the lumbar spine."

The defendant's proof entitles him to judgment as a matter of law on the threshold issue of "serious injury", thereby shifting the burden to the plaintiff. However, the plaintiff, by failing to submit any opposition to the motion, has wholly failed to meet his burden to come forward with proof in admissible form to raise a triable issue of fact requiring a trial.

Accordingly, the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted.

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

ORDERED that the defendant's motion for summary judgment is 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 19, 2007

FILED

APR 30 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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