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. 004

PATRICIA CHOEZ, LUIS A. MOLINA and JADIRY JIMINIAN

MOTION CAL. NO. 6

KAPLAN, J.:

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

At approximately 6:30 p.m. on November 1, 2000, plaintiff Luis Fernandez, 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 due to his failure to repeatedly comply with court ordered discovery, he is precluded from testifying or offering any evidence at trial with regard to his medical claim as per the prior order of this court on September 20, 2007 (Tingling, J.). Defendants Molina and Jiminian cross move for summary judgment, on the same grounds. Luis Fernandez has failed to appear at eight scheduled Independent Medical Examinations.

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).

While the Court of Appeals has consistently instructed the "(n)egligence cases by their very nature do not usually lend themselves to summary judgment", in a case such as this where defendants have met there burden and defendant Fernandez, the party against whom summary judgment has been sought has elected to remain silent, summary judgment is warranted. Ugarriza v Schmider, 46 NY2d 471, 474 (1971). As such, pursuant to CPLR§ 3212, the defendants are all granted summary judgment as against plaintiff Fernandez

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants motion for summary judgment is granted in its entirety, and the complaint of Luis Fernandez is dismissed in its entirety, it is further

ORDERED that the Clerk of the court shall enter judgment accordingly.

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.

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