

Erazo v Diallo

2007 NY Slip Op 32776(U)

August 28, 2007

Supreme Court, New York County

Docket Number: 0103329/2003

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

MILAGROS ERAZO

INDEX NO. 103329/06

- v -

MOTION DATE 6-27-07

SAMBA DIALLO, G. TRANSPORTATION
and MILAGROS BETANCOURT

MOTION SEQ. NO. 002

MOTION CAL. NO. 29

The following papers, numbered 1 to 4, were read on this motion by defendants Diallo and G. Transportation for summary judgment on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102(d), and cross-motion by defendant Betancourt seeking the same relief.

PAPERS NUMBERED

Notice of Motion – Affidavits – Exhibits

1

Notice of Cross Motion – Affidavits – Exhibits

2

Answering Affidavits – Exhibits (Memo)

3

Affirmation in Reply

4

Cross-Motion: Yes No

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In this action to recover damages for injuries arising from a motor vehicle accident, the undisputed facts establish that on the evening of August 5, 2005, a vehicle driven by defendant Samba Diallo and owned by defendant G. Transportation was involved in a collision with a vehicle owned and operated by defendant Milagros Betancourt at the intersection of Seventh Avenue and 113th Street in Manhattan. The plaintiff, Milagros Erazco, a passenger who first sought medical treatment four days after the collision claims to have suffered various injuries to her back and neck, including herniated discs with corresponding restrictions in her ranges of motion. She underwent a four month course of medical treatment and claims to still suffer pain which limits her activities.

The plaintiff claims that her injuries constitute a "permanent loss or use of a body organ, member, function or system," a "significant limitation of use of a body

function or system,” and a “medically determined injury or impairment of a non-permanent nature which prevented her 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 occurrence of the injury or impairment”, three categories of “serious injury” as defined by Insurance Law § 5102(d).

There are two motions now before the court: (1) defendants Diallo and G. Transportation’s motion for summary judgment dismissing the complaint pursuant to CPLR 3212 on the ground that the plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102(d), and (2) defendant Betancourt’s cross motion seeking the same relief.

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 the “No-Fault” Law (Insurance Law § 5102[d]), he or she bears the initial burden of establishing the absence of a “serious injury” as a matter of law.

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, 98 NY2d 345 (2002); Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyer, 79 NY2d 955 (1992).

It is also settled law that a herniated or bulging disc may constitute a serious injury within the meaning of Insurance Law § 5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., 22 AD3d 326 (1st

Dept. 2005); Arjona v Calcano, 7 AD3d 279 (1st 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 Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., *supra*; Simms v APA Truck Leasing Corp., 14 AD3d 322 (1st Dept. 2005).

Where, as here, 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 Eyer, 79 NY2d 955 (1992).

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key. See Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395 (1957). 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).

In this case, the defendants have met their initial burden of establishing, as a matter of law, that the plaintiff did not sustain a "serious injury" under any of the three categories of the statutory definition she alleges. The defendants' proof includes an affirmed report of Dr. Wendy Cohen, a neurologist, who examined the plaintiff and reviewed her medical records on November 30, 2006. Dr. Cohen, found normal functioning and a full range of motion in her neck and back. She concluded that Erazo suffered only a neck sprain which has resolved. The defendants also proffer the affirmed report of Dr. Allen Rothpearl, a radiologist who reviewed her MRI films. Dr. Rothpearl concludes that Erazo suffers from cervical disc degeneration and straightening of the lordosis in her lumbar spine. He finds no evidence of either herniated or bulging discs and states that these findings are unrelated to the subject accident.

In opposition, the plaintiff submits, inter alia, the affirmations of Dr. Bożena Augustyniak, Dr. Luba Karlin, neurologist and Dr. Jeffrey Chess a radiologist. She also proffers her own affidavit as well as the denial of New York Motor Vehicle No-Fault Insurance dated November 4, 2005.

Dr. Augustyniak first examined the plaintiff on August 9, 2005, and last treated her on December 1, 2005. It is Dr. Augustyniak's opinion that as a result of this accident, the plaintiff suffered significant range of motion deficits in her cervical spine which are causally related to the subject accident and which are permanent. Dr. Karlin, who examined plaintiff on September 5, 2005 performed a number of objective tests including EMG/NCV testing and determined Erazo had very significant limitations in her ranges of motion in both her lumbar and cervical spines. Dr. Karlin provides actual numeric measurements and compares them to a stated norm. Dr. Starkman, who examined plaintiff on April 25, 2007 in response to these motions performed a number of objective tests and measured her ranges of motion with a goniometer. After comparing his measurements to a stated norm he concludes that she suffers a decrease of some 20%. He finds her to have a partial permanent impairment as a result of the August 5, 2005 collision.

The plaintiff also submits the affirmation of Dr. Jeffrey Chess, a board certified radiologist, who conducted and interpreted plaintiff's MRI's taken August 5, 2005 and September 2, 2005. It is Dr. Chess' opinion that the MRI's show herniated discs at C2-C3, C4-C5 effacing the anterior aspect of the thecal sac and herniations at L2-L3 impinging on the right neural foramen. Contrary to defendant's claim the plaintiff's medical submissions show contemporaneous medical testing, the objective nature of the tests, what the normal range of motion should be and that 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).

The plaintiff also submits her affidavit in which she details her current difficulties in performing household chores as well as walking, standing and bending. She claims she can no longer work as a hairdresser as a result of the accident. She avers that her total cessation of medical treatment in December of 2005 was the result of the denial of further medical benefits by No-Fault, which is supported by her No-Fault Insurance Denial of Claim form attached. See Sepulveda v Reyes, 19 AD3d 297 (1st Dept. 2005).

The plaintiff's proof presents a triable issue of fact as to whether she sustained a "significant limitation of use of a body function or system," but does not raise any triable issues as to the categories of "permanent loss or use of a body organ, member, function or system," or the "90/180" category.

Accordingly, the motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted to the extent that the complaint is dismissed insofar as it asserts a claim under the "permanent loss or use of a body organ, member, function or system" category or "90/180" category of serious injury as defined by Insurance Law § 5102(d), and the motion is otherwise denied.

For these reasons and upon the foregoing papers, it is,

ORDERED that the motion and cross-motion by defendants for summary judgment dismissing the complaint on the ground that plaintiff did not sustain "serious injury" as defined by Insurance Law § 5102(d) are granted to the extent that the complaint is dismissed insofar as it asserts a claim under the "permanent loss or use of a body organ, member, function or system" category or the "90/180" category of serious injury as defined by Insurance Law § 5102(d), and the motions are otherwise denied; and it is further,

ORDERED that the parties shall appear for a pre-trial conference on October 23, 2007, at 9:30 a.m. at Part 22, 80 Centre Street, Room 136.

Dated: August 28, 2007

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