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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

PEARL SOLOMON

INDEX NO. 107563-~~20005~~ 2005

MOTION DATE 4-11-07

- v -

MOTION SEQ. NO. 002

MOTION CAL. NO. 116

MAXISOGLU MORAYR

Cross-Motion: ■ Yes ☐ No

On November 11, 2004, at approximately 8:30 p.m., as she was crossing within the pedestrian crosswalk and with the green light at the intersection of West 72nd Street and Central Park West in Manhattan, the plaintiff, Pearl Solomon was struck by a vehicle owned and operated by defendant Maxisoglu Morayr. The plaintiff was transported to the emergency room of Lenox Hill Hospital where she remained for five days, receiving treatment to her injured left foot and ankle. After her release she underwent a significant course of medical treatment including debridement of her ankle and foot to help with wound rehabilitation as well as physical therapy which continues to date. Ms. Solomon commenced the instant action seeking damages for the injuries she allegedly sustained in the accident.

The defendants now move for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d). In opposition, the plaintiff argues that she met the threshold requirement by establishing that her injuries fell within two statutory categories of "serious injury" - (1) a "significant limitation of a body function or system" specifically, a loss of range of motion of the ankle and foot and (2) a "medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for at least 90 days during the180 days immediately following the occurrence of the injury or impairment." The plaintiff also cross-moves for summary judgment on the issue of liability.

It is settled law that 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 the "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. 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 an issue of fact requiring a trial. See Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); 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 experts' 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).

In support of their motion, defendants provide, *inter alia*, the affirmed reports of Dr. William Kulak and Dr. Scott Coyne, both of whom performed independent medical exams as part of this litigation, the pleadings as well as the deposition transcript of the plaintiff.

Upon examining the seventy-two year old plaintiff on September 11, 2006, Dr. Kulak, an orthopedist found a slight restriction to plaintiff's range of motion with regard to her ankle. He verifies her crush injuries as well as the presence of a small permanent scar but finds no objective evidence of a permanent injury and opines she is "fully functional for activities of daily living and occupational duties".

Dr. Coyne, a board certified radiologist reviewed the plaintiff's MRI's and x-ray films taken of her left foot, ankle and knee, as well as her prior medical records and the pleadings in the instant matter. Dr. Coyne concludes that these tests reveal the presence of "advanced chondrocalcinosis with associated degenerative arthritic change's." He opines that these findings are indicative of long-standing problems and are wholly unrelated to the accident in issue. He also relates her knee problems to these "degenerative" conditions.

In opposition to the motion, plaintiff submits the affirmed report of Dr. Joyce Goldenberg, board certified in physical medicine and rehabilitation, the plaintiff's affidavit, pictures depicting the plaintiff's injuries and certified copies of her medical treatment records, including those of Dr. Steven Lee, an orthopedic surgeon and Joint Effusion Physical Therapy.

On October 19, 2006, Dr. Goldenberg, who reviewed plaintiff's extensive medical treatment history, performed a musculoskeletal examination of Ms. Solomon. Using objective testing, and relating her findings to the stated norm, Dr. Goldenberg found decreased ranges of motion with regard to her ability to turn her foot inward (14%)or outward (33%). She also opines that plaintiff suffers decreased sensation in her left foot, and casually relates her findings to the accident at issue. Finally, Dr. Goldenberg concludes that these injuries and restrictions with their resultant pain and discomfort are permanent.

Ms. Solomon's affidavit details the circumstances of the collision, her medical condition and treatment, that she was confined at home for 45 days, unable to walk and that she could not perform any of her daily activities for at least six months. She required a cam boot, cane and walker, as well as constant assistance to perform the most mundane daily activities. She could not participate in running or walking, her usual form of exercise, nor could she bend to pick up objects of any weight, still has a limp and is forced to wear shoes larger than her normal size because of the permanent swelling to her left foot and ankle.

Here, the defendants met their initial burden by producing evidentiary proof in admissible form sufficient to show the absence of any material issue fact. However, in opposition to the motion, plaintiff produced sufficient proof in admissible form to raise a triable issue of fact requiring a trial. See Kossen v. Algaze 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, supra; Winegrad v. New York Univer. Med Ctr., supra; Zuckerman v City of New York, supra. The plaintiff's proof established, among other things that she suffered crush injury as a result of the accident, that she underwent an extensive course of physical therapy, which continues to date and that her injuries prevented her from engaging in her normal activities after the accident.

As such, the plaintiff's proof raised a triable issue as to whether she suffered a serious injury within the definition of Insurance Law §5102 (d), in that the accident resulted in, among other injuries, a crushed ankle and foot which required debridement and other surgical intervention, medical appliances and an extended course of physical therapy. See Noriega v Sauerhaft, 5 AD3d 121 (1st Dept. 2004); Morrow v. Schoenfeld, 10 Misc 3d 1069(A), (Sup Ct, Suffolk County 2005); compare Medley v Lopez., 7 AD 3d 470 (1st Dept. 2004). The proof showed that the injury is still unresolved, is still causing her pain and has limited her range of motion. See Toure v Avis Rent A Car Systems, supra; Kossen v Algaze, supra; Zuckerman v City of New York, supra.

Assuming, without deciding, that the defendant also established , as a matter of law that the plaintiff did not sustain a "medically determined injury or impairment of a non-permanent nature" which precluded her from engaging in substantially all of her usual and customary daily activities for at least 90 of the 180 days immediately following the accident" (Insurance Law §5102[d]), the

plaintiff's own proof presented a triable issue. To establish "serious injury" under the "90/180 category", the plaintiff must (1) demonstrate that his or her usual activities were curtailed during the requisite time period and (2) submit competent credible evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in plaintiff's daily activities. See, Toure v Avis Rent A Car Systems, supra.

The proof submitted by Ms. Solomon demonstrated that her injury was "medically determined" and that she has been unable to perform her customary and usual activities since the accident, including walking, running, cooking, shopping, cleaning and playing with her grandchild. Curtailment of a plaintiff's sporting or athletic activities may be considered on a 90/180 claim (see Kaplan v Gak, 259 AD2d 736 (2d Dept. 1999); Uhl v Sofia, 245 AD2d 988 (3rd Dept. 1997). Particularly, where as here plaintiff presented proof that running and distance walking constituted a significant portion of her daily activities prior to the accident. The plaintiff further demonstrated that these were not self-imposed restrictions but were medically indicated. Construing this proof in the light most favorable to the plaintiff, as it must (see Kesselman v Lever House Restaurant, supra; Goldman v Metropolitan Life Ins. Co., supra), the Court concludes the plaintiff has raised triable issues on serious injury requiring a trial.

The plaintiff has cross-moved for summary judgment on the issue of liability. In support of her motion, the plaintiff proffers her own complaint and affidavit, a transcript of defendant Morayr's examination before trial, the New York City Police Report, photographs of the intersection where the accident occurred and an affidavit from Margaret Marino, an independent witness who was crossing the intersection immediately behind Ms. Solomon and who witnessed her being struck by defendant's Sports Utility Vehicle. These submissions show that plaintiff was crossing West 72nd Street, within the designated pedestrian crosswalk and with the light, when defendant while making a left turn from Central Park West, struck her crushing her foot and ankle. Ms. Solomon avers that she looked for on-coming traffic before leaving the curb. The defendant's pposition indicates that he was making a lawful turn did not see Ms. Solomon as she entered the intersection, nor did her realize he had struck her until after the impact.

It is undisputed that a pedestrian has the right of way when crossing within the crosswalk and with the light. See Pire v Otero, 123 AD2d 611 (2d Dept. 1986). The defendant driver Morayr also has a common-law duty to see that which he should have seen through the proper use of his senses. Larsen v Spano, 35 AD3d 820 (2d Dept. 2006). In response, the defendants have not presented any issues of fact to be resolved by a jury on the issue of liability.

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 plaintiff's motion for summary judgment on the issue of liability is granted, and it is further

ORDERED that the parties are directed to appear for their scheduled mediation at Med-2, 80 Centre Street, New York, New York on June 26, 2007 at 9:30 a.m..

This constitutes the decision and order of the court.

Dated: June 6, 2007

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

DEBORAH A. KAPLAN

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Check if appropriate: ☐ DO NOT POST