

<b>Washington v Fairbanks</b>
2007 NY Slip Op 32458(U)
August 2, 2007
Supreme Court, New York County
Docket Number: 0105491/2005
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

DIANE WASHINGTON

INDEX NO. 105491-2005

MOTION DATE 6-20-07

MOTION SEQ. NO. 003

MOTION CAL. NO. 115

JAMES E. FAIRBANKS

KAPLAN, J.:

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

In this personal injury action, defendant James E. Fairbanks moves for summary judgment dismissing the complaint on the ground that the plaintiff Diane Washington did not sustain a "serious injury" within the meaning of Insurance Law 5102(d), and as such any recovery should be limited to that provided by No-Fault Insurance.

Diane Washington, a bicyclist was crossing at the intersection of East 6<sup>th</sup> Street and Avenue C in Manhattan on March 1, 2004 in the pedestrian crosswalk and with the green light, at approximately 4:30 p.m., when she was struck by a vehicle operated and owned by James E. Fairbanks. After the collision, Washington was thrown to the ground. Mr. Fairbanks is alleged to have fled the scene of the accident after speaking briefly to the plaintiff as she lay prone in the intersection. Plaintiff commenced the instant action for personal injuries allegedly sustained in the accident, including but not limited to her back and knees.

In support of his motion, the defendant submits the affirmed report of Dr. Michael Katz, board certified in orthopedics and Dr. Adam Bandler, a board certified neurologist. Each of these physicians performed an Independent Medical Exam (IME) on the plaintiff as part of this litigation. Defendant also proffers the deposition testimony of the plaintiff, the complaint and various other medical records and filings.

Dr. Katz, who examined Washington on December 19, 2006, reviewed her prior medical records including her surgical reports before conducting his examination. As part of the examination he measured the ranges of motion in her cervical, thoracic and lumbar spine as well as both of her knees. In his report, he includes the objective tests he employed in making his determination that her

ranges of motion are unrestricted and that she suffers only resolved sprains and strains and does not suffer any disability. Relying on plaintiff's prior medical reports he concludes that her knee injury was degenerative in nature and not casually related to the subject accident. He opines that she had a very successful arthroscopic surgery on her knee with excellent results.

Dr. Bendler, who examined Washington on December 12, 2006 lists the objective tests he employed during his examination, which lead him to conclude that she does not suffer from any neurological problem. He indicates that plaintiff has had two prior knee surgeries. In further support of his motion, the defendant submits the plaintiff's deposition testimony, which discusses her treatment and activities subsequent to the accident, copies of a portion of her prior medical records as well as the pleadings.

In opposition to the motion, the plaintiff proffers the affidavit of Dr. Ron Noy, a board certified Orthopedic Surgeon, the MRI reports of Dr. Stephen Brownstein, and Dr. Dennis Rossi, both board certified radiologists as well as her deposition testimony and a copy of the New York City Police Department report filled out in conjunction with this accident. The plaintiff's submissions detail the injuries to her back and knees as well as her course of treatment. Dr. Brownstein's sworn report of plaintiff's knee confirms the presence of an "intersubstance tear" of the posterior horn of the medial meniscus or "myoxid degeneration." and suggests clinical correlation.

On the day following the accident, Washington presented at the emergency room of Beth Israel Hospital for treatment. She then consulted with her regular physician Dr. Kevin Schiller, who began her on a course of physical therapy. When that failed to provide any relief Dr. Schiller sent plaintiff for a series of knee MRI's and referred her to Dr. Noy, an orthopedic surgeon. During his initial examination, Dr. Noy performed several objective tests on plaintiff's knees with positive results leading him to diagnose her with chondromalacia of patella bilateral knees and positive meniscus tears. He had her continue physical therapy and return for a further evaluation one week later. He then began a regular series of visits and evaluations. During his later examinations of plaintiff, and based on her MRI films he found that her left knee, which had been previously injured and operated on was worsened as a result of the accident. On an exam in May, Dr. Noy concluded that her right knee, which was injured as a result of the accident had not benefitted from treatment and indeed may have progressed to a full meniscus tear.

Having determined that her current course of treatment would have no further benefit, Dr. Noy recommended plaintiff undergo surgery on her left knee, which was performed on October 12, 2004. His post operative diagnosis was a left knee medial meniscus tear, loose body and osteoarthritis with chondromalacia of the medial femoral condyle and patella.

During plaintiff's most recent visit to Dr. Noy in the Spring of 2006 he asserts that plaintiff has suffered a permanent injury as a result of the accident and prescribed a knee brace as well as medications, steroid injections and an additional course of physical therapy. He casually relates her knee injuries to the subject accident.

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 (1<sup>st</sup> 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 plaintiff's 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 v Twentieth 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 (1<sup>st</sup> Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1<sup>st</sup> Dept. 2004).

Here, on the issue of "serious injury" 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, plaintiff has satisfied his burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact. Garner v Tong, 27 AD3d 401 (1<sup>st</sup> Dept. 2006); Priviteria v Brown, 28 AD3d 733 (2<sup>d</sup> Dept. 2006); Secore v Allen, 27 AD3d 825 (3<sup>rd</sup> Dept. 2006); DeJesus-Martinez v Singh, 2007 NY Slip Op 50256U, 2007 N.Y. Misc. Lexis 373 (App. Term 1<sup>st</sup> Dept. 2007); Martin v Marquez, 2007 NY Slip Op 50214U, 2007 N.Y. Misc. Lexis 333 (App. Term 1<sup>st</sup> Dept. 2007). Dr. Roy's affidavit, coupled with Dr. Brownstein's and Dr. Rossi's reports raised a triable issue as to whether Washington suffered a serious injury within the meaning of Insurance Law § 5102 (d) with regard to the torn meniscus in her knee which required surgery to repair. Engles v Claude, 39 AD3d 357 (1<sup>st</sup> Dept. 2007); see Noreiga v Sauercraft, 5 AD3d 121 (1<sup>st</sup> Dept. 2004); Hernandez v. Almanzar, 32 AD3d 360 (1<sup>st</sup> Dept. 2006); Michel v Graham, 2003 Slip Op. 51170U (App. Term 2<sup>d</sup> Dept. 2003).

For these reasons and upon the foregoing papers, and oral argument held it is

ORDERED that the motion for summary judgment by defendant James E.

Fairbanks is denied in its entirety, and it is further,

ORDERED that the parties are to appear for their previously scheduled pre-trial conference on September 20, 2007, Part 22, 80 Centre Street, Room 136, at 9:30 a.m..

This constitutes the Decision and Order of the Court.

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

Dated: August 2, 2007

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

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