

Ragoonath v Payne

2007 NY Slip Op 33111(U)

September 24, 2007

Supreme Court, New York County

Docket Number: 0102535/2005

Judge: Deborah A. Kaplan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

JOHNNY RAGOONATH and LAMAR JUNIOUS

INDEX NO. 102535/05

- v -

MOTION DATE 6-27-07

MOTION SEQ. NO. 002-000

MARIO PAYNE and ANCIL SERRETTE

MOTION CAL. NO. 73

The following papers, numbered 1 to 5, were read on the motions by defendants to dismiss the complaint of plaintiffs Johnny Ragoonath and Lamar Junious on the ground that they did not sustain a 'serious injury' within the meaning of Insurance Law § 5102(d). Plaintiff Johnny Ragoonath cross-moves to dismiss defendants' counter-claims.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1,2,3</u>
Answering Affidavits — Exhibits (Memo)	<u>4</u>
Replying Affidavits (Reply Memo)	<u>5</u>

FILED
OCT 07 2007
NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

On January 26, 2003, at approximately 5:30 p.m., a three car collision occurred on the Franklin Delano Roosevelt Drive near its intersection with East 175th Street. The collision involved a vehicle operated by Johnny Ragoonath in which Lamarri Junious was a passenger as well as one owned and operated by defendant Mario Payne and another owned and operated by defendant Ancil Serrette. Ragoonath and Junious commenced the instant action claiming, *inter alia*, that they 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 [them] from performing substantially all of the material acts which constitute their usual and customary daily activities for at least 90 days during the 180 days immediately following the occurrence of the injury or impairment." The defendants now move for summary judgment, pursuant to CPLR 3212 dismissing the complaint in its entirety on the ground that the plaintiffs did not sustain a "serious injury" as defined by Insurance Law § 5102(d). Plaintiff Johnny Ragoonath on the counter-claims moves to dismiss also, asserting Lamarri Junious' failure to establish a "serious injury".

It is settled law that 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, defendants seeks summary judgment on the threshold "serious injury" issue under "No-Fault threshold" issue (Insurance Law § 5102[d]), they bear 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). 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 plaintiffs' 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 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).

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

In support of their motion for summary judgment, defendants proffer plaintiff's verified bill of particulars and deposition testimony, the affirmed reports of Dr. Irving M. Etkind, a board certified orthopaedic surgeon, Dr. Daniel J. Feuer, a board certified neurologist, and Dr. Stephen W. Lasting, a board certified radiologist.

Dr. Etkind examined plaintiff Johnny Ragoonath on May 25, 2006. He indicates that he reviewed plaintiff's medical records before performing a number of objective tests. These tests, all of which are described in his report, revealed a normal range of motion as compared to the stated norm. He concludes that plaintiff's orthopedic examination shows no abnormalities or any signs of permanent orthopaedic problems. His diagnosis was "resolved soft tissue sprains about the paraspinal region and upper and lower extremities."

On May 4, 2006, Dr. Etkind examined the plaintiff Lamarri Junious. In his report, he includes the range of motion tests he administered after reviewing plaintiff's medical records. He states that plaintiff's test results were all within the normal range. He concludes that his orthopedic examination of Junious' cervical, dorsolumbar spines and upper and lower extremities was normal and that he suffers no disabilities. His diagnosis was "resolved soft tissue sprains of the paraspinal area."

Dr. Feuer, examined Johnny Ragoonath on November 13, 2006 and Lamarri Junious on June 26, 2006. Dr. Feuer performed a series of objective range of motion tests of their cervical and lumbosacral spines, in addition to reviewing their medical records including their MRI films. His finds that neither plaintiff showed any abnormal results, nor did they have any objective signs of disability or permanency.

On May 9, 2006, Dr. Lastig reviewed plaintiff Ragoonath's MRI films of his cervical spine and left knee. In his report Dr. Lastig states that the cervical MRI film shows cervical straightening and disc desiccation at C4-C5 and C5-C6. However, he concludes these findings are the result of degenerative disc disease. The MRI film of the left knee is devoid of evidence of internal derangement. Also on May 9, 2006, Dr. Lastig reviewed plaintiff Junious's MRI films of his lumbar spine and right shoulder. He concludes that the lumbar spine MRI film shows no evidence of either disc herniations or bulges. Further, the MRI film of the right shoulder shows no signs of tears and is within normal limits.

Plaintiff Johnny Ragoonath's deposition testimony reveals that he first sought medical attention two days after the accident and missed approximately two weeks of work.

Accordingly, the movants have met their burden on this motion for summary judgment thereby shifting the burden to the plaintiffs. To defeat the motion, the plaintiffs must present proof sufficient to raise issues of fact. In opposition to the motion, the plaintiffs submits a portion of Johnny Ragoonath's deposition testimony, and the unaffirmed reports of Dr. Steve B. Losik, Dr. Teresella Gondolo, a neurologist, Dr. Ayoob Khodadadi, a board certified radiologist and Dr. Victor Katz. Unaffirmed medical reports are normally inadmissible (Grasso v. Angerami, 79 N.Y.2d 813 (1991); Pagano v. Kinsbury, 182 A.D.2d 268 (2nd Dep't 1992); CPLR 2106), however, if the defendants refer to a plaintiff's unaffirmed reports on their motion for summary judgment, the reports are properly before the Court. Bent v. Jackson, 15 A.D.3d 46 (1st Dept. 2005); Brown v. Achy, 9 A.D.3d 30 (1st Dept. 2004). Dr. Losik, Dr. Gondolo and Dr. Khodadadi's reports were all referred to by defendants' doctors and thus, before the Court. Dr. Katz's unaffirmed report dated February 21, 2007 which was made in response to this motion was not referred to by defendants' doctors and is not admissible on this motion. Grasso v. Angerami, *supra*; Pagano v. Kinsbury, *supra*; CPLR 2106.

Plaintiff Lamarri Junious has not submitted any opposition to the motions to dismiss. Accordingly, by failing to respond to this motion and choosing to remain silent, plaintiff Lamarri Junious has failed to meet his burden. That is, he fails to present proof sufficient to raise issues of fact as to whether he sustained a "serious injury" as defined by Insurance Law 5102(d).

Dr. Losik examined plaintiff Johnny Ragoonath on January 30, 2003. Dr. Losik diagnosed plaintiff with cervical and lumbosacral disc herniations and sprains/strains as well as contusions on his left knee and shoulder. However, his

report is devoid of any detail as to what objective tests, if any, he employed in making his diagnosis. Toure v Avis Rent A Car Systems, supra; Dufel v Green, supra.

Dr. Gondolo conducted a physical examination of Ragoonath on February 23, 2003, after reviewing his cervical spine MRI film which revealed a disc herniation at C4-C5. While she cites a general decreased range of motion in his cervical and lumbar spine, she does not provide any details concerning any actual measurements taken of plaintiff's range of motion in either his back, shoulder or knee or how they would compare to a stated norm. Nor does she specify any objective tests she employed in determining that he had restrictions in his range of motion. Further, she does not indicate these claimed restrictions were significant. Her final diagnosis was cervical radiculopathy and cervical spine sprain and strain syndrome. Toure v Avis Rent A Car Systems, supra; Dufel v Green, supra. See Milazzo v Gesner, 33 AD3d 317 (1st Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1st Dept. 2006). Additionally, Ragoonath fails to submit any evidence of objective tests performed contemporaneously with the occurrence of the accident to substantiate his claim. Pommells v. Perez, supra; Toulson v. Young Han Pae, 13 A.D.3d 317 (1 Dept. 2004).

Dr. Khodadadi reviewed plaintiff's left knee and cervical spine MRI films and concluded he suffered a separation involving the medial meniscus, straightening of the cervical spine and narrowing and disc herniation at C4-C-5. Nevertheless, "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 Pommells v Perez, supra at 574; Park v Champagne, 34 AD3d 274, 276 (1st Dept. 2006). Nor has he provided any competent evidence of any restrictions associated with his knee injury. Further, plaintiff fails to present objective medical evidence of a medically determined injury or impairment which caused the alleged limitations in his daily activities. See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, supra.

Accordingly, defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted. As such, the motion of plaintiff Johnny Ragoonath on the counter-claims is denied as moot.

ORDERED that the motion of the defendants for summary judgment dismissing the complaint as against Johnny Ragoonath and Lamarri Junious is granted, and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the defendants dismissing the complaint in its entirety.

This constitutes the Decision and Order of the Court.

FILED
OCT 01 2007
NEW YORK
COUNTY CLERKS OFFICE

Dated: September 24, 2007

Deborah Kaplan

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST