

**Deme v Kunkle**

2007 NY Slip Op 32052(U)

July 2, 2007

Supreme Court, New York County

Docket Number: 0101361/2005

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

AMATH DEME

INDEX NO. 101361/05

- v -

MOTION DATE 4-01-07

MOTION SEQ. NO. 003

SHAD KUNKLE, MERCEDES BENZ USA, EVENT SOLUTIONS and EVENT PUBLISHING, INC.

MOTION CAL. NO. 40

The following papers, numbered 1 to 3 were read on this Motion by defendant for summary judgment on the threshold "serious injury" issue (Insurance Law 5102(d)).

Notice of Motion – Affidavits – Exhibits

PAPERS NUMBERED

Answering Affidavits – Exhibits (Memo)

Affirmation in Reply

1

2

3

Cross-Motion:  Yes  No

**FILED**  
JUL 09 2007  
NEW YORK COUNTY CLERK'S OFFICE

In this action to recover damages for injuries sustained in a motor vehicle accident, plaintiff alleges that on August 31, 2004, on Park Avenue near its intersection with East 36<sup>th</sup> Street in Manhattan, the vehicle he was driving was struck by a vehicle driven by defendant Shad Kunkle and owned by defendant Mercedes Benz USA.

Plaintiff commenced the instant action claiming, *inter alia*, that he sustained serious injuries as defined by Insurance Law § 5102(d) - i.e. "permanent consequential limitation of use of a body function or system." Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

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, plaintiff’s deposition testimony and the affirmed reports of Dr. Amy Weiss-Citrome, who examined the plaintiff on May 17, 2006 and Dr. Edward Toriello, a board certified orthopedic surgeon, who examined the plaintiff on July 18, 2006.

In her report, Dr. Weiss-Citrome states that the twenty-seven year-old plaintiff, reported neck and back pain. Dr. Weiss-Citrome performed a number of objective tests, all of which are described in her report and all of which indicated normal range of motion as compared to the stated norm. She concludes that there is “no need for any further treatment, physical therapy, follow-up, diagnostic testing or any other treatment.” Dr. Weiss-Citrome opines that plaintiff suffers from resolved strains and sprains to his cervical and lumbar spine.

Dr. Toriello, after a physical examination and a review of plaintiff’s prior medical records, found a normal range of motion in Deme’s cervical spine, lumbosacral spine, shoulders, elbows, wrists, hands, knees and calves. Dr. Toriello concludes that plaintiff’s examination “reveals evidence of a resolved cervical

hyperextension injury, resolved low back strain, resolved left shoulder strain and resolved left calf contusion.”

The defendant’s proof entitles them to judgment as a matter of law on the threshold issue of “serious injury”, thereby shifting the burden to the plaintiff. In opposition to the motion, the plaintiff submits the report of Dr. Robert Diamond, a board certified radiologist, dated February 8, 2007, the affirmation of Dr. Ali Guy, board certified in physical medicine and rehabilitation, dated February 14, 2007, as well as his own affidavit.

Dr. Diamond, who conducted an MRI of plaintiff’s lumbar spine on February 7, 2007, concludes there are disc bulges at L3-4, L4-5 and a disc herniation at L5-S1. Dr. Guy’s affirmation states that he performed both a physical examination and reviewed the plaintiff’s MRI results. Dr. Guy who first examined the plaintiff on September 13, 2004, found significant restriction in his range of motion, in that Deme’s neck lateral flexion was reduced by 50 percent and the lumbosacral area revealed a 50 percent decrease. Dr. Guy states in January and February 2006 he gave plaintiff a series of paraspinal injections to his lower back to treat severe back pain.

On February 5, 2007, Dr. Guy re-evaluated plaintiff in response to this motion. He again found significant restrictions in his range of motion, in that Deme’s back extension was decreased from 0 to 30 degrees to 0 to 15 degrees, flexion was decreased from 0 to 90 degrees to 0 to 45 degrees and SLR was 75 degrees with bilateral low back pain as compared to normal of 90 degrees pain free. He concluded that plaintiff’s “condition is permanent with a permanent partial disability casually related to the accident of August 31, 2004.” 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 that the plaintiff’s limitations were significant. See Milazzo v Gesner, 33 AD3d 317 (1<sup>st</sup> Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1<sup>st</sup> Dept. 2006). Thus, plaintiff has met her burden.

Defendant’s argue in their reply affirmation that plaintiff’s supplemental bill of particulars dated February 13, 2007 is a nullity because they were served without leave of court. CPLR 4043 provides that “a party may serve a supplemental bill of particulars with respect to claims of continuing special damages

and disabilities without leave of court at any time, but not less than thirty days prior to trial, provided however that no new cause of action may be alleged or new injury claimed." Defendants maintain that the supplemental bill of particulars dated February 13, 2007, which alleges among other things, disc herniations and bulges are new injuries to plaintiff's lumbar spine and should not be admitted into evidence. In as much as the injuries stated in the supplemental bill of particulars dated February 13, 2007 relate to injuries previously pleaded in the bill of particulars dated October 7, 2005 and August 23, 2006 they are admissible.

Accordingly, the defendant's 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 and oral argument held, it is,

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

This constitutes the Decision and Order of the Court.

**FILED**  
JUL 09 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: July 2, 2007

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

**DEBORAH A. KAPLAN**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check If appropriate:  DO NOT POST