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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

ARIEL B. BANEA

- v -

F & M PLUMBING SUPPLY CO. of N.Y. and JERROD COSTON

INDEX NO. 111275-2004
MOTION DATE 5-2-07
MOTION SEQ. NO. 004
MOTION CAL. NO. 7

KAPLAN, J.:

In this personal injury action, the defendants F & M Plumbing Supply Co. of N.Y. (F& M Plumbing) and Jerrod Conston move for summary judgment dismissing the complaint on the ground that the plaintiff Ariel Banea did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). Plaintiff Ariel Banea cross-moves for summary judgment on the issue of liability against both defendants.

At approximately 3:30 p.m. on August 27, 2001, plaintiff Banea accompanied by co-employee Kaliker Narine, was operating a 1999 Ford pick-up truck owned by his employer. While stopped at a red light on Second Avenue between East 64th and East 65th Streets, New York, New York, the vehicle was struck from behind by a vehicle operated by Jerrod Coston and owned by F & M Plumbing. As a result of this incident, plaintiff claims to have sustained a serious injury including herniated and bulging discs, headaches and vertigo as well as damage to his cervical and lumbar spines resulting in severe and permanent bodily injury. 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. Robert Goldstein, a board certified orthopedist, who performed a Independent Medical Exam (IME) on the plaintiff as part of this litigation as well as certified copies of plaintiff's prior medical reports and deposition transcript as well as the pleadings.

Dr. Goldstein, who reviewed plaintiff's prior medical records, prior to performing his examination on July 14, 2006, discusses in his report, various observations after testing of the plaintiff's mobility and flexibility and concludes that his neurological exam is within normal limits. Dr. Goldstein indicates that Banea has a "full range of painless motion" in his cervical spine as well as upper

extremities. He also notes "no evidence of cervical disc herniations" or spasms. He concludes that Banea is not disabled and diagnoses a resolved sprain of his cervical spine.

In opposition to the motion, the plaintiff submits an affirmed report from Dr. Clarita E. Herrera which provides a very brief summary of her treatment of Banea since 2002, when he first came to see her after his insurance coverage changed. The report fails to provide either the details of the extent of plaintiff's claimed limitations or how they were medically determined. Her March 15, 2007 report fails to discuss any current limitations other then in the most broad and unsubstantiated terms. Plaintiff also includes a letter, in inadmissible form, from Dr. Benjamin Nachemie to Dr. Herrera which contains some measurements of an undefined area of plaintiff's range of motion, which he concludes is the result of "degenerative cervical arthritis." Finally, plaintiff includes the affirmed report of Dr. William Louie, a radiologist who performed and interpreted plaintiff's MRI films, who find plaintiff displays "small and tiny" disc protusions.

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 failed to satisfy his burden by presenting sufficient admissible medical evidence which would establishes a triable issue. 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). Dr. Herrera's report fails to state how she made her determinations, what objective tests if any she employed, what the range of motion actually is and how it compares to the norm. It is well settled that "[a]lthough a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law 5102(d), a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration." Monette v Keller, 281 AD2d 523 (2nd Dept. 2001); see Pommels v Perez, 4 NY3d 566 (2005); Meija v DeRose, 35 AD3d 407(2d Dept. 2006); Kearse v New York City Transit Authority, 16 AD3d 45 (2d Dept. 2005); Silkowski v Alvarez, 19AD3d 476 (2d Dep't. 2005); Diaz v Turner, 306 AD2d 241 (2d Dept. 2003). Thus, Dr. Hererra's report fails to adequately address any range of motion deficiencies claimed. Vasquez v Reluzco, 28 AD3d 117 (1st Dept. 2006). The proffered submissions fail to provide any foundation for the physician's conclusions. Franchi v. Palmieri, 1 NY3d 536 (2003); Stevens v Homiak Transport, 21 AD3d 300 (1st Dept. 2005).

Accordingly, the motion by defendants F & M Plumbing Supply Co. of N.Y. and Jerrod Coston for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) is granted, and the complaint against these defendants is dismissed. As such, the plaintiff's cross-motion for summary judgment on liability is denied as

moot.

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

ORDERED that the defendants' motion for summary judgment is granted in its entirety, and the complaint against defendants F & M Plumbing Supply Co. And Jerrod Coston is dismissed in its entirety, and it is further

ORDERED that the plaintiff's cross motion for summary judgment on liability is denied as moot, and it is further,

ORDERED that the Clerk of the court is to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: June 29, 2007

Deborah Kaplan

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

DEBORAH A. KAPLAN

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

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