Cortes v Majeed
2007 NY Slip Op 32091(U)
July 2, 2007
Supreme Court, New York County
Docket Number: 0115070/2005
Judge: Deborah A. Kaplan
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SCANNED ON 7/11/2007

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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

NATACHA CORTES, an infant and CHRISTAIN CORTES, an Infant by their Mother and Natural Guardian, EVA SOTO, and EVA SOTO, Individually

INDEX NO. 115070-2005

MOTION DATE 5-9-07

- v -

MOTION SEQ. NO. 001

MOHAMMED MAJEED, IRMA TAXI CORP., ALI AKHTAR and S & R MEDALLION CORP.

MOTION CAL. NO. 26

KAPLAN, J.:

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Christian Cortes did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). The motion is denied for the reasons set forth below.

At approximately 3:30 p.m. on August 15, 2005, plaintiffs Natacha and Christian Cortes, were crossing East 5th Street, between Avenues C & D, New York, New York to access a playground adjacent to a Public School 15. They were not crossing within in the pedestrian intersection and were struck by a vehicle operated by Mohammed Majeed. As a result of this incident, plaintiff Christian Cortes claims to have sustained a serious injury to his head, face, and arm and continues to have headaches and dizziness. Defendants Mohammed Majeed, Irma Taxi Corp. and Ali Akhtar, 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 report of Dr. Edward Weiland, board certified in neurology and psychiatry. Dr. Weiland performed an Independent Medical Examination of the plaintiff on November 9, 2006, at his Brooklyn, New York office.

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Dr. Weiland, in his report, discusses various observations of the plaintiff's mobility, flexibility and reactions and concludes that Christian has a "normal neurological examination" as well as a " history of resolved closed head trauma" and as such does not suffer from any disability. Although Dr. Weiland states that both a CT scan and x-rays were taken of Christian, he does not review them prior to conducting his examination or formulating his conclusions. While Dr. Weiland states he performed "a detailed neurological examination" on Christian, and reports his findings to be normal, his report is completely devoid of any information about the objective tests he employed or how he reached his conclusions. Additionally, Dr. Weiland refers to Christian a five year old male child as "female "over a dozen times throughout the report, even detailing conversations he allegedly had with the child's mother concerning her "daughter Christian" during the exam.

In opposition to the motion, the plaintiff submits the examination before trial testimony of his mother Eva Soto as well as that of his teenage sister Natacha Cortes outlining the occurrence of the accident, his course of treatment and the impact of his injuries on his daily activities. The plaintiff argues that the defendants have failed to meet their initial burden on the motion, pointing out many perceived weaknesses. In their reply the defendants submit an additional affirmation from Dr. Weiland stating his report may contain some "typographical errors."

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 vTwentieth 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 failed to meet 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. Specifically, the affirmed report of Dr. Edward Weiland fails to set forth the objective test or tests relied upon in reaching his conclusions. Madatov v Madatov,

27 AD3d 531 (2d Dept 2006); Vasquez v Reluczo, 28 AD3d 365 (1st Dept. 2006). Nor did Dr. Weiland ever examine plaintiff's CT scan or x-rays prior to making his determinations, despite acknowledging their existence. See Wadford v Gruz, 35 AD3d 258 (1st Dept. 2006); Nix v Yang Gao Xing, 19 AD3d 227 (1st Dept. 2005); Dixon v Pena, 5 AD3d 283 (1st Dept. 2004). Finally, the addendum to his original report claiming typographical errors to explain his many misstatements about the child is unpersuasive, considering the contents of the report as a whole. As such, it is not necessary to consider the plaintiff's proof presented in opposition to the motion. See Facci v Kaminsky, 18 AD3d 806 (2d Dept. 2005).

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is denied in its entirety.

The parties are directed to appear for a pre-trial conference, Part 22, 80 Centre Street, New York, New York, Room 136 on August 2, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.

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Dated: July 2, 2007

Deborah Kaplan

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

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