Whisenant v Farazi
2009 NY Slip Op 30564(U)
March 11, 2009
Supreme Court, New York County
Docket Number: 105504/06
Judge: Paul Wooten
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SCANNED ON 3/17/2009

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

PRESENT: HON. PAUL WOOTEN, Justice — **PART 22**

INDEX NO. 105504/06

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO. 109

HOUSTON WHISENANT,
Plaintiff,

- v -

RAFIUL FARAZI and HASINA FARAZI,
Defendant.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

FILED
MAR 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ■ Yes ☐ No

On August 14, 2005, plaintiff, a pedestrian, was struck by defendants vehicle. The accident occurred on First Avenue, at or near its intersection with 10th Street, New York, New York. Plaintiff commenced this action, to recover damages for alleged personal injuries suffered as a result of the of the subject motor vehicle accident. Defendants now move for an order pursuant to CPLR § 3212, granting summary judgment and dismissing the complaint on the basis that plaintiff cannot prove that she suffered a serious injury, pursuant to 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 on-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 that ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

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]; *Rubensccastro 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 Eyler*, 79 NY2d 955, 957 [1992]; *Scheer v Koubek*, 70 NY2d 678, 679 [1987]).

It is well settled that positive MRI results may constitute a serious injury within the meaning of Insurance Law §5102(d) (*see Pommels v Perez*, 797 NYS2d 380 [2005]; *Nagbe v Mimigreen Hacking Group, Inc.*, 802 NYS2d 416 [1 Dept. 2005]). Furthermore, 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 Sys., supra* quoting *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 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].

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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 Eyler, supra; *Pirrelli v Long Is. R.R.*, 641 NYS2d 240 [1 Dept 1996]).

A defendant 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 Eyler*, *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 a defendant has made such a showing, the burden shifts to the plaintiff to come 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*, *supra*; *Gaddy v Eyler*, *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 16 7 [1 Dept 1998]). However, "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" (*see Offman v Singh*, *supra*; *Winegrad v New York Univ. Med Ctr., supra*).

DISCUSSION

In support of their motion, defendants submit, *inter alia*, plaintiff's deposition testimony and the affirmed medical report of Dr. Julio Westerband, an orthopedist. This evidence

establishes that the defendants have come forward with sufficient evidence in admissible form to warrant as a matter of law a finding that plaintiffs have not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d] (*See*, *Gaddy v Eyler*, 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 evidentiary proof in admissible form to warrant the showing 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 submits, *inter alia*, the affirmation and medical reports of Dr. Kevin E. Wright, a orthopedic surgeon and the affirmed MRI report of Dr. Thomas E. Kolb, a radiologist.

Defendants argue that Dr. Wright relied upon medical findings of "other alleged doctors" as the basis for his medical conclusions. Defendants also argue that plaintiff's evidence is insufficient to demonstrate his range of motion limitations, immediately following the subject accident. However, Dr. Wright conducted an initial examination of plaintiff on October 19, 2005, and follow-up examinations on January 18, 2006, May 22, 2008 and June 11, 2008. In his June 11, 2008, examination he also reviewed the MRI report of the plaintiff's ankle taken on June 4, 2008 by Dr. Kolb. Dr Kolb's MRI examination revealed "partial tear of the anterior and posterior talo-fibular ligaments" (See affidavit by Dr. Kolb and MRI report, plaintiff's exhibit c).

Dr. Wright's initial examination occurred only two months after the subject accident and his June 12, 2008 affirmation, included his objective findings of plaintiff's limited ranges of motion. Thus, Dr. Wright's initial examination satisfied the contemporaneous examination, required " to substantiate a claim of 'serious injury' pursuant to Insurance Law § 5102 (d)"*(Silva v Vizcarrondo*, 819 N.Y.S.2d 246[1 Dept 2006]). Accordingly, plaintiffs have met their burden of proof to establish a triable issue of fact.

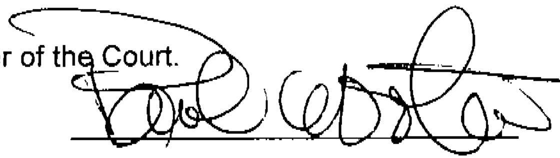
For these reasons and upon the foregoing papers, it is,

ORDERED that the defendant's motion for summary judgment is denied; and it is further,

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

IT IS FURTHER ORDERED that upon service of a copy of this order with notice of entry, the Clerk of the Trial Support Office (Room 158) shall restore this action to its former place on the trial calendar.

This constitutes the Decision and Order of the Court.



Dated: 3-11-09

MAR 11 2009

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

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