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

PRESENT: HON. DEBORAH A. KAPLAN Justice PART 22

AURORA PEREZ

- v -

KISMELY A. CABREJA, GELSO D. CABREJA and ARGENTINA T. NIVAR

INDEX NO. 110646-2003

MOTION DATE 4-25-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 92

KAPLAN, J.:

In this personal injury action, defendants Kismely and Gelso Cabreja move for summary judgment dismissing the complaint on the ground that the plaintiff Aurora Perez did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). The remaining defendant Argentina Nivar cross-moves for the same relief. Those motions are denied for the reasons set forth below.

At approximately 7:00 p.m. on July 11, 2000, plaintiff Aurora Perez, was a passenger in a vehicle operated by Gelso Cebreja and owned jointly by Gelso and Kismely Cabreja. That evening on West 187th Street near its intersection with Broadway, New York, New York, that vehicle was involved in an accident with a vehicle operated and owned by Argentina Nivar. As a result of this incident, plaintiff claims to have sustained a serious injury to her cervical and lumbar spines. Defendants Cabreja, 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 Nivar cross moves for summary judgment, on the same grounds, relying on the submissions of Cabreja.

In support of their motion, the defendants submit the affirmed reports of Dr. Edward Weiland, a board certified neurologist and Dr. Robert Israel, 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 deposition testimony of the plaintiff, as well as the complaint and various other filings. They also include a report prepared by Dr. Steven Mendelsohn, a radiologist who reviewed plaintiff's MRI films.

Dr. Weiland, who reviewed plaintiff's prior medical records, before performing his examination on December 15, 2005, discusses in his report, the objective tests he employed during his examination and his observations of the

plaintiff's mobility and flexibility. He concludes that her neurological exam is within normal limits and she does not suffer any objective neurological disability or neurological permanency, casually related to the accident. Dr. Israel, who also reviewed plaintiff's prior medical records as prepared by her physicians, before conducting his examination on January 18, 2006, indicates that Perez exhibits a full and normal range of motion with regard to her upper and lower extremities. He casually relates her complaints to the accident but finds she has merely resolved cervical, thoracic and lumbar spine sprains. Dr. Mendelsohn in his report disagrees with the findings of plaintiff's radiologist and states that there is no evidence of "disc herniation" and that there are only "mild degenerative changes", not casually related. 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 affidavit as well as the affirmed reports of Dr. Aric Hausknecht, a neurologist and Dr. John Rigney, the radiologist who interpreted her films. Plaintiff also includes various other medical reports, which are detailed in the submissions of the movants. All of the plaintiffs submissions detail the injuries to her spine. The most recent exam on March 16, 2006 by Dr. Hausknecht, who reviewed plaintiff's other medicals as well as films, indicates, among his findings a deficit in the plaintiff's forward movement of her lumbar spine of some 45 degrees as compared to the stated normal value of 90. He also finds that the forward left and right lateral flexion in her lumbar spine is limited to 30 from a stated norm of 50. The report details the many objective tests used in making his findings, including the NCV/EMG and MRI. He concludes that it is his professional opinion, that plaintiff has suffered "a permanent, consequential limitation of her cervical and lumbosacral spine," as well as a "significant limitation of her neurologic and muskuloskeletal system." He has restricted her activities and casually relates her injuries to the subject accident. Dr. Rigney confirms the presence of herniated discs at L4-L5, L5-S1 as well as loss of curvature with straightening. The plaintiff in her affidavit provides details about the collision and her subsequent treatment including eight months of physical therapy and chiropractic care. She claims she only was able to leave her home for medical treatment and could not perform any of her job responsibilities as a care giver to young children. She explains the gap in her treatment by stating she had reached maximum benefit and that any additional treatment would be palliative.

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 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 the gap in her course of

treatment by presenting evidence that she could not continue as a result of termination of her medical benefits. 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, 2007~~ July 16, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: June 21, 2007

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

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

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