Polonia v Trio Asbestos Removal Corp.

2007 NY Slip Op 31148(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0108713/2004

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN, Justice — PART 22

JUAN M. POLONIA

- v -

TRIO ASBESTOS REMOVAL CORP., JAN WOJDYLON and LUIS A. TINEO

INDEX NO. 108713-2004

MOTION DATE 2-21-07

MOTION SEQ. NO. 002 & ~~003~~

MOTION CAL. NO. 87

FILED
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KAPLAN, J.:

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Juan M. Polonia did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). The motion is denied for the reasons set forth below.

At approximately 5:30 p.m. on August 30, 2003, plaintiff Juan M. Polonia, was a passenger in a vehicle operated by defendant Luis A. Tineo. On that evening near the intersection of East 16th Street and First Avenue, New York, New York , that vehicle was involved in an accident with a vehicle operated by Jan Wojdylon and owned by Trio Asbestos Removal Corp.. As a result of this incident, plaintiff claims to have sustained a serious injury to his lumbar spine, as well as herniated discs causing impingement, a lumbrsacral radiculopathy with resulting limitations on his range of motion as well as other injuries. Defendants , Wojdylon and Trio Asbestos, now move for summary judgment averring that plaintiff has failed to establish a serious injury as defined by Insurance Law §5102. Defendant Tineo cross moves for summary judgment, on the same grounds under Motion Sequence 003.

In support of their motion the defendants submit the affirmed reports of Dr. Howard Baruch, a board certified orthopedist and Dr. Jay Litt, a board certified radiologist. Defendants also proffer the deposition testimony of the plaintiff, as well as copies of various pleadings. Each of these doctors performed an Independent Medical Examination (IME) on the plaintiff as part of this litigation.

Dr. Baruch, who reviewed plaintiff's prior medical records but not his MRI, prior to performing his examination on September 12, 2005, discusses in his report various observations of the plaintiff's mobility and flexibility and concludes that his orthopedic examination is within normal limits. He indicates plaintiff has a full range

of motion, with no restrictions indicated in either the lumbar or cervical spine. He details the tests he employed as well as his findings and then compares them to the normal range of motion. Dr. Litt, concludes in his report that plaintiff exhibits among other findings a " partial lumbarization at S1... a loss of signal diffusely with loss of disc height at L5-S1...mild bulging of discs and...facet joint hypertrophy bilaterally at both levels." He concludes that his findings are indicative of degenerative changes rather than related to the subject accident.

In opposition to the motion, the plaintiff has submitted an affirmed report from Dr. Jeffrey Weiss, who has treated him since the accident, and details his course of treatment as well as plaintiff's diagnosed injuries. Dr. Weiss discusses plaintiff's range of motion restrictions, concluding among his findings that he has between 10-20% restrictions in both his lumbar and cervical spines. He discusses plaintiff's treatment as well as his current findings of restriction related to the disc and spine injuries alleged here. He also discusses the MRI photos which were taken immediately after the subject accident, however unlike defendant's physicians he casually relates the findings to the accident of August 2003. Finally, Dr. Weiss concludes that Polonia has suffered a permanent injury to his spine.

The plaintiff also argues that the defendant's summary judgment motion, filed some sixty days after the note of issue was filed is untimely, and as such should be denied in its entirety.

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 (1st 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 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 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 vTwentieth 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).

First, as to the timeliness claim, CPLR 3212(a) provides that any party may move for summary judgment after issue has been joined, however a court may set a date after which no motion may be filed so long as it is not less than thirty days. In the absence of a court rule, the statutory period of one hundred and twenty days will apply. Here, the parties filings were controlled by the rules of court governing this action (Tingling, J.) which provided that all summary judgment motions must be made within thirty days of the filing of the Note of Issue. CPLR 3212(a) further provides that any motions for summary judgment made more than one hundred and twenty days after the filing of the note of issue requires that good cause be shown. In support of his application defendant avers that he did not receive the compliance conference order, and in the absence of any contrary ruling, made his motion within sixty days, as per the rules of New York County Supreme Court-Civil Branch. The Court notes, that shortly after the issuance of the pre-trial conference order in the instant matter, Judge Tingling changed his part rules to permit summary judgment motions within sixty days of the filing of the Note of Issue. As such, the Court will accept the defendant's motion as timely. 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 Eyler, supra. However, plaintiff has satisfied his burden by presenting sufficient admissible evidence which establishes to create triable issues of fact on the serious injury issue. Garner v. Tong, 27 AD 3d 401 (1st Dept. 2006); Priviteria v. Brown, 28 AD3d (2d Dept. 2006); Secore v Allen, 27 AD3d 825 (3d Dept. 2006). Plaintiff has also successfully addressed any gap in his treatment by presenting evidence that he could not continue as a result of the termination of his benefits. See Pommells v Perez, 4 NY3d 566 (2005); Garner v.Tong, supra; Neuberger v Gill, 19 AD3d 561 (2d Dept. 2005).

For these reasons and upon the foregoing papers, as well as oral argument held, it is

ORDERED that the defendants motion for summary judgment is denied in its entirety, and it is further

ORDERED that the parties are directed to appear on June 5, 2007, 9:30 a.m. Med-2, 80 Centre Street, New York, New York for their previously scheduled mediation.

This constitutes the Decision and Order of the Court.

FILED
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Dated: , April 20, 2007

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN J.S.C.

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