

Jae Jung v Gillet

2007 NY Slip Op 31807(U)

June 13, 2007

Supreme Court, New York County

Docket Number: 0111769/2005

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

JAE JUNG

INDEX NO. 111769-2005

MOTION DATE 4-11-07

MOTION SEQ. NO. 00

MOTION CAL. NO. 94

- v -

KATHRYN GILLET and RICHARD GILLET

KAPLAN, J.:

FILED

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GOVERNMENT OFFICE
NEW YORK

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Jae Jung did not sustain a "serious injury" within the meaning of Insurance Law 5102(d).

On the evening of August 29, 2002 near the intersection of West 57th Street and Ninth Avenue, New York, New York a vehicle owned and operated by Jae Jung was involved in a collision with a vehicle operated by Kathryn Gillet and owned by Katherine and Richard Gillet jointly. As a result of this incident, plaintiff claims to have sustained a serious injury to his neck and back. 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 reports of Dr. Phillip Robbins an orthopedist and Dr. Daniel Feuer, a board certified neurologist. Defendants also proffer the deposition testimony of the plaintiff, as well as the complaint and various other filings. Each of these doctors, performed a Independent Medical Exam (IME) on the plaintiff as part of this litigation.

Dr. Robbins examined the plaintiff on June 26, 2006, after reviewing his prior medical reports, including his MRI's. In his report, Dr. Robbins details the independent tests he employed during his examination as well as the ranges of motion in both Jung's lumbar and cervical spine, which he states are normal. He also examined plaintiff's shoulders and concluded that Jung's range of motion in these areas is compromised as compared to the norm. Dr. Robbins concludes that plaintiff suffers from shoulder impingement but since this is not a claim related in the bill of particulars which he has reviewed, he concludes it must be related to one of plaintiff's prior car accidents. He opines that plaintiff suffers from cervical and lumbar derangements and cites plaintiff's MRI reports in support of his conclusions. He further avers that this accident has exacerbated a prior cervical

spine condition. However, he finds that the claimed injury to plaintiff's lumbar spine "appears to be casually related to the motor vehicle accident of 8/29/02." While Dr. Robbins does casually relate some of plaintiff's injuries to the August 2002 accident, he finds he has no permanent orthopedic disabilities or limitations as a result.

Dr. Feurer, who reviewed plaintiff's prior medical records, prior to performing his examination on June 26, 2006, discusses in his report, various observations of the plaintiff's mobility and flexibility and concludes that his neurological exam is within normal limits. He concludes that he does not suffer any objective neurological disability or neurological permanency, casually related to the accident. In further support of their motion, the defendants also submit a portion of the plaintiff's deposition, discussing his treatment and activities subsequent to the accident, including the fact that he did not seek medical treatment until a few days after the incident and was able to return to his work responsibilities immediately thereafter.

In opposition to the motion, the plaintiff submits his affidavit as well as the affidavit of Dr. Chee Gap Kim, who examined plaintiff on January 5, 2007. Dr. Kim treated Jung shortly after the August 2002 accident and has treated him for his prior car accidents. Jung discusses the objective tests he employed during his examinations, and gives detail about the plaintiff's ranges of motion in his cervical and lumbar spines which have been consistently restricted between 15-50% since the accident as compared to the stated norm. He discusses the plaintiff's MRI report which was also relied upon by defendant's doctors in making their analysis of plaintiff's physical condition. Dr. Kim discusses plaintiff's prior accidents and explains that the herniated discs now evident in the MRI reports were not present as a result of the prior accidents, but rather caused by the instant incident. He opines that plaintiff had not suffered any prior injuries to his lumbar spine and that this accident exacerbated his prior injury to the cervical spine. As such, Dr. Kim casually relates plaintiff's condition to the subject accident and concludes that Jung permanent sustained a "permanent partial disability" as a result. Jung also includes his own affidavit which details his course of treatment and explains the gap in treatment as a result of both the lack of insurance benefits as well as the fact that he reached his maximum medical benefit from the course of treatment he received over six-months from Dr. Kim. Dr. Kim in his affidavit supports Jung's explanation stating that once Jung reached his "maximum level of recovery he released him" from his care.

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 plaintiffs’ 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 satisfied his burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact on the significant limitation issue. 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 SlipOp 50214U, 2007 N.Y. Misc. Lexis 333(App. Term 1st Dept. 2007). Plaintiff has also sufficiently addressed the gap in his course of treatment by presenting evidence that he could not continue as a result of no insurance benefits as well as having reached a maximum medical benefit in that any other treatment would be merely palliative. See Pommells v Perez, Brown, Dunlap, Carasco v Mendez, 4 NY3d 566 (2005); Garner v Tong, *supra*; Neuberger v Gill, 19 AD3d 561 (2d Dept. 2005). However, plaintiff has failed to present legally sufficient evidence on his claim of not being able to perform substantially all of his usual and customary duties for not less than ninety of the one hundred and eighty days following the accident. Lopez-Carpio-Ceballo, 20 AD3d 336 (1st Dept. 2005), Mejia v Rodriguez, 13 Misc 3d 136A (App. Term 1st Dept. 2006).

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants motion for summary judgment is granted to the extent that the plaintiff's claim that he was unable to perform substantially all of his usual and customary activities for not less than ninety of the one hundred and eighty days following the accident is dismissed; and it is further

ORDERED that the remaining branches of the motion and cross-motion for summary judgment are denied, and the remainder of the action shall continue.

The parties are directed to appear for a pre-trial conference, Part 22, 80 Centre Street, New York, New York, Room 136 on June 21, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.

FILED 1
 JUN 19 2007
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: June 13, 2007

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

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