

Hamed v MH Tr. Inc.
2008 NY Slip Op 31226(U)
April 23, 2008
Supreme Court, New York County
Docket Number: 0112613/2006
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

MOHAMED HAMED

INDEX NO. 112613-2006

MOTION DATE 4-23-08

- v -

MOTION SEQ. NO. 001

MH TRANSIT INC. and FERUZ A. KHAN

MOTION CAL. NO. 67

KAPLAN, J.:

In this personal injury action, 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 Insurance Law 5102(d). The motion is denied for the reasons set forth below.

On June 17, 2004, plaintiff Mohamed Hamed a pedestrian, lawfully crossing at the intersection East 92nd Street and First Avenue in Manhattan was struck by a vehicle owned by MH Transit Inc. and operated by Feruz A. Khan. As a result of this incident, plaintiff claims to have sustained serious injury to his lumbar spine, cervical spine, shoulder and knee. Defendants MH Transit and Khan, 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 only the affirmed report of Dr. Michael Rafiy, a board certified orthopedist, who conducted an examination of the plaintiff on July 26, 2007 and a small portion of the plaintiff's deposition testimony.

Dr. Rafiy, in his report, discusses various observations of the plaintiff's mobility and flexibility and concludes that while plaintiff exhibits significant restrictions in the range of motion in both his neck, cervical and lumbar spines, they are self-imposed. Dr. Rafiy does not disclose any what objective tests if any he employed during his examination. Nor did Dr. Rafiy review any of plaintiff's prior medical records including an MRI report which revealed injury to his spine among

FILED

APR 28 2008

COUNTY CLERK'S OFFICE
NEW YORK

other diagnostic tests.¹ Finally, Dr. Rafiy, among other defects in his report misstates the facts of this case including asserting Mr. Hamed was a passenger in a cab which was involved in an accident. In fact, Mr. Hamed was a pedestrian struck by defendant's cab.

In opposition to the motion, the plaintiff submits the MRI report of Dr. Michael L. Amoroso, a radiologist, who interpreted plaintiff's MRI films of his spine. Dr. Wasserman concludes that plaintiff has suffered a disc injuries at C4-5, C5-6, L3-4 and L5-S1. The plaintiff also offers an affidavit from Dr. Alfred A. Mauro. This report details his examinations of the plaintiff, the treatment he rendered and the objective tests he used in determining that Hamed suffered significant restrictions in his ranges of motion as well as his ability to perform his daily activities. Dr. Mauro also casually relates his findings to the accident and states the disabilities are permanent.

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).

¹ Dr. Rafiy does indicate that he would like to review the plaintiff's prior medical reports to "see if they effect his findings". (Defendant's Exhibit D).

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. The affirmed report of Dr. Rafiy fails to set forth the objective test or tests relied upon in reaching his conclusions. Cabellero v Fev Taxi Corp., __AD3d__, 2008 NY Slip Op. 2219(1st Dept. 2008), Paterson v Arturo Rivera, __AD3d__, 2008 Slip Op. 2038 (1st Dept. 2008); Madatov v Madatov, 27 AD3d 531 (2d Dept 2006); Vasquez v Reluczo, 28 AD3d 365 (1st Dept. 2006); Nix v Xiang 19 AD3d 227 (1st Dept. 2005). Further, he does not address the objective findings of plaintiff’s MRI which showed multiple disc bulges, herniations as well as other injuries. See Nix v Xiang, supra; Offerman v Singh, 27 AD3d 284 (1st Dept. 2006). Furthermore, Dr. Rafiy does find significant restrictions in the plaintiff’s ranges of motion. 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).

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is denied in its entirety. CONFERENCE ON MAY 16, 2008 DEN DEN. 103, 50 CENTRE ST. 9:30 AM.

This constitutes the Decision and Order of the Court.

FILED
APR 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 23, 2008

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