

Martinez v Anita-Nidhi Cab Corp.

2007 NY Slip Op 32092(U)

July 5, 2007

Supreme Court, New York County

Docket Number: 0115160/2005

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

ILIANA MARTINEZ

INDEX NO. 115160/05

MOTION DATE 4-4-07

MOTION SEQ. NO. 002

MOTION CAL. NO. 79

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- v -

NEW YORK
COUNTY CLERK'S OFFICE

ANITA-NIDHI CAB CORP., GABANDEEP SINGH
and STEPHEN DIPPEL

The following papers, numbered 1 to 7 were read on this motion and cross-motions for summary judgment and to strike a pleading - Notice of Motion by defendants Anita-Nidhi Cab Corp. and Gabandeep Singh to dismiss the complaint on the ground that plaintiff did not sustain "serious injury" as defined by Insurance Law § 5102(d); Notice of Cross-Motion by defendant Stephen Dippel for the same relief; Notice of Cross-Motion by the Plaintiff for summary judgment on the issue of liability as against all defendants and to strike the answer of defendants Cab Corp. and Singh; Defendant Cab Corp. and Singh's opposition to the Motion to strike their answer; Defendant Dippel's Partial Opposition to Plaintiff's Cross-Motion; and Plaintiff's Reply Affirmation.

Cross-Motion: Yes No

In this action to recover damages for injuries arising from a motor vehicle accident, the undisputed facts establish that the parties were involved in a multi-car collision on the FDR Drive on January 13, 2004. A taxi owned by the defendant Anita-Nidhi Cab Corp. and driven by defendant Gabandeep Singh struck the rear of a PT Cruiser owned and driven by defendant Stephen Dippel. Dippel claims that the car in front of him stopped abruptly, causing him to come to a sudden stop. The plaintiff, Illiana Martinez, was a passenger in the taxi driven by Singh. After the collision, Singh drove the plaintiff, who was complaining of pains in her chest and ribs, to the office of her primary care physician. At the suggestion of her physician, she went to NYU Hospital, where MRI studies revealed, inter alia, a disc herniation.

In her Bill of Particulars, the plaintiff alleges that she suffered bulges, herniations and compressions of the cervical spine, right elbow tendonitis, right shoulder derangement and impingement, rib contusion, limited range of motion in the neck and cervical spine and recurrent headaches. She further claims that her

injuries constitute a "permanent loss or use of a body organ or member" and/or a "significant limitation of use of a body function or system," two categories of "serious injury" as defined by Insurance Law § 5102(d). At her deposition, the plaintiff, a physical therapy assistant, testified that she lost no time from work after the accident but is still unable to do heavy lifting. She continues to suffer pain in her neck, right shoulder and back, has difficulty with household chores and sitting for long periods of time, and experiences pain upon turning her head and lifting her right arm.

There are three motions now before the court. (1) Defendants Cab Corp. and Singh's motion to dismiss the complaint pursuant to CPLR 3211 and for summary judgment pursuant to CPLR 3212 on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d) and defendant Dippel's cross-moves for the same relief. (2) The plaintiff's cross-motion for summary judgment as against all defendants on the issue of liability and (3) to strike the answer of defendants Cab Corp. and Singh for failure to appear for depositions. They will be addressed in that order.

(1) Motion and Cross-Motion for Summary Judgment
on the Issue of "Serious Injury"

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 the "No-Fault" Law (Insurance Law § 5102[d]), he or she bears the initial burden of establishing the absence of a "serious injury" as a matter of law.

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, 98 NY2d 345 (2002); Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyley, 79 NY2d 955 (1992). However, “[w]here 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., *supra*.

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key. 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).

It is also settled law that a herniated or bulging disc may constitute a serious injury within the meaning of Insurance Law §5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., 22 AD3d 326 (1st Dept. 2005); Arjona v Calcano, 7 AD3d 279 (1st Dept. 2004). Furthermore, a CT scan or MRI may constitute objective evidence to support subjective complaints. (see Arjona v Calcano, *supra*; Lesser v Smart Cab Corp., 283 AD2d 273 [1st Dept. 2001]), so long as the plaintiff offers “some objective evidence of the extent or degree of the alleged physical limitations, and their duration, resulting from the disc injury.” Arjona v Calcano, *supra*; see Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., *supra*; Simms v APA Truck Leasing Corp., 14 AD3d 322 (1st Dept. 2005).

In this case, the moving defendants have failed to meet their burden in the first instance of submitting 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. They submit the pleadings, including the plaintiff’s Bill of Particulars, and the affirmed reports of Dr. Edward Weiland, a board-certified neurologist, and Dr. Andrew Bazos, a board-certified orthopedic surgeon, both of whom examined the plaintiff in November 2006, at the request of the defendants. Both examining physicians state

that they found only *resolved* sprains/strains of the cervical and thoracic spines; Dr. Bazos also finds a resolved shoulder sprain. Both physicians state that they reviewed the report of the MRI of plaintiff's cervical spine taken on 3/19/04, two months after the accident, which revealed "multilevel spondilotic disease with moderate sized central *disc herniation at C4/5 level.*" However, neither Dr. Weiland nor Dr. Bazos make any attempt to explain that report or its findings. See Wadford v Gruz, 35 AD3d 258 (1st Dept. 2006); Nix v Yang Gao Xiang, 19 AD3d 227 (1st Dept. 2005); Dixon v Pena, 5 AD3d 283 (1st Dept. 2004). As stated above, MRIs may constitute objective evidence of a herniated disc. See Arjona v Calcano, *supra*; Lesser v Smart Cab Corp., *supra*. Drs. Weiland and Bazos also conclude that the plaintiff had full range of motion in all tested areas, including the cervical spine, but each fails to identify the objective range of motion test(s) he used in reaching those conclusions. See Palladino v Antonelli, – AD3d – (2nd Dept. May 22, 2007); Park v Champagne, 34 AD3d 274 (1st Dept. 2006); Taylor v Terrigno, 27 AD3d 316 (1st Dept. 2006); Nagbe v Mini Green Hacking Corp., 22 AD3d 326 (1st Dept. 2005).

Since the defendants failed to meet their burden in the first instance, the court need not consider the sufficiency of the plaintiff's opposition papers. Nonetheless, the court notes that the plaintiff's papers include (1) an affirmation of Dr. Karl Hausmann, a neuro-radiologist, who reviewed an MRI study of the plaintiff's cervical spine taken on September 8, 2006, and concluded that it showed various disc herniations and other spinal abnormalities; (2) an affirmation of Dr. Stephen Wilson, a board-certified neurologist, dated January 17, 2007, in which he states that he treated the plaintiff for her injuries from February 27, 2004, through November 30, 2006, notes the March 19, 2004, MRI which revealed a herniated disc at C4-5 and Dr. Hausman's report of the September 8, 2006, MRI which also revealed disc herniation, states that a physical examination conducted on November 30, 2006, reveals range of motion deficits in the cervical spine and right shoulder and concludes that these injuries were caused by the subject accident and are permanent; and (3) the plaintiff's deposition testimony, in which she states that she had no prior or subsequent injuries to her spine and that she underwent a course of physical therapy starting in March 2004 and continuing to the present.

Accordingly, the motion and cross-motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) are denied.

(2) Cross-Motion for Summary Judgment on the Issue of Liability

The plaintiff cross-moves for partial summary judgment on the issue of liability as against all defendants. Neither defendant Dippel nor defendants Cab Corp. and Singh attribute any culpable conduct to the plaintiff or otherwise proffer any persuasive opposition. As the innocent passenger in the taxi driven by defendant Singh, the plaintiff is entitled to summary judgment on the issue of liability, notwithstanding any potential issues of comparative negligence as between the defendants. See Garcia v Tri-County Ambulette Service, Inc., 282 AD2d 206 (1st Dept. 2001); Johnson v Phillips, 261 AD2d 269 (1st Dept. 1999); Silberman v Surrey Cadillac Limousine Service, Inc., 109 AD2d 833 (2nd Dept. 1985). The court notes that defendants Cab Corp. and Singh have already been precluded from testifying at trial and, in any event, now support the granting of partial summary judgment to the plaintiff. Defendant Dippel's argument that summary judgment on the issue of liability is premature given the outstanding deposition of Singh is without merit since there will be no such deposition [see (3) below].

(3) Cross-Motion to Strike Answer

The plaintiff and defendant Dippel were deposed in 2006. Defendants Cab Corp. and Singh were never deposed. The plaintiff now cross-moves to strike the answer of defendants Cab Corp. and Singh pursuant to CPLR 3126 for their repeated failure to appear for depositions.

The Case Scheduling Order directs that all depositions take place on or before July 5, 2006, an order of the court (Tingling, J.) dated August 28, 2006, directs that the depositions be held on or before October 20, 2006, and a subsequent order of Justice Tingling, dated December 22, 2006, directs that defendant Singh be deposed on January 11, 2007. [No reference was made to a deposition to a representative of defendant Cab Corp.] Singh did not appear. By an order dated January 19, 2007, this court directed Singh to appear for a deposition on or before February 13, 2007, or face possible preclusion from testifying at trial. He did not appear. By a self-executing order dated March 2, 2007, this court (Kaplan, J.) directed Singh to appear for a deposition on or before March 30, 2007, or he would be precluded. He again failed to appear. Since that was a self-

executing order, defendant Singh is now precluded from testifying.

In opposition to the motion, defendants Cab Corp. and Singh argue that discovery was stayed pending the determination of their summary judgment motion and that, in any event, the plaintiff has failed to establish that their failure to comply was "willful, contumacious or in bad faith." See Palmenta v Columbia Univ., 266 AD2d 90, 91 (1st Dept. 1999). The defendants are incorrect.

First, discovery was not stayed upon the filing of the defendants' motion since the court directed, in an order dated after the defendants' motion was filed, that discovery continue. See Vista Surgical Supplies, Inc. v Progressive Casualty Insurance Co., 13 Misc 3d 141(A) (App Term, 2nd & 11th Jud Dist. 2006). CPLR 3214(b) provides for an automatic stay of discovery but only if the court does not order otherwise. In its March 2, 2007, order, the court ordered otherwise. To the extent that Socrates Psychological Services v Progressive Casualty Insurance Co., 7 Misc 3d 642 (Civil Ct, Queens County 2005) or Rizz Management Inc. v Kemper Insurance Company, 4 Misc 3d 1005(A) (Civil Ct, Queens County 2004) hold otherwise, this court declines to follow them. It should also be noted that the March 2, 2007, order was preceded by two other so-ordered stipulations in which the defendants agreed to appear for re-scheduled depositions, and failed to do so.

Further, a court can direct discovery to continue during the pendency of a summary judgment motion if there is any legitimate need for the discovery. See Reilly v Oakwood Heights Community Church, 269 AD2d 582 (2nd Dept. 2000); John Eric Jacoby, M.D., P.C. v Loper Associates, Inc., 249 AD2d 277 (2nd Dept. 1998). Since the defendants' motion concerned a "serious injury" issue, they could have proceeded with their depositions since their testimony would concern the issue of liability. This would have facilitated the determination of the plaintiff's cross-motion on that issue without further delaying resolution of this matter.

The papers submitted on this motion indicate that the problem underlying the defendant Singh's failure to appear was and is his counsel's inability to locate him. Although he may have appeared for one deposition on December 5, 2006, which did not proceed, that deposition was rescheduled several times thereafter and he failed to appear each time, in violation of three court orders. Thus, it appears that the defendants' motion was filed, at least in part, in an attempt to postpone discovery, a dilatory tactic that cannot be countenanced. See CPLR 3126.

In her affirmation, defense counsel makes the conclusory assertion that she made good faith efforts to locate her clients by hiring, at an undisclosed time, an in-house investigator to locate Singh, and argues that a deposition would prove to be an unnecessary expense should the defendants' motion be granted and the complaint dismissed. Both arguments are unavailing. See generally Frye v City of New York, 228 AD2d 182 (1st Dept, 1996); Dauria v City of New York, 127 AD2d 459 (1st Dept. 1987).

The court finds that defendant Singh's complete failure to comply with a series of discovery orders directing him to appear for a deposition over the course of a nearly one-year period constitutes "precisely the sort of dilatory and obstructive, and thus contumacious, conduct warranting the striking of their answer[]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998). Nonetheless, since the plaintiffs' motion to strike was filed prior to the so-ordered stipulation dated March 2, 2007, the court considers that so-ordered stipulation to have resolved the issue as to defendant Singh, and the same relief is warranted as to defendant Cab Corp.. Accordingly, the plaintiffs' motion to strike the answer of defendants Cab Corp. and Singh is granted to the extent that defendants Cab Corp. and Singh are precluded from testifying at trial.

For these reasons and upon the foregoing papers, it is,

ORDERED that the motion by defendants Anita-Nidhi Cab Corp. and Gabandeep Singh pursuant to CPLR 3211 and 3212 to dismiss the complaint on the ground that plaintiff did not sustain "serious injury" as defined by Insurance Law § 5102(d) is denied; and it is further,

ORDERED that the cross-motion by defendant Stephen Dippel pursuant to CPLR 3211 and 3212 to dismiss the complaint on the ground that plaintiff did not sustain "serious injury" as defined by Insurance Law § 5102(d) is denied; and it is further;

ORDERED that the cross-motion of the plaintiff for summary judgment as against all defendants on the issue of liability is granted, and it is further,

ORDERED that the cross-motion of the plaintiff to strike the answer of defendants Cab Corp. and Singh pursuant to CPLR 3126 is granted to the extent

that those defendants are precluded from testifying at the trial; and it is further,

ORDERED that the parties shall appear for a status conference on August 28, 2007, at 9:30 a.m. at Part 22, 80 Centre Street, Room 136.

July 5, 2007
Dated: ~~June 29, 2007~~
JUL 05 2007

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

DEBORAH A. KAPLAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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