Pinkhasov v Weaver
2007 NY Slip Op 33457(U)
October 12, 2007
Supreme Court, New York County
Docket Number: 0117624/2005
Judge: Deborah A. Kaplan
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SCANNED ON 10/24/2007
[* 1]

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

YASHA PINKHASOV

- v -

JUNIOR WEAVER, MYNA TAXI, INC. and GAVRIEL PINKHASOV

INDEX NO. 117524/05

MOTION DATE

MOTION SEQ. NO. 002-003

MOTION CAL. NO. 100

The following papers, numbered 1 to 4, were read on the motion and cross-motion by defendants to dismiss the complaint on the ground that plaintiff 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 ...	1,2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ■ Yes ☐ No

FILED
OCT 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

On February 15, 2005, a two car collision occurred on Queens Boulevard near its intersection with Skillman Avenue in Queens County, involving a vehicle owned and operated by Yasha Pinkhasov and a vehicle operated by defendant Junior Weaver and owned by Myna Taxi, Inc.. 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 defendants now move for summary judgment, pursuant to CPLR 3212 dismissing the complaint in its entirety on the ground that the plaintiff 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 his 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 plaintiff claim 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. See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, supra.

In support of their motion for summary judgment, defendants proffer the pleadings, plaintiff's deposition testimony, the affirmed reports of Dr. Jonathan Lewin, an orthopaedist and Dr. Marianna Golden, a board certified neurologist. Both Doctors Lewin and Golden performed an Independent Medical Examination (IME) on the plaintiff as part of this litigation.

Dr. Lewin examined Pinkhasov on December 6, 2006. He indicates that he reviewed plaintiff's medical records, which included reports and notes from Dr. Teodoro Pang. He also 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 a stated norm. He concludes that plaintiff had a normal orthopedic examination with no objective signs of permanency or disability. His diagnosis was resolved cervical strain/sprain.

Dr. Golden examined Pinkhasov on December 6, 2006. She also reviewed his medical records, which included reports and notes from Dr. Pang, prior to conducting the physical and neurological examination. In her report, Dr. Golden concludes that plaintiff showed normal ranges of motion in his lumbar spine and neck. She states Pinkhasov had a normal neurological examination with no objective signs of permanency, disability, limitation or need for further intervention.

Plaintiff's deposition testimony and affidavit reveal that he was confined to bed for only a few days after the accident. However, he was never advised by a doctor to refrain from such activities.

Accordingly, the movants have met their burden on this motion for summary judgment thereby shifting the burden to the plaintiff. To defeat the motion, the plaintiff must present proof sufficient to raise issues of fact. In opposition to the motion, the plaintiff submits his affidavit, an affirmation and reports by Dr. Pang, and various unaffirmed reports and medical records. 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 defendants 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). In this instance neither of defendants' doctors referred to any of the unaffirmed MRI reports submitted by plaintiff, thus they will not be considered on this motion.

The plaintiff's submissions indicate that Dr. Pang fist examined Pinkhasov on April 4, 2005, almost two months after the subject collision. At that time, he diagnosed him with, *inter alia*, cervical, lumbosacral and psoas sprains/strains. However, his report is 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, the plaintiff 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. Pang conducted follow-up examinations of Pinkhasov until July 5, 2005, where he made the same diagnosis and gave the same undetailed descriptions of plaintiff's ranges of motion. On May 3, 2007, Dr. Pang conducted an examination where he found restrictions in both plaintiff's cervical and lumbar spine extension

With regard to his 90/180 claim, the plaintiff fails to present any 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. According to his own proof, plaintiff never sought any treatment after 2005 and only visited Dr. Pang in 2007 for an exam in response to this motion. This gap of almost two years or, more accurately, a cessation of treatment, further undermines the plaintiff's claim of serious injury under Insurance Law §5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Milazzo v Gesner, supra; Berete v Ford Motor Credit Co., 29 AD3d 452 (1st Dept. 2006); Rubensccastro v Alfaro, 29 AD3d 436 (1st Dept. 2006); Vasquez v Reluzco, supra; Perez v Rodriguez, 25 AD3d 506 (1st Dept. 2006); Baez v Rahamatali, 24 AD3d 256 (1st Dept. 2005); Agramonte v Marvin, 22 AD3d 322 (1st Dept. 2005). These submissions wholly fail to meet the plaintiff's burden in opposition.

Accordingly, 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 granted.

ORDERED that the motion of the defendants for summary judgment dismissing the complaint 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.

This constitutes the Decision and Order of the Court.

FILED
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Dated: October 12, 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**