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| Shafiroff v I & D Hacking Corp. |
| 2007 NY Slip Op 30951(U) |
| April 18, 2007 |
| Supreme Court, New York County |
| Docket Number: 0116312/2005 |
| Judge: Deborah A. Kaplan |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

JACQUELINE SHAFIROFF

FILED

INDEX NO. 116312-2005

- v -

APR 27 2007

MOTION DATE 2-21-07

I & D HACKING CORP., MUHAMMAD SULTAN,
SHIRLEY CHEUNG and MICHAEL CHEUNG

MOTION SEQ. NO. 001 & 002

MOTION CAL. NO. 108 & 109

KAPLAN, J.:

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

On July 17, 2005, plaintiff Jacqueline Shafiroff, was a passenger in a vehicle operated by Mohammad Sultan and owned by I & D Hacking Corp.. On that morning near the intersection of Park Avenue and East 35th Street, New York, New York, that vehicle was involved in an accident with a vehicle operated by Michael Cheung and owned by Shirley Cheung. As a result of this incident, plaintiff claims to have sustained a serious injury to her head and lacerations to her face requiring some thirty stitches which resulted in a permanent disfigurement. Defendants I & D Hacking and Sultan, now move 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 Michael and Shirley Cheung cross move for summary judgment, on the same grounds.

In support of their motion, the defendants submit the affirmed reports of Dr. Robert Goldstein, a board certified plastic and reconstructive surgeon and, Dr. Iqbal Merchant, a board certified neurologist. Defendants also proffer color photographs and 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. Goldstein, who did not review plaintiff's prior medical records, prior to performing his examination on July 18, 2006, discusses in his report, various physical observations of the plaintiff and details two scars on her face above her eye and on her nose. He concludes that these two scars which are white in color are "permanent and cannot be improved with plastic surgery". Dr. Merchant who examined plaintiff on September 7, 2006, concludes her motor, cranial and mental exam results are all within normal range. He further opines that she does not suffer any objective neurological disability or neurological permanency, casually related to the accident. 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, as well as a photo of her face.

In opposition to the motion, the plaintiff, who was twenty-one years of age at the time of the accident, submits her affidavit, which details the injuries she suffered, as well as her feelings regarding her appearance. She further advises that she has consulted with several plastic surgeons and has been told that her scarring cannot be reduced. She also includes verified medical records and reports concerning her treatment at Bellevue Hospital following the accident, an affirmed report from Dr. Donald Weisman, a plastic surgeon who she consulted with on December 20, 2006 and includes a series of color photographs taken immediately after the accident as well as during her December consultation. All of the plaintiff's submissions detail the injuries to her head and specifically her face. The most recent exam by Dr. Weisman details among his findings the scars on plaintiff's face, which he casually relates to the accident.

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).

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 v Twentieth 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 disfigurement claim. Tugman v. PJC Sanitation Service, 23 AD3d 457 (2d Dept 2005). Her submissions have established that her scars are permanent, discolored and that no treatment can improve them. Abdulai v Roy, 232 AD2d 735 (1st Dept. 1996). A triable issue has been established, in that a jury may conclude that a reasonable person would view her physical appearance as "unattractive", "objectionable" or that she would be the "object of pity or scorn." Insurance Law §5102(d), Zulawski v. Zulawski, 170 AD2d 979 (4th Dept. 1991).

For these reasons and upon the foregoing papers as well as oral argument held, it is

ORDERED that the motion of defendants I & D Hacking Corp. and Muhammad Sultan, for summary judgment is denied in its entirety, and its further

ORDERED that the cross motion by defendants Shirley Cheung and Michael Cheung, for summary judgment is denied in its entirety.

The parties are directed to appear on June 25, 2007, Part 40, 60 Centre Street, 9:30 a.m., ready to proceed to trial.

This constitutes the Decision and Order of the Court.

Dated: April 18, 2007

FILED
APR 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

Deborah Kaplan

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN

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