

Diop v Joseph

2007 NY Slip Op 31537(U)

May 4, 2007

Supreme Court, New York County

Docket Number: 0108750/2005

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

IBRAHIMA DIOP

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MOTION DATE 5/2/07

MOTION SEQ. NO. 002

MOTION CAL. NO. 33

MAURICE W. JOSEPH
and ALLIED BUILDING PRODUCTS CORP.

KAPLAN, J.:

In this personal injury action, the defendants Maurice W. Joseph and Allied Building Products Corp. move for summary judgment dismissing the complaint on the ground that the plaintiff Ibrahima Diop did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). The motion is granted for the reasons set forth below.

At approximately 3:30 p.m. on July 31, 2002 plaintiff avers that as he was driving his vehicle near the intersection of Chrystie Street and Delancey Street, New York, New York, he was struck by a vehicle operated by defendant Maurice A. Joseph and owned by Allied Building Products Corp.. As a result of this incident, plaintiff claims to have sustained a serious injury to his cervical and lumbar spine, herniated and bulging discs and a resulting restriction in his ranges of motion. Defendants, now move 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.

In support of their motion, the defendants submit the affirmed report of Dr. Phillip Robbins, the deposition testimony of the plaintiff as well as the complaint and various other filings. Dr. Robbins performed a Independent Medical Exam (IME) on the plaintiff as part of this litigation. The defendants also argue that plaintiff's treatment history indicates a significant, unexplained gap in treatment.

Dr. Robbins, who performed his medical examination on September 21, 2006 discusses in his report, various observations and tests of the plaintiff's mobility, flexibility and motor and sensory skills and responses and concludes that his orthopedic exam is within normal limits. Further, Diop exhibits a full and normal range of motion with regard to his upper and lower extremities. Dr. Robbins provides not only the a numeric calculation of the plaintiff's range of motion, but details the norm as well as the objective tests, including a goniometer that he

employed in making his determination that the plaintiff suffers only from resolved cervical and lumbar strains.

Dr. Robbins, who reviewed Diop's prior medical records, notes that plaintiff did not go to the emergency room after the accident, rather he saw his own physician the following day and undertook a three month course of physical therapy. Diop has not received any medical treatment related to the accident at issue in the instant case since 2002.

In further support of their motion, the defendant submits the plaintiff's deposition, discussing his treatment and activities subsequent to the accident. Plaintiff's testimony reveals that after the accident he stayed out of work for approximately three months, but was not directed to do so by his physician.

In opposition to the motion, the plaintiff submits an affirmed report of Dr. Gaston Sterlin, his physician who treated Diop after the subject accident and again on February 21, 2007. The report by Dr. Sterlin finds a deficit in the plaintiff's range of movement in his lumbar and cervical spine. He observes that Diop occasionally suffers pain upon movement in "inclement weather". However, Dr. Sterlin states that all of his findings and measurements related to plaintiff's ranges of motion "were determined visually." His report is devoid of information concerning what objective tests if any he used in making his determination. He concludes that plaintiff's injuries have resulted in a permanent partial impairment.

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 plaintiff's 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 failed to satisfy his burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact on any of 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 (2^d Dept. 2006); Secore v Allen, 27 AD3d 825 (3rd Dept. 2006); DeJesus-Martinez v Singh, 2007 NY Slip Op 50256U, 2007 N.Y. Misc. Lexis 373 (App. Term 1st Dept. 2007); Martin v Marquez, 2007 NY Slip Op 50214U, 2007 N.Y. Misc. Lexis 333 (App. Term 1st Dept. 2007). Plaintiff's medical submissions are devoid of any objective medical basis to substantiate the claimed disabilities. Smith v Brito, 23 AD3d 273 (1st Dept. 2005) Picott v Lewis, 26 AD3d 319 (2^d Dept. 2006).; Chan v Perez, 24 AD3d 197 (1st Dept. 2005). Dr. Sterlin's affidavit, while setting forth a numerical finding of limitation fails to state any objective tests performed to enable him to reach his conclusions. Rather, he indicates that he determined the purported restrictions visually. Henry v. Rivera, 34 AD3d 352 (1st Dept. 2006); Nagbe v. Mini Green Hacking Group, 22 AD3d 326 (1st Dept. 2005); Taylor v. Terrigno, 27 AD3d 316 (1st Dept. 2006); Rivera v. Benaroti, 29 AD3d 340 (1st Dept. 2006). Finally, plaintiff has failed to satisfactorily address the extended gap in his treatment, from 2002 to date. Agramonte v. Marvin, 22 Ad3d 322 (1st Dept. 2005).

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

ORDERED that the defendants' motion for summary judgment is granted in its entirety and the complaint of Ibrahima Diop is dismissed in its entirety, and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED
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Dated: May 4, 2007

Deborah Kaplan

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

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