

Abramzon v Parker

2007 NY Slip Op 31334(U)

May 23, 2007

Supreme Court, Richmond County

Docket Number: 0013189/2004

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3**

**Index No.: 13189/2004
Motion No.: 2 & 3**

ALLA ABRAMZON and EDWARD ABRAMZON,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**KEVIN J. PARKER, DEBRA ANN PARKER, BORIS
OSTROVSKY and ALEXANDR OSTROVSKY,**

Defendants

The following items were considered in the review of this motion for summary judgment

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 2
Answering Affidavits	3
Replying Papers	5
Exhibits	Attached to Papers
Memorandum of Law	4

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants, Boris and Alexandr Ostrovsky, seek an order pursuant to CPLR § 3212 granting summary judgment on both liability and on the ground that the plaintiff has not sustained a “serious injury” as defined in Insurance Law § 5102(d).¹ Co-defendants, Kevin J. Parker and Debra Ann Parker, oppose the Ostrovsky motion for summary judgment based on liability and move in support of the motion based upon the serious injury threshold. The plaintiff opposes all aspects of this motion.

¹ A serious injury must be a personal injury, “[W]hich results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitutes such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment” (Insurance Law §5102 [d]).

This action was commenced to recover for the personal injuries sustained as a result of a multi-car motor vehicle accident on Hylan Boulevard, Staten Island, New York on or about October 31, 2003. At the deposition of plaintiff, Alla Abramzon, she testified that at the time of the accident her vehicle was moving, but she was in the process of coming to a stop as the traffic control light was turning red. She stated that she observed the Ostrovsky vehicle in her rear-view mirror approximately one car length behind her own vehicle at this point. She then testified that she felt two impacts to the rear of her vehicle. She testified that there was approximately one to two seconds between the first and second impacts to her vehicle, but that she did not recall whether her car moved or not after the first impact.

The moving defendant, Alexandr Ostrovsky, also was deposed at which time he testified that he observed the vehicle in front of him come to a stop at a red traffic light prior to the accident. He then testified that after he brought his vehicle to a complete stop, he looked into his rear view mirror and saw the vehicle behind him, a Ford Explorer coming at him pretty fast. Furthermore, Mr. Ostrovsky testified that he was hit in the rear and that after his vehicle was hit, it was pushed into the rear of the vehicle in front of him.

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion” (*Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990]). The court’s role upon a motion for summary judgment is one of issue finding rather than issue determination. (*McKinney v. Setteducatti*, 183 AD2d 879 [2d Dept 1992]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable (*American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 [1st Dept 1994]). Here, there is at least one triable issue of fact as the plaintiff’s testimony at her deposition differs from the moving defendant’s testimony at his deposition. Specifically, the plaintiff states that her vehicle was struck in the rear twice, once while she was

coming to a stop, and then one to two seconds later again. The testimony of defendant Ostrovsky was that his vehicle was at a complete stop, when struck in the rear and pushed into the plaintiff's vehicle. Ostrovsky's version of the facts only yields one contact with the plaintiff's car thereby creating a question of fact for the jury to decide. Accordingly, that aspect of the defendants' motion is denied.

A motion for summary judgment based upon the serious injury threshold set forth in Insurance Law §5104(a) can only be established under the categories set forth in foot note 1.. (*Coon v. Brown*, 192 AD2d 908 [3rd Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3rd Dept 1982].) Thus, the mere fact that one has been injured, even seriously, does not establish that a "serious injury" has been sustained. (*Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff'd* 63 NY2d 645 [1984].) Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness or disease (11 NYCRR §65-2.1[e]), that results in one of the nine serious injury threshold categories. (*See, Van Norstrand v. Regina*, 212 AD2d 883 [3rd Dept 1995].)

It is important to keep in mind the policies underlying the enactment of the No-Fault Law and the law's structure when litigating no-fault related issues. Courts have consistently held that the No-Fault Law must be interpreted to fulfill the policies the legislature had in mind. (*See, Oberly v. Bangs Ambulance*, 96 NY2d 295 [1991]; *Scheer v. Koubek*, 70 NY2d 678 [1987]; *Maida v. State Farm*, 66 AD2d 852 [2d Dept 1978].) It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of "serious injury" (*see, e.g., Licari v. Elliott*, 57 NY2d 230, 237).

A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations (*see, Kordana v. Pomellito*, 121 AD2d 783,

appeal dismissed, 68 NY2d 848). The burden, in other words, shifts to plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (*see, Gaddy v. Eyer*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000]). The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*id*). Additionally, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings which are based on a recent examination of the plaintiff.

Here, defendants are unable to meet their burden of establishing a *prima facie* case that plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d), as neither moving defendants submit the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. In fact, both defendants' attorney's affirmations and motion exhibits are devoid of any medical evidence whatsoever. Accordingly, these motions are denied in their entirety.

Accordingly, it is hereby:

ORDERED, that the motion of defendants, Boris Ostrovsky and Alexandr Ostrovsky, for summary judgment based upon liability is denied; and it is further

ORDERED, that both motions for summary judgment by all defendants based upon the serious injury threshold are denied in their entirety; and it is further

ORDERED, that all parties return to DCM 3 at 9:30AM on Monday, **June 4, 2007** for a pre-trial conference.

ENTER,

DATED: May 23, 2007

Joseph J. Maltese
Justice of the Supreme Court