

Oluwafemi v Nel Taxi Corp.

2007 NY Slip Op 31150(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0110164/2005

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

JOSEPH OLUWAFEMI

INDEX NO. 110164/05

MOTION DATE 2-28-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 68

NEL TAXI CORP. and ALI AHMED

FILED
MAY 10 2007
NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 2, were read on this 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).

PAPERS NUMBERED

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

1

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

2

Answering Affidavits — Exhibits (Memo) _____

Cross-Motion: Yes No

On May 1, 2005, as he was driving on Fourth Avenue near the intersection of Union Street in Brooklyn the plaintiff was struck by a taxi owned by defendant Nel Taxi Corp. (Nel Taxi) and operated by defendant Ali Ahmed (Ahmed). Plaintiff commenced the instant action seeking damages for personal injuries he 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 commenced the instant action seeking damages for the injuries he allegedly sustained in the accident, including injuries to his back and neck. The plaintiff claims that his injuries fall under the definition "serious injury" as defined by Insurance Law § 5102(d) (1) a "significant limitation of a body function or system" specifically, a loss of range of motion back and neck and/or (2) a "medically determined injury or impairment of a non-permanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his usual and customary daily activities for at least 90 days during the 180 days immediately following the occurrence of the injury or impairment."

The defendants 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).

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 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 (1st Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1st Dept. 2004).

In support of their motion, defendants provide affirmed reports by Dr. Iqbal Merchant and Dr. Michael P. Rafiy, both of whom performed independent medical exams of plaintiff as part of this litigation. Dr. Merchant, a board certified neurologist, reviewed plaintiff's medical records prior to his examination on October 19, 2006. Dr. Merchant examined the plaintiff's cervical spine, thoracic spine, lumbar spine, higher mental functions, cranial nerves, motor exam, reflexes, sensory exam, cerebellar functions, and gait and station. In his report he states that plaintiff's tests were all normal and diagnoses plaintiff with resolved cervical, thoracic and lumbar sprain/strains. Dr. Merchant did not comment on plaintiff's face, left hand, and chest and deferred his opinion to the appropriate specialist.

Dr. Rafiy, a board certified orthopedic surgeon conducted his examination on October 19, 2006 after his review of plaintiff's medical records. In his report, Dr. Rafiy concludes that plaintiff had normal range of motion in his left hand, lumbar spine and cervical spine. Dr. Rafiy states that plaintiff suffers no disability from an orthopedic point of view and there is no permanency or residuals.

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

In opposition, plaintiff submits his own affidavit, MRI's taken of his lumbosacral spine and cervical spine as well as the affirmations of Dr. Mark Heyligers and Dr. Joyce Goldenberg. An MRI of the lumbosacral spine taken on June 30, 2005 revealed posterior disc herniation at L5-S1 impinging on the anterior aspect of the spinal cord. An MRI of the cervical spine taken on June 30, 2005 revealed posterior disc bulge at C4-5 impinging on the anterior aspect of the spinal canal.

Dr. Heyligers provided care and treatment to plaintiff on May 4, 2005 regarding the injuries sustained during the accident on May 1, 2005. Dr. Heyligers conducted numerous objective tests where he concluded that plaintiff has a posterior disc herniation at L5-S1 and a cervical bulging disc at C4-5, resulting in significant limitations and restrictions of motion of his cervical spine, lumbar spine and shoulder.

Dr. Goldenberg examined plaintiff on January 18, 2007 and performed several objective range of motion tests and a neurological examination. Her tests revealed a loss of range of motion of the lumbar and cervical spine specifically a lumbar disc herniation at L5-S1 and a cervical disc bulge at C4-5. She further concluded that plaintiff "sustained a permanent impairment and disability and will continue to have pain and consequential restriction, loss of use and limitation of motion of his lumbar spine and neck." Dr. Goldenberg details the objective tests employed, plaintiff's results and correlates them to the stated norm. She concludes that his disabilities are causally related to the accident of May 1, 2005.

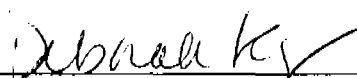
Thus, plaintiff has presented sufficient proof in admissible form of a triable issue as to whether he sustained a serious injury within the meaning of Insurance Law § 5102(d). See Garner v. Tong, *supra*; Privitera v. Brown, 28 A.D.3d 733 (2nd Dept., 2006).

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: April 20, 2007


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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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