Ying Luan Yang v Yusupov

2007 NY Slip Op 32862(U)

August 19, 2007

Supreme Court, New York County

Docket Number: 0104715/2006

Judge: Deborah A. Kaplan

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SCANNED ON 9/14/2007
[* 1]

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

PRESENT: HON. DEBORAH A. KAPLAN, Justice — PART 22

YING LUAN YANG

- v -

GAVRIEL YUSUPOV

INDEX NO. 104715/06
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO. 142

The following papers, numbered 1 to 5 were read on this motion by the defendant for summary judgment to dismiss plaintiff's complaint on the ground that he did not meet the 'serious injury' threshold requirement of New York State Insurance Law § 5102(d) and cross-motion by plaintiff on liability.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Notice of Cross-Motion — Affidavits — Exhibits ...	2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4
Replying Affidavits (Reply Memo)	5

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Cross-Motion: ■ Yes ☐ No

On January 22, 2006, at the intersection of East 14th Street and University Place in Manhattan, plaintiff was riding his bicycle when he was struck by defendant's vehicle. Plaintiff commenced the instant action claiming, *inter alia*, that he sustained 'serious injuries' as defined by Insurance Law § 5102(d) - i.e. "permanent consequential limitation of use of a body function or system" and 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 the180 days immediately following the occurrence of the injury or impairment." The defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). The plaintiff cross-moves seeking summary judgment on the issue of laibility.

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, defendant seeks summary judgment on the threshold "serious injury" issue under "No-Fault threshold" issue (Insurance Law § 5102[d]), he 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).

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 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).

Additionally, where the plaintiff claims serious injury under the "90/180" category of Insurance Law §5102(d), he must (1) demonstrate that his 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 his daily activities. Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, supra.

In this case, the defendant has produced 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 he proffers the pleadings in the action, plaintiff's verified bill of particulars, plaintiff's deposition testimony and the affirmed report of Dr. Andrew N. Bazos, a board certified orthopedic surgeon.

Dr. Bazos, who examined the plaintiff on January 18, 2007, in addition to reviewing his medical records, performed a number of objective tests, all of which are described in his report and all of which revealed a normal range of motion as compared to the stated norm. Dr. Bazos also reviewed plaintiff's MRI's of his cervical and lumbar spine dated February 14, 2006, where he found disc herniations at C4-C5 and C5-C6. He concludes plaintiff has a history of cervical and lumbar sprains/strains and right knee and left shoulder sprains, which are all resolved. He finds that plaintiff has no orthopedic disability, residual or permanency based upon his physical examination.

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 the pleadings, his affidavit, the ambulance call report, the police accident report and the affidavit of Dr. Irving Liebman, a board certified orthopedic surgeon.

In his affidavit, Dr. Liebman states that he performed physical examinations of the plaintiff on January 26, 2006, March 6, 2006, April 20, 2006 and most recently on March 20, 2007. These visits are in addition to numerous physical therapy sessions plaintiff participated in which ended on June 2, 2006. At each examination, he performed range of motion testing of the lumbar and cervical spine and found significant restrictions. On January 26, 2006 and again on March 6, 2006 his clinical impression was that plaintiff was disabled from employment for an undetermined amount of time. On June 2, 2006, Dr. Liebman advised plaintiff that he had received the maximum benefit from physical therapy and was instructed to continue with home treatment. On March 20, 2007, in response to this motion Dr. Liebman performed range of motion testing of the lumbar and cervical spine, where he again diagnosed significant restrictions in all areas compared to the stated norms. He states that the injuries are causally related to the accident of January 22, 2006.

Plaintiff's deposition testimony establishes that he was employed full-time as a delivery person and kitchen helper at Taco Grill restaurant and after the subject accident he was not able to work until June 2006.

Thus, the plaintiff presents objective medical evidence of a medically determined injury or impairment which caused the alleged limitations in his daily activities. Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, supra.

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 denied.

In support of plaintiff's motion for summary judgment on liability, he proffers the defendant's deposition testimony, his affidavit, the ambulance call report and the police accident report which establishes that plaintiff was struck by defendant's vehicle when he failed to brake at the subject intersection. This proof satisfies the plaintiff's burden on the motion and creates a prima facie case of liability against the defendant.

Vehicle and Traffic Law §1231 subjects bicyclists to all of the duties applicable to motorists, but also gives them the same rights and privileges as motorists. See Aiello v City of New York, 32 AD3d 361 (1st Dept. 2006); Redcross v State, 241 AD2d 787 (3rd Dept. 1997); Secor v Kohl, 67 AD2d 358 (2nd Dept. 1979). Vehicle and Traffic Law §1234 requires bicyclists to ride "near the right hand curb or edge of the roadway... in such a manner as to prevent undue interference with the flow of traffic." Motorists, however, are required to "exercise due care to avoid colliding with any bicyclist." Vehicle and Traffic Law §1146.

The plaintiff's proof satisfies his burden on this motion in that it shows that he was not negligent and did not contribute to the accident in any way. Nothing in the proof submitted indicates any violation of a traffic rule by the plaintiff. Indeed, it shows that he complied with the rules, and that the defendant failed to stop at the intersection.

In opposition to the motion, the defendant challenges the plaintiff's credibility and

[* 4]

his comparative fault in the collision. However, he has failed to come forward with evidentiary proof in admissible form that would raise a triable issue of fact as to those or any other issues. See Alvaraz v Prospect Hospital, supra; Zuckerman v City of New York, supra. Specifically, he has failed to identify any inconsistency in the testimony or other proof to create a triable issue. See McFadden v Bruno, --AD3d ---, 2007 Slip.Op. 00989 (1st Dept. February 6, 2007); Natale v Woodstock, 35 AD3d 1128 (3rd Dept. 2006); Silverman v Clark, 35 AD3d 1 (1st Dept. 2006).

Nor has the defendant presented any proof, such as testimony or an affidavit from an eyewitness or expert, to contradict the plaintiff's account of the accident. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to meet the requirement of tender in admissible form. Zuckerman v City of New York, supra at 562; see Cilli v Resjefal Corp., 16 AD3d 339 (1st Dept. 2005); Garcia v Verizon New York, Inc., 10 AD3d 339 (1st Dept. 2004). The defendant has submitted only the affirmation of his attorney, who claims no personal knowledge of the accident. Thus, the affirmation is without probative value. See Zuckerman v City of New York, supra at 563; Johannsen v Rudolph, 34 AD3d 338 (1st Dept. 2006); Diaz v New York City Tr. Auth., 12 AD3d 316 (1st Dept. 2004).

For these reasons and upon the foregoing papers, it is

ORDERED that the motion of the defendant for summary judgment on the ground that 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 motion for summary judgment on the issue of liability is granted, and it is further,

ORDERED that, upon the filing of a note of issue, the matter will be set down for a trial on the issue of damages, and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all parties, the County Clerk, and the Clerk of the Trial Support Office within 45 days of entry.

This constitutes the Decision and Order of the Court.

Dated: August 19, 2007

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**

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