

Mei-Yu Chen v Puppe Cab Corp.

2007 NY Slip Op 33798(U)

November 16, 2007

Supreme Court, New York County

Docket Number: 0111272/2005

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

MEI-YU CHEN

INDEX NO. 111272/2005

- v -

MOTION DATE 9-19-07

PUPPE CAB CORP., MYSTIC LEASING
TRANS. CORP., and KAJETAN KWIATKOWSKI

MOTION SEQ. NO. 001

MOTION CAL. NO. 21

The following papers, numbered 1 to 4, were read on this motion by defendants for summary judgment on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102(d), and cross-motion by plaintiff for partial summary judgment on the issue of liability.

PAPERS NUMBERED

Notice of Motion – Affidavits – Exhibits

1

Notice of Cross Motion – Affidavits – Exhibits

2

Answering Affidavits – Exhibits (Memo)

3

Affirmation in Reply

4

Cross-Motion: Yes No

FILED
NOV 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

In this action to recover damages for injuries arising from a motor vehicle accident, the undisputed facts establish that on the morning of December 7, 2004, at the intersection of East 2nd Street and Second Avenue in Manhattan, the plaintiff, a pedestrian was struck by a livery vehicle driven by defendant Kajetan Kwiatkowski and owned by defendant Puppe Cab Corp., as it was making a left turn from Second Avenue. The plaintiff was knocked to the ground and transported by ambulance to the emergency room at Bellevue Hospital. Claiming to have suffered *inter alia* a fracture to the greater tuberosity of her upper right humerus and both herniated and bulging discs, the plaintiff commenced the instant action seeking damages for her injuries. The defendants now move for summary judgment dismissing the complaint on the ground that the plaintiff did not suffer a "serious injury" within the meaning of Insurance Law §5102(d), and as such any recovery should be limited to that provided by "No-Fault" insurance benefits.

There are two motions now before the court: (1) defendants' motion 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 (2) plaintiff's cross-motion for partial summary judgment on the issue of liability.

(1) Motion for Summary Judgment on the Issue of "Serious Injury"

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 includes a claim of "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 Eyler, 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).

Applying these principles to the matter before the court, the defendant's motion must be denied. Even assuming the defendant's met their burden in the first instance, the plaintiff's opposition papers raise triable issues of fact requiring resolution by a jury.

First, Insurance Law § 5102(d) expressly includes "fracture" as a category of "serious injury." Plaintiff has submitted a certified copy of her medical records from Bellevue Hospital which contain a radiological report of the her right shoulder taken on December 7, 2004 indicating a "fracture of the greater tuberosity." She has also submitted copies of her MRI reports which confirm the presence of both herniated and bulging discs. It is well settled law that a herniated or bulging disc may constitute a serious injury within the meaning of the statute. See Pommels v Perez, 4 NY 3d 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 Lesser v Smart Cab Corp., 283 AD2d 273 (1st Dept. 2001)), so long as 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 plaintiff has also submitted an affirmation for Dr. Jay Komerath, who oversaw plaintiff's treatment at New York Comprehensive Medical P.C. during the time period of January 2005 until July 25, 2007 and Dr. Ali Guy who treated plaintiff as well. These reports also confirm the fracture revealed in the Bellevue x-ray films as well as herniated and bulging discs as revealed in MRI films taken on January 17th and 20th, of 2005. They also show restrictions in Chen's range of motion in her neck and back. Dr. Komerath further limited plaintiff's daily activities immediately following the collision. The reports casually relate her injuries and subsequent restrictions to the subject accident. Additionally, plaintiff submits the affirmed report of Dr. John Rigeny, a radiologist who administered and interpreted her MRI films.

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 in its entirety.

(2) Cross-Motion for Summary Judgment on the Issue of Liability

The plaintiff cross-moves for partial summary judgment on the issue of liability as against both defendants. That motion must be granted since the plaintiff has demonstrated, by proof in admissible form, the absence of any triable issues of fact and the right to judgment as a matter of law. 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. In support of her motion, the plaintiff proffers the pleadings, the New York City Police report prepared in conjunction with this accident, her deposition testimony and the deposition testimony of defendant Kwiatkowski. These submissions reveal that as she was crossing East Second Street, within the designated pedestrian crosswalk, and with the light she was struck by the defendant's vehicle which was making a left turn from Second Avenue. Chen indicated she looked for on-coming traffic before leaving the curb and proceeding across the intersection. When she was only partially across, she was struck by the defendant. Defendant in his deposition indicates he did not see the plaintiff until the contact occurred, but that she was crossing within the crosswalk and the intersection was well lit. Although, admitting there was contact between the cab and Ms. Chen, he argues that Ms. Chen touched the cab, the cab

did not touch her. He further testified that as a result of the contact, plaintiff's body rolled across the hood of his car before hitting the pavement. After the accident, members of Ms. Chen's family arrived on the scene and remained until she was transported by ambulance to the hospital.

Once the plaintiff met her burden, it became incumbent upon the defendants to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. The defendants' papers in opposition consist only of an attorney's affirmation, with references to the deposition transcripts of plaintiff and defendant. Of course, affirmations of attorneys who claim no personal knowledge of the accident are without probative value on motions such as these. See Zuckerman v City of New York, supra at 563; Johannsen v Rudolph, 34 AD3d 338 (1st Dept. 2006); Diaz v New York City Transit Authority., 12 AD3d 316 (1st Dept. 2004). They may, however, serve as vehicles for submitting documentary evidence or other proof in admissible form as an attachment. See Alvarez v Prospect Hospital, supra at 325; Zuckerman v City of New York, supra at 563. The defendant argues that since Chen was clothed in blue jeans and a black jacket at the time of the accident, she may have contributed to the accident. Counsel also argues that the cab may not actually have hit Chen, but a close reading of Kwiatkowski's deposition transcript reveals that argument is without merit. Contrary to the defendants' assertion, Kwiatkowski's testimony does not establish a non-negligent explanation for the collision to rebut the presumption of negligence.

On summary judgment, the court's role is one of issue identification, not issue determination. It is undisputed that a pedestrian has the right of way when crossing within the crosswalk. See Pire v Otero, 123 AD2d 611 (2d Dept 1986). The defendant driver Wallerstein also has a common-law duty to see that which he should have seen through the proper use of his senses. Domanova v State of New York, 2007 NY Slip Op. 5454 (2d Dept 2007); Larsen v Spano, 35 AD3d820 (2d Dept 2006). However, the law imposes a duty upon the pedestrian not to leave the curb or other place of safety and enter the path of the vehicle when it is so close that it is impractical for the driver to yield. Rudolph v Kahn, 4 AD3d 408 (3d Dept 2004). Here, the plaintiff indicated that she checked for on-coming traffic before leaving the curb and traveling across East Second Street. She walked within the pedestrian crosswalk and crossed with the green light. Her account is corroborated by the defendant's own deposition testimony. In response, the

defendants have not presented any issues of fact to be resolved by a jury on the issue of liability.

Accordingly, the plaintiff's cross-motion for summary judgment on the issue of liability is granted and, in light of the disposition of the defendants' motion for summary judgment, the matter shall be set down for a trial on the issue of damages in regard to the remaining causes of action of the complaint.

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 cross-motion by the plaintiff for partial summary judgment on the issue of liability is granted, and it is further,

ORDERED that the parties shall appear for a compliance conference on December 18, 2007, at 9:30 a.m. at Part 22, 80 Centre Street, Room 136.

Dated: November 16, 2007

FILED
NOV 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

Deborah Kaplan

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE