

Silverman v New York Neva Taxi Corp.

2007 NY Slip Op 31800(U)

May 20, 2007

Supreme Court, New York County

Docket Number: 0107350/2004

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

DANIEL SILVERMAN and ROBIN SILVERMAN

INDEX NO. 107350/04

- v -

MOTION DATE 3-21-0

N.Y. NEVA TAXI CORP. and ALEXANDER ARUTYUNOV

MOTION SEQ. NO. 002

MOTION CAL. NO. 115

The following papers, numbered 1 to 3 were read on this Motion by defendants for summary judgment on the threshold "serious injury" issue (Insurance Law 5102[d]) and this Cross-motion by plaintiffs for summary judgment on liability.

Notice of Motion – Affidavits – Exhibits

PAPERS NUMBERED

1

Notice of Cross Motion – Affidavits – Exhibits

2

Affirmation in Reply

3

Cross-Motion: Yes No

In this action to recover damages for injuries sustained in a motor vehicle accident, it is alleged that on February 26, 2004, on Park Avenue near the intersection of East 47th Street in Manhattan, a vehicle being driven by plaintiff Daniel Silverman was struck in the rear while stopped at a red light by a vehicle being driven by defendant Alexander Arutyunov and owned by defendant N.Y. Neva Taxi Corp.

Plaintiffs commenced the instant action claiming, *inter alia*, that Daniel Silverman sustained serious injuries as defined by Insurance Law § 5102(d) - i.e. "permanent consequential limitation of use of a body function or system." The defendants now move for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Plaintiffs cross-moves for summary judgment on the issue of liability.

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).

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).

In this case, the defendants have produced 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. Specifically, they produced the pleadings, the deposition testimony of the parties, and the affirmed reports of Dr. Edward Weiland, a board certified neurologist, who examined the plaintiff on May 19, 2005 and Dr. Roger Berg, a radiologist, who reviewed plaintiff's MRI dated April 21, 2004.

The deposition testimony establishes that Daniel Silverman has a previous back injury, and has for many years received medical treatment including epidural shots. In addition, he was confined to bed for two days and he missed only a few days of work.

In his report, Dr. Weiland states that the 40 year-old plaintiff, reported that he had neck and back pain radiating to both shoulders and buttocks and thighs. Dr. Weiland performed a number of objective tests, all of which are described in his report and all of which indicated normal neurological functioning. In particular, his report states that "no disability exists in regard to any injury reportedly occurring." Dr. Weiland was of the opinion that there is no "evidence of lateralizing neurological deficits at the present time."

Dr. Berg reviewed plaintiff's MRI report dated April 24, 2004, and concludes only the presence of degenerative disc disease in the cervical spine with left C5-6 herniation. Dr. Berg concludes that "a contribution to the herniation from the accident in question appears unlikely."

The defendants' proof entitles them to judgment as a matter of law on the threshold issue of "serious injury", thereby shifting the burden to the plaintiffs. In opposition to the motion, the plaintiffs submit the affirmation of Dr. Alan Miller, an orthopedic surgeon, dated January 26, 2007, in addition to Daniel Silverman's affidavit and deposition.

Dr. Miller's report states that he performed a physical examination in addition to reviewing the plaintiff's MRI results, and neurodiagnostic testing along with the records maintained in his office. Dr. Miller explains that he first examined the plaintiff on February 27, 2004 where he found restriction in range of motion - lumbar spine extension and lateral rotation was decreased from 30 to 25 degrees and lumbar flexion was decreased from 90 to 80 degrees; cervical spine extension was decreased from 45 to 35 degrees, lateral rotation decreased from 80 to 75 degrees and cervical flexion was decreased from 45 to 40 degrees. Dr. Miller's impression at that time was the plaintiff "suffered a cervical radiculopathy and herniated nucleus disc and lumbar radiculopathy with herniated nucleus disc." He suggested that the plaintiff undergo physical therapy, epidural injections and anti-inflammatory medications.

On January 12, 2007, Dr. Miller re-evaluated plaintiff in response to this motion. He again found restrictions of range of motion - cervical spine extension was decreased from 45 to 35 degrees, lateral rotation decreased from 80 to 70 degrees and cervical flexion was decreased from 45 to 40 degrees. He also found restrictions of range of motion lumbar spine extension and lateral rotation, which was decreased from 30 to 25 degrees and lumbar flexion was decreased from 90 to 80 degrees. He concluded that plaintiff has "suffered a herniated disc at C6-7 with some displacement of the spinal cord posteriorly impinging on the left nerve C6-C7, as well as a herniated disc at L4-5 and L5-S1" and that these injuries are a result of the February 26, 2004 accident. The plaintiff's medical submissions show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiffs' limitations were significant. See Milazzo v Gesner, 33 AD3d 317 (1st Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1st Dept. 2006). Dr. Miller further opines that plaintiff has a "significant limitation of use of his musculature, skeleton and nervous system," which "will result in permanent, consequential limitation of use to his neck and lower back lesions." Thus, plaintiff has met his burden.

There is no dispute that plaintiff's treatment with Dr. Miller terminated within a couple months after the accident. The explanation tendered for the cessation in treatment was that plaintiff alleges to have done home physical therapy which is supported by Dr. Miller in his report. Where a gap or, more accurately, a cessation of treatment, may undermine a plaintiff's claim of serious injury under Insurance Law §5102(d), here, unlike in Pommels v Perez, 4 NY3d 566 (2005) the plaintiff has provided an explanation as to the gap in treatment.

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.

The plaintiffs also move for summary judgment on the issue of liability. It is also well settled that the driver of a motor vehicle must maintain a safe distance between his vehicle and the one in front of him, taking into account the weather and road conditions. See Vehicle and Traffic Law § 1129(a); Francisco v Schoepfer, 30 AD3d 275 (1st Dept. 2006); Malone v Morillo, 6 AD3d 324 (1st Dept. 2004). Any rear-end collision with a stationary vehicle creates a prima facie case of liability against the operator of the moving vehicle and, to rebut the presumption, the operator of the moving vehicle must come forward with an adequate, non-negligent explanation for the collision. See Mariano v NYCTA, – AD3d –, 2007 SlipOp 01806 (1st Dept. March 6, 2007); Woodley v Ramirez, 25 AD3d 451 (1st Dept. 2006); Garcia v Bakemark Ingredients (East) Inc., 19 AD3d 224 (1st Dept. 2005).

In support of plaintiffs' motion for liability, they proffer Daniel Silverman's deposition testimony which establishes that while stopped at a red light, his vehicle was struck in the rear by the defendants' vehicle. This proof satisfied the plaintiffs' burden on the motion and created a prima facie case of liability against the defendants. Nothing in the proof submitted indicates any violation of a traffic rule by the plaintiff. Indeed, it shows that he complied with the rules, and that the taxi driver simply failed to exercise due care to avoid colliding with him.

In opposition to the motion, the defendants challenge Daniel Silverman's credibility and his comparative fault in the collision. However, they have failed to come forward with evidentiary proof in admissible form that would raise a triable issue of fact as to those or any other issues. See Alvarez v Prospect Hospital, *supra*; Zuckerman v City of New York, *supra*. Specifically, they have failed to identify any inconsistency in his testimony or other proof to create a triable issue as to his credibility. See McFadden v Bruno, –AD3d ---, 2007 Slip.Op. 00989 (1st Dept. February 6, 2007); Natala v Woodstock, 35 AD3d 1128 (3rd Dept. 2006); Silverman v Clark, 35 AD3d 1 (1st Dept. 2006).

Nor have the defendants presented any proof, such as testimony or an affidavit from an eyewitness or expert, to contradict the plaintiff's account of the accident. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to meet the requirement of tender in admissible form. Zuckerman v City of New York, *supra* at 562; see Cilli v Resjefal Corp., 16 AD3d 339 (1st Dept. 2005); Garcia v Verizon New York, Inc., 10 AD3d 339 (1st Dept. 2004).

The defendants have submitted only the affirmation of their attorney, who claims no personal knowledge of the accident. Thus, the affirmation is without probative value. See Zuckerman v City of New York, supra at 563; Johannsen v Rudolph, 34 AD3d 338 (1st Dept. 2006); Diaz v New York City Tr. Auth., 12 AD3d 316 (1st Dept. 2004). While an attorney's affirmation may serve as a vehicle for submitting documentary evidence or other proof in admissible form as an attachment (see Alvarez v Prospect Hospital, supra at 325; Zuckerman v City of New York, supra at 563), the only relevant attachment to the attorney's affirmation here is an unsworn self-serving MV-104 accident report, which raises no material issues of fact. Bendik v. Dybowski, 227 A.D.2d 228 (1st Dept. 1996); Rue v. Stokes, 191 A.D.2d 245 (1st Dept. 1993). Therefore, the plaintiffs are entitled to summary judgment on the issue of liability.

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

ORDERED that the motion of the defendants for summary judgment on the issue of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is denied, and it is further,

ORDERED that the plaintiffs' motion for summary judgment on the issue of liability is granted, and it is further,

ORDERED that, upon the filing of a note of issue, the matter will be set down for a trial on the issue of damages, and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED
 JUN 19 2007
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: May 20, 2007

Deborah Kaplan
 Deborah A. Kaplan J.S.C.
DEBORAH A. KAPLAN
 NON-FINAL DISPOSITION

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