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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

JIN WEN MEI

- v -

BAO YU SITU and YU HONG LIU

INDEX NO. 100591-2006

MOTION DATE 5-2-07

MOTION SEQ. NO. 002

MOTION CAL. NO. 71

KAPLAN, J.:

In this personal injury action, defendants Bao Yu Situ and Yu Hong Liu move for summary judgment dismissing the complaint on the ground that the plaintiff Jin Wen Mei did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). This motion is denied for the reasons set forth below.

At approximately 7:10 p.m. on March 4, 2004, as he was crossing within the pedestrian crosswalk and with the green light at the intersection of 61st Street and Fort Hamilton Parkway, Brooklyn, New York, the plaintiff Jin Wen Mei was struck by a vehicle operated by defendant Liu and owned defendant Situ, which was making a left turn. As a result of this incident, plaintiff claims to have sustained a serious injury to his cervical and lumbar spine, left shoulder and left knee. Defendants 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. Ravi Tikoo, a board certified neurologist and Dr. Barry Katzman, board certified in orthopedics. Each of these doctors, performed a Independent Medical Exam (IME) on the plaintiff as part of this litigation. Defendants also proffer the medical reports of Dr. Robert April and Dr. Michael Katz who examined plaintiff on behalf of the no-fault insurance carriers. They also submit the radiologist report of Dr. Richard Heiden, who reviewed plaintiff's MRI and other films as well as the deposition testimony of the plaintiff, the complaint and various other filings.

Dr. Tikoo, who reviewed plaintiff's prior medical records, before performing his examination on October 4, 2006, discusses in his report his observations of the plaintiff's mobility and flexibility. He concludes that his neurological exam is within normal limits and he does not suffer any objective neurological disability or neurological permanency, casually related to the accident. He diagnoses Mr. Mei as having a "history of lumbosacral strain and soft tissue injuries." Notably,

Dr. Tikoo's report is devoid of any details of his examination, including what objective tests if any he employed in making his determination as to plaintiff's condition. Dr. Katzman, who also reviewed plaintiff's prior medical records as prepared by his physicians, before conducting his examination on October 5, 2006, indicates that Mei exhibits a full and normal range of motion with regard to his upper and lower extremities. While he casually relates Mei's complaints to the accident he finds he has merely resolved left knee, left shoulder, left hip, left wrist and cervical, thoracic and lumbar spine strains. Dr. Katzman does list the objective tests he employed and does detail the plaintiff's range of motion percentages as compared to the stated norm. Dr. April examined plaintiff on May 13, 2004 and found him to suffer from hypertension unrelated to the accident but "no neurological diagnosis.' Dr. April also advised against any further medical treatment finding "maximum medical improvement has occurred." Dr. Katz, who performed an orthopedic examination of plaintiff on May 13, 2004 found him only to suffer from resolved lumbosacral strain and resolved contusions of the left knee, wrist and shoulder. Finally, Dr. Richard Heiden, who interpreted plaintiff's MRI's finds "Schmorl's node at L-4, anterior protrusion at L3-4, L4-L5, disc bulges at L4-5 and L5-S1." However, Dr. Heiden contends these findings coupled with the dehydration of plaintiff's lumbar spine are degenerative changes and not related to the subject 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.

In opposition to the motion, the plaintiff submits his deposition testimony, the pleadings as well as the affirmed reports of Dr. Tsai Chao, who has overseen his care since the accident and Dr.Ayoob Khodadadi, a radiologist who interprets his films. Plaintiff has also submitted copies of Dr. Chao's complete file, the medical reports submitted by movants as well as various other medical reports, which are detailed in the submissions of the movants, and the police report in this case. All of the plaintiffs submissions detail the injuries to his back, wrist, knee and shoulder. The most recent exam on February 22, 2007 by Dr. Chao, who reviewed plaintiff's other medicals as well as films, indicates, among his findings a deficit in the plaintiff's range movement of his cervical spine varying between 13-56% as compared to the stated normal value. He also finds that the range of motion in his left shoulder is limited from 7-34% from the stated normal values. The report details other notable restrictions and details the many objective tests Dr. Chao used in making his findings, including the MRI. Dr. Chao also provides range of motion results contemporaneous with his first examination of Mei on March 6, 2004, some two days after he was struck by defendant's vehicle. He concludes that it is his professional opinion, that plaintiff has suffered "a permanent, consequential limitation of his neck, lower back and left shoulder." Dr. Chao restricted Mei's activities after the initial examination finding him to be totally incapacitated. Dr. Khodadadi confirms the presence of an "intra substance tear

involving the posterior horn of the medial meniscus' in Mei's left knee."

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. 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 has also sufficiently addressed any gap in his course of treatment by presenting evidence that he could not continue as a result of termination of his medical benefits, which in fact is supported by movants own submissions. 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).

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

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

The parties are directed to appear for their scheduled mediation conference, Part Med-2, 80 Centre Street, New York, New York, on July, 11, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: June 26, 2007

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

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