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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

HAL GILENSON

INDEX NO. 106209/05

MOTION DATE 1-17-07

- v -

MOTION SEQ. NO. 003

IRENE & SHERYL TAXI, INC. and MOHAMMED ALAMGIR

MOTION CAL. NO. 12

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 meet the serious injury threshold requirement of Insurance Law § 5102(d).

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

Cross-Motion: ☐ Yes ■ No

FILED

The motion is denied in accordance with the attached Opinion.

MAR 16 2007

This constitutes the Decision and Order of the Court.

COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 7, 2007

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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KAPLAN, J.:

In this personal injury action, 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 Insurance Law 5102(d). The motion is denied for the reasons set forth below.

I. Factual and Procedural Background

At approximately 1:00 a.m. on July 14, 2004, as he was crossing Second Avenue at the corner of 14th Street in Manhattan, the plaintiff was struck by a taxi owned by defendant Irene & Sheryl Taxi and operated by defendant Mohammed Alamgir. The impact caused the plaintiff to be propelled into the air and down onto the roadway. He sustained injuries to his right knee, which had made direct contact with the taxi, as well as his neck, back, shoulder and forehead. He was transported to the emergency room at Beth Israel Medical Center where he was treated and released.

Two days later, he saw his primary care physician, Dr. Steven Dillon who informed him that he sustained a torn meniscus [a disc of cartilage separating two bones]. Dr. Dillon referred him for an MRI, which confirmed the diagnosis, and advised him not to engage in the athletic activities he usually engaged in daily - volleyball, biking, running and tennis - or in other normal activities such climbing stairs, walking long distances and household chores if they caused any discomfort. On March 21. 2005, the plaintiff underwent arthroscopic surgery for the torn miniscus and an extended course of physical therapy both before and after the surgery.

The 39-year-old plaintiff, a league volleyball player who engaged in that and other sports on a daily basis, was unable to resume these activities for more than a year after the accident. He alleges that despite undergoing several months of physical therapy, surgery to repair the torn meniscus, and additional physical

therapy, as well as continuing home exercises prescribed by his doctors, he still has pain in his right knee and has not been able to engage in all the activities he engaged in prior to the accident. He further states that for no less than four or five months after the accident, he was unable to do a substantial part of the activities that made up his daily routine.

According to the plaintiff, he participated in a year-round competitive volleyball league which he belonged to for seven years. He competed in games once or twice a week and practiced with his team for several hours two or three days a week. He also played in non-league games on other days, and roller-bladed, biked and played tennis two or three times per week during the appropriate seasons. Prior to the accident he was between jobs and spent a significant portion of the day engaged in these athletic activities. Due to his pain, and upon the advice of his doctors, the plaintiff was unable to play volleyball for the remainder of the 2004 season and all of the 2005 season. He did not resume playing until the spring of 2006, and claims to have still not returned to his pre-accident level of activity. He has not resumed biking or roller-blading. The plaintiff further states that for four or five months after the accident, he could no longer engage in routine household chores, such as cooking, cleaning, or grocery shopping. He was forced to rely upon family and friends to do that for him.

On or about April 12, 2005, the plaintiff commenced the instant action seeking damages for the injuries he sustained in the accident.

In his Verified Bill of Particulars, the plaintiff claimed to have sustained injuries to his right knee and spine. As to the knee, he suffered a medial meniscus tear, chondromalacia patella and medial femoral condyle, and contusion - which required "surgical intervention on 3/21/05 consisting of right knee arthroscopy, femoral chodroplasty medial femoral condyle and patella, medial meniscus repair using fast-fix meniscal repair system." The plaintiff further claims to have a "loss of range of motion of the right knee" and "diminution in strength of the right knee." As to his cervical spine, he sustained a "posterior herniated disc at C5-C6 level, posterior disc bulging at C4-C5, C3-C4 levels, straightening of the cervical lordotic curvature, and scarring and discoloration to the upper forehead."

The plaintiff further alleged that these injuries fell under three categories of "serious injury"as defined by Insurance Law § 5102(d), including (1) a "significant limitation of a body function or system, to wit, his cervical spine and his right knee" and (2) a "medically determined injury or impairment of a non-permanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his usual and customary daily activities for at least 90 days during the180 days immediately following the occurrence of the injury or impairment."

By an order dated February 15, 2007, this Court granted a motion by the plaintiff for summary judgment on the issue of liability, and directed an inquest on

damages.

II. The "Serious Injury" Summary Judgment Motion

The defendants now move for summary judgment dismissing the complaint in its entirety on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d). In opposition, the plaintiff argues that he met the threshold requirement by establishing that his injuries fell within the two statutory categories of "serious injury" - (1) a "significant limitation of a body function or system and (2) a "medically determined injury or impairment of a non-permanent nature which prevented [him] from performing substantially all of the material acts which constitute his usual and customary daily activities for at least 90 days during the180 days immediately following the [accident." Insurance Law 5102(d).

In support of their motion, the defendants submit the affirmed reports of Dr. Roger Berg, a board certified radiologist, Dr. Gregory Montalbo, a board certified orthopedic surgeon, and Dr. Edward Weiland, a board certified neurologist.

Dr. Berg examined an MRI of the plaintiff's right knee taken on 8/2/04, and an x-ray and CT scans of the cervical spine taken on the date of the accident. He found no abnormalities.

In regard to the MRI, Dr. Berg concludes that the right knee shows a normal amount of joint fluid and the "menisci have normal signals and shape without tear or capsule separation. He finds "minimal bone bruising" of the upper posterior tibia, but "no permanent injury or internal joint derangement."

In regard to the cervical spine x-rays, Dr. Berg finds "a normal alignment and lordosis of the spinal column with no bony injury, subluxation, facet arthritis or prevertabral swelling." In regard to the cervical CT scan, Dr. Berg finds "mild cervical spine degeneration" and, in regard to both, concludes that "there is nothing here that is a result of the accident in question or would cause orthopedic or neurological impairment."

Dr. Montalbo , who performed an orthopedic IME of the plaintiff on 6/23/06, reported "no objective abnormal findings" and concluded that the plaintiff had recovered from his surgery with no permanent injuries as a result of the accident.

Specifically, Dr. Montalbo, notes a normal cervical spine lordosis and no paraspinal spasm or tenderness, and normal range of motion. All neurological testing showed normal functioning. As to the injured right knee, Dr. Montalbo found only healed arthroscopic incisions but no pain or tenderness and a normal range of motion. He found the plaintiff to have a normal gait and no muscle atrophy. He disagreed with Dr. Meyersons' surgical report of the arthroscopic

procedure, which noted "cartilage damage" and "undersurface tearing" of the meniscus. It was Dr. Montalbo's opinion that the right knee showed only early degenerative changes, a common condition in the general population and consistent with the plaintiff's age.

Dr. Weiland, who performed a Neurological IME of the plaintiff on 3/2/06, noted that the plaintiff complained of "pain in the right knee and lower back with activities of daily living." However, Dr. Weiland's testing indicated all normal findings and no neurological deficits. The examination included testing of the plaintiff's eyes, face and head, as well as range of motion and sensation tests. Dr. Weiland opined that the plaintiff needed no further treatment, assistance with daily activities, medical equipment or transportation services and was able to return to gainful employment.

In further support of their motion, the defendants also submit a portion of the plaintiff's deposition, taken on March 1, 2006, in which he testifies that he was released from the hospital the same day as the accident and spent a day or two in bed at home before he was able to see his primary care physician. He again spent only a day or two at home after his surgery. The plaintiff testified that at the time of the accident he was unemployed but at the time of the deposition was employed as a partner in a bar, where he worked two days a week.

In opposition to the motion, the plaintiff submits his own affidavit outlining the occurrence of the accident, his course of treatment and the impact of his injuries on his daily activities, as set forth above.

The plaintiff also offers the affirmed reports from Dr. Stephen Dillon, a board certified internist and plaintiff's primary care physician, Dr. Marie Leong, a radiologist, Dr. Robert Myerson, a board certified orthopedic surgeon, and Dr. Jonathan Garay, a board certified orthopedist.

Dr. Dillon states that the plaintiff came to his office on July 16, 2004, two days after the accident, complaining of headaches, neck stiffness, right shoulder pain, head trauma with scalp abrasions and pain in his right knee. A physical examination revealed "mild edema in the supra patella region of the right knee with tenderness in the medial aspect" and a McMurray test, a manual flexing test to detect meniscal tears] was positive. Dr. Dillon's initial impressions were (1) head trauma and headaches, (2) neck pain due to whiplash and (3) right knee pain and swelling. He referred the plaintiff for an MRI of the right knee due to suspicions of a meniscal tear, and for a CT of his brain to rule out intracranial bleeding. He advised the plaintiff not to engage in many of his ADLs including volleyball, biking, running and tennis, until given medical clearance.

When the MRI, conducted by Dr. Marie Leong at Diagnostic Radiology Associates, confirmed his diagnosis of a torn meniscus, Dr. Dillon referred the

plaintiff to Dr. Meyerson for an orthopedic consultation in regard to his knee complaints, and to Dr. Garay for physical therapy of the knee.

The plaintiff returned to Dr. Dillon's office on November 24, 2004, for a re-evaluation. He found the plaintiff's knee to be "progressing slowly with continued complaints of pain." Dr. Dillon found that flexion range of motion was 110 out of a normal 130. The plaintiff was advised to continue physical therapy and follow his restrictions on his ADLs until given medical clearance.

Dr. Leong's report states that her 8/4/06 MRI of plaintiff's right knee revealed (1) "a small peripheral tear of the medial meniscal posterior horn near its junction with the medial meniscal body, (2) tiny focus of increased signal seen within the lateral patellar fact cartilage, which may indicate a cartiliginous injury vs, mild chondromalacia, and (3) a small area of mild bone marrow edema within the posterior aspect of the medial tibial plateau and questionably at the medial most medial tibial plateau, a non-specific finding" which could be due to "bone-bruising."

Dr. Meyerson examined the plaintiff on September 1, 2006, and found mild soft tissue swelling over the medial aspect of his right knee, medial joint tenderness and a positive Steinmann test [test for pain upon tibial rotation]. After reviewing the MRI of the right knee, Dr. Meyerson reached the same conclusions as the radiologist, Dr. Leong. Dr. Meyerson noted that the plaintiff underwent a six-month course of physical therapy which served to moderate his symptoms, but that he continues to experience pain.

Dr. Meyerson performed arthroscopic surgery on the plaintiff's knee on 3/21/05, wherein he repaired the torn meniscus by debriding the inferior surface and performed a "femoral chondroplasty [corrective surgery of the knee cartilage] on the medial femoral condyle and patella." The operative report notes "no evidence" of "meniscal or articular cartilage pathology" or "legamentous pathology." However, it also states that Dr. Meyerson found "undersurface tearing" of the medial meniscus and chondral damage to the medial femoral condyl.

The plaintiff was seen by Dr. Meyerson for post-operative evaluations on 3/21/05, 4/20/05, 7/27/05 and 8/30/06. He showed slow improvement in the right knee but still reported pain and tenderness associated with increased activity. He experiences knee pain when sitting in a cross-legged position or applying pressure to the knee, such as kicking a soccer ball. X-rays of the knee show some small osteophytes on the tibial spines. Dr. Meyerson recommended that the plaintiff continue with stretching and strengthening exercises at home. He further noted that the injury raised the plaintiff's risk of developing posttraumatic arthritis, and opined that the symptoms were permanent and will worsen over time, necessitating further treatment.

Dr. Garay, supervised the plaintiff's physical therapy at the Chelsea Village

Medical Center. Upon his first examination on10/4/04, the plaintiff complained of knee pain with palpation and Dr. Garay noted "pain with grinding of the patella and with Apley compression" and with isometric contraction of the quadriceps, which by then had only "4/5 strength." His diagnosis was "contusion fo the right knee, medial meniscal tear of knee" and his plan of treatment was physical medicine and rehabilitation. As late as May of 2005, some 10 months after the accident, the plaintiff was still reporting pain, was using a cane to walk and his flexion range of motion in his right was 115 of a normal 130 degrees, an 11.5% restriction. Dr. Garay treated the plaintiff through 6/28/05, at which time he instructed him to gradually return to his normal activities.

III. Analysis

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. 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 "No-Fault threshold" issue (Insurance Law § 5102[d]), he or she bears the initial burden of establishing the absence of a "serious injury" as a matter of law. This is because, in enacting Insurance Law §5102(d), the Legislature intended to weed out frivolous claims and limit recovery to significant injuries arising from motor vehicle accidents. See Pommells v Perez, 4 NY3d 566 (2005); Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Licari v Elliot, 57 NY2d 230 (1982).

"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." Offman v Singh, 27 AD3d 284, 285 (1st Dept. 2006); see Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985).

However, if the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, supra; Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med Ctr., supra; Zuckerman v City of New York, supra. The party opposing a motion for summary judgment on the threshold "serious injury" issue must come forward with objective proof of his or her injury to raise a triable issue. See Toure v Avis Rent A Car Systems, supra; Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, 79 NY2d 955 (1992). However, either "an expert's designation of a numeric percentage of a plaintiff's loss of range of motion" or "an expert's qualitative assessment of a plaintiffs' condition" may substantiate a claim of serious injury. See Toure v Avis Rent A Car

Systems, supra; 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 vTwentieth Century Fox Film Corp., 3 NY2d 395 (1957). Furthermore, 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).

Here, the defendants met their initial burden by producing evidentiary proof in admissible form sufficient to show the absence of any material issue of fact. Specifically, the affirmed reports of Dr. Roger Berg, Dr. Gregory Montalbo and Dr. Edward Weiland, none of whom reported any abnormal findings, established that the plaintiff did not sustain any a "significant limitation of a body function or system" (Insurance Law § 5102[d]), as a matter of law. However, in opposition to the motion, the plaintiff produced sufficient proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, supra; Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med Ctr., supra; Zuckerman v City of New York, supra.

In addition to his own affidavit, the plaintiff proffered objective proof of his injury (See Toure v Avis Rent A Car Systems, supra; Dufel v Green, supra) by producing the affirmed reports of Dr. Stephen Dillon, Dr. Marie Leong, Dr. Robert Myerson and Dr. Jonathan Garay, which refuted the findings of defendants' experts. This proof established, among other things, that he suffered a torn meniscus as a result of the accident, that he underwent surgery and an eight-month course of physical therapy and that his injury prevented him from fully engaging in his normal activities for at least one year after the accident.

As such, the plaintiff's proof raised a triable issue as to whether he sustained a "significant limitation of a body function or system" (Insurance Law §5102[d]) in that the accident resulted in, among other injuries, a torn meniscus which required surgery and an extended course of physical therapy. See Noriega v Sauerhaft, 5 AD3d 121 (1st Dept. 2004); Morrow v Schoenfeld, 10 Misc 3d 1069(A), (Sup Ct, Suffolk County 2005); compare Medley v Lopez, 7 AD3d 470 (1st Dept. 2004). The proof further showed that the injury was still unresolved, was still causing the plaintiff pain and was still limiting his range of motion in the knee for at least ten months after the accident. See Toure v Avis Rent A Car Systems, supra.

Assuming, without deciding, that the defendants also established, as a matter of law, that the plaintiff did not sustain a "medically determined injury or impairment of a non-permanent nature " which precluded him from engaging in

substantially all of his usual and customary daily activities for at least 90 days during the180 days immediately following the accident" (Insurance Law §5102[d]), the plaintiff's own proof presented a triable issue. To establish "serious injury" under the "90/180" category, the plaintiff must (1) demonstrate that his or her usual activities were curtailed during the requisite time period and (2) submit competent credible evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in plaintiff's daily activities. See Toure v Avis Rent A Car Systems, supra.

The proof submitted by the plaintiff demonstrated that his injury was "medically determined" and that he was unable to perform his usual daily athletic activities for more than a year after the 7/14/04 accident and was unable to engage in household chores, such as cooking and cleaning, or grocery shopping for four or five months. Curtailment of a plaintiff's athletic or sporting activities may be considered on a 90/180 claim (see Kaplan v Gak, 259 AD2d 736 [2nd Dept. 1999]; Uhl v Sofia, 245 AD2d 988 [3rd Dept. 1997) particularly where, as here, they constituted such a significant portion of the plaintiff's daily activities prior to the accident. The plaintiff further demonstrated that these were not self-imposed restrictions but were medically indicated. Both Dr. Dillon and Dr. Garay instructed him not to engage in his athletic activities for at least 90 days after the accident. Their own reports and medical records confirmed this. Construing this proof in the light most favorable to the plaintiff, as it must (see Kesselman v Lever House Restaurant, supra; Goldman v Metropolitan Life Ins. Co., supra), the Court concludes that the plaintiff has raised triable issues requiring a trial. Accordingly, the defendants' motion for summary judgment must be denied.

IV. Conclusion

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is denied in its entirety.

This constitutes the Decision and Order of the Court.

FILED
MAR 16 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 7, 2007

Deborah A. Kaplan J.S.C.
DEBORAH A. KAPLAN
J.S.C.

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