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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

JOAN BENDER

INDEX NO. 113058-2005

MOTION DATE 2-21-07

MOTION SEQ. NO. 002

- v -

SHERRI ALTSCHULER and FABRINI IMPORTS, LTD.

MOTION CAL. NO. 12

KAPLAN, J.:

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Joan Bender 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 May 8, 2003, plaintiff Joan Bender, was operating a vehicle which was struck from behind by a vehicle operated by defendant Sherri Altschuler and owned by defendant Fabrini Imports. Ltd., at the intersection of Jericho Turnpike and Cold Spring Hill Road in Suffolk County. As a result of this incident, plaintiff claims to have sustained a serious injury to her lumbar and cervical spine, as well as herniated discs with resulting limitations on her range of motion as well as other injuries. Defendants, Altschuler and Fabrini, now move for summary judgment averring that plaintiff has failed to establish a serious injury as defined by Insurance Law §5102.

In support of their motion the defendants submit the affirmed reports of Dr. Iqbal Merchant, a board certified neurologist, Dr. Michael Katz, a board certified orthopedist and Dr. David Fisher, a board certified radiologist. Defendants also proffer the deposition testimony of the plaintiff, as well as copies of various pleadings. Doctors Merchant and Katz each performed an Independent Medical Examination (IME) on the plaintiff as part of this litigation. Dr. Fisher reviewed and interpreted her MRI's.

Dr. Merchant, who reviewed plaintiff's prior medical records before performing his examination on August 24, 2006, discusses in his report various observations of the plaintiff's mobility and flexibility and concludes that her neurological examination is within normal limits. He indicates the plaintiff has a full range of motion, with no restrictions indicated in either the lumbar or cervical spine. He details the tests he employed as well as his findings and then compares them to

the normal range of motion. Dr. Merchant concludes that plaintiff has resolved lumbar and cervical sprains and suffers no disability. Dr. Katz, who examined plaintiff on September 19, 2007 also details the objective tests he employed, his findings with regard to plaintiff's mobility and compares them to the norm. Dr. Katz indicates that all of the tests performed were negative and that plaintiff has only resolved cervical and lumbar strains. Finally, Dr. Fisher concludes that the MRI submitted does not indicate any herniated or bulging discs as claimed by plaintiff but rather shows degenerative changes only, rather than injuries related to the collision in question. He concludes that these injuries are a pre-existing condition.

Finally, the plaintiff's deposition shows that she missed only a few days of work after the accident, and has been continuously employed since that time. Additionally, she testified that she had been involved in a prior motor vehicle accident in 2000 in Montana in which she had sustained injuries to some of the same parts of her body as claimed here.

In opposition to the motion, the plaintiff has submitted her own sworn affidavit as well as the sworn affidavit of Dr. Steven Jellon, a board certified doctor of chiropractic medicine, who has been treating plaintiffs since her doctor referred her shortly after the accident. Dr. Jellon details his course of treatment over the past four years as well as plaintiff's diagnosed injuries. Dr. Jellon also conducted a recent examination of Bender on January 29, 2007, in which he performed a number of ranges of motion tests using a Goniometer to measure the exact percentages of restrictions in movement as compared to the stated norms. He concludes among his findings that she has between 22-67% limitations in both her lumbar and cervical spines. He also discusses the MRI photos which were taken immediately after the subject accident, but unlike defendants' physicians he casually relates the findings to the accident of August 2003, and notes the disc injuries. Finally, Dr. Jellon concludes that Bender has suffered a permanent injury to her spine.

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 evidence which establishes to create triable issues of fact on the serious injury claim of "permanent consequential limitation of use/significant limitation of use" under Insurance Law § 5102(d). Garner v. Tong, 27 AD 3d 401 (1st Dept. 2006); Privitera v. Brown, 28 AD3d (2d Dept. 2006); Secore v Allen, 27 AD3d 825 (3d Dept. 2006).

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, and it is further

ORDERED that the parties are directed to appear on May 3, 2007, 9:30 a.m. Med-2, 80 Centre Street, New York, New York for their previously scheduled mediation.

This constitutes the Decision and Order of the Court.

Dated: , April 20, 2007

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

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