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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

DIOMEDES FRANCISCO

- v -

OLUWA FEMI AJAYI and VERIZON NEW YORK, INC.

INDEX NO. 105926/05

MOTION DATE 2-21-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 41

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	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ■ No

On September 18, 2004, at approximately 11:45 a.m., as he was crossing within the pedestrian crosswalk and with the green light at the intersection of West 175th Street and Amsterdam Avenue in Manhattan, the plaintiff was struck by a vehicle owned by defendant Verizon New York, Inc. and operated by defendant, Oluwa Femi Ajayi. The plaintiff was transported to the emergency room of Harlem Hospital Center where he was treated and released. He underwent arthroscopic surgery for a torn medial meniscus of the right knee on May 5, 2005, and a resulting course of physical therapy. He commenced the instant action seeking damages for the injuries he allegedly sustained in the accident.

The defendants now move for summary judgment dismissing the complaint 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 two statutory categories of "serious injury" - (1) a "significant limitation of a body function or system" specifically, a loss of range of motion of the right knee and (2) a "medically determined injury or impairment of a nonpermanent 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."

It is settled law that 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. 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 an issue of fact requiring a trial. See Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); 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 experts' qualitative assessment of a plaintiff's 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).

In support of their motion, defendants provide, *inter alia*, the affirmed reports of Dr. Daniel Fuerer and Dr. Salvatore Lenzo, both of whom performed independent medical exams of plaintiff as part of this litigation.

Upon examining the plaintiff on September 11, 2007, Dr. Fuerer, a neurologist, found no objective neurological disability or neurological permanency that is causally related to the subject accident.

Dr. Lenzo conducted an independent orthopedic examination of the plaintiff on August 31, 2006, and found "loose bodies" in the plaintiff's right knee which, in his view, were due to underlying degenerative changes. Dr. Lenzo further states that plaintiff has normal range of motion in his right knee, which is 0 to 145 degrees of flexion. However, Dr. Lenzo's report is devoid of any information describing the independent tests he employed during his exam or how he determined the plaintiff's range of motion. Dr. Lenzo, who also reviewed several of plaintiffs' medical records including radiological records from Harlem Hospital opines that plaintiff has "significant degenerative joint disease" of the right knee.

In opposition to the motion, plaintiff submits the affirmed of Dr. Jeffrey Kaplan, a board certified an orthopaedic surgeon, as well as the plaintiff's affidavit. Dr. Kaplan first examined plaintiff on September 30, 2004, when plaintiff complained of persistent right knee pain. An MRI performed on October 11, 2004, revealed "extensive edema in the medial tibial plateau and lateral femoral condyle. Tear of the posterior horn of the medial meniscus." After two subsequent examinations, Dr. Kaplan advised plaintiff to undergo an arthroscopy, a surgical procedure of his right knee.

On May 11, 2005, Dr. Kaplan performed the right knee arthroscopy, which confirmed a torn medial meniscus and diagnosed articular surface injury of the medial demoral condyle of the right knee, and loose cartilginous bodies and synovitis, removed the cartiliginous bodies, excised a deep radial tear in the horn of the meniscus and debrided some irregularity surfaces of the medial condyle and synovium. He prescribed a home exercise program for the plaintiff.

Dr. Kaplan saw the plaintiff again on November 7, 2006. The plaintiff was ambulating with a cane and complaining of persistent right knee pain. His examination revealed moderate valgus/varus instability as compared to the left, and a decreased range of motion - right knee flexion was limited to 110 degrees while normal range is 135-145 degrees. Dr. Kaplan opined that this represents a significant limitation of motion which affects and limits the use of the plaintiff's right leg and impairs his ability to ambulate. It was his opinion that the plaintiff sustained a 40-60% loss of the use of his right lower extremity. Dr. Kaplan's report further states that these injuries are causally related to the accident, and are permanent.

Here, the defendants met their initial burden by producing evidentiary proof in admissible form sufficient to show the absence of any material issue fact. However, in opposition to the motion, plaintiff produced sufficient proof in admissible form to raise a triable issue of fact requiring a trial. See Kossen v. Algaze 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, supra; Winegrad v. New York Univer. Med Ctr., supra; Zuckerman v City of New York, supra. The plaintiff's proof established, among other things that he suffered a torn meniscus as a result of the accident, that he underwent an extensive course of physical therapy and that his injuries prevented him from engaging in his normal activities after the accident.

As such, the plaintiff's proof raised a triable issue as to whether he suffered a serious injury within the definition of 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 AD 3d 470 (1st Dept. 2004). The proof showed that the injury is still unresolved, is still causing plaintiff pain and is still

limiting his range of motion. See Toure v Avis Rent A Car Systems, supra.

Moreover, any gap in treatment has been sufficiently explained in plaintiff's affidavit in which he states he has continued since his surgery to perform the physical therapy exercises prescribed by his surgeon Dr. Kaplan, and that no other treatment would result in any improvement to his leg. See Pommells v Perez, 4 NY3d 566 (2005); Garner v Tong, 27 AD 3d 401 (1st Dept. 2006); Neuberger v Gill, 19 AD3d 561 (2d Dept. 2005).

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

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

This constitutes the decision and order of the court.

Dated: April 20, 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**