

**Lewis v Yassir**

2007 NY Slip Op 33709(U)

November 8, 2007

Supreme Court, New York County

Docket Number: 0124691/2002

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN

PART 22

Justice

JOANNE LEWIS

INDEX NO. 124691-2002

MOTION DATE 11/7/07

MOTION NO. 002

MOTION CAL. NO. 68

- v -

YAHYA KASSIM YASSIR and NAGIB ALI ASSAED

KAPLAN, J.:

**FILED**  
NOV. 19 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 Joanne Lewis did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). The motion is granted for the reasons set forth below.

At approximately 3:40 p.m. on November 22, 1999, plaintiff avers that as her vehicle was stopped at a red light at the intersection of Eighth Avenue and St. Nicholas Avenue in Manhattan, she was struck in the rear by a vehicle owned by defendant Nagib Ali Assaed and operated by defendant Yahya Kassim Yassir. As a result of this incident, plaintiff claims to have sustained a serious injury to her cervical spine as well as other injuries. Defendants now move 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 their motion, the defendants submit the affirmed reports of Dr. Andrew Bazos, a board certified orthopedist and Dr. Edward Weiland, 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 complaint and various other filings.

Dr. Weiland, who performed his medical examination on May 25, 2006, discusses in his report, various observations of the plaintiff's mobility and flexibility and concludes that her neurological exam is within normal limits. He finds that she does not suffer any objective disability casually related to the accident. Dr. Weiland

\* 2 ]  
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 Lewis had unrestricted ranges of motion.

Dr. Bazos, indicates that plaintiff during her examination on May 25, 2006, exhibits a full and normal range of motion with regard to her shoulder and spine. Dr. Bazos concludes that plaintiff's exam shows no objective indications of injury.

In opposition to the motion, the plaintiff submits a 1999 letter from her chiropractor, Dr. Lewis Castaldi, of St. Nicholas Physical Medicine & Rehabilitation Services, P.C., which discusses his examination of Lewis approximately one week after the accident. In order to be admissible, this eight year old letter from Dr. Lewis, a chiropractor would have to be in the form of an affidavit. CPLR § 2106, Ramos v Dekhtyar, 301 AD2d 428 (1<sup>st</sup> Dept. 2003). She also includes a series of unsworn, un-affirmed and un-certified medical records, reports and bills, which are also not in admissible form.

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 (1<sup>st</sup> 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 v Twentieth 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 (1<sup>st</sup> Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1<sup>st</sup> 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 her 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 (1<sup>st</sup> Dept. 2006); Priviteria v Brown, 28 AD3d 733 (2d Dept. 2006); Seore v Allen, 27 AD3d 825 (3<sup>rd</sup> Dept. 2006); DeJesus-Martinez v Singh, 2007 NY Slip Op 50256U, 2007 N.Y. Misc. Lexis 373 (App. Term 1<sup>st</sup> Dept. 2007); Martin v Marquez, 2007 NY Slip Op 50214U, 2007 N.Y. Misc. Lexis 333 (App. Term 1<sup>st</sup> 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 (1<sup>st</sup> Dept. 2005); Zeigler v Ramadhan, 5 AD3d 1080 (4<sup>th</sup> Dept. 2004); James v Yoen Wah Rental, Inc., et al., (1<sup>st</sup> 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 (1<sup>st</sup> Dept. 2005) Picott v Lewis, 26 AD3d 319 (2d Dept. 2006). The plaintiff's medical submissions do not show when or what tests were performed, 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 (1<sup>st</sup> Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1<sup>st</sup> Dept. 2006), Henry v. Rivera, 34 AD3d 352 (1<sup>st</sup> Dept. 2006); Nagbe v. Mini Green Hacking Group, 22 AD3d 326 (1<sup>st</sup> Dept. 2005); Taylor v. Terrigno, 27 AD3d 316 (1<sup>st</sup> Dept. 2006); Rivera v. Benaroti, 29 AD3d 340 (1<sup>st</sup> Dept. 2006). Additionally, they fail to provide evidence of objective tests performed contemporaneously with the occurrence of the accident to substantiate plaintiff's claim. Pommells v. Perez, *supra*; Toulson v. Young Han Pae, 13 A.D.3d 317 (1 Dept. 2004). Nor do they address the apparent eight year gap in treatment. A gap or, more accurately, a cessation of treatment, may undermine a plaintiff's claim of serious injury under Insurance Law §5102(d). See Pommells v Perez, *supra*, Mullings v. Huntwork, 26 A.D.3d 214 (1<sup>st</sup> Dept. 2006); Quezada v. Luque, 27 A.D.3d 205 (1<sup>st</sup> 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 Joanne Lewis 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.

Dated: November 8, 2007

*Deborah Kaplan*

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN

J.S.C.

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