

Yamamoto v Carled Cab Corp.

2007 NY Slip Op 33956(U)

November 27, 2007

Supreme Court, New York County

Docket Number: 0114653/2004

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

YUKO YAMAMOTO

INDEX NO. 114653-04

- v -

MOTION DATE 8-29-07

MOTION SEQ. NO. 006

CARLED CAB CORP. and TAHA T.M. HEWEDY

MOTION CAL. NO. 134

The following papers, numbered 1 to 5, were read on this motion by the defendants for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d), and cross-motion by the plaintiff for partial summary judgment on the issue of liability.

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

Notice of Cross-Motion - Affidavits — Exhibits (and Memo

Affirmation In Opposition

Replying Affidavits (Reply Memo)

Cross-Motion: Yes No

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1</u>
Notice of Cross-Motion - Affidavits — Exhibits (and Memo	<u>2</u>
Affirmation In Opposition	<u>3</u>
Replying Affidavits (Reply Memo)	<u>4,5</u>

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This is an action to recover damages for injuries allegedly sustained in motor vehicle accident. At approximately 8:35 a.m on November 20, 2001, the plaintiff, a registered nurse, was walking to work when she was struck and knocked to the ground by a taxi driven by defendant Taha Hewedy and owned by defendant Carled Cab Corp.. The plaintiff was crossing Park Avenue at the corner of East 36th Street, in the crosswalk, and the taxi was turning left from 36th Street into the northbound lanes of Park Avenue. She was transported to a hospital by ambulance and released the same day. She missed about ten days of work and thereafter underwent a three-year course of chiropractic treatment addressed to her continuing neck pain and other complaints.

There are two motions now before the court - (1) the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law §5102(d); and (2) the plaintiff moves 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. If the moving party makes the requisite showing, the burden 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, 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).

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).

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. 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).

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 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).

In support of their motion, the defendants submit the pleadings, including the Bill of Particulars, and the affirmed reports of Dr. Peter Godsick, a board certified orthopedist, and Dr. Jerome Block, a board certified neurologist. Both doctors examined the plaintiff at the defendants' request in August or September of 2006 and both found normal functioning, no deficits and both conclude that the plaintiff requires no further treatment.

Dr. Godsick noted that the plaintiff complained of intermittent neck pain which radiated into the right shoulder area. He found tenderness and complaints of discomfort on rotation to the right, as well as a mild flattening of the lordotic curve, but no other abnormalities. However, while it states that he found normal range of motion in the shoulders, Dr. Godsick's report fails to state which, if any, objective tests he employed in reaching that conclusion. See Palladino v Antonelli, 40 AD3d 944 (2nd Dept. 2007); Park v Champagne, 34 AD3d 274 (1st Dept. 2006); Taylor v Terrigno, 27 AD3d 316 (1st Dept. 2006); Nagbe v Mini Green Hacking Corp., *supra*. Nor does Dr. Godsick address the MRI of the plaintiff's cervical spine, taken on May 20, 2006, which shows disc herniations and bulges. See Wadford v Gruz, 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 his report, Dr. Block states that he reviewed the May 2006 MRI and reports of the plaintiffs' chiropractor, Dr. Handt, and physiatrist, Dr. Sorin. Dr. Block concluded that the plaintiff's neurological examination was "entirely normal." He notes that the May 2006 MRI shows "small central disc herniations" at C5-6 and C4-5, and minor disc bulging at C3-4 and C4-5. Dr. Block further states, however, that even though she complained of cervical pain on extension maneuvers and right sided neck and shoulder pain and stiffness, the plaintiff "shows full and painless spinal movements" and "normal cervical range of motion without muscle spasm." Dr. Block states that the plaintiff's neck and shoulder complaints and the tingling of her right small and ring fingers suggest "C8 root problem" but that "the changes noted are common even without history of trauma." Dr. Block concludes that these changes "are not associated with any neurological problems and would not be responsible for" the plaintiff's subjective complaints.

Even assuming that the defendants' met their burden on their motion by way of Dr. Block's report, the plaintiff's opposition papers present factual issues, at least as to whether she sustained a "significant limitation of use of a body function or system" (Insurance Law § 5102[(d)]). While the plaintiff's proof may not ultimately suffice to meet her burden of proof at trial, it is sufficient to defeat the defendants' motion.

The plaintiff submits, *inter alia*, an affirmation and report of Dr. Roman Sorin, who states that on January 25, 2002, approximately two months after the accident, he conducted a physical examination of the plaintiff and an EMG and nerve conduction velocity study, which is used to assess the health of muscles and the nerves that control them. He found "significant limitation in using her cervical dorsal lumbosacral spine during flexion extension, lateral bending and rotation." Dr. Sorin found "restricted range of motion in the neck and lumbosacral spine due to pain and stiffness" and "pain and tenderness in cervical paraspinals radiating to both shoulders." He concluded that, as a result of the accident, the plaintiff suffered from "vertebral derangement due to spinal injury" and radiculopathy at C4-5, which caused weakness and pain that radiated from the neck. Dr. Sorin concluded that these conditions, which are permanent, were caused by the accident, since the plaintiff was symptom free prior to the accident.

The plaintiff also submits an affidavit, report and treatment records of Dr. Jay Handt, her chiropractor, who treated her approximately two times per week from January 2002 to February 2005. Dr. Handt's report of his January 25, 2002, examination of the plaintiff states that she suffered "vertebral derangement due to spinal injury," "strain and sprain" of the spine and "cervical radiculopathy at C4-5." He opined that she suffered from restricted range of motion in the neck and lumbosacral spine due to pain and stiffness. Upon his examination of the plaintiff in March 2005, Dr. Handt found "vertebral subluxation complex in the cervical, thoracic and lumbar spine" with nerve root injury, cervical radicular involvement and cervical muscular deconditioning syndrome. In his affidavit, dated May 23, 2007, Dr. Handt states that he conducted a total of three trials for cervical range of motion and found average deficits ranging from 11.6% to 54.8%, which are significant. Dr. Handt opines that the injuries were caused by the accident and were permanent. The submissions from Dr. Sorin and Dr. Handt sufficiently address the defendants' contention of lack of contemporaneous range of motion testing. Compare Lopez v Simpson, 39 AD3d 420 (1st Dept. 2007); Atkinson v Oliver, 36 AD3d 552 (1st Dept. 2007).

The plaintiff's papers also include an affirmation and report of Dr. Hal Gutstein, a board certified neurologist who examined the plaintiff on April 20, 2007. Dr. Gutstein found that the plaintiff sustained central disc herniation at C6-7, bulging discs at C3-4 and C4-5, nerve root dysfunction at C4-5 and radiculopathy. After conducting goniometer range of motion testing, Dr. Gutstein found deficits ranging from 22% to 40%. It was Dr. Gutstein's opinion that the plaintiff's injuries were caused by the subject accident, since she had no symptoms prior to the accident and the injuries were consistent with her account of the collision. According to Dr. Gutstein, the plaintiff was likely to suffer

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of motion testing, Dr. Gutstein found deficits ranging from 22% to 40%. It was Dr. Gutstein's opinion that the plaintiff's injuries were caused by the subject accident, since she had no symptoms prior to the accident and the injuries were consistent with her account of the collision. According to Dr. Gutstein, the plaintiff was likely to suffer posttraumatic arthritis of the deranged portions of the spine and even further disc herniation, requiring continued treatment.

Accordingly, the defendants' 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.

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

In her cross-motion, the plaintiff contends that she is entitled to summary judgment on the issue of liability since the deposition testimony of the parties establishes, as a matter of law, that the defendants were solely liable for the accident.

The plaintiff's deposition testimony showed that she was crossing Park Avenue in the crosswalk from the northeast corner heading west toward the median divider with the traffic light in her favor when she suddenly noticed the defendants' taxi and another taxi turning left onto Park Avenue. The defendants' taxi struck her on her left side and she fell down to the pavement on her right side. Defendant Hewedy testified that he turned left from 36th Street onto Park Avenue with a green light and was traveling about 5 miles per hour when his taxi struck the plaintiff in the righthand lane of Park Avenue. According to Hewedy, his view of the northeast corner was not obstructed but he did not see the plaintiff until just before he struck her. He further testified that the plaintiff was in the crosswalk when he struck her.

By this proof, the plaintiff has establishing a prima facie case of negligence on the part of Hewedy. In opposition, the defendants have failed to raise any factual issue requiring a trial. The defendants merely argue, in essence, that the plaintiff, as a long-time resident of Manhattan, could have acted more prudently in crossing the street. However, the defendants do not suggest any particular actions or precautions the plaintiff could have taken to avoid being struck by their taxi. In any event, both Vehicle and Traffic Law § 1111(a)(3) and New York City Traffic Regulations § 30(a) (11 RCNY 4-03[a][1][II]) grant the right of way to pedestrians walking within a crosswalk with a green light in their favor.

See Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438 (2007); Conradi V New York City Transit Authority, 249 AD2d 436 (2nd Dept. 1988); Brito v MBSTQA, 188 AD2d 253 (1st Dept. 1992). An unexcused violation of a statutory standard of care constitutes negligence per se. See Martin v Herzog, 228 NY 164 (1920); Holleman v Miner, 267 AD2d 867 (3rd Dept. 1999); Weiser v Dalbo, 184 AD2d 935 (3rd Dept. 1992); Cordero v City of New York, 112 AD2d 914 (2nd Dept. 1985); Pattern Jury Instructions 2:26 (1999). Moreover, a driver is negligent if he or she has failed to see that which, through the proper use of senses, should have been seen. See Berner v Koegel, 31 AD3d 591 (2nd Dept. 2006); Breslin v Rudden, 291 AD2d 471 (2nd Dept. 2002), *lv denied* 98 NY2d 605 (2002). It is not disputed that at the time of the accident, the plaintiff was lawfully within the crosswalk with the traffic light in her favor, and defendant Hewedy has proffered no excuse for failing to properly observe the plaintiff and yield the right of way.

Accordingly, the plaintiff's cross-motion for summary judgment on the issue of liability must be granted.

For these reasons and upon the foregoing papers, it is,

ORDERED that the motion by the 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 at Part 22, 80 Centre St. Room 136, on December 11, 2007, at 9:30 a.m. for a pre-trial conference, as previously scheduled.

Dated: November 27, 2007

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 DEC 07 2007
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Deborah Kaplan

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