

Rodriguez v Yudith Corp.

2007 NY Slip Op 31930(U)

June 26, 2007

Supreme Court, New York County

Docket Number: 0108817/2005

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

AIDA RODRIGUEZ

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MOTION DATE 5-9-07

MOTION SEQ. NO. 001

YUDITH CORPORATION, GILBERTO A. SANTOS,
WAH CHUN LEE and SAIDOU SOUMAHORO

MOTION CAL. NO. 92

KAPLAN, J.:

In this personal injury action, defendant's Wah Chun Lee and Saidou Soumahoro move for summary judgment dismissing the complaint on the ground that the plaintiff Aida Rodriguez did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). Defendants Yudith Corporation and Gilberto A. Santos, relying on the submissions of Lee and Soumahoro cross-move seeking the same relief. These motions are denied for the reasons set forth below.

At approximately 11:50 a.m. on February 24, 2005, plaintiff was a passenger in a vehicle operated by Gilberto A. Santos and owned by Yudith Corporation. That morning on Third Avenue near its intersection with East 96th Street, New York, New York, that vehicle was involved in an accident with a vehicle operated by Saidou Soumahoro and owned by Wah Chun Lee. As a result of this incident, plaintiff claims to have sustained a serious injury to her cervical and lumbar spine as well as her left knee. 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. Edward Weiland, a board certified neurologist and Dr. Robert Israel, board certified in orthopedics. Each of these doctors, performed an Independent Medical Exam (IME) on the plaintiff as part of this litigation. Defendants also proffer a portion of the deposition testimony of the plaintiff, the complaint and various other filings.

Dr. Weiland, who performed his examination of the seventy-one year old plaintiff on September 14, 2006, discusses in his report his observations of her mobility and flexibility. The examination was conducted while Ms. Rodriguez, a left lower leg amputee from complications of diabetes remained seated in her wheel

chair. He concludes that she exhibited only minimal restrictions in flexion, extension, and lateral rotational movements of the neck, shoulder and lower torso. He also found plaintiff had a full range of motion in her right knee and foot. Although he could not perform a complete exam, Dr. Weiland diagnoses Ms. Rodriguez as having a "history of reported neck and lower back trauma" which is "resolving." Dr. Israel performed his examination on July 28, 2006. Notably, he states in his report under the caption "purported medical records" that he reviewed plaintiff's "bill of particulars" but no actual medical records. Dr. Israel, unlike Dr. Weiland was able to perform a full examination of Rodriguez, including measuring the ranges of motion in her cervical and lumbar spine, right hand and knee. He includes the objective tests he employed in making his determination that her ranges of motion are unrestricted and that she suffers from resolved sprains of the lumbar and cervical spine, right knee, hand, foot and leg.

In further support of their motion, the defendants also submit a portion of the plaintiff's deposition, discussing her treatment and activities subsequent to the accident.

In opposition to the motion, the plaintiff proffers the affidavit of Dr. Douglas Schwartz, board certified in Physical Medicine and Rehabilitation, who has overseen her care since the accident and her own affidavit. The plaintiff's submissions detail the injuries to her neck and back as well as her right knee and foot. The most recent exam on October 24, 2006 by Dr. Schwartz, who reviewed plaintiff's other medicals as well as films, indicates, among his findings a deficit in the plaintiff's range movement of his cervical spine varying between 22-80% as compared to the stated normal value. He also finds that the range of motion in her lumbar spine is limited from 44-80% from the stated normal values. The report details other notable restrictions and details the many objective tests Dr. Schwartz used in making his findings, including the MRI/CT scans which revealed the presence of herniated and bulging discs. Dr. Schwartz also describes the plaintiff's condition when he first examined her on March 2, 2005, at which time he determined she was totally disabled. He concludes that it is his professional opinion, that plaintiff has suffered a permanent, consequential limitation of her neck, lower back and right knee, as a result of the subject accident.

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 satisfied his burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact. Garner v Tong, 27 AD3d 401 (1st Dept. 2006); Privitera 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).

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

ORDERED that the motion for summary judgment by defendants Wah Chun Lee and Saidou Soumaharo is denied in its entirety, and it is further,

ORDERED that the cross-motion of defendants Yudith Corporation and Gilberto A. Santos is also denied in its entirety, and it is further

ORDERED that plaintiff Aida Rodriguez is granted a trial preference based on age.

The parties are directed to appear for their scheduled status conference, Part 22, 80 Centre Street, New York, New York, on July, 11, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 26, 2007

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

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