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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

PAUL TONG and SUSANNA S. CHAN

- v -

JOIN IN (USA) TRADING INC. and NG LAI SANG

INDEX NO. 112702/05

MOTION DATE 3-14-07

MOTION SEQ. NO. 002

MOTION CAL. NO. 93

The following papers, numbered 1 to 3, were read on this motion by the defendants for summary judgment dismissing the complaint on the ground that the plaintiff Susanna Chan did not meet the serious injury threshold requirement of Insurance Law § 5102(d).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ■ No

On August 16, 2004, as the plaintiffs were crossing Bayard Street between Mott and Elizabeth Streets in Manhattan, they were struck by a vehicle owned by defendant Join In Trading Inc. and driven by defendant Ng Lai Sang. Plaintiff Paul Tong, 82 years old, suffered a fractured rib, a lacerated lip and other injuries, and was transported to the hospital. Sixty-two-year-old plaintiff Susanna Chan claims to have suffered injuries to her right shoulder and left hip. She sought medical treatment one week later.

The plaintiffs thereafter commenced the instant action seeking damages for the injuries they allegedly sustained in the accident. Plaintiff Chan alleged that she suffered "serious injury" within the meaning of Insurance Law § 5102(d) in that she suffered a "medically determined injury or impairment of a non-permanent nature which prevented [her] from performing substantially all of the material acts which constitute his usual and customary daily activities for at least 90 days during the180 days immediately following the occurrence of the injury or impairment." Insurance Law § 5102(d). The defendants now move for summary judgment dismissing the complaint as to plaintiff Chan on the ground that she did not meet that statutory requirement.

It is settled law that 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. 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 an issue of fact requiring a trial. See Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); 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).

Where, as here, the plaintiff claims serious injury under the "90/180" category of Insurance Law §5102(d), he or she must (1) demonstrate that his or her usual activities were curtailed during the requisite time period and (2) submit competent credible evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in plaintiff's daily activities. Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Gaddy v Eyler, 79 NY2d 955 (1992).

In support of their motion, the defendants submit the plaintiff's bill of particulars, which states that she was confined to home for only three days after the accident, was not confined to bed and was not incapacitated in any way. They also rely upon the affirmed reports by Dr. Ravi Tikoo, a board certified neurologist, and Dr. Robert Orlandi, a board certified orthopaedic surgeon, both of whom performed independent medical exams of plaintiff in September of 2006.

Dr. Tikoo noted the plaintiff's complaints of neck and shoulder pain but found all normal functioning upon testing, with only mild tenderness of the cervical spine, and no "significant clinical evidence of neuropathy, radiculopathy or disc herniation." He noted that this plaintiff was not employed at the time of the accident and concluded that she is currently "able to function in her normal capacity."

Dr. Orlandi's orthopaedic exam revealed no abnormality, disability or permanence attributable to the accident In his report, he notes the plaintiff's subjective complaints of pain in the shoulders and in a confined area of the lower back, which he finds "atypical.' He also finds paresthesis of both hands, which he finds "unusual" since there is no paresthesis in either arm. He found a restriction in the cervical range of motion in extension (45 degrees; normal being 50 degrees) and rotation right and left (60 degrees; normal being 70 degrees). Dr. Orlandi opines that the restrictions are due to "age-related cervical spondyloss, which is universal in this age group." Dr. Orlandi's diagnosis was resolved cervical strain, lumbar strain and right shoulder strain.

Contrary to the plaintiff's argument, the reports of Drs. Tikoo and Orlandi are in admissible form. See CPLR 2106; Offman v Singh, 27 AD3d 284 (1st Dept. 2006). Moreover, the defendant's have satisfied their burden on this motion by demonstrating the absence of a "serious injury" as a matter of law. While the reports of Drs. Tikoo and Orlandi do not specifically address the "90/180" claim asserted by the plaintiff, the claim is belied by her own bill of particulars. Moreover, not only has she failed to come forward with proof in admissible form to raise an issue of fact, she submits proof to support the defendant's position.

At 5', 190 lbs, legally blind and on dialysis, the plaintiff testified that she did not seek medical treatment until one week after on the day of the accident. Although she felt pain in her shoulder, she believed that she was "okay" and did not want to miss any dialysis treatments. She presented at the hospital one week later complaining of chest pains and breathing problems. An x-ray was negative. While at the hospital, she forgot to tell the doctors about her shoulder pain. When she mentioned it two weeks later, she was was sent for physical therapy at New York Hospital. She went three times a week "for about a month and later on for about two months." She testified that she currently feels pain in her hip when walking up the stairs of her fifth floor walk-up apartment. For that reason, she stayed home, mostly in bed for about six months after the accident, unable to do housework and unable to go out except for doctor and therapy appointments. Moreover, the plaintiff testified that she was able to travel to China in December 2005 and, at the time of the deposition in June 2006, the only pain medication she needed was an occasional Tylenol.

As stated above, the plaintiff's own bill of particulars states that she was confined to home for only three days after the accident, was not confined to bed and was not incapacitated in any way after the accident. While the plaintiff later testified that she stayed home for six months after the accident, she wholly fails to establish that even these restrictions were not self-imposed or did not exist prior to the accident. Therefore, to the extent that her deposition testimony contradicts her pleading, the court finds that it was tailored to meet statutory requirements and, in any event, is insufficient to support a claim of "serious injury" under the "90/180" category of Insurance Law § 5102(d). See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, supra.

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is granted, all causes of action of plaintiff Susanna Chan are dismissed, and the Clerk of the Court is directed to enter judgment in favor of the defendants and against plaintiff Susanna Chan on those causes of action only, and it is further,

ORDERED that the action shall continue as to plaintiff Paul Tong, and it is further,

ORDERED that the remaining parties are to be appear at Mediation-2, 80 Centre Street, NY, NY, on July 9, 2007, at 9:30 a.m. as previously scheduled.

This constitutes the Decision and Order of the Court.

Dated: May 15, 2007

Deborah K

Deborah A. Kaplan *J.S.C.*

DEBORAH A. KAPLAN
J.S.C.

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

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