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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

RAMON RODRIGUEZ and IRMA CABRERA

INDEX NO. 116252/04

MOTION DATE 1-17-07

- v -

MOTION SEQ. NO. 002

HAMADA ABDALLAH and JOSE CRUZ

MOTION CAL. NO. 103

The following papers, numbered 1 to 8 were read on this motion and cross-motions for summary judgment - Notice of Motion by defendant Abdallah for Partial Summary Judgment on the issue of liability, Notice of Cross-Motion of Plaintiffs for Summary Judgment against Defendant Cruz on the issue of liability, Notice of Cross-Motion of Defendant Cruz for Summary Judgment dismissing the complaint on the threshold issue of whether the plaintiff sustained "serious injury" as defined by Insurance Law 5102(d), Reply Affirmation of Defendant Abdallah, Notice of Cross-Motion of Defendant Abdallah for Summary Judgment dismissing the complaint, Affirmation in Opposition of Plaintiffs and Reply Affirmation of Defendant Cruz.

Cross-Motion: ■ **Yes** ☐ **No**

In this action to recover damages for injuries arising from a motor vehicle accident, the undisputed facts establish that the parties were involved in a three-vehicle collision on February 14, 2003, at approximately 12:30 p.m., at the intersection of the Cross Bronx Expressway Service Road and Rosedale Avenue. Plaintiff Rodriguez' vehicle, a 1995 Lincoln Town Car, was stopped at a red traffic signal in the southbound lane, having just exited the Expressway. Defendant Abdallah's vehicle, a Chevrolet van, was stopped just behind Rodriguez. Defendant Cruz' vehicle, a 1987 Ford Crown Victoria, collided with the rear of Abdallah's vehicle, which, in turn collided with the rear of Rodriguez' vehicle. Cruz alleges that as he exited the Expressway, his brakes suddenly failed, rendering him unable to stop. After the collision, Rodriguez complained of neck, back and chest pain. He and Abdallah were transported to a hospital by ambulance, treated and released.

Plaintiff Rodriguez and his wife commenced the instant action claiming, *inter alia*, that he sustained serious injuries as defined by Insurance Law § 5102(d). In his Bill of Particulars, he alleges injuries to his lumbar and cervical spine - "herniated

nucleus pulposus at L5-S, disc bulge at L4-L5, lumbosacral radiculopaty, lumbar strain, sprain of the lumbar spine, cervical strain, sprain of the cervical spine, midline cervical tenderness, midline thoracic pain, cerebral concussion and post-concussion syndrome.'

At his deposition, the plaintiff testified that he took painkillers for a few days after the accident and then went to see Dr. Samuel Malamud, who was recommended by a friend. Dr. Malamud took an x-ray and gave plaintiff some pain pills, but no prescription. Dr. Malamud also sent him for an MRI at Third Avenue Radiology and Imaging. When his pain continued. he returned to Dr. Malamud who administered heat therapy. According to the plaintiff, this consisted of placing hot towels on the plaintiff's back. He received the therapy three times per week for six months, and discontinued it mainly because he could not afford it. Although he stated that finances were "one of the reasons" for discontinuing, he did not elaborate on any other reason.

Three months after the accident, he saw another doctor, D. Arias who diagnosed diabetes and told him that it was caused by emotional problems and anxiety. He saw no other doctor after that, except Dr. Malamud, and no doctor ever recommended surgery for any injury arising from the accident. The plaintiff, a self-employed taxi driver, claimed to have been out of work for three months following the accident, after which time he returned to work for six hours per day. He also testified that Dr. Malamud told him to stay home for three months the first time he visited his office, a few days after the accident. He also states that for three months after the accident, he was unable to help his mother with household chores. According to the plaintiff, he is still unable to sit, stand or walk for long periods of time and still feels pain in his neck and back

The following motions are now before the court: (1) defendant Abdallah moves for summary judgment dismissing the complaint as against him on the issue of liability; (2) plaintiffs cross-move for summary judgment against defendant Cruz on the issue of liability; and (3) both defendants cross-move for summary judgment dismissing the complaint on the ground that plaintiff Rodriguez did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

Because it is the dispositive motion in this case, the Court will first address the defendants cross-motion for summary judgment on the threshold issue of

serious injury. See Insurance Law § 5102(d).

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).

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).

In this case, defendants Abdallah and Cruz have produced 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. Specifically, they produced the affirmed reports of Dr. Ravi Tikoo, a board certified neurologist, Dr. Robert Zaretsky, a board certified orthopedic surgeon, and Dr. Jessica Berkowitz, a board certified radiologist.

When he examined the plaintiff on 11/28/05, *Dr. Tikoo* performed sensory, motor, coordination, cognitive and reflex tests. He found the plaintiff's condition to be "essentially normal" notwithstanding his complaints of neck, back and left shoulder pain. He found only mild tenderness of the cervical and lumbar spine. Dr.

Tikoo found no associated spasm and full range of motion. Dr. Tikoo concluded that "despite his subjective complaints, there was no objective findings to substantiate these complaints."

Dr. Zaretsky examined the plaintiff on 11/30/05 and also found all testing to be normal. There was "no evidence of spasm of the paracervical muscles or trapezii." Plaintiff had full range of motion, intact reflexes and no signs of atrophy. As a result of the accident, the plaintiff "sustained sprains of the cervical, dorsal and lumbar spine, which have resolved." He found that the disc bulges noted in the Bill of Particulars "are considered to be degenerative and non-traumatic." Dr. Zaretsky further reported that "at this time, there is no further evidence of disability" since the plaintiff "is doing his usual occupational activities as a driver." He noted that the plaintiff was working full-time as a taxi driver and reports only occasional back and neck discomfort.

Dr. Berkowitz reviewed an MRI film of the plaintiff's spine taken at Third Avenue Open MRI on 4/3/03, less than two months after the accident. [The affirmed report of *Dr. Charles Barak* interpreting the 4/3/03 MRI states that the plaintiff's spine showed a "normal lordotic curve" and no evidence of fracture or spondylolisthesis but indicated "a right paracentral herniated nucleus pulposus at L5-S1 and a disc bulge at L4-L5.] Dr. Berkowitz found a "diffuse disc bulge at L5-S1" but noted that "disc bulges are chronic and degenerative in origin." She found no evidence of acute traumatic injury to the lumbar spine, such as vertebral fracture, asymmetry of the disc spaces, ligamentous tear or epidural hematoma." Dr. Berkowitz reports that her evaluation of the MRI "reveals no causal relationship between the claimant's alleged accident and the findings on the MRI examination."

In opposition, the plaintiff failed to come forward with objective proof of his injury to raise any factual issue requiring a trial. He submits his own affidavit and deposition testimony, as set forth above. However, since the plaintiff's subjective complaints alone are not sufficient, he was required to come forward some objective proof of his injury to raise a triable issue. See Toure v Avis Rent A Car Systems, supra; Dufel v Green, supra; Gaddy v Eyler, supra. He failed to meet this burden.

The plaintiff's submission from *Dr. Samuel Malamud,* his treating physician, is denominated an "affidavit" but is not properly affirmed nor sworn to. Thus, it is

not in admissible form and need be considered by the court. See CPLR 2106; Grasso v Angerami, 79 NY2d 813 (1991); Elder v Stokes, 35 AD3d 799 (2nd Dept. 2006); Simms v APA Truck Leasing Corp., 14 AD3d 322 (1st Dept. 2005). In any event, Dr. Malamud's affidavit does not state that he is board certified in any specialty but only that he is a "family physician." He states that when the plaintiff came to his office several days after the accident, he found pain, tenderness and spasms in the posterior cervical spine with "highly restrictive movement of the head and neck." According to Dr. Malamud, he treated the plaintiff with physical therapy, chiropractic and acupuncture for approximately six months. However, the plaintiff never mentioned such therapies at his deposition. Dr. Malamud states that he directed the plaintiff not to engage in activities that caused discomfort, thus leaving his level of activity up to him. As a result, the plaintiff told the doctor he stayed home from work for three months. Dr. Malamud reviewed the MRI and concluded the bulging discs were the result of the car accident and not the aging process, but does not explain how he reached that conclusion.

In his affidavit, Dr. Malamud states that on plaintiff's last visit to his office, he still complained of back pain with numbness and tingling, which was aggravated by "pulling, pushing, stretching, cold and humidity." Dr. Malamud found a 30% restriction in range of motion in the lumbosacral spine, and15% restriction of motion in the posterior cervical spine, but does not state what tests he used or how he made that assessment. It was his opinion that "there is a reasonable degree of medical certainty that plaintiff's injuries were caused by the accident," and that he is "permanently disabled" and would require physical therapy "in the future."

It is well settled that "[a]lthough a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law 5102(d), a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration." Monette v Keller, 281 AD2d 523 (2nd Dept. 2001); see Pommels v Perez,4 NY3d 566 (2005); Mejia v DeRose, 35 AD3d 407 (2nd Dept. 2006); Kearse v New York City Transit Authority,16 AD3d 45 (2nd Dept. 2005); Diaz v Turner, 306 AD2d 241 (2nd Dept. 2003). Thus, even if Dr. Samuel's affidavit constituted proof in admissible form, it fails to adequately address the range of motion deficits claimed therein. Moreover, the plaintiff's proof fails to establish any causal connection between the bulging disc condition shown in the MRI and the accident. While Dr. Malamud opines that the condition is not the result of the aging process, he wholly fails to explain his conclusion, which was

necessary to properly address the defendants' proof. As noted above, in her affirmed report Dr. Berkowitz explained that she reached her conclusion that the disc abnormalities were degenerative in nature because she "found no evidence of acute traumatic injury to the lumbar spine, such as vertebral fracture, asymmetry of the disc spaces, ligamentous tear or epidural hematoma." Thus, the plaintiff's assertion that the disc bulge and herniation were caused by the accident is nothing more than sheer speculation. See Bycinthe v Kombos, 29 AD3d 845 (2006).

Accordingly, the cross-motions of defendants Hamada Abdallah and Jose Cruz for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) are granted, and the complaint is dismissed.

The dismissal of the complaint renders the parties' remaining motions academic.

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

ORDERED that the cross-motions of defendants Hamada Abdallah and Jose Cruz for summary judgment dismissing the complaint are granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 15, 2007

Enter:

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

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