

**Cruz v White Pidgeon Express Cab Corp.**

2008 NY Slip Op 31228(U)

April 20, 2008

Supreme Court, New York County

Docket Number: 0114843/2006

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

**RAMON CRUZ**

INDEX NO. 114843-2006

MOTION DATE 4-16-08

MOTION SEQ. NO. 001

- v -

**WHITE PIDGEON EXPRESS CAB CORP. and  
SYED ZIA**

MOTION CAL. NO. 

**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 April 25, 2005, plaintiff Ramon Cruz while driving near the intersection of Eighth Avenue and West 42<sup>nd</sup> Street in Manhattan was involved in a collision with a vehicle owned by White Pigeon Express Cab Corp. and operated by Syed Zia. As a result of this incident, plaintiff claims to have sustained serious injury to his lumbar spine, thoracic spine, shoulder and elbow. Defendants White Pidgeon and Zia, 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. S.W.Bleifer, a board certified orthopedist, who conducted an examination of the plaintiff on April 24, 2007 and a small portion of the plaintiff's deposition testimony.

Dr. Bleifer, in his report, discusses various observations of the plaintiff's mobility and flexibility and concludes that he has resolved sprains of the cervical spine and shoulder. While failing to disclose any actual measurements taken or any objective tests employed, Dr. Bleifer concludes that all of plaintiff's ranges of motion are normal. Dr. Bleifer also did not review any of plaintiff's prior medical

records including an MRI report which revealed injury to his lumbar spine at L4-5 and an EMG/NCV report among other diagnostic tests. Dr. Bleifer does indicate that he would like to review any of the plaintiff's prior medical reports to "see if they impact his findings". (Defendant's Exhibit D)

In opposition to the motion, the plaintiff submits the MRI report of Dr. Ahmed Wasserman, a radiologist, who interpreted plaintiff's MRI films of his spine as well as his shoulder. Dr. Wasserman concludes that plaintiff has suffered a disc injury at L4-5. The plaintiff also offers affirmed reports from Dr. Aric Hausknecht, and certified reports from Dr. Tatanya Katsman. Each of these physicians details their examinations of the plaintiff, the treatment they rendered and the objective tests they used in determining that he suffered significant restrictions in his ranges of motion as well as his ability to perform his daily activities. Each physician also casually relates their 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 (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 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 report of Dr. Bleifer fails to set forth the objective test or tests relied upon in reaching his conclusions, or what the actual range of motion was. Cabellero v Fev Taxi Corp., \_\_ AD3d \_\_, 2008 NY Slip Op. 2219(1st Dept. 2008), Paterson v Arturo Rivera, \_\_ AD3d \_\_, 2008 Slip Op. 2038 (1<sup>st</sup> Dept. 2008); Madatov v Madatov, 27 AD3d 531 (2d Dept 2006); Vasquez v Reluczo, 28 AD3d 365 (1<sup>st</sup> Dept. 2006); Nix v Xiang 19 AD3d 227 (1<sup>st</sup> Dept. 2005). Further, he does not address the objective findings of plaintiff's MRI which showed a disc bulge as well as other injuries. See Nix v Xiang, supra; Offerman v Singh, 27 AD3d 284 (1<sup>st</sup> Dept. 2006). 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.

This constitutes the Decision and Order of the Court.

**FILED**  
APR 28 2008  
NEW YORK  
COUNTY CLERKS OFFICE

Dated: April 20, 2008

*Deborah Kaplan*  
Deborah A. Kaplan / S.C.  
**DEBORAH A. KAPLAN**  
J.S.C.

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