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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

MARGUERITE KOCH and HEATHER REID

INDEX NO. 100814-2004

MOTION DATE 3-22-07

- v -

MOTION SEQ. NO. 005

MOTION CAL. NO.

LAUREN ASHLEY ERICKSSON, GAYLE ERICKSSON, MOHABATPAL SINGH, TEJINDER SINGH and JAGDISH SINGH

KAPLAN, J.:

In this personal injury action, the defendants Mohabatpal Singh, Tejinder Singh and Jagdish Singh move for summary judgment dismissing the complaint on the ground that the plaintiff Heather Reid 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 1:30 a.m. on October 22, 2004, plaintiff Heather Reid, was a passenger in a livery cab operated by defendant Jagdish Singh and owned by defendants Mohabatpal Singh and Tejinder Singh. On that evening at the intersection of Canal Street and Varick Street, New York, New York, that vehicle was involved in an accident with a vehicle operated by Lauren Ashley Ericksson and owned by Gayle Ericksson. As a result of this incident, plaintiff claims to have sustained serious injury to her cervical and lumbar spine, head, face, jaw, mouth and leg among other injuries. Defendants Singh, 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.

In support of their motion, the defendants submit the affirmed reports of Dr. Edward Weiland, a board certified neurologist, Dr. Lester Lieberman, board certified in orthopedics and Dr. Isaac Seinick, DDS. Defendants also proffer 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. Weiland, who reviewed plaintiff's medical records prior to performing his examination on May 11, 2006, discusses in his report, various observations of the plaintiff's mobility and flexibility and concludes that her neurological exam is within

normal limits. He opines that she does not suffer any objective neurological disability or neurological permanency, casually related to the accident and diagnoses her as having resolved sprains and strains as well as closed head trauma. Dr. Lieberman, who also reviewed plaintiff's medical records as prepared by her physicians, indicates that during her examination she exhibits a full and normal range of motion except with regard to her neck and lower back. He reports with regard to her neck, an extension to 10 degrees with a stated norm of 30 degrees and left and right rotation to 50 degrees with 80 degrees the stated norm. With regard to her lower back he indicates [f]lexion 70 degrees with a stated norm of 90 degrees and left and right bending 30 degrees with a stated norm of 45 degrees. Dr. Lieberman provides not only the a numeric calculation of the plaintiff's range of motion, but details the norm as well as the objective tests can he employed in making his determination. He however concludes that Reid has some slight "decreased range of motion and neck, which is subjective." Dr. Seinick who also reviewed plaintiff's medical reports concludes that her dental surgery and treatment were for treatment of tooth decay and not for injuries associated with the October 2004 collision. 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.

In opposition to the motion, the plaintiff submits her deposition testimony as well as the affirmed reports of Dr. Madhu Boppana, who has treated her since the collision in 2004, as well as the report of Dr. Lieberman which was submitted on behalf of the movants and discussed above. Plaintiff also includes various other medical reports, including her MRI reports, which are detailed in the submissions of the movants. Plaintiff also submits her deposition testimony. Although plaintiff's attorney's affirmation indicates that Reid's affidavit is attached to her submission, it is not. All of the plaintiffs submissions detail the injuries to her spine, including herniated and bulging discs, as well as her resulting limitations to her ranges of motion as well as her dental problems. Dr. Boppana concludes that in his professional opinion, plaintiff has suffered permanent and significant injuries to her lumbar and cervical spine with permanent limitation in movement. He further addresses the gap in her treatment indicating that she had achieved the maximum medical benefit from her course of treatment which included physical therapy, epidural shots, anti-inflammatory and muscle relaxant medications. Finally he casually relates her injuries to the accident of October 2004.

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 medical evidence and by reliance on movants submissions which establishes to create triable issues of fact on the significant limitation issue as well as the permanent consequential limitation issue. Garner v Tong, 27 AD3d 401 (1st Dept. 2006); Privitera 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 SlipOp

50214U, 2007 N.Y. Misc. Lexis 333(App. Term 1st Dept. 2007). Dr. Lieberman's report indicates significant restrictions in Reid's range of movement in both her back and neck. Sow v. Arias, 21 AD3d 326 (1st Dept. 2005). Plaintiff has also sufficiently addressed the gap in her course of treatment by presenting evidence that she had achieved the maximum medical benefit and any further treatment would be merely palliative. See Pommells v Perez, Brown, Dunlap, Carasco v Mendez, 4 NY3d 566 (2005); Garner v Tong, supra; Neuberger v Gill, 19 AD3d 561 (2d Dept. 2005). Finally, plaintiff has sufficiently substantiated her 90/180 claim, by demonstrating that her injury was "medically determined" and that she was unable to perform her usual daily activities since the October 2004 accident, including competitive long-distance running in such events as the New York and Boston marathons. Curtailment of a plaintiff's athletic or sporting activities may be considered on a 90/180 claim (see Kaplan v Gak, 259 AD2d 736 (2d Dept.1999) particularly where, as here, they constituted such a significant portion of the plaintiff's daily activities prior to the accident. Construing this proof in the light most favorable to the plaintiff, as it must (see Kesselman v Lever House Restaurant, supra; Goldman v Metropolitan Life Ins. Co., supra), the Court concludes that plaintiff has raised triable issues requiring a jury trail. Accordingly, the defendant's motion for summary judgment must be denied.

For these reasons and upon the foregoing papers, it is

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

The parties are directed to appear for a pre-trial conference, Part 22, 80 Centre Street, New York, New York, Room 136 on June 14, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: May16, 2007

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

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

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