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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

GUY ST. ROSIA

- v -

BACKAR SINGHA and R&R TAXI CORP.

INDEX NO. 116863-2004

MOTION DATE 2-28-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 102

KAPLAN, J.:

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Guy St. Rosia 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 9:00 p.m. on May 11, 2003, plaintiff Guy St. Rosia, was operating a vehicle which was involved in a collision with a vehicle operated by defendant Backar Singh and owned by defendant R & R Taxi Corp., at the intersection of Lexington Avenue and East 44th Street in New York County. As a result of this incident, plaintiff claims to have sustained a serious injury to his lumbar and cervical spine, a torn rotator cuff, torn tendons and other shoulder injuries all with resulting limitations on his range of motion. Defendants, Singha and R & R Taxi, 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 report of Dr. Robert Israel, a board certified orthopedist and the deposition testimony of the plaintiff, as well as copies of various pleadings. Dr. Israel performed an Independent Medical Examination (IME) on the plaintiff as part of this litigation.

Dr. Israel, who neither reviewed plaintiff's prior medical records nor his MRI, before performing his examination on August 4, 2006, discusses in his report various observations of the plaintiff's mobility and flexibility and concludes that his orthopedic 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. Israel concludes that plaintiff has resolved lumbar, thoracic, shoulder and cervical sprains and suffers no disability.

Finally, the plaintiff's deposition which was taken with the assistance of a Creole interpreter shows that he missed approximately two months from work after the accident, and details his activities and treatment since that time. Additionally, he testified that while his doctors have recommended surgery, after consultation with his family he has declined an invasive course

of treatment due to religious reasons.

In opposition to the motion, the plaintiff has submitted his own sworn affidavit as well as the sworn affidavits of Dr. Harvey Bishow and Dr. Stanley Liebowitz, both whom have been treating plaintiff since shortly after the accident. Dr. Bishow details his course of treatment over the past four years as well as plaintiff's diagnosed injuries. Dr. Bishow has conducted a number of objective range of motion and other diagnostic tests and has determined that plaintiff exhibits significant numeric percentages of restriction in movement as compared to the stated norms. Dr. Liebowitz, who last examined the plaintiff in December of 2006, has similar findings tho those submitted by Dr. Bishow. He also discusses the MRI photos which were taken immediately after the subject accident, indicating the torn rotator cuff and other injuries and casually relates the findings to the accident of May 2003. Finally, Dr. Liebowitz concludes that St. Rosia has suffered a permanent injury to his right shoulder.

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 his burden by presenting sufficient admissible evidence which establishes to create triable issues of fact on the serious injury claims that he suffered a significant as well as permanent and consequential limitation of his shoulder and arm which resulted from the accident in question. These same submissions substantiate his claim that he could not perform all of his customary and usual activities for the 90 of the first 180 days following the accident. See, Insurance Law § 5102(d), Garner v. Tong, 27 AD 3d 401 (1st Dept. 2006); Priviteria 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 7, 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 J.S.C.

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

Check if appropriate: ☐ **DO NOT POST**