

<b>Rodriguez v Exit Towing</b>
2007 NY Slip Op 31679(U)
May 25, 2007
Supreme Court, New York County
Docket Number: 0105844/2005
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

MIGUEL RODRIGUEZ

INDEX NO. 105844/2005

MOTION DATE 3-14-07

MOTION SEQ. NO. 002

MOTION CAL. NO. 123

- v -

EXIT TOWING and MATTHEW POTASH

The following papers, numbered 1 to 3, 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).

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

2

Replying Affidavits (Reply Memo) \_\_\_\_\_

3

Cross-Motion:  Yes  No

On August 25, 2004, a tow truck owned by defendant Exit Towing Inc. and driven by defendant Matthew Potash collided with a livery cab which was stopped at a red traffic light. The driver of the livery cab, plaintiff Miguel Rodriguez, commenced this action to recover damages for injuries allegedly sustained in the accident. He claims to have suffered a "serious injury" as defined by Insurance Law § 5102(d), ie. a permanent loss of a use of a body organ, member, function or system" and/or a "medically determined injury or impairment" that prevented him from performing his usual activities for 90 of the 180 days following the accident. The defendants now move for summary judgment dismissing the complaint on the ground that the plaintiff did not meet the threshold "serious injury" requirement. The defendants' motion is denied.

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. 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 Eyer, 79 NY2d 955 (1992).

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

In support of their motion, the defendants have produced the pleadings, the deposition testimony of the plaintiff, several 2004 reports of *Dr. Thomas Scilaris*, a board certified orthopaedic surgeon, and his associate *Dr. Christopher Kyriakides*, an orthopaedist, as well as radiology reports of *Dr. Dennis Rossi*, a board certified radiologist, who reviewed the plaintiff's MRI films for Dr. Kyriakides, and an EMG of the upper and lower extremities.

At his deposition, the 54-year-old plaintiff testified that, upon being struck, his car moved forward four or five feet, his chest hit the steering wheel and his back and head hit the seat and headrest. He immediately felt pain in his neck, back and shoulder. He was transported to the hospital by ambulance and released the same day. The plaintiff sought for neck, shoulder and back pain treatment from Dr. Christopher Kyriakides at New York Orthopaedic Surgery and Rehabilitation. Dr. Kyriakides sent him for MRI studies and for physical therapy and chiropractic therapy, which continued sometime into 2005. He was prescribed pain medication and used a collar for one week thereafter the accident. He also used a back brace and a cane, although these were not prescribed by a doctor.

The plaintiff testified that he was confined to bed for two weeks, missed three or four months of work after the accident and thereafter returned to work on a reduced schedule. He testified that, as a result of this accident, he is unable to use stairs, run, stand for any long period of time, bend over, play with children, sleep well, do heavy lifting or work full-time driving a taxi. At the time of the deposition, he was still taking Motrin and Tylenol for pain. Dr. Kyriakides recommended surgery for his shoulder but he did not undergo the surgery because his insurance would not cover the procedure.

In his report dated September 1, 2004, Dr. Scilaris of New York Orthopaedic found "exquisite tenderness" in the "C1 region of the plaintiff's spine with only 15 degrees of flexion, extension and lateral bending, tenderness and pain at the L4-L5 level and a positive Spurling's maneuver. Dr. Scilaris concluded that the plaintiff suffered from cervical radiculopathy and lumbar derangement and prescribed a course of physical therapy and anti-inflammatory medication. Dr. Scilaris noted that the plaintiff admitted to a previous injury to his neck and lower back and that his symptoms were exacerbated from the subject accident. In his report dated September 16, 2004, Dr. Kyriakides noted continued spasms and limited range of motion complaints of neck and back. He found that the plaintiff "remains totally disabled" and prescribed anti-inflammatory medication. He ordered an MRI of the cervical spine to corroborate the radiculopathy.

The MRI report of Dr. Rossi, dated October 4, 2004, notes a "clinical suspicion of disc herniation" and concludes that the film shows "multi-level loss of

disc signal anterior spondylosis" and "multi-level spondylitic ridge bulging disc complexes with asymmetry to the left at C3-4 and C5-6." At C6-7, the MRI showed a "2-3 mm broad base spondylitic ridge bulging disc complex."

In November 2004, Dr. Scilaris conducted a follow-up exam of the plaintiff and found some continuing symptoms -tenderness in the lumbar spine, limited range of motion, neck pain radiating into the right arm, and sharp lower back pain - but also improvement in the shoulder. Dr. Scilaris found the plaintiff to be "totally disabled" and noted that he would continue physical therapy.

The report of the EMG, performed by Dr. Kyriakidis, noted that the tests suggest a "lumbar radiculopathy compounded with left pronounced peripheral neuropathy and concomitant polyneuropathy involving the right side." Dr. Kyriakidis further noted that his impression was "evidenced by the abnormal spontaneous activity and nerve conduction abnormalities" noted in the report.

The defendants failed to meet their burden on this motion. It is well settled that a herniated or bulging disc may constitute a serious injury within the meaning of Insurance Law 5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., 22 AD3d 326 (1<sup>st</sup> Dept. 2005); Ariona v Calcano, 7 AD3d 279 (1<sup>st</sup> Dept. 2004). While "a plaintiff must still offer some objective evidence of the extent or degree of the alleged physical limitations, and their duration, resulting from the disc injury" (Ariona v Calcano, 7 AD3d 279 [1<sup>st</sup> Dept. 2004]; see Pommels v Perez, 4 NY3d 566 [2005]; Nagbe v Mimigreen Hacking Group, Inc., *supra*; Simms v APA Truck Leasing Corp., 14 AD3d 322 [1<sup>st</sup> Dept. 2005]), a CT scan or MRI may constitute objective evidence to support subjective complaints. See Ariona v Calcano, *supra*; Lesser v Smart Cab Corp., 283 AD2d 273 (1st Dept. 2001).

Here, the defendants own proof, consisting largely of reports of the plaintiffs' treating doctors, shows that an MRI of the plaintiff's spine indicated herniated or bulging discs approximately one month after the accident. The defendants failed to proffer any evidence that the condition resolved at any point thereafter. Moreover, while the defendant's proof showed that the plaintiff may have suffered a prior injury, it was insufficient to show that his current injuries

were not causally related to the subject accident. See Lesser v Smart Cab Corp., supra. Thus, the defendants failed to establish the absence of a "serious injury" as a matter of law in regard to the plaintiff's claim of "permanent loss of a use of a body organ, member, function or system." See Pommells v Perez, supra; Toure v Avis Rent A Car Systems, supra; Licari v Elliot, supra.

Since the defendants failed to meet their burden of proof, the burden never shifted to the plaintiff. In any event, the court notes that the plaintiff's opposition papers include an affirmation of Dr. Kyriades dated January 3, 2007, which states that he examined the plaintiff on September 9, 2004, and again on December 12, 2006, performed range of motion tests and found significant restrictions in the cervical and lumbar spine on both occasions. Dr. Kyriades reviewed the MRI studies of the cervical spine, lumbar spine and right shoulder and the reports prepared by Dr. Dennis Rossi, Dr. Gelber and Dr. Schwartz. Dr. Kyriades found that these MRI's and reports revealed "disc bulges at C3-C4 and C5-C6, impingement with intrasubstance signal change within the rotator cuff of the right shoulder and disc bulges t L3-L4-, L4-L5 and L5-S1." Dr. Kyriades states that the plaintiff's injuries, deficits and restrictions are permanent and are causally related to the accident.

Also included in the plaintiff's opposition papers is the affirmation of Dr. Rossi who, after examining the October 4, 2004, MRI films of the plaintiff's cervical spine, concluded that the plaintiff suffered a "bulging disc at C3-C4 and C5-C6." The affirmation of Dr. Gelber, a board certified radiologist, who examined the MRI films of the plaintiff's lumbar spine taken October 21, 2004, states that the plaintiff suffered "disc bulges at L3-L4 and L5-S1." The affirmation of Dr. Schwartz, a radiologist, states that the plaintiff's shoulder MRI taken October 13, 2004, shows "impingement with intrasubstance signal change within the rotator cuff of the right shoulder."

Accordingly, the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is denied.

For these reasons and upon the foregoing papers, it is,

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

ORDERED that the parties are to appear for a pre-trial conference on July 24, 2007, in Part 22, 80 Centre St., Room 136, as previously scheduled.

Dated: May 25, 2007

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
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