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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

KAREN CHOEZ and LUIS FERNANDEZ

INDEX NO. 403238-2004

MOTION DATE 1-24-07

- v - MOTION SEQ. NO. 003

PATRICIA CHOEZ, LUIS A. MOLINA and JADIRY JIMINIAN

MOTION CAL. NO. 7

KAPLAN, J.:

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Karen Choez did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). The motion is denied for the reasons set forth below.

At approximately 6:30 p.m. on November 1, 2000, plaintiff Karen Choez, was a passenger in a vehicle operated and owned by defendant Patricia Choez. On that evening near the intersection of Vyse Avenue and 178th Street, Brooklyn, New York, that vehicle was involved in an accident with a vehicle operated by Luis A. Molina and owned by Jadiry Jiminian. As a result of this incident, plaintiff claims to have sustained a serious injury to her cervical and lumbar spines. Defendant Patricia Choez, now moves for summary judgment averring that plaintiff has failed to establish a serious injury as defined by Insurance Law §5102, and as such any recovery should be limited to that provided by No-Fault Insurance. Defendants Molina and Jiminian cross move for summary judgment, on the same grounds.

In support of their motion, the defendants submit the affirmed reports of Dr. Daniel Feurer, a board certified neurologist and, Dr. Jay Nathan, board certified in orthopedics. Defendants also proffer the deposition testimony of the plaintiff, as well as the complaint and various other filings. Each of these doctors, performed a Independent Medical Exam (IME) on the plaintiff as part of this litigation.

Dr. Feurer, who reviewed plaintiff's prior medical records, prior to performing his examination on April 24, 2007, discusses in his report, various observations of the plaintiff's mobility and flexibility and concludes that her neurological exam is within normal limits. He concludes that she does not suffer any objective neurological disability or neurological permanency, casually related to the accident. Dr.Nathan, who also reviewed plaintiff's prior medical records as prepared by her physicians, indicates that plaintiff during her examination exhibits a full and normal range of motion with regard to her upper and lower extremities. Dr. Nathan provides not only the a numeric calculation of the plaintiff's range of motion, but details the norm as well as the objective tests can he employed in making his determination. In further support of their motion, the defendants

also submit a portion of the plaintiff's deposition, discussing her treatment and activities subsequent to the accident.

In opposition to the motion, the plaintiff submits her deposition testimony as well as the affirmed reports of Dr. George Y. Krementsov, who has treated her since the collision in 2000, as well as the affirmed medical report of Dr. Joseph L. Paul, a orthopedic surgeon who examined her on December 5, 2006. Plaintiff also includes various other medical reports, which are detailed in the submissions of the movants. All of the plaintiffs submissions detail the injuries to plaintiff's spine. The most recent exam by Dr. Paul indicates, among his findings a deficit in the plaintiff's movement forward of her lumbar spine of some 45 degrees as compared to the stated normal value of 90. He also finds that her straight leg raising was at 45 degrees as opposed to the stated normal of 90. Dr. Paul also details the tests he employed in making his findings. He concludes that it is his professional opinion, that plaintiff has suffered "a permanent, significant and severe injury to the cervical spine and lumbar spine as a result of the motor vehicle accident of November 11, 2000."

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 have met their initial burden by producing evidentiary proof in admissible form sufficient to show the absence of any material issue of fact. See Toure v Avis Rent A Car Systems supra; Gaddy v Eyler, supra. However, plaintiff has satisfied her burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact on the significant limitation issue. Garner v Tong, 27 AD3d 401 (1st Dept. 2006); Priviteria v Brown, 28 AD3d 733 (2d Dept. 2006); Secore v Allen, 27 AD3d 825 (3rd Dept. 2006); DeJesus-Martinez v Singh, 2007 NY Slip Op 50256U, 2007 N.Y. Misc. Lexis 373 (App.Term 1st Dept. 2007); Martin v Marquez, 2007 NY SlipOp 50214U, 2007 N.Y. Misc. Lexis 333(App. Term 1st Dept. 2007). Plaintiff has also sufficiently addressed the gap in her course of treatment by presenting evidence that she could not continue as a result of termination of her medical benefits. See Pommells v Perez, Brown, Dunlap, Carasco v Mendez, 4 NY3d 566 (2005); Garner v Tong, supra; Neuberger v Gill, 19 AD3d 561 (2d Dept. 2005).

For these reasons and upon the foregoing papers, it is

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

The parties are directed to appear for a pre-trial conference, Part 22, 80 Centre Street, New York, New York, Room 136 on April 25, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: March 16, 2007

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN
J.S.C.

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

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