

Hui Chen v Little

2007 NY Slip Op 31229(U)

May 3, 2007

Supreme Court, New York County

Docket Number: 0107507/2004

Judge: Deborah A. Kaplan

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SCANNED ON 5/15/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

HUI CHEN

INDEX NO. 107507-2004

MOTION DATE 3/7/07

MOTION SEQ. NO. 003

- v -

GEORGE P. LITTLE

MOTION CAL. NO. 141

KAPLAN, J.:

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Hui Chen 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 8:30 a.m. on December 9, 2003 plaintiff avers that as he was traveling on the Bronx River Parkway near Exit 7E, Bronx, New York, he was struck in the rear by a vehicle owned and operated by defendant George P. Little. As a result of this incident, plaintiff claims to have sustained serious injury to his cervical and lumbar spines, including herniated discs and a decreased range of motion. Defendant Little, now moves for summary judgment averring that plaintiff has failed to establish a serious injury as defined by Insurance Law §5102, and as such any recovery should be limited to that provided by No-Fault Insurance.

This action was commenced by the service of a summons and complaint on May 17, 2004. The Note of Issue was filed by the plaintiff on May 16, 2005, certifying that all discovery had been completed and that the case was trial ready. The defendant made an initial motion for summary judgment which was denied by the Court (Tingling, J.) on November 8, 2006, for failure of the movant to appear as directed by the Court. Now over seven months since the filing of the Note of Issue and close to three years after commencement of this action, the defendant has again asked the court to grant him summary judgment.

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 provide that all summary judgment motions must be made within sixty 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 was unaware of the scheduled argument and simply failed to appear. However, the defendant never sought leave to vacate the November 28, 2006 decision, nor did he ever seek to extend their time to file the instant motion. Rather he continued with post-note discovery and filed the instant motion once that was completed.

In support of his motion, the defendant submits the affirmed reports of Dr. Ravi Tikoo, a board certified neurologist and Dr. Robert Zaretsky, an orthopedic surgeon. Defendant also proffers the deposition testimony of the plaintiff as well as the complaint and various other filings. Each of these doctors, performed a Independent Medical Exam (IME) on the plaintiff as part of this litigation.

Dr. Tikoo, who performed his medical examination, on December 15, 2005 discusses in his report, various observations of the plaintiff's mobility and flexibility and concludes that his neurological exam is within normal limits. He concludes that despite his subjective complaints, he does not suffer any objective neurological disability or neurological permanency, casually related to the accident. Dr. Tikoo also indicates that plaintiff does not present with any evidence of neuropathy, radiculopathy or disc herniation. Dr. Zaretsky, indicates that plaintiff during his examination on February 21, 2006, exhibits a full and normal range of motion with regard to his upper and lower extremities. Dr. Zaretsky provides not only the a numeric calculation of the plaintiff's range of motion, but details the norm as well as the objective tests that he employed in making his determination that the plaintiff suffers only from resolved cervical and lumbar strains, and a herniated disc at L5-S1. In further support of their motion, the defendants also submit the plaintiff's deposition, discussing his prior motor vehicle accident of 1997 and his treatment and activities subsequent to the accident of 2003.

In opposition to the motion, the plaintiff submits is his own affidavit, as well as an affirmed report of Dr. Jay Komerath, who examined the plaintiff on July 20, 2006 and has treated him since the subject accident. Plaintiff also includes the affirmed medical report of Dr. John T. Rigney, interpreting his MRI film studies. While Dr. Komerath has treated Mr. Chen since the collision, only his most recent report is affirmed. The report by Dr. Komerath finds a deficit in the plaintiff's movement of his lumbar and cervical spine as compared to the stated normal. Dr. Komerath, discusses the objective tests he employed, his findings and compares them to the stated norm. He concludes that it is his professional opinion, that plaintiff has sustained a permanent and significant limitation of function in both of his neurological and musculoskeletal system. Dr. Komerath also discusses plaintiff extensive therapy and treatment, which has so far failed to resolve his restrictions and recommends surgery as the next step in treatment. Dr. Komerath also casually relates the disabilities detailed in his report to the accident at issue.

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 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).

Here, in circumstances such as these, the Court need not even consider the merits of the motion as the movant has not moved for summary judgment within the proscribed time period, nor has he made the requisite showing of good cause to

relieve him of the one hundred and twenty day filing requirement. Brill v City of New York, 2 NY3d 648 (2004); Miceli v State Farm Mut. Auto. Ins. Co., 3 NY 3d (2004); Giandana v Providence Rest Nursing Home et. al, __AD3d__, 2007 N.Y.App. Div. Lexis 2757 (1st Dept. 2007). Further, the defendant has not addressed the prior ruling of November 2007. Nor did he seek leave of court during the protracted litigation in this matter to extend the time to file his motion. See Cabibel v XYZ Associates, L.P. et. al, __AD3d__, 2007 N.Y. App. Div. Lexis579 (1st Dept. 2007); Glaser v. Abramovitz, __AD3d__, 2007 App. Div. Lexis 1357 (1st Dept. 2007).

However, were the court to consider the defendant's motion, it concludes he has met his 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 medical evidence which establishes to create triable issues of fact on the claimed sections of serious injury pursuant to Insurance Law §5102 (d). Garner v Tong, 27 AD3d 401 (1st Dept. 2006); Priviteria v Brown, 28 AD3d 733 (2d Dept. 2006); Secore v Allen, 27 AD3d 825 (3rd Dept. 2006).

For these reasons and upon the foregoing papers, it is

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

The parties are directed to appear for their scheduled mediation, Med-2, June 4, 2007, 9:30 a.m., 80 Centre Street, New York, New York.

This constitutes the Decision and Order of the Court.

FILED
MAY 15 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 3, 2007

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

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