

**Weinberg v Okapi Taxi Inc.**

2009 NY Slip Op 30491(U)

March 4, 2009

Supreme Court, New York County

Docket Number: 100880-2006

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN  
Justice

PART 22

JOSHUA WEINBERG,  
Plaintiffs,

INDEX NO. 100880-2006

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

- v -

MOTION SEQ. NO. 001

OKAPI TAXI INC. and JADAB DEY,  
Defendants.

MOTION CAL. NO. 119

The following papers, numbered 1 to 3, were read on this motion by defendants' for summary judgment on the threshold "serious injury" issue.

NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____	1
Answering Affidavits — Exhibits (Memo)	_____	_____
Replying Affidavits (Reply Memo)	_____	_____

**FILED**  
 COUNTY CLERK'S OFFICE  
 NEW YORK  
 MAR 06 2009

Cross-Motion:  Yes  No

On May 7, 2005, plaintiff Joshua Weinberg, sustained right ankle and foot (heel) injuries while exiting a yellow taxi cab operated by Jabad Dey and owned by Okapi Taxi Inc., ("defendants"). The accident occurred on Gansevoot Street near the intersection of 9th Avenue, New York, New York. Defendant Dey fled the scene of the accident, but was subsequently discovered and arrested. Plaintiff Weinberg was taken to the emergency room at St. Vincent's Hospital, where he was treated and released. On January 20, 2006, plaintiff commenced this action to recover for injuries sustained as a result of the subject accident. The parties have completed discovery and the Note of Issue is filed. Defendants now move for an order, pursuant to CPLR § 3212, granting summary judgment and dismissing the complaint on the issue of "serious injury" as defined by New York Insurance Law § 5102(d).

## SERIOUS INJURY THRESHOLD

Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101, *et seq.* - the "No Fault" statute), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*Marquez v New York City Tr. Auth.*, 686 NYS2d 18 [1 Dept 1999]; *DiLeo v Blumberg*, 672 NYS2d 319 [1 Dept 1998]).

Insurance Law § 5102 (d) defines "serious injury" as:

a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

It is indisputable that five of the nine categories of serious physical injuries discussed by Insurance Law 5102 (d) are not applicable herein as there is no allegation of death, dismemberment, fracture or a loss of a fetus. Therefore, the court must determine if the injuries to the plaintiff's right foot constitute either: (1) a permanent loss of use of a body organ, member, function, or system; (2) a significant limitation of use of a body function or system; (3) a permanent consequential limitation of use of a body function or system; (4) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (See defendants' motion, exhibit c, plaintiff's bill of

[\* 3 ]  
particulars, paragraph 20.)

Serious injury is a threshold issue, and thus, a necessary element of plaintiff's prima facie case (*Licari v Elliott*, 57 NY2d 230 [1982]; *Toure v Harrison*, 775 NYS2d 282 [1 Dept 2004]; Insurance Law § 5104 [a]). This is in accord with the purpose of the "No-Fault" law, which was to "weed out frivolous claims and limit recovery to significant injuries" (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]; *Licari v Elliott*, 57 NY2d 234 [1982]; *Rubenscastro v Alfaro*, 815 NYS2d 514 [1 Dept 2006]).

In order to satisfy the statutory threshold, the plaintiff must submit competent objective medical evidence of his or her injuries, based on the performance of objective tests (*Grossman v Wright*, 707 NYS2d 233 [2 Dept 2000]; *Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*Gaddy v Eyer*, 79 NY2d 955, 957 [1992]; *Scheer v Koubek*, 70 NY2d 678, 679 [1987]).

A CT scan or MRI may constitute objective evidence to support subjective complaints (see *Arjona v Calcano*, 776 NYS2d 49 [1 Dept 2004]; *Lesser v Smart Cab Corp.*, 724 NYS2d 49 [1 Dept 2001]). The plaintiff's medical submissions must show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiff's limitations were significant (see *Milazzo v Gesner*, 822 NYS2d 49 [1 Dept 2006]; *Vasquez v Reluzco*, 814 NYS2d [1 Dept 2006]).

With respect to the categories of significant limitation of use of a body function or system and permanent consequential limitation of use, "[w]hether a limitation of use or function is "significant" or "consequential" (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure v Avis Rent A Car Systems, supra* quoting *Dufel v Green, supra*).

[\* 4 ]

Where the plaintiff claims serious injury under the 90-out-of-180 day category of the Insurance law 5102(d), plaintiff must prove that he was curtailed from performing his usual activities to a great extent rather than some slight curtailment, and submit competent credible evidence based on the objective medical findings of a "medically determined" injury or impairment of a non-permanent nature which caused the limitations in his daily activities. (See *Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Gaddy v. Eyer*, 79 NY2d 955, 958 [1992], citing *Licari v. Elliott*, 57 NY2d 230, 236 [1982].)

#### SUMMARY JUDGMENT STANDARD

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the courts which may decide the issue on a motion for summary judgment (*Perez v Rodriguez*, 809 NYS2d 15 [1 Dept 2006]). On a motion for summary judgment based upon a failure to sustain a serious injury, the defendants bear the initial burden of establishing the absence of a serious injury by tendering evidentiary proof in admissible form eliminating any material issues of fact from the case (*Toure v Avis Rent A Car Sys.*, *supra*; see also *Gaddy v Eyer*, *supra*; *Pirrelli v Long Is. R.R.*, 641 NYS2d 240 [1 Dept 1996]).

Defendants may rely either on the sworn or affirmed statements of their examining physician, plaintiff's deposition testimony and plaintiff's unsworn physician's records (*Fragale v Geiger*, 733 NYS2d 901 [2 Dept 2001]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). An affirmed physician's report demonstrating that plaintiff was not suffering from any disability or consequential injury resulting from the accident is sufficient to satisfy a defendant's burden of proof (see *Gaddy v Eyer*, *supra*). In addition, the Courts have unanimously held that a party may not use an unsworn medical report prepared by the parties' own physician on a motion for summary judgment (See *Grasso v Angerami*, 79 NY2d 813 [1991]; *Offman v Singh*, 813 NY2d 56 [1 Dept 2006]). Moreover, CPLR § 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury.

Once defendants have made such a showing, the burden shifts to the plaintiff to come

[\*5]

forward with prima facie evidence, in admissible form, to rebut the presumption that there is no issue of fact as to the threshold question (see *Pommells v Perez*, 797 NYS2d 380 [2005]; *Gaddy v Eyer*, *supra*; *Perez v Rodriguez*, *supra*). A medical affirmation or affidavit based on a physician's own examination, tests, and review of the record, can support the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co.*, 668 NYS2d 167 [1 Dept 1998]).

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 Corporation*, 3 NY2d 395, 165 NYS2d 489 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of 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*, 816 NYS2d 13, 29 AD3d 302,, [1 Dept 2006]; *Goldman v. Metropolitan Life insurance Company*, 788 NYS2d 25, 13 AD3d 289, [1 Dept 2004].

#### DISCUSSION

In support of their motion, the defendants submit, *inter alia*, the pleadings, plaintiff's deposition testimony, the affirmed medical reports of Dr. Gordon Montalbano, a board certified orthopedic surgeon and Dr. Audrey Eisenstadt. Defendants also submit the uncertified and unaffirmed MRI report of Dr. Robert Waxman, *plaintiff's* radiologist and, the uncertified operative record of Dr. Matthew Roberts, *plaintiff's* orthopedic surgeon. Plaintiff's unaffirmed and uncertified medical reports are admissible. (See *Fragale v Geiger*, *supra* ; *Pagano v Kingsbury*, *supra*).

Defendants argue that plaintiff's alleged ankle and foot injuries lack supporting medical evidence. On October 5, 2007, Dr. Montalbano conducted an objective examination of plaintiff's right ankle and foot (heel). Dr. Montalbano also reviewed copies of Dr. Waxman's MRI reports and plaintiff's emergency room records from St. Vincent's Hospital. Dr.

Montalbano concluded, that "the claimant has no disability as a result of the accident."

Defendants further argue that the plaintiffs "90/180" claim is insufficient because there is no medically determined injury based upon the accident. See *Toure, supra*.

Defendants have come forward with sufficient evidence in admissible form demonstrate that plaintiffs have not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d] (See, *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]; *Lowe v Bennett*, 511 NYS2d 603 [1 Dept 1986], *Affd*, 69 NY2d 700 [1 Dept 1986]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). Thus, the burden shifts to plaintiffs to produce admissible evidence of the existence of a "serious injury", creating a triable issue of fact. (See *Zuckerman v City of New York, supra*; *Forrest v Jewish Guild for the Blind, supra*).

In opposition, plaintiff has submitted the following: plaintiff's deposition testimony; an unaffirmed copy Dr. Robert Waxman's MRI report, the uncertified emergency room records from St. Vincent's Hospital and the affirmation and medical reports of Dr. Matthew Roberts, plaintiff's orthopedic surgeon,

Unaffirmed or uncertified medical reports and records are normally inadmissible on a motion for summary judgment (*Grasso v Angerami, supra*; *Offman v Singh, supra*; CPLR § 2106). However, a reference to plaintiff's unsworn or unaffirmed reports in the defendants' moving papers or by the defendants' medical experts, is sufficient to place such records properly before the court and to permit the plaintiff to rely upon and submit these reports in opposition to the motion" (see *Kearse v. New York City Tr. Auth.*, 789 NYS.2d 281 [2 Dept 2005]; see *Ayzen v. Melendez*, 749 NYS2d 445 [2 Dept 2002]).

Plaintiff's medical evidence is insufficient to establish "permanent, consequential limitation and significant limitation" (Insurance Law § 5102 (d)). Plaintiff's initial MRI's of the foot and heel, were taken on June 7, 2005, four weeks after the accident. Dr. Waxman's MRI report indicated a lesion of the talus in the plaintiff's right foot. Dr. Waxman determined that the

MRI was "essentially [an] unremarkable MRI examination of the right foot" (see MRI Report dated June 8, 2005). Plaintiff's evidence is insufficient to show that this lesion was *caused* by the accident or that it results in a permanent, consequential limitation and/or significant limitation.

Moreover, Dr. Roberts, plaintiff's orthopedic surgeon, determined in his initial examination and all of the subsequent examinations that plaintiff exhibited a "normal right foot without Achilles tendon" (See Dr. Roberts initial examination report dated July 25, 2008, p. 2)

On September 14, 2005, due to plaintiff's "continued symptoms", Dr. Roberts performed surgery on plaintiff's foot. Dr. Roberts determined that plaintiff suffered from "gastrocnemius equinus which puts increase pressure on his forefoot and ankle" and, "given his history of diabetes, decision was made to lengthen his calf muscle at the same time to decrease stress on his forefoot ankle" (See September 14, 2005, operative records of Dr. Matthew Roberts', p. 2-3). However, this evidence is insufficient to demonstrate that plaintiff's condition was a result of the subject accident.

In addition, at plaintiff's final examination on March 28, 2008, Dr. Roberts concluded that plaintiff does not suffer from a permanent, consequential limitation and/or significant limitation after the foot surgery. Dr. Roberts also concluded that plaintiff has full range of motion without tenderness and the x-rays of plaintiff's foot are "unremarkable and plaintiff can "increase his activities as tolerated and has no restriction in terms of a mechanical standpoint . . . [h]owever, his symptoms will indicate his activity level and obviously if he is having pain he may need to take some Advil or Motrin to help him with that or to modify his activities." (See Dr. Roberts Report, plaintiff's affirmation in opposition, exhibit B, p 2.)

Thus, the evidence submitted by plaintiff, liberally construed in the light most favorable to the opposing party, does not demonstrate the existence of a "serious injury" pursuant to Insurance Law § 5102(d). Accordingly, there is no material issue of fact requiring a trial.

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

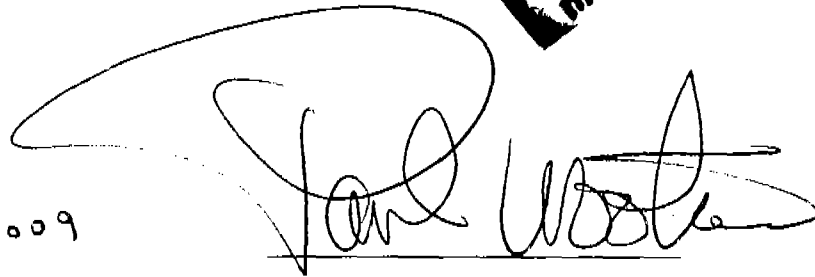
ORDERED that the defendants' motion for summary judgment is granted; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants, dismissing the complaint in its entirety, with costs and disbursements to defendants as taxed by the Clerk, and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

**FILED**  
MAR 06 2009  
COUNTY CLERK'S OFFICE  
NEW YORK



Dated: *March 4, 2009*  
MAR 04 2009

Paul Wooten J.S.C.  
**Paul Wooten**  
J.S.C.

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