

Cardona v Martinez

2007 NY Slip Op 34538(U)

September 27, 2007

Supreme Court, New York County

Docket Number: 104760-2005

Judge: Deborah A. Kaplan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

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

RICHARD CARDONA

INDEX NO. 104760-2005

FILED

MOTION DATE 8-1-07

- v -

OCT 05 2007

MOTION SEQ. NO. 004

MOTION CAL. NO. 25

OLGA M. MARTINEZ and JOAN DE LA ROSA
the name of the driver currently unknown
MOTOR VEHICLE INDEMNIFICATION CORPORATION

KAPLAN, J.:

In this personal injury action, the defendant Olga M. Martinez moves for summary judgment dismissing the complaint on the ground that the plaintiff Richard Cardona did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). Defendant, Motor Vehicle Indemnification Corporation (MVIAC) cross-moves, seeking the same relief. The motions are denied for the reasons set forth below.

At approximately 10:00 p.m. on June 5, 2002, as he was returning home from work, plaintiff Anthony Cardona was struck by a motor vehicle at the intersection of Audubon Avenue and West 168th Street in Manhattan. After the car struck Mr. Cardona, it remained briefly at the scene and then left. A witness provided the police with a license plate number, which was traced to defendant Olga M. Cruz. As a result of this incident, plaintiff claims to have sustained a serious injury to his back, leg and jaw, including but not limited to herniated and bulging discs, radiculopathy, head injury and TMJ syndrome. Defendant Martinez, 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. Defendant MVIAC, cross-moves seeking the same relief and relying upon the submissions of Martinez.

In support of his motion, the defendant submits the affirmed reports of

RECEIVED
OCT 03 2007
IAS MOTION
SUPPORT OFFICE

MVAI

Dr. Daniel Feurer, board certified neurologist, Dr. Howard Baruch, board certified orthopedist and Dr. Harvey Lefkowitz, board certified radiologist. She also includes the pleadings as well as the plaintiff's deposition testimony.

Dr. Feurer performed an Independent Medical Examination of the plaintiff on May 8, 2006, as part of this litigation. Prior to conducting his examination he reviewed plaintiff's medical records including the MRI film. In his report he discusses various observations of the plaintiff's mobility and flexibility. Dr. Feurer indicates that he found no restrictions with regard to movement of plaintiff's cervical spine, in fact he claims that flexion measures at forty-five degrees with a stated norm of forty-five, and that shoulder rotation is seventy degrees with a stated norm of seventy. However, the report is devoid of any information about any objective tests he employed or how he reached his conclusions. Dr. Baruch, conducted his examination of the plaintiff on May 15, 2006. Dr. Baruch also claims the plaintiff has no restrictions in his ranges of motion, however he indicates that cervical flexion is at sixty degrees with a stated norm of sixty and shoulder rotation is at one hundred and thirty degrees, the stated norm. Dr. Baruch also fails to indicated what objective tests he used in reaching his conclusions. These two reports read together indicate striking differences in both the measurements ascribed to the plaintiff's ranges of motion taken just one week apart as well as the stated norm cited by each expert.

Dr. Berg reviewed the MRI films of the plaintiff's spine. He disagrees with the conclusions of plaintiff's radiologist and finds no evidence of a herniated disc. He does however diagnosis a bulge at L5-S1 with dehydration. He avers that this condition is degenerative and not the result of trauma.

In opposition to the motion, the plaintiff submits the affirmed reports of Dr. Mark Kostin, who examined him on May 9, 2007, the unaffirmed reports of Dr. Roman Tabakman, Dr. Noel Worrel Howell, Dr. Baktash Booterabi, Dr. Jeffrey Chess, Dr. Michael Lisogorsky and Dr. Ravindra Ginde. Unaffirmed medical reports are normally not admissible (Grasso v Angerami, 79 NY2d 813 (1991); Pagano v Kinsbury, 182 AD2d 268 (2d Dept. 1992); CPLR 2106), however if the defendant's refer to the plaintiff's unaffirmed reports in their motion for summary judgment, the reports are now properly before the Court. Bent v Jackson, 15 AD3d

46 (1st Dept. 2005); Brown v. Achy, 15 AD3d 30 (1st Dept. 2004). Dr. Kostin's report lists the objective tests he used during the examination as well as detailing the restrictions in Cardona's ranges of motion. He also gives examples of how these restrictions have impaired plaintiff's ability to stand, sit and bend among other activities. Dr. Kostin finds the restrictions to be permanent and casually relates the plaintiff's injuries to the June 5, 2002 accident. The plaintiff also proffers his own affidavit which describes the subject accident, his medical treatment thereafter as well as his continuing limitations with regard to his daily activities.

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 plaintiff's 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 (1st Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1st Dept. 2004).

Here, the defendants failed to meet 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. Specifically, the affirmed reports of Dr. Feurer and Dr. Baruch fail to set forth the objective test or tests relied upon in reaching their conclusions. Madatov v Madatov, 27 AD3d 531 (2d Dept 2006); Vasquez v Reluczo, 28 AD3d 365 (1st Dept. 2006). Remarkably, each defense expert utilizes a different stated norm in measuring the plaintiff's ranges of motion and each one reached markedly different results despite the examinations occurring close in time. The defendants submissions which are replete with inconsistencies themselves raise issues of fact to be submitted to a jury. As such, it is not necessary to consider the plaintiff's proof presented in opposition to the motion. See Facci v Kaminsky, 18 AD3d 806 (2d Dept. 2005). However, were the Court to consider the plaintiff's papers, it finds them to have satisfied any burden.

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is denied in its entirety.

The parties are directed to appear for a status conference, Part 22, 80 Centre Street, New York, New York, Room 136 on October 25, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.

FILED
OCT 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: September 27, 2007

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