Lisak v Dakh
2007 NY Slip Op 32216(U)
July 9, 2007
Supreme Court, New York County
Docket Number: 0106685/2005
Judge: Deborah A. Kaplan
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SCANNED ON 7/17/2007

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN, Justice — PART 22

VYACHESLAV LISAK

- v -

ROMAN DAKH, ALLA DAKH and ALEKSANDER SHIRAYEV

INDEX NO.	~~1050085-2005~~ 106685/2005
MOTION DATE	5-23-07
MOTION SEQ. NO.	001
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NEW YORK
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KAPLAN, J.:

In this personal injury action, the defendant moves for summary judgment dismissing the complaint on the ground that the plaintiff Vyacheslav Lisak did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). The motion is granted for the reasons set forth below.

At approximately 9:15 a.m. on July 10, 2004, at the intersection of Avenue O and Coney Island Avenue, Brooklyn, New York, plaintiff driving his own vehicle was involved in a car accident with a vehicle operated by defendant Aleksander Shirayev and owned by Roman Dakh. Each party contends that the other is responsible for the accident in that, Lisak avers that as he was stopped at a red light his vehicle was struck from behind by the Dakh vehicle. Defendants contend that Lisak passed the red light, stopped in the middle of the intersection and then placed his car in reverse and backed into their vehicle. In any event, as a result of this incident, plaintiff claims to have sustained a serious injury to his left shoulder. Defendants, now move for summary judgment averring that plaintiff has failed to establish a serious injury as defined by Insurance Law § 5102, and as such any recovery should be limited to that provided by No-Fault Insurance.

In support of their motion, the defendant submits the affirmed reports of Dr. Daniel Feurer, a board certified neurologist, Dr. William Kulak, an orthopedist and Dr. Eric Cantos, a radiologist who reviewed the plaintiff's MRI films. Defendants also proffer the deposition testimony of the plaintiff, as well as an independent witness Igor Guchinsky, the police reports made in conjunction with the accident and the complaint and various other filings. Each of these doctors,

performed a Independent Medical Exam (IME) on the plaintiff as part of this litigation. The defendants also argue that plaintiff's treatment history indicates a significant, unexplained gap in treatment.

Dr. Feurer, who performed his medical examination on July 27, 2006, discusses in his report, various observations of the plaintiff's mobility and flexibility and concludes that his neurological exam is within normal limits. He opines that Lisak does not suffer any objective neurological disability or neurological permanency, casually related to the accident. After reviewing plaintiff's prior medical records and tests and conducting his own examination he states there is no basis to support any claims of radiculopathy or median neuropathy. Dr. Kulak, indicates that plaintiff during his examination on July 27, 2006, exhibited some restriction of motion with regard to his left shoulder. However, Dr. Kulak after repeating several tests and performing others on Lisak concludes that these restrictions are subjective. He also determined, after reviewing Lisak's prior medical reports and films that he dislocated his shoulder but has not torn his rotator cuff or suffered any significant injury. He attributes any irregularities on plaintiff's films to be the result of a pre-existing degenerative Hill-Sach's deformity, which may have been exacerbated by his reported prior work as a welder and not by the subject collision. He opines that the plaintiff lacks a casually related disability as a result of the accident of record. Dr. Cantos's affirmation reveals that after examining Lisaak's MRI's and scans he exhibits only "mild degenerative changes" of the acromioclavicular joint, no herniated discs and normal other degenerative changes to plaintiff's cervical spine. He also offers an opinion akin to that of Dr. Kulak that any deformity revealed is a result of a degenerative pre-existing condition.

The plaintiff's deposition reveals that he refused medical treatment at the scene. In the days thereafter, he responded to an advertisement in a local newspaper for the "Brook Agency" which provided him with a series of referrals, including a mechanic for repair of his vehicle, an attorney to consult with and a physician to treat any injuries. Thus, well over a week after the collision, he began treatment with Dr. Viktor Gribenko. That treatment lasted for some four months, during which time he received physical therapy and chiropractic treatment. He testified that he has not received any medical treatment since January of 2005. Additionally, after the accident he claimed he was unable to work for two months at any of his customary self-employment as a party clown, professional photographer, computer operator, handyman and painter. He is now employed as a shift supervisor of a computer department.

In opposition to the motion, the plaintiff proffers his affidavit as well the affirmed report of Dr. Viktor Gribenko and the affirmed report of Dr. Robert Shepp, the radiologist who performed his films and scans. The report by Dr. Gribenko indicates that at his first examination of Lisak on July 19, 2004, he found him to be suffering inter alia, from whiplash injury, tendonitis of the supraspinatus tendon, one of the four muscles that comprise that rotator cuff and a slight Hill-Sach's deformity in his left shoulder. Upon examination he found "moderate tenderness" in his cervical and lumbar spine. While he opines there is a decreased range of motion in Lisak's left shoulder, the report is devoid of how that restriction was measured, what the actual range of motion was or what the stated norm is. He proposes in his most recent report of April 4, 2007 that Lisak still suffers from left shoulder pain, which is casually related to the accident. However he concludes that "with a reasonable degree of medical certainty that there is a good *possibility* of this condition becoming chronic and permanent in nature."

Dr. Schepp's report of the August 17, 2004 MRI reflects tendonitis of the supraspinatus tendon and the slight Hill-Sach's deformity but fails to casually relate either to the July 2004 collision. Finally, in his deposition, Lisak attributes his cessation of all treatment after only a few months to a lack of insurance benefits.

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).

"Where 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., 64 NY2d 851 (1985).

However, 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). However, either "an expert's designation of a numeric percentage of a plaintiff's loss of range of motion" or "an expert's qualitative assessment of a plaintiffs' condition" may substantiate a claim of serious injury. See Toure v Avis Rent A Car Systems, supra; Dufel v Green, supra.

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

Here, the defendants have met their initial burden by producing evidentiary proof in admissible form sufficient to show the absence of any material issue of fact. See Toure v Avis Rent A Car Systems supra; Gaddy v Eyler, supra. However, it is clear that plaintiff has failed to satisfy his burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact on any of the claimed sections of serious injury pursuant to Insurance Law §5102(d). Garner v Tong, 27 AD3d 401 (1st Dept. 2006); Priviteria v Brown, 28 AD3d 733 (2d Dept. 2006); Secore v Allen, 27 AD3d 825 (3rd Dept. 2006); DeJesus-Martinez v Singh, 2007 NY Slip Op 50256U, 2007 N.Y. Misc. Lexis 373 (App. Term 1st Dept. 2007); Martin v Marquez, 2007 NY Slip Op 50214U, 2007 N.Y. Misc. Lexis 333 (App. Term 1st Dept. 2007). The MRI films which reveal tendonitis in the supraspinatus tendon of Lisak's left shoulder do not establish a serious injury. Tobias v Chupenko, __AD3d __ (2nd Dept. 2007), 2007 NY Slip Op 5259; cf.

Yakubov v CG Trans Corp., 30 AD3d 509 (2d Dept. 2006). Plaintiff's medical submissions are devoid of any objective medical basis upon which to conclude he suffered the claimed disabilities. Smith v Brito, 23 AD3d 273 (1st Dept. 2005); Picott v Lewis, 26 AD3d 319 (2d Dept. 2006). Further, Dr. Gribenko's report fails to set forth any numerical finding of limitation in Lisak's left shoulder and fails to state the objective tests he performed which enabled him to reach his conclusions. Henry v Rivera, 34 AD3d 352 (1st Dept. 2006); Taylor v Terrigno, 27 Ad3d 316 (1st Dept. 2006); Rivera v Benaroti, 29 AD3d 3400 (1st Dept. 2006); Nagbe v. Mini Green Hacking Group, 22 AD3d 326 (1st Dept. 2005).

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is granted in its entirety and the complaint of Vyacheslav Lisak is dismissed in its entirety, and it is further,

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED
JUL 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 9, 2007

Deborah Kaplan

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

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