

Galante v Hudson City Paper Co., Inc.

2007 NY Slip Op 31314(U)

May 14, 2007

Supreme Court, New York County

Docket Number: 0118390/2003

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

DENNIS GALANTE and KATHLEEN GALANTE

INDEX NO. 118390-2003

MOTION DATE 3-14-07

MOTION SEQ. NO. 001

- v -

HUDSON CITY PAPER CO., INC. and
ALLEN P. LEVICKY

MOTION CAL. NO. 43

KAPLAN, J.:

FILED
MAY 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Dennis Galante 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 5:55 p.m. on August 10, 2001, plaintiff Dennis Galante, was struck by a vehicle operated by defendant Allen P. Levicky and owned by defendant Hudson Paper Co., Inc., at the intersection of Seventh Avenue and West 27th Street in New York County. As a result of this incident, plaintiff claims to have sustained a serious injury to his lumbar and cervical spine, his arm, hand and wrist as well as other injuries all with resulting limitations on his range of motion. Defendants, Levicky and Hudson Paper Co., Inc., now move for summary judgment averring that plaintiff has failed to establish a serious injury as defined by Insurance Law §5102.

In support of their motion the defendants submit the affirmed reports of Dr. Charles Tortero, an orthopedist, Dr. Ray Kulick, a hand specialist, Dr. Daniel J. Feurer, an neurologist and Dr. John T. Rigney, a radiologist, the deposition testimony of the plaintiff, as well as copies of various pleadings. All of these physicians performed an Independent Medical Examination (IME) on the plaintiff as part of this litigation.

Dr. Tortero, a board certified orthopedist who reviewed plaintiff's prior medical records, x-rays and MRI, before performing his examination on July 17, 2006, 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 the 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. Tortero finds that the diagnosis of deQuervain's tenosynovitis affecting plaintiff's hand is a result of his employment as a photographer and not casually related to the accident at issue. He concludes that plaintiff has lumbar and cervical sprains and suffers no disability.

Dr. Kulick, a board certified hand surgeon, who examined the plaintiff on August 10, 2006, notes an absence of swelling around the right hand and wrist. He describes a full unrestricted range of motion and concludes that Galante's complaints of pain are merely subjective and unsubstantiated by the claimed injury. He concludes there is no disability and that plaintiff can work without any restrictions or accommodations. Dr. Daniel J. Feurer, board certified in neurology, completed his IME of plaintiff on July 17, 2006. He describes the objective tests he employed in making his determinations and compares his findings to the stated norm. He concludes that his exam is normal and finds nothing to substantiate any claims of radiculopathy or neuropathy.

Dr. Rigney who reviewed the plaintiff's films on behalf of the defendants finds that the disc problems indicated are the result of chronic degeneration, and as such precede the date of the accident. Finally, the plaintiff's deposition details his activities and treatment since August 10, 2001.

In opposition to the motion, the plaintiff has submitted his own sworn affidavit as well as the sworn affidavit of Dr. Madhu Boppana who has been treating plaintiff since shortly after the accident. Dr. Boppana details his course of treatment as well as plaintiff's diagnosed injuries. Dr. Boppana discusses the results of objective range of motion and other diagnostic tests, including x-rays and MRI's and concludes that plaintiff exhibits significant numeric percentages of restriction in movement as compared to the stated norms. He casually relates the findings to the accident of August 2001. Finally, Dr. Boppana concludes that Galante has suffered a permanent and significant limitation of use in his neck, right shoulder, arm and hand. He explains the gap in plaintiff's treatment by opining that he had reached his maximum medical benefit and that further treatment would be only palliative.

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, 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 claims that he suffered a significant as well as permanent and consequential limitation of his neck, arm and hand which resulted from the accident in question. See, Insurance Law § 5102(d), Garner v Tong, 27 AD 3d 401 (1st Dept. 2006); Priviteria v. Brown, 28 AD3d (2d Dept. 2006); Seore v Allen, 27 AD3d 825 (3d

Dept. 2006).

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 July 9, 2007, 9:30 a.m. Med-1, 80 Centre Street, New York, New York for their previously scheduled mediation.

This constitutes the Decision and Order of the Court.

FILED
MAY 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 14, 2007

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

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