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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

LUIS MOLINA SR.

- v -

PATRICIA CHOEZ, LUIS A. MOLINA and JIMINIAN JADIRY

INDEX NO. 404395-2004
MOTION DATE 4-25-07
MOTION SEQ. NO. 001
MOTION CAL. NO. 68

KAPLAN, J.:

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Louis Molina Sr. did not sustain a "serious injury" within the meaning of Insurance Law 5102(d).

At approximately 6:30 p.m. on November 1, 2000, Karen Choez, was a passenger in a vehicle operated and owned by defendant Patricia Choez. On that evening near the intersection of Vyse Avenue and 178th Street, Brooklyn, New York, the Choez vehicle was involved in an accident with a vehicle operated by Luis A. Molina and owned by Jiminian Jadiry, in which plaintiff Louis Molina Sr. was a passenger. As a result of this incident, plaintiff claims to have sustained a serious injury to his neck, back and head. Defendant Luis A. Molina and Jiminian Jadiry, 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. Defendant Patricia Choez cross-moves for summary judgment, on the same grounds.

In support of their motion, the defendants submit the affirmed reports of Dr. Robert Israel, a board certified orthopedist and Dr. Daniel Feurer, a board certified neurologist. 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. Israel examined the plaintiff on March 23, 2006, after reviewing his prior medical reports. In his report, Dr. Israel details the independent tests he employed during his examination as well as the ranges of motion in both Molina's lumbar and cervical spine, which he states are normal. He also examined plaintiff's right knee, and concludes that Molina has resolved lumbar and cervical sprains as well as knee contusions. Dr. Israel does casually relate plaintiff's injuries to the November 2000

accident, but finds he has no permanent disabilities or limitations as a result.

Dr. Feurer, who reviewed plaintiff's prior medical records, prior to performing his examination on March 27, 2007, discusses in his report, various observations of the plaintiff's mobility and flexibility and concludes that his neurological exam is within normal limits. He concludes that he does not suffer any objective neurological disability or neurological permanency, casually related to the accident. In further support of their motion, the defendants also submit a portion of the plaintiff's deposition, discussing his treatment and activities subsequent to the accident, including the fact that he did not seek medical treatment until the next day when he traveled to a walk-in clinic and was able to return to his full responsibilities as a painter within two days.

In opposition to the motion, the plaintiff submits her deposition testimony as well as the affirmed reports of Dr. Eliot P. Schuster, who examined plaintiff on November 14, 2000, April 5, 2006 as well as January 24, 2007. Dr. Schuster discusses one of the objective tests he employed during his examinations, and gives detail about the plaintiff's ranges of motion in his cervical and lumbar spines which have been consistently restricted between 33-50% since the accident as compared to the stated norm. He discusses the plaintiff's MRI report which is in admissible form and attached to the plaintiff's submission. The report prepared by Dr. Ravindra Ginde notes the presence of two herniated discs with compression of the thecal sac. Dr. Schuster casually relates plaintiff's condition to the subject accident and concludes that Molina sustained a permanent loss of use of a body member, organ or function of the lumbar spine as well as a permanent consequential limitation of the same area. Molina also includes his own affidavit which details his course of treatment and explains the gap in treatment as a result of the cessation of no-fault insurance benefits. He avers that he continued a course of physical therapy at home. Dr. Schuster in his affidavit supports Molina's claim of at home physical therapy and further opines that after six months of physical therapy he had achieved the maximum medical benefit.

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 medical evidence which establishes to create triable issues of fact on the significant limitation issue, as well as the permanent loss of use of a body member, organ or function of the lumbar spine. 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 SlipOp 50214U, 2007 N.Y. Misc. Lexis 333(App. Term 1st Dept. 2007). Plaintiff has also sufficiently addressed the gap in his course of treatment by presenting evidence that he could not continue as a result of termination of his medical benefits as well as having reached a maximum medical benefit in that any other 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). However, plaintiff has failed to present legally sufficient evidence on his claim of not being able to perform substantially all of his usual and customary duties for not less then ninety of the one hundred and eighty days following the accident. Lopez-Carpio-Ceballo ,20 AD3d 336 (1st Dept. 2005), Mejia v Rodriguez, 13 Misc 3d 136A (App. Term 1st Dept. 2006).

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants Louis A. Molina and Jiminian Jadiry's motion as well as defendant Patricia Choez's cross-motion for summary judgment are granted to the extent that the plaintiff's claim that he was unable to perform substantially all of his usual and customary activities for not less then ninety of the one hundred and eighty days following the accident is dismissed; and it is further

ORDERED that the remaining branches of the motion and cross-motion for summary judgment are denied, and the remainder of the action shall continue.

The parties are directed to appear for a pre-trial conference, Part 22, 80 Centre Street, New York, New York, Room 136 on June 28, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: June 12, 2007

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

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

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