Darbouze v Melendez
2007 NY Slip Op 33647(U)
October 31, 2007
Supreme Court, New York County
Docket Number: 0118245/2004
Judge: Deborah A. Kaplan
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SCANNED ON 11/13/2007

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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

DARLENZY DARBOUZE

INDEX NO. 118245-2004

MOTION DATE 9-26-07

- v -

MOTION SEQ. NO. 004

CARLOS MELENDEZ, JR.

MOTION CAL. NO. 25

KAPLAN, J.:

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

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

At approximately 3:00 a.m. on March 12, 2004, plaintiff avers that as his vehicle was stopped at a red light on East 125th Street near the Franklin Delano Roosevelt Drive in Manhattan, he was struck in the rear by a vehicle owned and operated by defendant Gregory Melendez, Jr.. As a result of this incident, plaintiff claims to have sustained a serious injury to his cervical spine as well as other injuries. Defendant Melendez now moves for summary judgment averring that plaintiff has failed to establish a serious injury as defined by Insurance Law §5102, and as such any recovery should be limited to that provided by No-Fault Insurance.

In support of his motion, the defendant submits the affirmed reports of Dr. Robert Israel, a board certified orthopedist and Dr. Robert April, a board certified neurologist. Each of these doctors, performed a Independent Medical Exam (IME) on the plaintiff as part of this litigation. Defendant also proffers the deposition testimony of the plaintiff, the complaint and various other filings, plaintiff's un--affirmed and uncertified medical records from his prior motor vehicle accidents and a fall down the stairs (where he also injured his back) as well as the Fire Department Emergency Services reports.

Dr. Israel, who performed his medical examination on November 3, 2006, discusses in his report, various observations of the plaintiff's mobility and flexibility

and concludes that his orthopedic exam is within normal limits. He finds that he does not suffer any objective orthopedic disability casually related to the accident. Dr. Israel also reviewed plaintiff's prior medical reports including the MRI and lists the objective tests he employed as well as a stated norm for comparison upon which he concluded that Darbouze had unrestricted ranges of motion.

Dr. April, indicates that plaintiff during his examination on October 25, 2006, exhibits a full and normal range of motion with regard to his upper and lower extremities. Dr. April concludes that plaintiff's exam shows no objective indications of injury. In further support of their motion, the defendants also submit the plaintiff's deposition, discussing his treatment and activities subsequent to the accident. This testimony reveals that the plaintiff did not seek any medical treatment until approximately one month after the accident. At that time he underwent a course of physical therapy and massage which he terminated after a period if two months. This cessation occurred after plaintiff "started to feel better." He also stated he did not miss any time from school or from his job as a personal trainer.

In opposition to the motion, the plaintiff submits two pages of his deposition testimony and a number of unsworn, un-affirmed and un-certified medical records, reports and bills. An inadmissible report provided by plaintiff from Chelsea Village Physical Medicine and Rehabilitation Associates dated May 13, 2004 finds plaintiff has a full range of motion but for a "mild restriction" in the rotation of his cervical spine.

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. 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).

"Where 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., 64 NY2d 851 (1985).

However, 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, 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 vTwentieth Century Fox Film Corp., 3 NY2d 395 (1957). Furthermore, 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).

Here, the defendants have met their initial burden by producing evidentiary proof in admissible form sufficient to show the absence of any material issue of fact. See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, supra. However, plaintiff has completely failed to satisfy his burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact on any of the claimed sections of serious injury pursuant to Insurance Law §5102 (d).

Garner v Tong, 27 AD3d 401 (1st Dept. 2006); Priviteria v Brown, 28 AD3d 733 (2d Dept. 2006); Secore v Allen, 27 AD3d 825 (3rd Dept. 2006); DeJesus-Martinez v Singh, 2007 NY Slip Op 50256U, 2007 N.Y. Misc. Lexis 373 (App. Term 1st Dept. 2007); Martin v Marquez, 2007 NY Slip Op 50214U, 2007 N.Y. Misc. Lexis 333 (App. Term 1st Dept. 2007). The plaintiff's un-affirmed medical reports as well as unsworn medical records lack any probative value. Hernandez v Ramirez, 19 AD3d 192 (1st Dept. 2005); Zeigler v Ramadhan, 5 AD3d 1080 (4th Dept. 2004); James v Yoen Wah Rental, Inc., et al., (1st Dept. 2003). Even if the Court were to consider the plaintiff's medical submissions, they are devoid of any objective medical basis to substantiate the claimed disabilities. Smith v Brito, 23 AD3d 273 (1st Dept. 2005) Picott v Lewis, 26 AD3d 319 (2d Dept. 2006). The un-affirmed reports fail to either set forth a numerical finding of limitation or state any objective tests performed to enable the writer to reach his conclusions. Henry v. Rivera, 34 AD3d 352 (1st Dept. 2006); Nagbe v. Mini Green Hacking Group, 22 AD3d 326 (1st Dept. 2005); Taylor v. Terrigno, 27 AD3d 316 (1st Dept. 2006); Rivera v. Benaroti, 29 AD3d 340 (1st Dept. 2006).

For these reasons and upon the foregoing papers and oral argument held, it is

ORDERED that the defendants' motion for summary judgment is granted in its entirety and the complaint of Darlenzy Darbouze is dismissed in its entirety, and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

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NEW YORK

Dated: October 31, 2007
OCT 3 1 2007

Deborah Kaplan

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

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

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