Diouf v Bent Druban Corp.

2007 NY Slip Op 33186(U)

September 24, 2007

Supreme Court, New York County

Docket Number: 0109058/2005

Judge: Deborah A. Kaplan

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SCANNED ON 10/5/2007

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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

AMADOU DIOUF, CHEIKH AHMED SECK, LEE GIBSON and BAN BOURY SOBAR

INDEX NO. 109058/05

MOTION DATE 7-11-07

- v -

MOTION SEQ. NO. 002

BENT DRUBAN CORP. and LUIS MARTINEZ

MOTION CAL. NO. 20

The following papers, numbered 1 to 3, were read on the motion by defendants to dismiss the complaint of plaintiffs' Amadou Diouf and Cheikh Ahmed Seck on the ground that they did not sustain a 'serious injury' within the meaning of Insurance Law § 5102(d).

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

FILED
OCT 05 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ■ No

On September 20, 2004, at approximately 4:35 p.m., a two car collision occurred on the Bruckner Expressway near its intersection with East 136th Street in Bronx County. The collision involved a vehicle owned and operated by plaintiff Amadou Diouff in which plaintiff Cheikh Ahmed Seck was a passenger, as well as a vehicle operated by defendant Luis Rameriez and owned by Bent Druban Corp.. Diouff and Seck 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 the180 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).

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 plaintiffs' verified bill of particulars, their deposition testimony, the affirmed reports of Dr. Irving M. Etkind, a board certified orthopaedic surgeon and Dr. Robert S. April, a board certified neurologist.

Dr. Etkind examined plaintiffs Diouf and Seck on June 8, 2006. He indicates that he reviewed plaintiffs' 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 both plaintiffs had a normal orthopedic examination with no signs of any permanent orthopaedic problems. His diagnosis was resolved soft tissue sprains about the paraspinal area for Diouf and Seck.

Dr. April examined plaintiff Diouf on June 14, 2006 and plaintiff Seck on June 28, 2006. He reviewed their medical records, prior to conducting a physical and neurological examination. In his report, Dr. April concludes that both plaintiffs showed normal ranges of motion in their lumbar spines and upper limbs. He concludes that there are no objective neurological findings and that the accident of record did not produce any neurological diagnosis, disability, limitation or need for further intervention for either man.

Plaintiff Diouf's deposition testimony reveals that he declined being taken to the emergency room after the accident, however, after removing some boxes from his vehicle he drove to the emergency room complaining of pain in his head, neck, knees and lower back. Diouf's testimony also establishes that he was in a motor vehicle accident two years prior to the subject accident and missed approximately one month of work after this accident. Plaintiff Seck also declined to go to the emergency room after the accident, but arrived later complaining of pain to his entire body. He testified that he missed approximately three months of work, however, he was never advised by a doctor to do so.

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 submit their affidavits, the affirmed reports of Dr. Aric Hausknechts, a board certified neurologist, Dr. Tae Y. Hong, a chiropractor and the unaffirmed reports of Dr. Miklos Weinberger, a radiologist. 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 a doctor refers to unaffirmed reports in their affirmation, 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. Hong fist examined plaintiffs on September 22, 2004, where he diagnosed both of them with, *inter alia*, cervical and lumbar sprains/strains. However, his reports are devoid of detail as to what objective tests, if any, he employed in making his diagnosis, what the restrictions were and if the restrictions were significant. Toure v Avis Rent A Car Systems, supra; Dufel v Green, supra. Additionally, plaintiffs fail to submit any evidence of objective tests performed contemporaneously with the occurrence of the accident to substantiate their claim. Pommells v. Perez, supra; Toulson v. Young Han Pae, 13 A.D.3d 317 (1 Dept. 2004).

Dr. Hong conducted a follow-up examinations of Diouf on March 31, 2005 and Seck on April 7, 2005 where he found exactly the same restrictions in their ranges of motion. Their cervical spine extension was decreased from 50 to 30 degrees, right and left side rotation decreased from 80 to 60 degrees, left and right lateral flexion decreased from 40 to 20 degrees and cervical flexion was decreased from 60 to 40 degrees. Their lumbar spine extension was decreased from 30 to 15 degrees, right and left side rotation decreased from 30 to 15 degrees, left and right lateral flexion decreased from 20 to 10 degrees and cervical flexion was decreased from 90 to 60 degrees. His diagnoses remained the same, cervical and lumbar sprains/strains.

Dr. Hausknechts examined plaintiff Diouf on April 10, 2007, where he reviewed his medical records before performing a number of objective tests. These tests, all of which are described in his report, revealed restrictions of range of motion. He diagnosed him with cervical and lumbosacral derangement, disc herniations at L4-5 and associated radiculopathy at L5-S1. Dr. Hausknechts also examined plaintiff Seck on April 10, 2007 where also reviewed his medical records before performing a number of objective tests, which revealed restriction of range

of motion. He diagnosed him with cervical and lumbosacral derangement and disc bulges at C5-6, L3-4 and L4-5.

Dr. Weinberger reviewed plaintiffs MRI films of their lumbosacral spine dated October 28, 2004. Diouf's MRI film reveled a disc herniation at L4-L-5 and Seck's MRI film revealed disc bulges at L3-L4 and L4-L5. 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 Pommels v Perez, supra at 574; Park v Champagne, 34 AD3d 274, 276 (1st Dept. 2006). Further, plaintiffs fail to present objective medical evidence 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. Neither plaintiff was ever directed by a doctor to refrain from work or any other activities.

Accordingly, defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiffs Diouf and Seck did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted.

ORDERED that the motion of the defendants for summary judgment dismissing the complaint as against Diouf and Seck 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 as against Diouf and Seck.

This constitutes the Decision and Order of the Court.

FILED
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Dated: September 24, 2007

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**