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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

MARY PURNELL

- v -

KENINDE FAYEMI and RONALD SHERMAN

INDEX NO. 100899-2005

MOTION DATE 5-23-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 87

KAPLAN, J.:

In this personal injury action, both defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Mary Purnell did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). Defendant Ronald Sherman also moves for the same relief on the alternative ground, averring that he is not the owner of the vehicle involved in the collision and as such bears no responsibility. The motion is granted for the reasons set forth below.

At approximately 5:00 a.m. on January 18, 2003 plaintiff avers that as she sat stopped in her vehicle at a red light on West 13th Street near Eighth Avenue, New York, New York, she was struck from behind by a vehicle driven by Keninde Fayemi and owned by Ronald Sherman. As a result of this incident, plaintiff claims to have sustained a serious injury to her cervical and lumbar spines. Defendants Fayemi and Sherman, 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. Sherman also moves for summary judgment on the alternative ground that he was not the owner of the vehicle involved in the accident, and as such bears no responsibility.

In support of their motion, the defendants submit the affirmed reports of Dr. Andrew Bazos, a board certified orthopedic surgeon. Defendants also proffer the deposition testimony of the plaintiff as well as the complaint and various other filings. Sherman offers the New York State Department of Motor Vehicle records as well as a copy of the vehicles registration. Dr. Bazos, performed an Independent Medical Exam (IME) on the plaintiff as part of this litigation. The defendants also argue that plaintiff's treatment history indicates a significant, unexplained gap in treatment.

Dr. Bazos, who performed his medical examination on July 20, 2006, discusses in his report, various observations of the plaintiff's mobility and flexibility and concludes that her orthopedic exam is within normal limits. He concludes that

despite her subjective complaints, she does not suffer any objective orthopedic disability or permanency casually related to the accident. Dr. Bazos, indicates that plaintiff during her examination on November 2, 2006, exhibits a full and normal range of motion with regard to her upper and lower extremities. He 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 and lumbar strains. In further support of their motion, the defendants also submit the plaintiff's deposition, discussing her treatment and activities subsequent to the accident.

In opposition to the motion, the plaintiff submits an affidavit by her attorney and a "certif[ied] and attest[ed] statement of Rick Inacio, a New jersey chiropractor who treated her after the collision. Dr. Tsai Chao, references in his report MRI films taken of the plaintiff in March of 2003 as well as EMG tests performed in April of 2003. However neither of those reports are attached or certified by a radiologist. Dr. Inacio finds a deficit in the plaintiff's movement of her lumbar and lumbar spine, but fails to equate it to any norm. Further, he 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 it is his professional opinion, that plaintiff has suffers from a "permanent injury that has not healed to function normally and will not heal to function normally without any further treatment."

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 failed to satisfy her 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). Dr. Inacio's report fails to set forth a numerical finding of limitation and 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 medical reports in the form of a certified and attested report by a chiropractor lack any probative value. CPLR § 2106; Offman v Singh, 27 AD3d 284 (1st Dept. 2006); 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).

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is granted in its entirety and the complaint of Mary Purnell is dismissed in its entirety, as such it is not necessary for the Court to rule on Sherman's remaining motion, 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: May 28, 2007

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN
J.S.C.

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

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