

**Carr v Rosen**

2008 NY Slip Op 31357(U)

May 7, 2008

Supreme Court, New York County

Docket Number: 0102597/2006

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

FAYRANDUS CARR

INDEX NO. 102597/06

- v -

MOTION DATE 4-9-07

LAURA ROSEN

MOTION SEQ. NO. 003

MOTION CAL. NO. 19

The following papers, numbered 1 to 5, were read on this motion by the defendant 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

Affirmation in Opposition

Replying Affidavits (Reply Memo)

Cross-Motion:  Yes  No

**FILED**  
MAY 14 2008  
COUNTY CLERK'S OFFICE  
NEW YORK  
PAPERS NUMBERED  
1  
3  
4, 5

This is an action to recover damages for personal injuries allegedly sustained in a motor vehicle accident wherein the plaintiff, a pedestrian, was struck by the defendant's vehicle while in the crosswalk at the intersection of Tenth Avenue and West 50<sup>th</sup> Street in Manhattan on October 19, 2004. At her deposition, the plaintiff testified that she had a "walk" sign in her favor and was in the middle of the street when struck. The defendant, who was turning left onto Tenth Avenue, testified that she did not see the plaintiff until the moment of impact, and did not know if there were any crosswalks at that intersection.

There are two motions now before the court - (1) the defendants moves 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 cross-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 then shifts to the opposing party to come forward with proof in admissible form to raise a material 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).

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 the motion must then come forward with objective proof of his or her injury to raise a triable issue. See Touré v Avis Rent A Car Systems, 98 NY2d 345 (2002); Dufel v Green, 84 NY2d 795 (1995).

It is also settled law that 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 (1<sup>st</sup> Dept. 2005); Arjona v Calcano, 7 AD3d 279 (1<sup>st</sup> Dept. 2004). Furthermore, a CT scan or MRI may constitute objective evidence to support subjective complaints. (see Arjona v Calcano, *supra*; 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 (1<sup>st</sup> Dept. 2005).

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 (1<sup>st</sup> Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1<sup>st</sup> Dept. 2004).

Under these principles, the Court finds that the defendant has met her burden on the motion in the first instance by showing the absence of "serious injury" as a matter of law within the meaning of Insurance Law § 5102(d). However, the plaintiff's proof in opposition to the motion presents triable issues as to whether she sustained "serious injury." Accordingly, the defendant's motion for summary judgment dismissing the complaint must be denied.

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

Both Vehicle and Traffic Law § 1111(a)(3) and New York City Traffic Regulations § 30(a) (11 RCNY 4-03[a][1][l]) 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); Kirchgaessner v Hernandez, 40 AD3d 437 (1<sup>st</sup> Dept. 2007) Conradi v New York City Transit Authority, 249 AD2d 436 (2<sup>nd</sup> Dept. 1988); Brito v MBSTOA, 188 AD2d 253 (1<sup>st</sup> Dept. 1992). Further, an unexcused violation of a statutory standard of care, such as those, constitutes negligence per se. See Martin v Herzog, 228 NY 164 (1920); Holleman v Miner, 267 AD2d 867 (3<sup>rd</sup> Dept. 1999); Weiser v Dalbo, 184 AD2d 935 (3<sup>rd</sup> Dept. 1992); Cordero v City of New York, 112 AD2d 914 (2<sup>nd</sup> 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." Berner v Koegel, 31 AD3d 591, 592 (2<sup>nd</sup> Dept. 2006); see Breslin v Rudden, 291 AD2d 471 (2<sup>nd</sup> Dept. 2002), *lv denied* 98 NY2d 605 (2002); Salamone v Barebaum, 281 AD2d 199 (1<sup>st</sup> Dept. 2001).

The plaintiff correctly argues that she is entitled to partial summary judgment on the issue of liability because she was a pedestrian with the right of way in a crosswalk with a light in her favor. The proof submitted in support of her cross-motion, which includes her deposition testimony and affirmation, establishes her entitlement to that relief. In opposition, the defendant submits only the affirmation of her attorney. Affirmations of attorneys who claim no personal knowledge of the accident are without probative value on summary judgment motions. See Zuckerman v City of New York, *supra* at 563; Johannsen v Rudolph, 34 AD3d 338 (1<sup>st</sup> Dept. 2006); Diaz v New York City Transit Authority, 12 AD3d 316 (1<sup>st</sup> Dept. 2004). While they may serve as vehicles for submitting documentary evidence or other proof in admissible form as an attachment (see Alvarez v Prospect

Hospital, supra at 325; Zuckerman v City of New York, supra at 563), there are no attachments here. While the affirmation refers to certain exhibits, none are attached. Thus, the defendant's proof raises no factual issues requiring a trial on liability.

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

**ORDERED** that the motion by the defendant 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 for a pre-trial conference on June 24, 2008, 9:30 a.m. at Part 22, 80 Centre St., Room 136.

Dated: May 7, 2008

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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