

Wendon v Gee-Nee K. Hacking Corp.

2007 NY Slip Op 33640(U)

October 29, 2007

Supreme Court, New York County

Docket Number: 0112695/2005

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

SHERI WENDON

INDEX NO. 112695-2005

MOTION DATE 8-8-07

MOTION SEQ. NO. 001

- v -

GEE-NEE K. HACKING CORP., ZENON ZYGEL
and AMERICAN TRANSIT COMPANY

MOTION CAL. NO. 2

The following papers, numbered 1 to 3, were read on this motion by defendants Gee-Nee K. Hacking Corp. and Zenon Zygel for summary judgment dismissing the complaint on the ground that the plaintiff did not meet the serious injury threshold requirement of Insurance Law § 5102(d).

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

FILED
NOV 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Sheri Wendon did not sustain a "serious injury" within the meaning of Insurance Law §5102(d). The motion is denied for the reasons set forth below.

At approximately 12:35 a.m. on August 17, 2003, as Sheri Wenden was exiting a taxi cab owned by Gee-Nee K. Hacking, the driver Zenon Zygel began to drive off, dragging plaintiff and eventually running over her foot. She was removed by ambulance to New York University Hospital where she was treated, and later released with crutches. She reported to St. Vincent's Hospital Emergency Room three days later and began formal treatment with Dr. Larry Neuman, an orthopedist and sports medicine physician on August 26, 2003. As a result of this incident, plaintiff claims to have sustained a serious injury to her spine, right foot and ankle.

2]
Defendants now move for summary judgment averring that plaintiff has failed to establish 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 "No-Fault threshold" issue (Insurance Law § 5102[d]), he or she bears the initial burden of establishing the absence of a "serious injury" as a matter of law. 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).

Once 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, *supra*; Dufel v Green, 84 NY2d 795 (1995). However, "[w]here a defendant fails to meet his initial burden of establishing a prima facie case that the plaintiff did not sustain a serious injury, it is not necessary to consider whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact." Offman v Singh, 27 AD3d 284, 285 (1st Dept. 2006); see Winegrad v New York Univ. Med Ctr., *supra*.

It is well settled that a herniated or bulging disc may constitute a serious injury within the meaning of Insurance Law §5102(d). See Pommells 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).

The defendants rely upon the report of Dr. Iqbal Merchant, a board-certified neurologist, who examined the plaintiff on February 22, 2007. Despite her complaints of consistent pain and limitations during the examination, Dr. Merchant found that the plaintiff had suffered only sprains of the cervical and lumbar spine, which resolved. Further, that Wendon suffered no restriction in range of motion in any of the affected areas. He however fails to address either the bulging discs, Tarsal Tunnel Syndrome or many of the other injuries claimed in the original as well as the Supplemental Bill of Particulars filed in this case. Nor did he examine any of the plaintiff's prior medical records. See Wadford v Cruz, 35 AD3d 258 (1st Dept. 2006); Nix v Yang Gao Xiang, 19 AD3d 227 (1st Dept. 2005); Dixon v Pena, 5 AD3d 283 (1st Dept. 2004). In fact, the only "medical records" Dr. Merchant reviewed in connection with his examination of Wendon were the Bill of Particulars. Clearly, this legal pleading could in no way ever be construed as a medical record.

The defendant also submits an affirmed report from Dr. Marvin Winnell, an orthopedist who examined Wendon on February 26, 2007. Dr. Winnell also notes that plaintiff complained of pain, tingling and limitations in her right leg and upper right extremities as well as restrictions in mobility. He does list some of the objective tests he employed during his exam and concludes that there are no restrictions in her ranges of motion. Like Dr. Merchant, he finds plaintiff to have suffered from sprains and strains which are now resolved. He also lists the Bill of Particulars as a "medical record" he reviewed. The defendant also submits a two page excerpt from the plaintiff's deposition testimony.

The defendants are not entitled to summary judgment as they failed to present competent evidence that the plaintiff did not sustain a serious injury. Not only is Dr. Winnell's report conclusory and devoid of detail, it wholly fails to address plaintiff's claims of serious injury including the Tarsal Tunnel Syndrome and

and other claimed foot problems and deformities since the accident. Defendants' physicians wholly fail to address plaintiff's objective tests results revealed in her medical records which are indicative of serious injury. See Wadford v Cruz, supra, Diaz v Nunez, 5 AD3d 302 (1st Dept. 2004).

Since the defendant failed to meet its burden in the first instance, the court need not consider the sufficiency of the plaintiff's opposition papers. See, Facci v Kaminsky, 18 AD3d 806 (2d Dept. 2005).

For these reasons and upon the foregoing papers, it is

ORDERED that the defendant's motion for summary judgment is denied. The parties are directed to appear on November 9, 2007, Part 22, 80 Centre Street, Room 136 at 9:30 a.m. for a status conference.

This constitutes the Decision and Order of the Court.

October
Dated: ~~September~~ 29, 2007

FILED
NOV 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

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 REFERENCE