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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

FRANCISCO DIAZ

INDEX NO. 112924-2005

MOTION DATE 3/14/07

- v - FILED

MOTION SEQ. NO. 002

SUBARU LEASING CORP. and MAGALY A. RIVERA

MAY 17 2007

MOTION CAL. NO. 43

NEW YORK COUNTY CLERK'S OFFICE

KAPLAN, J.:

In this personal injury action, the defendant Magaly A. Rivera moves for summary judgment dismissing the complaint on the ground that the plaintiff Francisco Diaz did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). The motion is granted for the reasons set forth below.

At approximately 2:30 p.m. on September 16, 2003 plaintiff avers that as he was driving his vehicle near the intersection of Audubon Avenue and West 185th Street, New York, New York, he was struck by a vehicle operated by defendant Magaly A. Rivera. As a result of this incident, plaintiff claims to have sustained a serious injury to his lumbar spine, herniated and bulging discs and a resulting restriction in his ranges of motion. Defendant Rivera, now moves 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.

In support of her motion, the defendant submits the affirmed reports of Dr. Jay Rosenbaum, a board certified neurologist, Dr. David Fisher, a board certified radiologist and Dr. Howard M. Baruch, an orthopedist. Defendant also proffers the deposition testimony of the plaintiff as well as the complaint and various other filings. Dr. Rosenbaum and Dr. Baruch each performed a Independent Medical Exam (IME) on the plaintiff as part of this litigation. Dr. Fisher conducted a review of the plaintiff's MRI films. The defendant also argues that plaintiff's treatment history indicates a significant, unexplained gap in treatment.

Dr. Rosenbaum, who performed his medical examination on June 12, 2006, discusses in his report, various observations and tests of the plaintiff's mobility, flexibility and motor and sensory skills and responses and concludes that his neurological exam is within normal limits. He finds that despite his subjective complaints, Diaz does not suffer any objective neurological disability or neurological

permanency, casually related to the accident. Dr. Baruch, indicates that plaintiff during his examination on May 15, 2006, exhibits a full and normal range of motion with regard to his upper and lower extremities. Dr. Baruch provides not only the a numeric calculation of the plaintiff's range of motion, but details the norm as well as the objective tests that he employed in making his determination that the plaintiff suffers only from resolved cervical, lumbar, shoulder and thoracic strains.

Dr. Fisher in his affirmed evaluation of plaintiff's MRI films taken some six weeks after the collision, concludes that the films depict degenerative changes at disc levels L5/4, L3/4 and L5/S1. He opines that theses changes are degenerative in nature and not the result of the instant accident. In further support of their motion, the defendant submits the plaintiff's deposition, discussing his treatment and activities subsequent to the accident. Plaintiff's testimony reveals that after the accident he was able to immediately return to work as a supervisor at Premier Veal, where he oversees and assists a group of ten meat packers. Further, he testified that he first sought medical attention two days after the accident and is able to perform almost all of his regular activities.

In opposition to the motion, the plaintiff submits his own affidavit , as well as an affirmed report of Dr. Daniel Feurer, a board certified neurologist who examined the plaintiff on December 11, 2006, plaintiff's prior unaffirmed physician and physical therapy reports, as well as the original MRI report. The report by Dr. Feurer finds a deficit in the plaintiff's range of movement in his lower back, and comments on his difficulty in moving without some pain or discomfort. However, Dr. Feurer fails to state how he measured the plaintiff's range of motion and what objective tests if any he used in making his determination. He concludes that "[b]ased upon the absence of significant radicular symptoms and the normal EMG, I am of the opinion, within a reasonable degree of medical probability, that Mr. Diaz is not suffering from a radiculopathy or similar neurological impairment caused by impingement of herniated disc material upon an exiting nerve root." Dr. Feurer does believe that plaintiff does have some "protruding disc material" in his lower back, resulting in severe lower back pain. He casually relates his findings to the accident, and reasons Diaz has sustained both a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system.

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 defendant has met her 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 failed to satisfy his burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact on any of the claimed sections of serious injury pursuant to Insurance Law §5102 (d). Garner v Tong, 27 AD3d 401 (1st Dept. 2006); Priviteria v Brown, 28 AD3d 733 (2d Dept. 2006); Secore v Allen, 27 AD3d 825 (3rd Dept. 2006); DeJesus-Martinez v Singh, 2007 NY Slip Op 50256U, 2007 N.Y. Misc. Lexis 373 (App. Term 1st Dept. 2007); Martin v Marquez, 2007 NY Slip Op 50214U, 2007 N.Y. Misc. Lexis 333 (App. Term 1st Dept. 2007). Plaintiff's medical submissions are devoid of any objective medical

basis to substantiate the claimed disabilities. Smith v Brito, 23 AD3d 273 (1st Dept. 2005) Picott v Lewis, 26 AD3d 319 (2d Dept. 2006).; Chan v Perez, 24 AD3d 197 (1st Dept. 20050. Dr. Feurer's affidavit, while setting forth a numerical finding of limitation fails to state any objective tests performed to enable him to reach his conclusions. Henry v. Rivera, 34 AD3d 352 (1st Dept. 2006); Nagbe v. Mini Green Hacking Group, 22 AD3d 326 (1st Dept. 2005); Taylor v. Terrigno, 27 AD3d 316 (1st Dept. 2006); Rivera v. Benaroti, 29 AD3d 340 (1st Dept. 2006). Further, plaintiff's un-affirmed medical reports as well as unsworn medical records lack any probative value. Hernandez v Ramirez, 19 AD3d 192 (1st Dept. 2005); Zeigler v Ramadhan, 5 AD3d 1080 (4th Dept. 2004); James v Yoen Wah Rental, Inc., et al., (1st Dept. 2003). Finally, plaintiff has failed to satisfactorily address the extended gap in his treatment. Agramonte v. Marvin, 22 Ad3d 322 (1st Dept. 2005).

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

ORDERED that the defendants' motion for summary judgment is granted in its entirety and the complaint of Franklin Diaz is dismissed in its entirety, and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: April 26, 2007

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

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

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