

h
comm
001

Supplemental -

5417
scan
+

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

LUZ AZCONA,
Plaintiff,

INDEX NO. 110556/05

- v -

MOTION DATE _____

KAK ENTERPRISES, INC. and GORDON
CORTER

MOTION SEQ. NO. 001

Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to 2, were read on this motion by plaintiff for summary judgment on the threshold "serious injury" issue and on liability.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

FILED
NOV 28 2008
PAPERS NUMBERED
1
2
COUNTY CLERK'S OFFICE
NEW YORK

On February 14, 2005 near the intersection of Second Avenue and East 128th Street, in Manhattan, plaintiff was involved in a collision with defendants' vehicle. On August 18, 2005, plaintiff commenced this action to recover damages for alleged personal injuries suffered as a result of the subject accident. The parties have completed discovery and a note of issue was filed. Plaintiff now moves for summary judgment pursuant to CPLR § 3212, alleging that he has established that he suffered a "serious injury" pursuant to Insurance Law § 5102 (d) and on the issue of liability.

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]).

RECEIVED
NOV 24 2008
MOTION SUPPORT
OFFICE

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

a personal injury which results in . . . significant disfigurement; . . . 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, significant disfigurement, fracture or a loss of a fetus. Therefore, the court must determine if the injuries asserted by plaintiff 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) 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 90 days during the 180 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]; *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 Sys.*, *supra* quoting *Dufel v Green*, *supra*).

SUMMARY JUDGMENT ON SERIOUS INJURY

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 establishing a serious injury, the plaintiff bear the initial burden of establishing the serious injury by tendering evidentiary proof in admissible (see *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]).

An affirmed physician's report demonstrating that plaintiff suffered from a disability or

consequential injury resulting from the accident is sufficient to satisfy a their 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 plaintiff has made such a showing, the burden shifts to the defendant to come forward with *prima facie* evidence, in admissible form, to rebut the presumption that there is a serious injury (see *Pommells v Perez*, 797 NYS2d 380 [2005]; *Gaddy v Eyler, supra*; *Perez v Rodriguez, supra*).

DISCUSSION

In support of the motion, plaintiff submits, *inter alia*, a copy of the pleadings, his affidavit, the deposition testimonies of plaintiff, defendant Corter and non party witness Sergio Miguel Azcona and the affirmations and reports of Dr. Steven Stuhl and Dr. David Delman. Based on the foregoing, plaintiff has submitted evidence in legally admissible form to meet her burden, entitling her to summary judgment and a finding that she has sustained a "serious injury" within the meaning of Insurance Law § 5102 [d] (See, *Gaddy v Eyler, supra*; *Lowe v Bennett*, 511 NYS2d 603 [1 Dept 1986], *Affd*, 69 NY2d 700 [1 Dept 1986]). Thus, the burden shifts to defendants to produce evidentiary proof in admissible form in order to establish the lack of a serious injury (see *Taynisha Baez v Imamally Rahamatali*, 817 NYS2d 204 [2006]; *Franchini v Palmieri*, 775 NYS2d 232 [2003]; *Gaddy v Eyler, supra*; *Shinn v Catanzaro*, 767 NYS2d 88 [1 Dept 2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Forrest v Jewish Guild for the Blind*, 765 NYS2d 326 [1 Dept 2003]).

In opposition, defendants submit, *inter alia*, the affirmation of Dr. Robert Zaretsky, a

board certified orthopedic surgeon. His affirmation, concludes that after his evaluation of plaintiff over a year and a half after the subject accident, the injuries to her knee were degenerative. However, Dr. Zaretsky's affirmation is devoid of any details as to what objective tests were utilized, if any (*Bent v Jackson, supra; Toure v Avis Rent a Car System, supra; Vasquez v Reluzco, supra*). In addition, defendants submit no evidence to contradict plaintiff's "90/180" claim, which is clearly established by the record, including her treating physicians' affirmations. Accordingly, plaintiff has established a serious injury and defendants' affirmative defense for lack of a serious injury is dismissed.

SUMMARY JUDGMENT ON LIABILITY

In support of plaintiff's motion for summary judgment on liability she submits photographs of the accident scene, the uncertified police accident report, her affidavit, the affidavit of non party Azcona and the parties deposition testimonies. Uncertified police reports are normally inadmissible to indicate a party's liability, because the police officer who prepared the report was not an eyewitness to the accident, (*see Ann Connors v Duck's Cesspool Services, Ltd.*, 144 AD 2d 329, [1 Dept 1988]; *Figuroa v Luna*, 721 NY2d 635[1 Dept 2001]; *Murray v Donlan*, 433 NY2d 184 [2 Dept 1980]), the report in this instance does have some probative value because it falls into a hearsay exception (*Kelly v Wasserman*, 5 N.Y.2d 425, 429 [1959]; *Murray v Donlan, supra*). The report contains an admission by the defendant Corter, that he was in the middle lane and didn't see plaintiff's vehicle prior to making the right turn.

In opposition, defendants' aver, *inter alia*, that defendant Corter never made the admission in the police accident report. The Courts have held that testimony procured to defeat a summary judgment motion, which contains statements that are directly contradicted to an admission in a police accident report are insufficient to defeat the motion (*see Abramov v. Miral Corp.*, 805 NYS2d 119 [2 Dept 2005]). However, as in *Imamkhodjaev v. Kartvelishvili*, 843

NYS2d 160 [2 Dept 2007], where the defendant disputed that he made an admission in the police accident report and consequently the court held that there was a triable issue as to the defendant's credibility, this defendant also disputes the admission. Accordingly, defendant Corter's credibility is for a jury to determine.

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

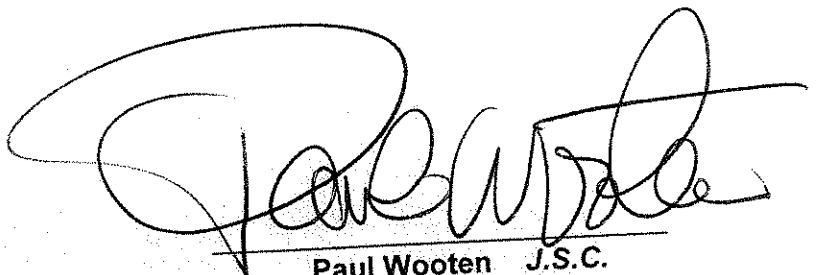
ORDERED that the plaintiff's motion for summary judgment establishing a serious injury is granted, and it is further,

ORDERED that defendants' affirmative defense of a lack of a serious injury is dismissed, and it is further,

ORDERED that the plaintiff's motion for summary judgment on the issue of liability is denied.

This constitutes the Decision and Order of the Court.

November 14, 2008
Dated: ~~October 26, 2008~~
NOV 14 2008



Paul Wooten J.S.C.

Paul Wooten
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

FILED
NOV 28 2008
COUNTY CLERK'S OFFICE
NEW YORK