

St. Cloud v Tolentino
2007 NY Slip Op 32771(U)
August 9, 2007
Supreme Court, New York County
Docket Number: 0102404/2006
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

SOPHONY ST. CLOUD

INDEX NO. 102404-2006

MOTION DATE 6-20-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 88

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VICTOR TOLENTINO
KAPLAN, J.:

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

At approximately 10:30 p.m. on July 19, 2004, a motor vehicle owned and operated by plaintiff Sophony St. Cloud was involved in a collision with a motor vehicle owned and operated by Victor Tolentino. As a result of this incident, plaintiff claims to have sustained a serious injury to her back and knee, including but not limited to herniated discs, a left knee meniscus tear and a partial tear of both the anterior crucial and medial collateral ligaments. Defendant Tolentino, now moves 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 his motion, the defendant submits the affirmed reports of Dr. Iqbal Merchant, board certified neurologist, Dr. Michael Rafiy, board certified orthopedist and Dr. Michael Berg, board certified radiologist. He also includes the pleadings as well as two pages of plaintiff's deposition testimony.

Dr. Merchant performed an Independent Medical Examination of the plaintiff on December 28, 2006, as part of this litigation. In his report he discusses various observations of the plaintiff's mobility and flexibility. Although he finds varying degrees of restriction with regard to movement in her cervical spine, which he

concludes are self-restricted, the report is devoid of any information about any objective tests he employed or how he reached his conclusions. While Dr. Merchant avers that he reviewed plaintiff's prior medical records, a close reading of his report reveals that he merely read the Bill of Particulars as well as the New York City Police Department report filled out in conjunction with this case. He did not review the MRI report or the many other medical records which were submitted by the plaintiff. Dr. Michael Rafiy, also conducted an examination of the plaintiff on December 28, 2007. While Dr. Rafiy, claims to have reviewed plaintiff's medical reports he only reviewed the same legal documents as Dr. Merchant. Dr. Rafiy, unlike Dr. Merchant did not find any restrictions in plaintiff's ranges of motion in her cervical spine. He concludes that she has left knee, cervical and lumbar sprains which have resolved. Dr. Berg reviewed the MRI films of the plaintiff's spine as well as her left knee. He disagrees with the conclusions of plaintiff's radiologist who he refers to as a "Dr. Eric Lubin" and finds no evidence of herniated disc at C3-4 or of any knee injury. Plaintiff's radiologist is actually Dr. Thomas Kolb, who also diagnosed herniated discs at C5-6, C6-7 with impingement upon the thecal sac as well as the actual spine and bulging discs at L4-5, L5-S1. Neither Dr. Berg, nor defendant's other physicians address these findings.

In opposition to the motion, the plaintiff submits the affirmed reports of Dr. Thomas Kolb, the radiologist who supervised and interpreted her MRI films, the affirmed report of Dr. Joyce Goldenberg, board certified in physical medicine and rehabilitation, who began treatment of Plaintiff on July 21, 2004, some two days after the subject accident, a complete set of her medical records, photos of her vehicle taken after the collision, the New York City Police Department report filled out in conjunction with this case, a notarized letter from her employer Global Ministries, the United Methodist Church report as well as her own affidavit.

The affirmation from Dr. Kolb indicates that plaintiff suffered posterior disc herniations at C4-5, C5-6, C6-7, L4-5, L5-S1 as well as an intra-substance tear of the posterior horn of the medial meniscus and a partial tear of her anterior cruciate ligament in her left knee. Dr. Goldenberg describes her care treatment of Ms. St. Cloud, including referrals to neurologists, physical therapy, steroid and pain injections. She restricted Ms. St. Cloud from working until October 18, 2004, and only allowed her to return with limitations on her physical activities. During her

initial examination, using objective test she found plaintiff to have restrictions in her ranges of motion ranging from 5-66%. In her most recent examination February 14, 2007, Dr. Goldenberg measures restrictions ranging from 4 to 27%. Dr. Goldenberg casually relates these injuries and restrictions to the subject accident and explains the cessation in plaintiff's treatment, indicating that she had reached the maximum benefit possible and that any other care would be palliative only. Ms. St. Cloud was directed to continue a home exercise program. The notarized letter from her employer confirms Dr. Goldenberg's assertion with regard to time missed from work and the limitations imposed upon St. Cloud's return.

Ms. St. Cloud's affidavit discusses the accident, her treatment and the effect of her injuries on her daily life. She indicates she is not only restricted in her ability to perform her job but also in her responsibilities for the care of her three children, one of whom is severely disabled. That child, Rebekah St. Cloud suffered asphyxia at birth, resulting in severe cognitive and motor delays. When she was six, Rebekah had surgery for a brain tumor. She requires constant care, including assistance with daily bathing and dressing. Although the child receives the assistance of a paraprofessional at school, plaintiff maintains primary responsibility for her daily activities which include lifting and moving Rebekah, now sixteen.

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 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 (1st Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1st Dept. 2004).

Here, the defendants failed to meet 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. Specifically, the affirmed report of Dr. Iqbal Merchant fails to set forth the objective test or tests relied upon in reaching his conclusions. Madatov v Madatov, 27 AD3d 531 (2d Dept 2006); Vasquez v Reluczo, 28 AD3d 365 (1st Dept. 2006). Nor did Dr. Merchant or Dr. Rafiy ever examine plaintiff's MRI's or other medical records

prior to making their determinations, despite the fact defendant provided them. See Wadford v Gruz, 35 AD3d 258 (1st Dept. 2006); Nix v Yang Gao Xing, 19 AD3d 227 (1st Dept. 2005); Dixon v Pena, 5 AD3d 283 (1st Dept. 2004). Finally, Dr. Berg fails to address many of the findings in plaintiff's MRI reports and refers to a "Dr. Lubin" who is not involved in this case. As such, it is not necessary to consider the plaintiff's proof presented in opposition to the motion. See Facci v Kaminsky, 18 AD3d 806 (2d Dept. 2005). However, were the Court to consider the plaintiff's papers, it finds them to have satisfied any burden.

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is denied in its entirety.

The parties are directed to appear for a status conference, Part 22, 80 Centre Street, New York, New York, Room 136 on September 4, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: August 9, 2007

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

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