

Westlaw

874 N.Y.S.2d 72

59 A.D.3d 352, 874 N.Y.S.2d 72, 2009 N.Y. Slip Op. 01409

(Cite as: 59 A.D.3d 352, 874 N.Y.S.2d 72)

Supreme Court, Appellate Division, First Department, New York.

Mahamadou DEMBELE, Plaintiff-Appellant,

v.

Pedro A. CAMBISACA, Defendant-Respondent.

Feb. 26, 2009.

Background: Plaintiff brought action seeking damages for personal injuries suffered in automobile accident. The Supreme Court, Bronx County, Sallie Manzanet-Daniels, J., granted defendant summary judgment. Plaintiff appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) defendant established his entitlement to judgment as a matter of law that plaintiff did not sustain "serious injury" in accident;
- (2) report of radiologist did not raise triable issue of fact as to whether plaintiff sustained "serious injury" from accident;
- (3) plaintiff's knee pain did not constitute loss of "substantially all" of usual daily activities;
- (4) medical report of plaintiff's orthopedist failed to raise triable issue of fact as to whether plaintiff sustained "serious injury" in accident; and
- (5) affirmation of plaintiff's orthopedist was inadmissible.

Affirmed.

West Headnotes

[1] Judgment ↪185.3(21)

[228k185.3\(21\) Most Cited Cases](#)

On motion for summary judgment in action by plaintiff seeking damages for personal injuries sustained in automobile accident, defendant established his prima facie entitlement to judgment as a matter of law that plaintiff did not suffer "serious injury" under no-fault statute through submission of affirmations of his orthopedist and neurologist. McKinney's Insurance Law § 5102(d).

[2] Automobiles ↪251.19

[48Ak251.19 Most Cited Cases](#)

[2] Judgment ↪185.3(21)

[228k185.3\(21\) Most Cited Cases](#)

Report of plaintiff's radiologist, based on MRI of plaintiff in March 2005 and submitted by plaintiff as proof of "serious injury" to meniscus in automobile accident, did not rebut defendant's orthopedist's findings of resolved sprain and no disability based on September 2006 examination, in opposing motion for summary judgment on ground that plaintiff did not sustain "serious injury"; radiologist made no findings as to causation of plaintiff's injury, and did not link torn meniscus to accident. McKinney's

Insurance Law § 5102(d).

[3] Automobiles ↪251.15

48Ak251.15 Most Cited Cases

[3] Judgment ↪185.3(21)

228k185.3(21) Most Cited Cases

Plaintiff's complaints that his knee hurt when he drove or walked up more than four steps, as proof that plaintiff sustained "serious injury" to his knee in automobile accident, did not constitute loss of "substantially all" of usual daily activities, in opposing motion for summary judgment on ground that plaintiff did not sustain "serious injury." McKinney's Insurance Law § 5102(d).

[4] Judgment ↪185.3(21)

228k185.3(21) Most Cited Cases

Medical report of plaintiff's orthopedist, submitted in opposition to defendant's motion for summary judgment on plaintiff's action seeking damages for knee injury suffered in automobile accident, failed to raise triable issue of fact as to whether plaintiff sustained "serious injury" under no-fault statute; orthopedist did not explain significance of his findings with respect to range of motion of plaintiff's left knee, and did not compare his range of motion findings with normal ranges. McKinney's Insurance Law § 5102(d).

[5] Judgment ↪185.1(3)

228k185.1(3) Most Cited Cases

[5] Judgment ↪185.1(8)

228k185.1(8) Most Cited Cases

Plaintiff's orthopedist's conclusions, in summary judgment affirmation, were inadmissible to extent they were based on unsworn medical records and reports, since defendant's doctors did not submit copies of unsworn papers with their reports, or expressly rely upon them in forming their own conclusions.

[6] Judgment ↪185.3(21)

228k185.3(21) Most Cited Cases

Absent any substantiating documentation or affidavit from his employer, plaintiff's vague and self-serving deposition testimony, that he did not return to work until "three or four months" after automobile accident, did not raise issue of fact that would preclude summary judgment on claim that plaintiff sustained "serious injury" for purposes of 90/180 day rule. McKinney's Insurance Law § 5102(d).

****74 Antin, Ehrlich & Epstein, P.C., New York (Thomas P. Kinney of counsel), for appellant.**

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondent.

SAXE, J.P., CATTERSON, MCGUIRE, MOSKOWITZ, ACOSTA, JJ.

***352 Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered September 25, 2007, which granted**

defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

[1][2][3] Defendant met his prima facie burden by demonstrating that plaintiff had not suffered a serious injury within the meaning of Insurance Law § 5102(d) with, among other things, the affirmations of his orthopedist and neurologist (see *Brown v. Achy*, 9 A.D.3d 30, 31, 776 N.Y.S.2d 56 [2004]). Plaintiff's radiologist's affirmation, based on a March 2005 MRI, could not rebut defendant's orthopedist's findings of a resolved sprain, and no disability, based on a September 2006 examination (see *Thompson v. Ramnarine*, 40 A.D.3d 360, 360-361, 835 N.Y.S.2d 566 [2007]). Additionally, plaintiff's radiologist made no findings as to causation of the injury and did not link the torn meniscus to plaintiff's accident (see *Otero v. 971 Only U, Inc.*, 36 A.D.3d 430, 431, 828 N.Y.S.2d 331 [2007]; *Medley v. Lopez*, 7 A.D.3d 470, 777 N.Y.S.2d 473 [2004]). At any rate, the existence of a partial meniscal tear, standing alone and with no evidence of any limitations caused thereby, is not sufficient to establish "serious injury" (see *Cornelius v. Cintas Corp.*, 50 A.D.3d 1085, 1087, 857 N.Y.S.2d 637 [2008]; *Medina v. Medina*, 49 A.D.3d 335, 853 N.Y.S.2d 77 [2008]). Moreover, even if substantiated, plaintiff's complaints that, among other things, his knee hurts when he drives or walks up more than four steps, do not constitute the loss of "substantially all" of his usual activities required to make a showing of serious injury.

[4][5] The affirmation of plaintiff's orthopedist also fails to raise an issue of fact as to permanent injury, as he does not explain the significance of his findings with respect to plaintiff's left knee's range of motion (ROM), or provide any comparison of his ROM findings with normal ranges (see *Otero*, 36 A.D.3d at 431, 828 N.Y.S.2d 331). The orthopedist's conclusions are also inadmissible to the extent that they are based on the unsworn medical records and reports, since defendant's doctors did not submit copies of those unsworn papers with their reports, or expressly rely upon them in forming their own conclusions (see *Hernandez v. Almanzar*, 32 A.D.3d 360, 361, 821 N.Y.S.2d 30 [2006]).

[6] *353 Without any substantiating documentation or affidavit from the employer, plaintiff's vague and self-serving deposition testimony, that he did not return to work until "three or four months" after the accident, does not suffice to show a "serious injury" for purposes of the 90/180 day rule (see *Burke v. Torres*, 8 A.D.3d 118, 119, 778 N.Y.S.2d 486 [2004]).

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