

Gordon v Zapata

2007 NY Slip Op 31142(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0102019/2005

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

SIMONE GORDON

INDEX NO. 102019/05

MOTION DATE 2-28-07

MOTION SEQ. NO. 002

MOTION CAL. NO. 41

- v -

ANTONIO M. ZAPATA, RIGHTON LIMO, INC. and
WILLIAM ROMAN

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

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

PAPERS NUMBERED

1

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

2

Answering Affidavits — Exhibits (Memo) _____

3

Cross-Motion: Yes No

FILED
MAY 09 2007
COUNTY CLERK'S OFFICE
NEW YORK

On June 27, 2003, as he was riding northbound in a taxi owned and operated by defendant Antonio M. Zapata (Zapata) on Park Avenue near the intersection of 107th Street in Manhattan the plaintiff was struck by a taxi owned by defendant Righton Limo, Inc. (Righton Limo) and being driven by defendant, William Roman (Roman). Plaintiff commenced the instant action seeking damages for personal injuries she allegedly sustained in the accident. The defendants now move, pursuant to CPLR 3212, for summary judgment on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law Section 5102(d). The motion is denied.

The plaintiff alleges the following injuries as a result of the accident; her left shoulder, right knee, left knee, back and head, contending they establish a "serious injury" as defined by Insurance Law § 5102(d).

The defendants Righton Limo and Roman now move 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). Defendant Zapata, cross-moves for the same relief relying on the submissions of co-defendants.

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, defendants seek 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). 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 plaintiff's 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 (1st Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1st Dept. 2004).

In support of their motion, defendants provide the affirmed reports by Dr. Alla Mesh and Dr. Lester Lieberman, both of whom performed independent medical exams of plaintiff as part of this litigation. On May 25, 2006, Dr. Mesh, a board certified neurologist, examined the plaintiff and reviewed plaintiff's medical records. In his report he states that plaintiff's tests were all normal and diagnoses plaintiff with a cervical, thoracic and lumbar sprain/strain and muscle tension headaches which were all resolved. Dr. Mesh did not comment on plaintiff's left shoulder, right elbow, left hand, left hip and right knee and deferred his opinion to the

appropriate specialist.

Dr. Lieberman conducted his examination on May 16, 2006 after his review of plaintiff's medical records. In his report, Dr. Lieberman states that plaintiff had normal range of motion in her neck, shoulders, lower back and both knees. Dr. Lieberman noted that plaintiff had a minor decreased range of motion in her neck and lumbar spine, however he finds this was normal. Dr. Lieberman states that plaintiff has no disability or permanency and her prognosis is good.

Accordingly, defendants have met their burden on a motion for summary judgment thereby shifting the burden to the plaintiff.

In opposition, plaintiff submits her own affidavit as well as the affirmation of Dr. Gideon Hedrych. Dr. Hedrych is a trauma specialist, board certified in emergency medicine who first examined plaintiff on July 3, 2003 regarding the injuries sustained during the accident on June 27, 2003. Dr. Hedrych conducted a follow up examination on December 11, 2006 where plaintiff complained of severe headaches, cervical back pain, frequently relating to the left shoulder blade, lumbosacral pain, left shoulder pain, right knee pain and left knee pain.

After the accident plaintiff had numerous MRI's of the brain, cervical spine, left shoulder, lumbosacral spine and right knee. An MRI of the cervical spine taken on August 6, 2003 revealed focal reversal of cervical lordosis consistent with abnormal intervertebral disc and superimposed muscle spasm, C3-4 right foraminal disc bulge, C4-5 shallow, irregular left central disc protrusion, C5-6 left foraminal disc protrusion and C6-7 left central disc bulge. An MRI of the left shoulder taken on August 12, 2003 revealed a "sasupraspinatus, anterior margin, small, full-thickness tear with abnormal subacromial and subdeltoid fluid." An MRI of the lumbosacral spine taken on August 14, 2003 revealed posterior bulging annulus at L3-4 and posterior disc bulge at L5/S1 with associated disc herniation. An MRI of the right knee taken on September 19, 2003 revealed a radial tear of lateral meniscus body.

During the December 11, 2006 follow-up visit Dr. Hedrych conducted numerous physical examinations where he concluded that plaintiff had limitations to her range of motion of the cervicodorsal spine, dorsolumbar spine, left shoulder, right knee and left knee. He concluded that plaintiff has a post-concussion syndrome; cervicodorsal derangement at C3-4; bulging disc at C6-7, and herniated discs at C4-5 and C5-6; cervical myelopathy and cervical radiculopathy; lumbosacral derangement with bulging discs; right lumbosacral radiculopathy; left shoulder derangement with torn lateral meniscus; and left knee derangement with traumatic tendinitis and possible torn meniscus. He concluded that plaintiff will have significant consequential loss of use and limitation of motion of a permanent nature of her cervical and lumbar spine, left shoulder, right knee and left knee. Dr. Hedrych details the objective tests employed, his results and

correlates them to the stated norm. He concludes that her disabilities are causally related to the accident of June 27, 2003.

Thus, plaintiff presented sufficient proof of a triable issue as to whether she sustained a serious injury within the meaning of Insurance Law § 5102(d). See Garner v. Tong, supra; Privitera v. Brown, 28 A.D.3d 733 (2nd Dept., 2006).

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motions for summary judgment are denied in their entirety. *Plaintiff to file note of issue by May 25th, 2007.*

This constitutes the Decision and Order of the Court.

FILED
MAY 09 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 20, 2007

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

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