

Francois v Flow Taxi Corp.

2007 NY Slip Op 32133(U)

July 3, 2007

Supreme Court, New York County

Docket Number: 0117778/2005

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

JOSEPH S. FRANCOIS

INDEX NO. 117778/05

MOTION DATE 4-4-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 41

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NEW YORK
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FLOW TAXI CORP. and
MOHAMMED I. IBRAHIM

- v -

The following papers, numbered 1 to 3, were read on this motion by defendants for summary judgment dismissing the complaint on the ground that the plaintiff did not meet the serious injury threshold requirement of Insurance Law § 5102(d).

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits (Memo) _____

2

Replying Affidavits (Reply Memo) _____

3

Cross-Motion: Yes No

On the morning of September 29, 2005, near the intersection of Madison Avenue and 50th Street, a delivery van driven by the plaintiff, Joseph Francois, was cut off by a taxi, stopped, and was struck in the rear by another taxi owned by defendant Flow Taxi Corp. and driven by defendant Mohammed Ibrahim. The plaintiff reported to a hospital emergency room the same day and thereafter underwent a course of physical therapy and acupuncture treatment. MRI studies performed in October 2005 revealed that the plaintiff suffered herniations of the lumbar spine and a torn right rotator cuff.

The plaintiff commenced the instant action seeking damages for his injuries, claiming, *inter alia*, that he sustained a "medically determined injury or impairment of a non-permanent nature which prevented [him] from performing substantially all of the material acts which constitute [his] usual and customary daily activities for at least 90 days during the 180 days immediately following" the accident or a "significant limitation of use of a body function or system." See Insurance Law § 5102(d). The defendants now move for summary judgment dismissing the

complaint on the ground that the plaintiff's injuries do not fall within either of those two categories of the statutory definition 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 "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. See Pommels v Perez, 4 NY3d 566 (2005); Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Licari v Elliot, 57 NY2d 230 (1982).

Once 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). If the plaintiff claims serious injury under the "90/180" category of Insurance Law §5102(d), he or she must (1) demonstrate that his or her usual activities were curtailed during the requisite time period and (2) submit competent credible evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in plaintiff's daily activities. Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Gaddy v Eyler, 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*.

It is well settled 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).

The defendant's motion must be denied.

First, the defendants met their burden of establishing that the plaintiff did not sustain a "serious injury" under the "90/180" category. They submit the plaintiff's verified bill of particulars, in which he alleges that he missed only one day of work and was confined to home and bed for only three days after the accident, and his deposition testimony in which he testified, *inter alia*, that he continued to make his deliveries after leaving the scene of the accident. He also testified that he has difficulty bending, vacuuming, sweeping, lifting heavy weights and lying in his side since the accident. In opposition, however, the plaintiff has failed to come forward with any proof to raise a triable issue in regard to his 90/180 claim. Indeed, he appears to have abandoned that claim.

However, the defendants' have failed to meet their burden of showing that, as a matter of law, the defendant did not sustain a "significant limitation of use of a body function or system." See Insurance Law 5102(d). The defendants rely upon the report of Dr. Robert Israel, a board-certified orthopedic surgeon, who examined the plaintiff on October 20, 2006. Dr. Israel found that the plaintiff had suffered sprains of the lumbar spine and right shoulder but concluded that these sprains had resolved and that the plaintiff suffered no restriction in range of motion in the affected areas. However, Dr. Israel wholly fails to address the MRI studies of the plaintiff's lumbar spine and right shoulder taken in October 2005, which showed "central herniations" at the L1-2, L2-3, L3-4, and L4-5 levels with "mild to moderate central stenosis" and a "full thickness tear of the anterior distal supraspinatus tendon with mild retraction." 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). Moreover, the defendants, to meet their burden, were required to show that these injuries were not causally related to the subject accident. Again, the defendants failed to make the requisite showing. In his report, Dr. Israel also fails to identify the type of objective range of motion test(s) he used, if any, in reaching his conclusions that there were no deficits in that regard. 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 defendant failed to meet its burden in the first instance, the court need not consider the sufficiency of the plaintiff's opposition papers. See Offman v Singh, *supra*; see Winegrad v New York Univ. Med Ctr., *supra*. Nonetheless, the court notes that the plaintiff's papers include the affirmed report of Dr. Mark Shapiro, a board-certified radiologist, who reviewed the October 2005 MRI studies and diagnosed the above-stated conditions, as well as the affirmed report of Dr. A. Shusterman, a board-certified internist who treated the plaintiff. When Dr. Shusterman last examined the plaintiff in December 2006, he found significant range of motion deficits in the right shoulder and lumbar spine, and concluded that these conditions, as well as the plaintiff's continuing complaints of headaches,

dizziness and pain in his spine and right shoulder, were causally related to the subject accident and were permanent.

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is granted to the extent that the Fourteenth and Fifteenth causes of action of the complaint, alleging that the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 are dismissed insofar as they assert a claim under the "90/180" category of that provision; and it is further,

ORDERED that the defendants' motion is otherwise denied, and it is further,

ORDERED that the parties are to appear at Mediation-2, 80 Centre Street, on July 30, 2007, 9:30 a.m. as previously scheduled.

This constitutes the Decision and Order of the Court.

Dated: July 3, 2007

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

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