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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

JON E. LONTOK and CORAZON LONTOK

- v -

EMERICH VAINRIB and LEONARD FELLER

INDEX NO. 111053-2004
MOTION DATE 5-9-07
MOTION SEQ. NO. 002
MOTION CAL. NO. 77

KAPLAN, J.:

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

At approximately 6:10 p.m. on August 24, 2001, on the Long Island Expressway, near its intersection with Main Street in Queens, New York, a vehicle driven by Jon E. Lontok and owned by Corazon Lontok was struck in the rear by a vehicle driven by Leonard Feller and owned by Emerich Vainrib. As a result of this incident, plaintiff claims to have sustained a serious injury to his neck, back and head. Defendants Emerich Vainrib and Leonard Feller, 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. Robert Zaretsky, a board certified orthopedist and Dr. Robert April, a board certified neurologist. Each of these doctors, performed an 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. Finally, defendants submit the affirmed report of Dr. Stephen Lastig, a radiologist who reviewed and interpreted plaintiff's MRI films.

Dr. Zaretsky examined the plaintiff on November 1, 2006, after reviewing his prior medical reports. In his report, Dr. Zaretsky details the independent tests he employed during his examination as well as the ranges of motion in both Lontok's lumbar and cervical spine, which he states are normal. He concludes that Lontok has resolved lumbar and cervical sprains and strains as well as a herniated disc at C5-6, as revealed in the MRI film.

Dr. April, who reviewed plaintiff's medical records, prior to performing his

examination on November 9, 2006, discusses in his report, various observations of the plaintiff's mobility and flexibility and concludes that his neurological exam is within normal limits. He performs a number of objective tests and measures plaintiff's range of motion utilizing an orthopedic caliper. He concludes that he does not suffer any objective neurological disability or neurological permanency, casually related to the accident. Dr. Stephen Lastig, a radiologist who interpreted plaintiff's MRI films confirms the presence of bulging and herniated discs, some of which he has determined as evidence of a degenerative condition and some not. 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 miss any work and did not receive any medical attention for days after the accident.

In opposition to the motion, the plaintiff submits a portion of his deposition testimony as well as the affidavit of Dr. Tamara Woller-Li, a chiropractor who first examined him eleven days after the accident, and the affirmed report of Dr. Rafael De La Cruz who examined plaintiff on October 13, 2006. Dr. De La Cruz's report is detailed and discusses the numerous independent tests he performed on plaintiff. He also discusses the MRI films, which are in admissible form and attached to the plaintiff's submission as well as Dr. Woller-Li's findings. This doctor concludes that plaintiff has restricted ranges of motion in both his cervical and lumbar spine as well as herniated discs, all casually related to the subject accident. Finally plaintiff includes the affirmed report of Dr. John Rigney, a radiologist who also administered and read plaintiff's MRI films of October 10, 2001 and also confirms the presence of several herniated discs with cord impingement.

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 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 from Dr. Woller -Li that after a course of physical therapy, acupuncture and chiropractic adjustments over a period of months he had achieved the maximum medical benefit possible, and 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, who was immediately able to resume his full work responsibilities as a financial counselor at Lenox Hill Hospital 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 Emerich Vainrib and Leonard Feller's 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 for summary judgment is denied, and the remainder of the action shall continue.

The parties are directed to appear for their scheduled mediation at Med-2, 80 Centre Street, New York, New York, on July 10, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: June 29, 2007

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

DEBORAH A. KAPLAN

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

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