

**Pinkley v Hope Express Cab Corp.**

2007 NY Slip Op 32725(U)

August 20, 2007

Supreme Court, New York County

Docket Number: 0104922/2006

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

KAREN PINKLEY and GARY PINKLEY  
*FILED*  
*AUG 31 2007*  
*- v -*  
*NEW YORK COUNTY CLERK'S OFFICE*  
HOPE EXPRESS CAB CORP. and  
DAVID MASHKABOV

INDEX NO. 104922/06  
MOTION DATE 6-6-07  
MOTION SEQ. NO. 002  
MOTION CAL. NO. 85

The following papers, numbered 1 to 4, were read on this motion and cross-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).

- Notice of Motion/ Order to Show Cause — Affidavits — Exhibits
- Answering Affidavits — Exhibits (Memo) \_\_\_\_\_
- Notice of Cross-Motion/ Order to Show Cause — Affidavits — Exhibits
- Replying Affidavits (Reply Memo) \_\_\_\_\_

<u>PAPERS NUMBERED</u>	
1	_____
2	_____
3	_____
4	_____

Cross-Motion:  Yes |  No

This is an action seeking damages for injuries allegedly sustained in a motor vehicle accident on May 30, 2004, at Broadway and 18<sup>th</sup> Street in Manhattan. The plaintiffs, visiting from Florida, and their daughter were passengers in a taxi owned by defendant Hope Express Cab Corp. when it was struck by a vehicle owned and operated by defendant David Mashkabov. Plaintiff Karen Pinkley claims to have been injured when her leg hit the back of the front seat. Following the collision, the plaintiffs and their daughter got into another taxi and continued on to the Statue of Liberty. Plaintiff did not seek medical treatment or file a police report.

A few days later, after flying back to Florida, the plaintiff visited her chiropractor, Dr. Dan Lewis, whom she had been seeing for at least 12 years, complaining of pain and spasm in her left hip. She underwent a course of physical, heat and massage therapy. The therapy was daily for five or six weeks and then was reduced to three or four days per week through 2006. According to the plaintiff, the therapy improves but does not eliminate the pain. Dr. Lewis sent her for MRIs of the left hip and referred her to an orthopedic surgeon, Dr. John Kagan,

who administered, by her estimation, about ten injections for the pain in her hip and lower spine. She also took Celebrex for a few months, was prescribed an anti-depressant by her family doctor, Dr. Joseph Hobson, and now takes a painkiller called Loratab. She alleges that she continues to suffer severe pain in her hip which radiates down her leg and which was not present before the subject accident. An administrative assistant for Sprint/Embarq, the plaintiff did not miss any work as a result of the accident. However, since the accident, she is unable to do any housework - her husband and a cleaning person do it - but she able to go to the supermarket and do some cooking. She has trouble with stairs and walking long distances. Since the accident, she has flown to Canada and New York and driven to North Carolina on vacation.

The plaintiff previously injured her neck in a car accident in 1970/1971 and injured her lumbar spine, at L-1, in a boating accident about ten years before this accident. She received treatment for these injuries prior to the instant accident from Drs. Lewis and Kagan.

The plaintiff commenced the instant action seeking damages for her injuries, claiming, *inter alia*, that he sustained a "permanent loss of use of a body organ or member", a "significant limitation of use of a body function or system" or 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. See Insurance Law § 5102(d). Her bill of particulars alleges various injuries to the lumbar and thoracic spine and left leg and hip and right shoulder. Defendant Mashkabov moves and defendant Hope Express Cab cross-moves for summary judgment dismissing the complaint on the ground that the plaintiff's injuries do not fall within 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 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).

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). 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, supra; Toure v Avis Rent A Car Systems, supra; Licari v Elliot, supra.

It is well settled that a plaintiff's subjective complaints alone are not sufficient to defeat the motion. See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, 79 NY2d 955 (1992). However, a herniated or bulging disc may constitute a serious injury within the meaning of Insurance Law §5102(d). See Pommells v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., 22 AD3d 326 (1<sup>st</sup> Dept. 2005); Arjona v Calcano, 7 AD3d 279 (1<sup>st</sup> 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 Pommells v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., supra; Simms v APA Truck Leasing Corp., 14 AD3d 322 (1<sup>st</sup> Dept. 2005).

Further, 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).

Applying these principles to the facts at bar, the defendants' motions must be granted.

In support of the motions, the defendants submit the pleadings in this case, the plaintiff's deposition testimony, summarized above, and the affirmed reports of Dr. Edward Weiland, a board certified neurologist, and Dr. Marc Brown, a board-certified radiologist.

Dr. Weiland conducted a neurological examination of the plaintiff on October 19, 2006, and reviewed the records of Drs. Lewis, Kagan and Hobson. He performed various tests, which he identifies in his report, and concludes that it was a "normal neurological examination" showing only resolved thoracic and lumbosacral sprain/strain. He finds that the plaintiff has full range of motion of the

cervical and lumbar spine, neck and both shoulders, Dr. Weiland notes the plaintiff's "subjective complaints of pain with light palpation over the lumbar region and posterior and superior aspect of the left hip and thigh." However, he finds "no joint crepitus or effusions" with range of motion activities of the left hip. Dr. Weiland notes that plaintiff reports continued therapy with Dr. Lewis at a frequency of one to three times per week, but concludes that she is in no need of further treatment, has no disability and is able to perform normal activities of daily living.

Dr. Marc Brown examined MRI studies of the plaintiff's lumbar spine taken on June 10, 2004, and found no evidence of disc herniation but only "minimal age-appropriate degenerative disc disease" which is "less than average" compared to people in plaintiff's age bracket. He does find "moderate wedge compression deformity at L-1" which "appears chronic" but all other findings were normal.

The defendants also submit treatment notes of Dr. Lewis dated April 13 through May 12, 2004, about a month before the accident. These records indicate that the plaintiff was then complaining of and exhibited subscapular tension, pain and tightness in her lower back, myopathy of the neck, mid back and lower back areas, and loss of range of motion in the lumbar spine. During this time, Dr. Lewis treated her with "gentle Cox distraction L/S1 with inferential and heat prescribed."

In opposition to the motion, the plaintiff submits an affidavit from her daughter, stating the circumstances of the accident, an affirmation and post-accident medical records of Dr. Kagan, and a brief affidavit and post-accident medical records of Dr. Lewis.

The defendants' correctly argue that the affirmation of Dr. Kagan lacks probative value since it is not in proper evidentiary form. Dr. Kagan states that he is licensed to practice medicine in the State of Florida but does not state that he is licensed to practice medicine in the State of New York. Thus, his affirmation does not comply with CPLR 2106 and may not be considered on this motion. See Parente v Kang, 37 AD3d 687 (2<sup>nd</sup> Dept. 2007); Moore v Edison, 25 AD3d 672 (2<sup>nd</sup> Dept. 2006); Sandoro v Andzel, 307 AD2d 706 (4<sup>th</sup> Dept. 2003); Palo v Latt, 270 AD2d 323 (2<sup>nd</sup> Dept. 2000). Nor are the medical reports submitted with his affirmation properly affirmed as required. Notably, in this affirmation, Dr. Kagan refers to an unaffirmed report of an MRI of the plaintiff's lumbar spine taken on April 21, 2005, and interpreted by Dr. Gilbert Malsby. Dr. Malsby concludes, and Dr. Kagan agrees, that the films show "mild bulging disc and facet arthrosis at low lumbar levels without compressive disc abnormality demonstrated" and "chronic compression fracture of L1" but "no acute fracture." Even assuming that these submissions may be considered, it is well settled, as stated above, that a disc herniation or bulge alone does not constitute "serious injury" within the meaning of Insurance Law §5102(d). The plaintiff fails to offer "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., supra.

Dr. Lewis' affidavit and medical reports do not meet the plaintiff's burden on this motion. The affidavit states only that he is a licensed chiropractor in the State of Florida, that he maintained the medical records of the plaintiff in the ordinary course of business and that all of his records are attached. However, the records themselves consist only of brief "office notes" which are initialed by Dr. Lewis and a report of a physical examination conducted June 3, 2004, when she first saw him after the accident. This report notes the plaintiff's account of the accident and her complaints of low back pain, but does not indicate any deficits in functioning that exceed those reported in Dr. Lewis' pre-accident reports. Indeed, this report reveals only mild tension and muscle stiffness in the low back, particularly over the "paravertebral musculature L1 through L5." In any event, these records, being unaffirmed, are without probative value and may not be considered on this motion. See Grasso v Angerami, 79 NY2d 813 (1991); Parente v Kang, supra; Hernandez v Taub, 19 AD3d 368 (2nd Dept. 2005).

Finally, the plaintiff wholly fails to establish "serious injury" under the "90/180" category of Insurance Law §5102(d). Her own deposition testimony and pleadings establish that she missed no work and experienced only slight curtailments in her usual and customary activities after the accident. See Licari v Elliot, supra.

The defendants having met their burden on these motions and the plaintiff having failed to meet hers, the motions must be granted.

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion and cross-motion for summary judgment are granted, the complaint is dismissed as against both defendants and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: August 20, 2007

**FILED**  
 AUG 31 2007  
 COUNTY NEW YORK  
 CLERK  
*Deborah Kaplan*  
 Deborah A. Kaplan J.S.C.  
**DEBORAH A. KAPLAN**  
 J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST     REFERENCE