

Chambers v Bah

2007 NY Slip Op 31147(U)

May 1, 2007

Supreme Court, New York County

Docket Number: 0107620/2005

Judge: Deborah A. Kaplan

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SCANNED ON 5/9/2007
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

**BLAKE CHAMBERS, DENNIS CARROLL, JR.,
Codi Chambers, all three infants under the age
of 18 years by their mother and natural guardian,
PATRICIA CHAMBERS, PATRICIA CHAMBERS,
individually, and DENNIS F. CARROLL**

INDEX NO. 107620/05

MOTION DATE 4-04-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 31

- v -

ISSA BAH

The following papers, numbered 1 to 1, 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). No opposition papers were submitted.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1</u>
Answering Affidavits — Exhibits (Memo)	<u>None</u>
Replying Affidavits (Reply Memo)	<u></u>

Cross-Motion: Yes No

On September 1, 2002, as plaintiffs were riding in a bicycle on East 149th Street near the corner of Exterior Street in the Bronx, when they were struck by a vehicle operated by defendant. The impact allegedly caused the plaintiffs numerous personal injuries.

The defendant now moves for summary judgment dismissing the complaint in its entirety on the ground that none of the plaintiffs sustained a "serious injury" as defined by Insurance Law § 5102(d). No opposition papers were submitted.

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

[*2]
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 his motion, defendant proffers plaintiffs' verified bill of particulars, the deposition testimony of Blake Chambers and affirmed reports by Dr. Marvin Winell, Dr. Iqbal Merchant, Dr. Michael Rafiy and Dr. Marianna Golden.

Dr. Winell, a orthopaedist, performed an independent orthopaedic exam of plaintiff Blake Chambers and plaintiff Patricia Chambers on June 27, 2006 where he conducted range of motion tests of plaintiffs' cervical spine, dorsal spine, lumbar spine and upper extremities in addition to reviewing their medical records. In his reports, Dr. Winell states that these plaintiffs do not demonstrate any objective evidence of disability or permanency.

Dr. Merchant, a board certified neurologist, conducted an independent neurological examination of plaintiff Dennis Carroll Jr. and plaintiff Dennis F. Carroll on July 13, 2006 where he conducted range of motion tests on their cervical spine, thoracic spine, lumbar spine, in addition to tests on their higher mental functions, cranial nerves, motor system, reflexes, sensory system, cerebellar functions and gait and station. In his reports, Dr. Merchant states that plaintiffs' tests came up

normal and concluded that plaintiff Dennis Carroll Jr. had a cervical, thoracic and lumbar sprain/strain which was now resolved and that plaintiff Dennis F. Carroll had a cervical and lumbar sprain which was also now resolved.

Dr. Rafiy, a board certified orthopaedic surgeon, conducted a independent orthopaedic examination of plaintiff Codi Chambers on October 23, 2006 where he conducted range of motion tests on plaintiff's cervical spine, bilateral shoulder and lumbar spine in addition to reviewing his medical records. In his report, Dr. Rafiy states that this plaintiff had a cervical and lumbar sprain/strain and a bilateral shoulder sprain which were now resolved.

Dr. Golden, a board certified neurologist, conducted an independent neurological examination of plaintiff Patricia Chambers on June 27, 2006 where she conducted range of motion tests on her neck, thoracic spine, lumbar spine and leg in addition to a review of her medical records. Dr. Golden also conducted tests concerning plaintiff's mental status, cranial nerves, motor system, reflexes, sensory system, cerebellar functions and gait and station. In her report, Dr. Golden states that this plaintiff had a normal neurological evaluation and she does not demonstrate any objective evidence of disability or permanency.

Accordingly, defendant has met his burden on a motion for summary judgment. In failing to submit any papers in opposition, the plaintiffs have failed to provide proof sufficient to raise any issues of fact as to whether they sustained a "serious injury" as defined by Insurance Law 5102(d).

For these reasons and upon the foregoing papers, it is

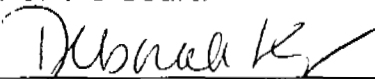
ORDERED that the defendant's motion for summary judgment is granted, without opposition, and the complaint is dismissed, and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the defendant dismissing the complaint in its entirety, without costs or disbursements, and it is further,

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

This constitutes the Decision and Order of the Court.

Dated: May 1, 2007


Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

FILED
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