

Delfino v Luzon

2008 NY Slip Op 33538(U)

May 16, 2008

Supreme Court, New York County

Docket Number: 117860/06

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

RAMOS AGUILAR DELFINO

INDEX NO. 117860/06

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

MOTION CAL. NO. 33

RODOLFO LUZON

The following papers, numbered 1 to 3, were read on this motion by the defendants 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).

Notice of Motion/ Order to Show Cause — Affidavits _____

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

FILED
MAY 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

- 1 _____
- 2 _____
- 3 _____

This is an action to recover damages for injuries allegedly sustained in motor vehicle accident, wherein the plaintiff, a bicyclist, was struck on his left side by a vehicle operated by Rudolfo Luzon on July 12, 2006 at the intersection of Frederick Douglas Boulevard and West 115th Street in Manhattan. The defendant received treatment at Harlem Hospital after the collision. He then began treatment at the Bronx Sheridan Medical Office and underwent shoulder surgery on October 28, 2006. 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 the Insurance Law §5102(d).

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 shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact. 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 Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Dufel v Green, 84 NY2d 795 (1995).

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

Assuming that the defendants proof was sufficient to meet their burden on this motion, it must nonetheless be denied since the plaintiff's opposition papers, which include the affirmation of the plaintiff's treating physician, Dr. Douglas O. Schwartz, board certified in physical medicine and rehabilitation, and plaintiff's affidavit, raise issues of fact requiring a trial.

Accordingly, the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is denied.


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

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is denied.

This constitutes the Decision and Order of the Court.

Dated: May 16, 2008

MAY 16 2008

FILED
MAY 21 2008
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Deborah A. Kaplan
DEBORAH A. KAPLAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE