

<b>Spellman v Luso Taxi Car Serv. of Ryebrook, N.Y.</b>
2008 NY Slip Op 30587(U)
February 25, 2008
Supreme Court, New York County
Docket Number: 0106853/2006
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

SADIA SPELLMAN

INDEX NO. 106853-2006

- v -

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

LUSO TAXI CAR SERVICE OF RYEBROOK, N.Y.,  
MYRIAM R. ROMERO and IVONNE SAEZ

MOTION CAL. NO. FILED

KAPLAN, J.:

MAR 03 2008

In this personal injury action, the defendants Myraim R. Romero and Ivonne Saez move for summary judgment dismissing the complaint on the ground that the plaintiff Sadia Spellman 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 10:50 a.m. on February 25, 2005 as the plaintiff exited a livery vehicle in the driveway of 55 Avon Circle, Ryebrook, New York, her foot became tangled in the car's seatbelt. She fell forward, struck the ground and became injured. As a result of this incident, plaintiff claims to have sustained a serious injury *inter alia* to her cervical and lumbar spine as well as her right shoulder and knee. Defendants now move for summary judgment arguing 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. Edward Weiland, a board certified neurologist, Dr. Marc Brown a radiologist and Dr. Andrew Bazos, a board certified orthopedist. Defendants also proffer a portion of the deposition testimony of the plaintiff, the complaint and various other filings.

Dr. Weiland, who performed his medical examination on April 12, 2007, discusses in his report, various observations of the plaintiff's mobility and flexibility and concludes that her neurological exam is within normal limits. He indicates that her ranges of motion are full and without restriction as compared to a stated norm. He concludes that she does not suffer any objective disability casually related to the accident and has only resolved sprains and resolved head trauma. Dr. Bazos, who also examined plaintiff April 12, 2007 indicates that Spellman has a full range of motion. He measured the ranges of motion of her spine as well as her knees and shoulders and cites no evidence of any claimed impairment. Dr. Brown who reviewed her cervical and lumbar films finds no evidence of herniations and notes that her spine alignment is normal. He does indicate there is

some very minor disc bulging which he concludes is degenerative. With regard to the MRI of her right knee performed on March 23, 2005, some thirteen months after the collision, it shows only mild degenerative changes unrelated to the accident, and no tears of the ligaments or tendons.

The plaintiff's deposition testimony reveals that after the accident she completed her work day visiting home bound elderly patients to check their medical status. She then presented at the local police department and asked that they call her an ambulance to transport her to a hospital. She was treated and released at Greenwich Hospital.

In opposition to the motion, the plaintiff first claims that the defendants did not meet their initial burden in that neither of their physicians examined her knee. That is belied by defendants' submissions which indicate that Dr. Bazos examined her knee and Dr. Brown reviewed the MRI of it. Spellman submits an affirmation from Dr. David Delman, who evaluated her on July 12, 2007 and a report affirmed by Dr. Joyce Goldenberg who performed a number of tests on plaintiff including EMG/NCV tests. Dr. Goldenberg also certifies her notes from plaintiff's sessions with her on February 23, 2006, March 14, 2006, and May 1, 2006. While both Dr. Delman and Goldenberg refer to restrictions in Spellman's knee, neither examined her close in time to the subject accident. From these submissions it appears she first was evaluated by Dr. Goldenberg almost a year later. She has also submitted a MRI report of her knee affirmed by Dr. Thomas Kolb taken on March 23, 2006 which indicates a torn anterior cruciate ligament in her right knee. However he does not casually relate this injury to the accident, nor does Dr. Delman or Dr. Goldenberg. The plaintiff's affidavit indicates that since the accident she has had trouble walking up and down stairs and lifting patients or heavy objects.

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 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 (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); Secore 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 very modest submissions tendered by the plaintiff are devoid of information as to substantiate her claim of a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which made up his usual and customary daily activities for ninety of the one hundred and eighty days after the accident. Rodriguez v Virga, 24 AD3d 650 (2d Dept. 2005). In fact, the plaintiff’s medical submissions, 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). With regard to plaintiff’s medical submissions,

other than her most recent examination, they do not show if, 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 if any 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). Nor has the plaintiff offered any contemporaneous findings of a loss of range of motion to her cervical and lumbar spine, nor her knee and shoulder as alleged. Norona v. Manhattan & Bronx Surface and Tr. Operating Auth., 40 AD3d 480 (1<sup>st</sup> Dept. 2007); Jiminez v Rojas, 26 AD3d 256 (1<sup>st</sup> Dept. 2006). Nor do they adequately address the apparent 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 Pommels v Perez, *supra*, Gonzalez v Beale, 37 AD3d 278 (1<sup>st</sup> Dept. 2007); Navedo v Jaime, 32 AD3d 788 (1<sup>st</sup> Dept. 2006); 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 Myriam R. Romero and Ivonne Saez's motion for summary judgment are granted in their entirety and the complaint of is dismissed with regard to those defendants only , and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly with regard to defendants Myriam R. Romero and Ivonne Saez.

This constitutes the Decision and Order of the Court.

Dated: February 25, 2008

**FILED**

MAR 03 2008

NEW YORK  
COUNTY CLERK'S OFFICE

*Deborah Kaplan*

Deborah A. Kaplan J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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