

Richard v Menalas

2007 NY Slip Op 32197(U)

July 3, 2007

Supreme Court, New York County

Docket Number: 0108522/2005

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

PAUL RICHARD

INDEX NO. 108522/05

- v -

MOTION DATE 5-02-07

JOSEPH FRITZ MENALAS, AWESOME TAXI
MANAGEMENTS, INC. and JOHN DOE

MOTION SEQ. NO. 001

MOTION CAL. NO. 78

The following papers, numbered 1 to 3 were read on this motion by defendants for summary judgment on the threshold "serious injury" issue (Insurance Law 5102[d]) against plaintiff.

Notice of Motion – Affidavits – Exhibits

Answering Affidavits – Exhibits (Memo)

Affirmation in Reply

Cross-Motion: Yes No

FILED
JUL 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

PAPERS NUMBERED

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In this action to recover damages for injuries sustained in a motor vehicle accident, it is alleged that on July 28, 2004, on Eight Avenue near its intersection with West 28th Street in Manhattan, a vehicle driven by plaintiff, while stopped at a red light was struck in the rear by a vehicle driven by defendant John Doe and owned by Awesome Taxi Management.

Plaintiff commenced the instant action claiming, *inter alia*, that he sustained serious injuries as defined by Insurance Law § 5102(d) - i.e. "permanent consequential limitation of use of a body organ or member" and 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." Defendants now move 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 Eyles, 79 NY2d 955 (1992).

In this case, the defendants have 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, they produced the pleadings, a memorandum of law, plaintiffs' deposition testimony, the affirmed report of Dr. Andrew Bazos, a board certified orthopedic surgeon, and the affirmed report of Dr. Edward Weiland, a board certified neurologist.

In his report, Dr. Bazos states that he examined plaintiff on December 7, 2006 where he 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 the areas plaintiff claimed were injured. Dr. Bazos further states that plaintiff had no "motor or sensory deficits in upper or lower extremities." In particular, his reports concludes that plaintiff had "resolved lumbar sprain/strain" and as such did not suffer from an orthopedic disability.

In his report, Dr. Weiland, who examined plaintiff on December 7, 2006,

describes the objective tests he performed which indicated a full range of motion. In particular, his report states that he had "no evidence of any lateralizing neurological deficits at the present time." He opines that Richard does not suffer from any neurologic residual or permanency based upon his physical examination.

Plaintiff testified at his deposition that he had been confined to bed for eight days after the accident. While he stated that he has been out of work as a courier from the time of the accident to the present, he was able to work the following Thursday, Friday and Monday immediately after the Wednesday accident. He also revealed that after his initial emergency room visit on the Saturday following the accident, he was advised by a doctor that he could return to work on Monday.

The defendants' proof entitles them to judgment as a matter of law on the threshold issue of "serious injury," thereby shifting the burden to the plaintiffs. In opposition to the motion, the plaintiff submits his deposition testimony, the affirmed, undated report of Dr. Richard Kaplan, and various unaffirmed medical reports and records. Unaffirmed medical reports are not admissible and as such will not be considered on this motion. Grasso v. Angerami, 79 N.Y.2d 813 (1991); Paganò v. Kinsbury, 182 A.D.2d 268 (2nd Dep't 1992); CPLR 2106.

The plaintiff in this case, has failed to provide objective proof of his injury. See Toure v Avis Rent A Car Systems, *supra*; Dufel v Green, *supra*. Dr. Kaplan's undated affirmation states that he first examined plaintiff on August 8, 2005, a year after the accident, where he found restrictions in his ranges of motion in his spine and generalized stiffness. Dr. Kaplan noted that he has not "obtained new diagnostic studies but ha[s] relied on the studies obtained in the year of treatment prior to [Robert] coming to see him." He espouses that plaintiff "remains permanently disabled as a result of the injuries sustained on July 25, 2005." Plaintiff's medical submissions do not show when the tests were performed, only that treatment began on August 8, 2005. It also is devoid of information to show the objective tests performed, if any, what the normal range of motion should be and whether the plaintiff's limitations were significant. See Milazzo v Gesner, 33 AD3d 317 (1st Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1st Dept. 2006). In addition, Dr. Kaplan's examination, which occurred over a year after the accident, is not objective medical proof, sufficient to establish that the injuries reported in his report were contemporaneous, and as such caused by the accident on July 28, 2004. Pommells v. Perez, *supra*; Toulson v. Young Han Pae, 13 A.D.3d 317 (1 Dept. 2004) Thus, plaintiff has not met his burden.

Accordingly, the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted.

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is granted, and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the defendants dismissing plaintiff's complaint, in its entirety, with costs and disbursements to defendants as taxed by the Clerk, and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: July 03, 2007



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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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