

**McCarthy v Cohen**

2007 NY Slip Op 32094(U)

June 29, 2007

Supreme Court, New York County

Docket Number: 0116513/2005

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

LOIS McCARTHY

INDEX NO. 116513/05

- v -

MOTION DATE 4-04-07

JEANETTE COHEN

MOTION SEQ. NO. 001

MOTION CAL. NO. 75

The following papers, numbered 1 to 4 were read on this Motion by plaintiffs for summary judgment on liability and this Cross-motion by defendant for summary judgment on the threshold "serious injury" issue (Insurance Law 5102[d]).

Notice of Motion - Affidavits - Exhibits

PAPERS NUMBERED

1

Notice of Cross Motion - Affidavits - Exhibits

2

Answering Affidavits - Exhibits (Memo)

3

Affirmation in Reply

4

Cross-Motion:  Yes  No

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

In this action to recover damages for personal injuries sustained in a motor vehicle accident, plaintiff Lois McCarthy alleges that on June 10, 2005, on Henry Hudson Parkway near the intersection of West 252<sup>nd</sup> Street in the Bronx, the vehicle she was operating was struck on the right side by a vehicle driven by defendant Jeanette Cohen.

Plaintiff commenced the instant action claiming, *inter alia*, that she sustained serious injuries as defined by Insurance Law § 5102(d) - i.e. "permanent consequential limitation of use of a body function or system." Plaintiff now moves for summary judgment on the issue of liability and defendant cross-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 defendant has 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, she submits the pleadings, plaintiff's deposition testimony and the affirmed report of Dr. Robert Israel, a board certified orthopedic surgeon, who examined the plaintiff on October 20, 2006.

In his report, Dr. Israel states that the sixty-two year-old plaintiff, claimed pain in her neck and back in addition to her right shoulder, elbow, wrist, hand, hip, arm and leg. Dr. Israel performed a number of objective tests, all of which are described in his report and all of which indicated a normal range of motion. In particular, his report states that plaintiff does not suffer any "disability as a result of the accident of record." Dr. Israel opines that she has suffered only sprains which have been resolved.

The defendant's proof entitles her to judgment as a matter of law on the threshold issue of "serious injury", thereby shifting the burden to the plaintiff. In opposition, the plaintiff submits the affidavits of Dr. Steven Brownstein, board certified radiologist, dated February 14, 2007, the affirmation of Dr. Charles Bagley, a board certified neurologist, dated February 16, 2007, in addition to her deposition transcript.

Dr. Brownstein, who read plaintiff's MRI film on June 29, 2005, and

concludes there is Grade I anterolisthesis at C4 in relationship to C5, in addition to disc herniations at C4-C5, C5-C6 and C6-C7. Dr. Brownstein concludes "that the injury was caused as a result of trauma and not degeneration."

Dr. Bagley's report states that he performed a physical examination in addition to reviewing the plaintiff's MRI results. He explains that when he first examined the plaintiff on June 17, 2005, he found significant restrictions in her ranges of motion, in that her cervical spine extension was decreased from 50 to 40 degrees, right rotation was decreased from 80 to 50 degrees, left rotation was decreased from 80 to 50 degrees, right lateral flexion was decreased from 40 to 10 degrees, left lateral flexion was decreased from 40 to 10 degrees and cervical flexion was decreased from 60 to 50 degrees. Dr. Bagley's impression at that time was the plaintiff had three cervical herniations.

On January 19, 2007, Dr. Bagley re-evaluated plaintiff in response to this motion. He again found significant restrictions in her ranges of motion, in that her cervical spine extension was decreased from 60 to 40 degrees, left rotation was decreased from 80 to 50 degrees, right lateral flexion was decreased from 45 to 25 degrees, left lateral flexion was decreased from 45 to 25 degrees and cervical flexion was decreased from 45 to 35 degrees. Her right shoulder forward flexion was also decreased. He concluded that plaintiff has a 20% loss of motion and "has cervical radiculopathy documented on EMG due to the disc herniation noted on MRI scan. She appears to have a separate right shoulder joint dysfunction and lower back and right sciatic pain and injury." He casually relates these injuries to the June 2005 accident. 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). Dr. Bagley further opines that the injuries plaintiff suffered are permanent. Thus, plaintiff has met her burden.

Accordingly, the defendant's 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) is denied.

The plaintiff also moves for summary judgment on the issue of liability. It is also well settled that a driver is negligent with respect to injuries caused when the driver falls asleep behind the wheel. Arakelyan v. Fiallo, 32 A.D.2d 626 (1<sup>st</sup> Dept. 1969).

In support of plaintiff's motion for summary judgment on liability, she proffers the defendant's deposition testimony which establishes that she fell asleep while driving immediately prior to the collision with plaintiff's vehicle. This proof satisfied the plaintiff's burden on the motion and created a prima facie case of liability against the defendant.

In failing to oppose plaintiff's motion the defendant has failed to come forward with any non-negligent explanation for the accident and has proffered no proof at all to raise a triable issue of fact on the issue of liability.

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, and it is further,

ORDERED that the plaintiff's motion for summary judgment on the issue of liability is granted, and it is further,

ORDERED that, ~~upon the filing of a note of issue,~~ the matter will be set down for a trial on the issue of damages, and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

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

Dated: June 29, 2007

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

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