

Vasquez v Pulley

2007 NY Slip Op 32780(U)

August 10, 2007

Supreme Court, New York County

Docket Number: 0105886/2005

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN

PART 22

Justice

MOISES VASQUEZ

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ERNEST PULLEY

The following papers, numbered 1 to 4 were read on this Motion by defendant for summary judgment on the threshold "serious injury" issue (Insurance Law 5102[d]) and this Cross-motion by plaintiff for summary judgment on liability.

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

PAPERS NUMBERED

1

Notice of Cross-Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

2

Answering Affidavits -- (Memo)

3

Reply Affidavits (Reply Memo)

4

Cross-Motion: [] Yes [] No

FILED SEP 06 2007 NEW YORK COUNTY CLERK'S OFFICE

On July 31, 2004, a vehicle operated and owned by defendant Ernest Pulley (Pulley) was traveling east on Ackerman Avenue in the County of Passaic, New Jersey, when it collided with a vehicle driven by plaintiff Moises Vasquez (Vasquez). The plaintiff commenced the instant action seeking damages for personal injuries allegedly sustained in the accident. Defendant now moves, pursuant to CPLR §3212(b), for summary judgment on the grounds that Vasquez failed to establish a "serious injury" as set forth in New York Insurance Law §5102(d). Plaintiff cross-moves, pursuant to CPLR 3212, for summary judgment on the issue of liability.

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 pursuant to Insurance Law §5102[d], he bears the initial burden of establishing the absence of a "serious

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injury” as a matter of law. 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).

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).

In this case, the defendant has submitted 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. Specifically, the defendant has offered in support of his application the pleadings, plaintiff’s deposition testimony, the affirmed reports of Dr. Ravi Tikoo, a board certified neurologist, who examined the plaintiff on July 7, 2006 and Dr. Robert Zaretsky, a board certified orthopaedic surgeon, who examined the plaintiff on July 11, 2006.

In his report, Dr. Tikoo states that the 38 year-old plaintiff, reported that he had mid and low back pain as a result of the accident. Dr. Tikoo performed a number of objective tests, all of which are described in his report and all of which indicated normal neurological functioning. Dr. Tikoo also reviewed plaintiff’s medical records including his lumbar spine MRI dated December 11, 2006. In particular, his report states that there were “no objective findings to substantiate these complaints.” Dr. Tikoo concludes that Vasquez “does not have significant clinical evidence of neuropathy, radiculopathy, or disc herniation.”

Dr. Zaretsky, after performing his examination of the plaintiff, concludes that all tests conducted showed normal functioning and ranges of motion in the areas plaintiff asserts were injured as a result of the subject accident. He found only sprain and strains of the cervical and lumbar spines, which were resolved.

The defendant’s proof entitles him to judgment as a matter of law on the threshold issue of “serious injury”, thereby shifting the burden to the plaintiff. In opposition to the motion, the plaintiff submits an affirmation from Dr. Aleksandr Martirosov, dated February 8, 2007, his own affidavit and portion of his deposition testimony.

Dr. Martirosov’s who first examined plaintiff in August of 2004, diagnosed

him with lumbar radiculopathy and dysfunction of the thoracic and lumbar regions. His MRI taken on December 11, 2006, revealed disc herniations at L4-5 and L5-S1. After several months of physical therapy and spinal manipulation in Dr. Martirosov's office, plaintiff still complained of severe back pain. On January 12 and January 19, 2005, Dr. Martirosov conducted manipulation under anesthesia at the Bergen Ambulatory Surgery Center. As of February 25, 2005, Dr. Martirosov reports, plaintiff has severe pain and is "unable to walk without help." Dr. Martirosov further reports that plaintiff "was prevented from performing virtually all his normal daily activities of life, including any and all work-related activities" for at least seven months after the accident.

Dr. Martirosov re-evaluated plaintiff on an unspecified date prior to his affirmation and concluded that plaintiff's restrictions in his back are permanent and significant in nature. He further opines that "the motor vehicle accident of July 31, 2004 was the competent producing medical cause of the injuries sustained by [plaintiff]." Using "standard range of motion testing", he found restrictions of range of motion as follows: 90% restriction of motion and loss of use of the thoracic spine and 80% restriction of motor of the lumbar spine. However, Dr. Martirosov's affirmation does not show when the tests were performed, the objective nature of the tests, how the measurements were made and what the normal range of motion should be. See Milazzo v. Gesner, 33 AD3d 317 (1st Dept. 2006); Vasquez v. Reluzco, 28 AD3d 365 (1st Dept. 2006). Nor does it provide a qualitative assessment of plaintiff's condition. See Toure v. Avis Rent A Car Systems, supra; Dufel v. Green, supra. In addition, "proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury." See Pommels v. Perez, supra at 574; Park v. Champagne, 34 AD3d 274, 276 (1st Dept. 2006).

Furthermore, there is no dispute that plaintiff's treatment with Dr. Martirosov terminated in 2005. There is no explanation tendered for the total cessation of treatment until the time Dr. Martirosov re-evaluated plaintiff in response to this motion. A gap or, more accurately, a cessation of treatment, may undermine a plaintiff's claim of serious injury under Insurance Law §5102(d). See Pommels v. Perez, supra. Dr. Martirosov's affirmation states that "at present, I feel he [plaintiff] has reached the maximum benefit possible through physical therapy..." However, the date of his affirmation, which is February 8, 2007, does not address the two year gap in treatment from 2005 through 2007. Mullings v. Huntwork, 26 A.D.3d 214 (1st Dept. 2006); Quezada v. Luque, 27 A.D.3d 205 (1st Dept. 2006).

The plaintiff further argues that his injuries fall under 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 occurrence of the injury or impairment" as defined by Insurance Law § 5102(d). Plaintiff's affidavit states among other things, "I was self employed at the time of the accident, and was unable to perform my work duties for over a year

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following the accident..." To establish a "serious injury" under the "90/180" category, the plaintiff 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. See Toure v Avis Rent A Car Systems, supra. Even though Dr. Martirosov's affirmation appears to support plaintiff's claim, he has failed to present any details about objective medical tests, if any, he employed or how his measurements relate to any stated norm.

Accordingly, the defendant's 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. As such the Court need not address the plaintiff's motion for liability.

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

ORDERED that the motion of the defendant for summary judgment on the issue of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is granted; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the defendant dismissing plaintiff's complaint, with costs and disbursements to defendant as taxed by the Clerk, and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

FILED
SEP 06 2007
NEW YORK
COUNTY CLERK'S OFFICE

August 10, 2007
Dated: ~~July 20, 2007~~

Deborah Kaplan
Deborah A. Kaplan
DEBORAH A. KAPLAN

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