

Kante v Diarrassouba
2007 NY Slip Op 32860(U)
September 5, 2007
Supreme Court, New County
Docket Number: 0103037/2006
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

BOUBACAR KANTE

INDEX NO. 103037/06

- v -

MOTION DATE 9-5-07

DRAMANE DIARRASSOUBA and
DONNA CAB CORP

MOTION SEQ. NO. 001

MOTION CAL. NO. 61

FILED
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NEW YORK
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The following papers, numbered 1 to 4, were read on this motion by the defendants for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d) and cross-motion by the plaintiff for, inter alia, summary judgment on the issue of liability.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits (and Memo)	<u>1</u>
Notice of Cross-Motion - Affidavits — Exhibits	<u>2</u>
Affirmation in Opposition	<u>3</u>
Replying Affidavits (Reply Memo)	<u>4</u>

Cross-Motion: Yes No

In this action to recover damages for injuries allegedly arising from a motor vehicle accident, the undisputed facts establish that at approximately 6:00 p.m. on June 6, 2004, a taxi owned by the defendant Donna Cab Corp. and driven by defendant Dramane Diarrassouba struck the rear of a taxi driven by the plaintiff, Boubacar Kante, while both vehicles were traveling north in the far right lane of Sixth Avenue in Manhattan. According to the plaintiff, he was traveling 20 or 30 miles per hour at the time of the impact and never saw the defendants' taxi before it hit him. He saw traffic ahead of him but his foot was on the gas pedal.

The plaintiff was transported to St. Vincent's Hospital emergency room and released the same day. He thereafter underwent a three-month course of physical therapy and was out of work for about the same period of time. The plaintiff claims to have suffered injuries to his cervical and lumbar spine and his right knee, including a torn meniscus, which constitute a "permanent consequential limitation

* 2]
of use of a body organ or member" and/or "significant limitation of use of a body function or system," two categories of "serious injury" as defined by Insurance Law § 5102(d). At his deposition, the plaintiff testified that he continues to suffer pain in his cervical spine area and knee, that he works five instead of six days per week and that he can no longer run or play soccer.

There are two motions now before the court - (1) the defendants move 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) the plaintiff cross-moves for, *inter alia*, summary judgment on the issue of liability.

(1) Motion for Summary Judgment on the Issue 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 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 Eyler, 79 NY2d 955 (1992). However, "[w]here 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., *supra*.

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). 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).

In this case, the moving defendants have failed to meet their burden in the first instance of submitting 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. They submit the pleadings, including the plaintiff's Bill of Particulars, and the affirmed reports of Dr. Iqbal Merchant, a board-certified neurologist, and Dr. Michael Rafiy, a board-certified orthopedic surgeon, both of whom examined the plaintiff in January 2007, at the request of the defendants. Both examining physicians state that they found only *resolved* sprains/strains of the cervical, thoracic and lumbar spines; Dr. Rafiy also finds a resolved shoulder and right knee sprains. However, neither addresses the report of the MRI of plaintiff's right knee taken on 7/14/04, five weeks after the accident, which revealed a "tear of the posterior horn of the medial meniscus." See Wadford v Gruz, 35 AD3d 258 (1st Dept. 2006); Nix v Yang Gao Xiang, 19 AD3d 227 (1st Dept. 2005); Dixon v Pena, 5 AD3d 283 (1st Dept. 2004). A torn meniscus may constitute a "serious injury" within the meaning of Insurance Law § 5102(d). See Noriega v Sauerhaft, 5 AD3d 121 (1st Dept. 2004); Morrow v Schoenfeld, 10 Misc 3d 1069(A), (Sup Ct, Suffolk County 2005); compare Medley v Lopez, 7 AD3d 470 (1st Dept. 2004). Drs. Merchant and Rafiy also conclude that the plaintiff had full range of motion in all tested areas but neither identifies the objective range of motion test(s) he used in reaching those conclusions. See Palladino v Antonelli, 40 AD3d 944 (2nd Dept. May 22, 2007); Park v Champagne, 34 AD3d 274 (1st Dept. 2006); Taylor v Terrigno, 27 AD3d 316 (1st Dept. 2006); Nagbe v Mini Green Hacking Corp., 22 AD3d 326 (1st Dept. 2005).

Since the defendants failed to meet their burden in the first instance, the court need not consider the sufficiency of the plaintiff's opposition papers.

Nonetheless, the court notes that the plaintiff's papers include (1) the plaintiff's deposition testimony and affidavit, setting forth the facts set forth above; (2) an affirmation of Dr. Jacob Lichy, the board certified radiologist who reviewed the MRI of the plaintiffs' knee and found a torn meniscus, as well as his MRI report; (3) and affidavit of Dr. Douglas Schwartz, who is a certified medical acupuncturist and is certified to practice physical medicine, and who examined the plaintiff in January 2007 for his Workers' Compensation claim and found a "derangement of the right knee and a permanent impairment of 15% scheduled loss of use of the right leg"; (4) an affidavit of Dr. Mark Heyligers, plaintiff's treating chiropractor, who states that plaintiff underwent a course of therapy - spinal manipulation, lumbar traction and paraspinal electrical stimulation - between June 2004 and March 2005, which ended because, in this doctor's view, he received the maximum possible improvement and would not benefit from ongoing treatment. Dr. Heyligers advised the plaintiff refrain from strenuous activity and not to work until the end of August 2004. He examined the plaintiff again on April 11, 2007, and found significant range of motion deficits on the cervical, thoracic and lumbar spine and sacral hip, with a "whole person impairment rating" of 50%. It was Dr. Heyligers opinion that the plaintiff suffered from cervical and lumbar disc herniations, brachial radiculitis and neuritis of the sciatic nerve, and that these conditions were caused by the subject accident and were permanent.

As such, even if the defendants had met their burden in the first instance, the plaintiff's proof would raise triable issues as to whether he sustained permanent consequential limitation of use of a body organ or member" and/or "significant limitation of use of a body function or system." See Insurance Law § 5102(d). The "gap in treatment" was also explained by Dr. Heyligers. See Pommels v Perez, 4 NY3d 566 (2005). The plaintiff's proof also presented triable issues as to whether he sustained a "medically determined injury or impairment of a non-permanent nature which precluded him from engaging in substantially all of his usual and customary daily activities for at least 90 days during the 180 days immediately following the accident." See Insurance Law § 5102(d). The plaintiff's proof demonstrated that these were not self-imposed restrictions but were medically indicated.

Accordingly, the defendants' 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 denied.

(2) Cross-Motion for Summary Judgment on the Issue of Liability

The plaintiff cross-moves for, *inter alia*, partial summary judgment on the issue of liability. It is his position that, having been struck in the rear by the defendants' taxi, a presumption of negligence attaches and, since defendant Diarrassouba has been precluded from testifying for failing to appear for a deposition, the presumption cannot be rebutted at trial.

It is well settled that the driver of a motor vehicle is expected to drive at a safe rate of speed, taking into account weather and road conditions, and to maintain a safe distance from the vehicle in front of him (~~see~~ Vehicle and Traffic Law §§ 1129[a]; 1180[a]; Malone v Morillo, 6 AD3d 324 (1st Dept. 2004); Mitchell v Gonzalez, 269 AD2d 250 [1st Dept. 2000]). "[T]his rule imposes on [drivers] a duty to be aware of traffic conditions, including vehicle stoppages." Johnson v Phillips, 261 AD2d 269, 271 (1st Dept. 1999). Thus, a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver who strikes the vehicle in front, unless the operator of the rear vehicle can come forth with an adequate, non-negligent explanation for the collision. See Somers v Condlin, 39 AD3d 289 (1st Dept. 2007); Francisco v Schoepfer, 30 AD3d 275 (1st Dept. 2006); Garcia v Bakemark Ingredients (East) Inc., 19 AD3d 224 (1st Dept. 2005); Grimes-Carrion v Carroll, 13 AD3d 125 (1st Dept. 2004); Johnson v Phillips, *supra*.

In light of these principles, the defendant is correct in arguing that there is a presumption of negligence in rear-end collisions. However, that presumption applies only where the front vehicle is "stopped or stopping." The defendant provides and research reveals no authority to the contrary or to warrant expansion of the presumption in this case. Here, the plaintiff's own deposition testimony establishes that he was traveling at up to 30 miles per hour at the time of the collision, that his foot was on the gas pedal and that he did not see the defendants' taxi at any time prior to the impact. There is no testimony as to how

long the plaintiff was traveling in that lane prior to the impact. This proof falls short of establishing that the plaintiff's taxi was "stopped or stopping" so as to warrant application of the presumption under the decisional authority cited above.

Nor does the fact that defendant Diarrassouba is precluded from testifying entitle the plaintiff to judgment as a matter of law. "[S]ummary judgment based on an order of preclusion is not automatic in the First Department." Instead, "the Court must analyze the effect of the preclusion order in each particular case." Mendez v Queens Plumbing Supply, Inc., 12 Misc 2d 1064 (Sup Ct, Bronx County 2006). Here, the defendants' "answer was not stricken and they were not precluded from establishing the affirmative defense of comparative negligence asserted therein" through the cross-examination of plaintiff's witnesses. See Ramos v Shendell Realty Group, Inc., 8 AD3d 41 (1st Dept. 2004).

Furthermore, it is well settled that "[i]n general, questions of negligence regarding a road accident are best resolved at a jury trial" (Lindgren v NYCHA, 269 AD2d 299, 302 [1st Dept. 2000]) and the issue of comparative negligence and apportionment of liability are almost always matters for the finder of fact. See Andre v Pomeroy, 35 NY2d 361, 366 (1974); Hazel v Nika, 40 AD3d 430 (1st Dept. 2007); Cabrera v Hirth, 8 AD3d 196 (1st Dept. 2004); Thomas v. Ronai, 189 A.D.2d 635 (1st Dept. 1993), *affd.*, 82 NY2d 736 (1993). Accordingly, there must be a trial on the issue of liability.

Finally, the plaintiff provides no basis to strike the defendants' First, Second, Third or Fifth Affirmative Defenses, the Fifth being that the plaintiff did not meet the "serious injury" threshold requirement of Insurance Law §5102(d) [see Section (1) above].

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

ORDERED that the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d) is denied; and it is further,

ORDERED that the plaintiff's cross-motion for, *inter alia*, partial summary judgment on the issue of liability is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: September 5, 2007

Deborah Kaplan

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

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