

Bogdanovich v Singh
2007 NY Slip Op 32149(U)
July 12, 2007
Supreme Court, New York County
Docket Number: 0106705/2005
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Bogdanovich, L

INDEX NO. 106705/05

- v -

MOTION DATE _____

Singh, S

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in
accordance with the attached decision
and orders.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JUL 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 12, 2007

MARTIN SHULMAN
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 1

-----X
LOUISE STRATTEN BOGDANOVICH,

Index No. 106705/05

Plaintiff,

-against-

SOWARAN SINGH and ZARATE CAB
CORPORATION,

Defendants.
-----X

FILED
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MARTIN SHULMAN, J.:

Plaintiff Louise Stratten Bogdanovich commenced this action to recover for personal injuries sustained on December 31, 2004 when the trunk of a taxi struck her back while she was removing luggage therefrom. Defendants Sowaran Singh and Zarate Cab Corporation¹ (collectively "defendants") move for summary judgment dismissing the complaint against them pursuant to CPLR 3212 on the ground that the plaintiff fails to satisfy the threshold requirement of suffering a serious injury under Insurance Law § 5102(d).

The court must determine in the first instance whether plaintiff has established that the injuries allegedly sustained fall within the definition of a "serious injury". *Licari v. Elliot*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). In order for this court to grant a summary judgment motion defendants must establish a prima facie case that the plaintiff did not sustain a "serious injury" as contemplated by Insurance Law § 5102(d).

¹ Defendant Zarate Cab Corporation is the owner of the taxi and defendant Sowaran Singh was its operator.

Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002); see also, *Gaddy v. Eyer*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992).

Insurance Law § 5102(d) in pertinent part defines "serious injury" as follows:

. . . a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Plaintiff alleges that she sustained a serious injury under the last three categories of the "serious injury" threshold definitions, to wit: permanent consequential limitation of use of plaintiff's lower back, neck, legs, shoulders and arms; significant limitation of use of plaintiff's lower back, neck, legs, shoulders and arms; and a medically determined injury or impairment which prevented plaintiff from performing substantially all the material acts which constitute her usual and customary daily activities for not less than 90 days of the 180 days immediately following the occurrence of the injury or impairment.

In support of their motion for summary judgment dismissing the instant action, defendants rely on the sworn reports of Dr. Richard Lechtenberg, a neurologist, who performed an independent neurologic examination of plaintiff on June 5, 2006, and of Dr. Robert Israel, a board certified orthopedic surgeon, who performed an independent orthopedic examination of plaintiff on June 2, 2006. Dr. Lechtenberg concluded that plaintiff had a normal range of motion in her cervical and lumbar spines, as well as in

her shoulders, knees, ankles, elbows, wrists and hips (Defendants' Exhibit C, Dr. Lechtenberg's report dated 6/12/06). Dr. Israel found resolved sprains of the cervical, thoracic and lumbar spines, bilateral shoulders, left ankle and leg, and bilateral arms (Exhibit D, Dr. Israel's report dated 6/2/06). Based upon their respective examinations and review of plaintiff's medical records, Drs. Lechtenberg and Israel opined that plaintiff has no causally related disability as a result of the subject accident.

Based on the submission of the foregoing medical reports, this court finds that defendants meet their burden in establishing a prima facie case that the plaintiff did not sustain a "serious injury" within the purview of Insurance Law § 5102(d). *Toure v. Avis Rent A Car Systems, Inc., supra*. Upon such a showing, it becomes incumbent upon the plaintiff to come forward with sufficient evidence in admissible form to raise a factual issue as to whether a "serious injury" has been sustained. *Licari v. Elliot, supra*.

In opposition, plaintiff submits, inter alia, her medical records from Duke Chiropractic, P.C., where she received physiotherapy under the care of Dr. Peter J. Duggan, from January 6, 2005 until May 18, 2005 (Plaintiff's Exhibit E, medical records); sworn reports from Dr. Joyce Goldenberg, a board certified physiatrist, who treated her from May 20, 2005 until December 15, 2005, and occasionally at present (Plaintiff's Exhibits F, G and H, Dr. Goldenberg's reports dated 5/20/05, 11/30/05 & 12/7/06); and affirmations from radiologists Jacob Lichy, M.D. and Thomas M. Kolb, M.D. (Plaintiff's Exhibits J & K, affirmations dated 10/27/05 & 1/31/06, respectively).

Dr. Goldenberg reviewed diagnostic studies performed on the plaintiff consisting of, inter alia, an MRI of the lumbar spine on August 9, 2005; an MRI of the cervical spine on October 31, 2005; and an EMG of the cervical and lumbar spines on August

10, 2005. She conducted cervical and lumbar range of motion tests, measuring plaintiff's mobility with an inclinometer or goniometer, and comparing each of plaintiff's limitations of motion to normal function. Based on her physical examinations of the plaintiff, the diagnostic test results, and the history plaintiff provided, Dr. Goldenberg concluded that plaintiff sustained, as a result of the subject accident, the following injuries: lumbar disc herniation at the level of L1-2; lumbar disc bulge at the level L2-3; lumbar radiculopathy at the level of L4-5; lumbar myofascial pain syndrome/muscle spasms; cervical disc bulge at the level of C5-6; cervical radiculitis at the levels of C5-6; and cervical myofascial pain syndrome/muscle spasms (Plaintiff's Exhibit H, Dr. Goldenberg's report dated 1/7/06). She opined that plaintiff "has and will continue to have pain, consequential loss of use and limitation of motion of her cervical and lumbar spines" and "has permanent impairment and disability, solely due to the injuries sustained in the [within] accident." *Id.*

Case law holds that objective proof of a plaintiff's injury is required to satisfy the statutory serious injury threshold. *Toure v. Avis Rent A Car Systems, Inc., supra*. To prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. *Id.* An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system. *Id.*

In view of, inter alia, Dr. Goldenberg's conclusions regarding plaintiff's range of motion limitations, impairment and disability that are based on her objective tests and physical examinations of the plaintiff, plaintiff successfully opposes defendants' summary judgment motion by raising a triable issue of fact as to whether a "serious injury" has been sustained. *Toure v. Avis Rent A Car Systems, Inc., supra*; see also, *Ferguson v. Budget Rent-A-Car*, 21 A.D.3d 730, 800 N.Y.S.2d 693 (1st Dept., 2005).

Accordingly, it is

ORDERED that the motion by defendants Sowaran Singh and Zarate Cab Corporation, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them is denied.

Counsel for the parties are directed to appear for a pre-trial conference to be held on August , 2007 at 9:30 a.m., at 111 Centre Street, Room 1127B, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
July 12, 2007


HON. MARTIN SHULMAN, J.S.C.

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