

Betancourt v Diallo

2007 NY Slip Op 33636(U)

November 2, 2007

Supreme Court, New York County

Docket Number: 0103990/2006

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

MILAGROS BETANCOURT

INDEX NO. 103990/06
~~103300/06~~

MOTION DATE 9-19-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 7

- v -

SAMBA DIALLO, G. TRANSPORTATION

The following papers, numbered 1 to 3, were read on this motion by defendants Diallo and G. Transportation for summary judgment on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102(d).

PAPERS NUMBERED

Notice of Motion – Affidavits – Exhibits

1

Answering Affidavits – Exhibits (Memo)

2

Affirmation In Reply

3

Cross-Motion: Yes No

In this action to recover damages for injuries arising from a motor vehicle accident, the undisputed facts establish that on the evening of August 5, 2005, vehicle driven by defendant Samba Diallo and owned by defendant G. Transportation was involved in a collision with a vehicle owned and operated by plaintiff Milagros Betancourt at the intersection of Seventh Avenue and 113th Street in Manhattan. The plaintiff, Milagros Betancourt suffered various injuries to her back, neck and knee including herniated discs with corresponding restrictions in her ranges of motion and a meniscus tear of her left knee which was operated on in September 2006. She underwent a course of rehabilitative medical treatment but claims to still suffer pain which limits her activities.

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The plaintiff claims that her injuries constitute a "permanent loss or use of a body organ, member, function or system," a "significant limitation of use of a body function or system," and a "medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute his usual and customary daily activities for at least

90 days during the 180 days immediately following the occurrence of the injury or impairment", three categories of "serious injury" as defined by Insurance Law § 5102(d).

The defendants Diallo and G. Transportation now 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 as such any recovery should be limited to that provided by No-Fault insurance.

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).

It is also settled law that a herniated or bulging disc may constitute a serious injury within the meaning of Insurance Law § 5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., 22 AD3d 326 (1st Dept. 2005); Arjona v Calcano, 7 AD3d 279 (1st Dept. 2004). Furthermore, a CT scan or MRI may constitute objective evidence to support subjective complaints. (see Arjona v Calcano, *supra*; Lesser v Smart Cab Corp., 283 AD2d 273 [1st Dept. 2001]), so long as the plaintiff offers "some objective evidence of the extent or

degree of the alleged physical limitations, and their duration, resulting from the disc injury." Arjona v Calcano, supra; see Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., supra; Simms v APA Truck Leasing Corp., 14 AD3d 322 (1st Dept. 2005).

Where, as here, the plaintiff claims serious injury under the "90/180" category of Insurance Law § 5102(d), he or she must (1) demonstrate that his or her 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 plaintiff's daily activities. Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Gaddy v Eyer, 79 NY2d 955 (1992).

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). 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).

The defendants rely on the affirmed reports of Dr. Ebenezer Essuman, a neurologist, Dr. Robert Israel, an orthopedist and Dr. Allen Rothpearl, a radiologist. Dr. Essuman examined Betancourt on January 12, 2007, after reviewing some of her prior medical records. Although he does not state how he evaluated her ranges of motion, he concludes that she has no restrictions. He finds that she suffers from sprains, strains and contusions, all of which have resolved. The affirmed report of Dr. Robert Israel, indicates he examined the plaintiff on January 12, 2007 after reviewing her medical records. Dr. Israel, did not review plaintiff's MRI. He finds she has a full range of motion in her neck and back. He also concludes that her knee has healed and that she had sprains and strains of her back and neck which have resolved.

The defendants also proffer the affirmed report of Dr. Allen Rothpearl, who reviewed the MRI films of her back but did not review any films of her knee. While Dr. Rothpearl concludes that Betancourt suffers from cervical disc degeneration, spondylosis and bulging discs, he finds no evidence of herniated discs and states

that these findings are unrelated to the subject accident. He states that his findings are "most likely" degenerative.

In opposition, the plaintiff submits, inter alia, the affirmations of Dr. Bozena Augustyniak, Dr. Aric Hausknecht, a neurologist, Dr. Luba Karlin, a physiatrist, Dr. Steven Struhl, an orthopedic surgeon and Dr. Jeffrey Chess a radiologist. She also proffers her own affidavit, a portion of her deposition testimony and a letter from her employer, Metropolitan Health Insurance Company confirming her excused absence from work during the period of August 10, 2005 thru October 16, 2005 as disability leave based on medical submissions.

Dr. Augustyniak first examined the plaintiff on August 9, 2005, and last treated her on December 1, 2005. It is Dr. Augustyniak's opinion that as a result of this accident, the plaintiff suffered herniated and bulging discs which caused significant range of motion deficits in her cervical spine. These findings are causally related to the subject accident and he suggests they are permanent. He also diagnosed her with a medial meniscus tear in her left knee. He referred her to Dr. Struhl for a surgical consultation after months of physical therapy failed to provide relief from pain. Dr. Struhl performed arthroscopic surgery on the plaintiff on September 22, 2005.

Dr. Karlin, who examined plaintiff on September 8, 2005 performed a number of objective tests including EMG/NCV testing and determined Erazo had very significant limitations in her ranges of motion in her cervical spine. Dr. Karlin provides actual numeric measurements and compares them to a stated norm. Dr. Hausknecht, who examined plaintiff on June 19, 2007 in response to this motions performed a number of objective tests and measured her ranges of motion with a goniometer. After comparing his measurements to a stated norm he concludes that she suffers a decrease of some 30% in her cervical spine. He finds her to have significant and permanent impairments to her cervical spine as well as her neurological and musculoskeletal systems as a result of the August 5, 2005 collision.

The plaintiff also submits the affirmation of Dr. Jeffrey Chess, a board certified radiologist, who conducted and interpreted plaintiff's MRI films taken on August 15, 2005 and on August 23, 2005. It is Dr. Chess' opinion that the MRI's show herniated discs at C4-C5 impinging on the thecal sac and bulging discs at C5-

C6 and C6-C7 as well as a straightening of the cervical lordosis. Dr. Chess also confirms the oblique tear of the posterior horn of the medial meniscus in Betancourt's left knee. The plaintiff's medical submissions show both contemporaneous and recent medical testing, the objective nature of the tests, what the normal range of motion should be and that the plaintiff's limitations were significant. See Milazzo v Gesner, 33 AD3d 317 (1st Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1st Dept. 2006).

The plaintiff also submits her affidavit in which she details her current difficulties in performing household chores as well as walking, standing and bending. She avers that any cessation of medical treatment was the result of the denial of further medical benefits by No-Fault. See Sepulveda v Reyes, 19 AD3d 297 (1st Dept. 2005). She also avers that she is still suffering knee pain and has consulted Dr. Struhl, who has recommended further surgery.

The plaintiff's proof presents a triable issues of fact as to whether she sustained a serious injury as a result of the August 5, 2005 accident.

Accordingly, the 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.

For these reasons and upon the foregoing papers, it is

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

ORDERED that the parties shall appear for a pre-trial conference on December 13, 2007, at 9:30 a.m. at Part 22, 80 Centre Street, Room 136.

Dated: November 2, 2007

Deborah Kaplan
Deborah Kaplan
J.S.C.

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