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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

CYNTHIA SEYMOUR and NEKIA SEYMOUR

- v -

DANIEL FURMAN and RICALE TAXI

INDEX NO. 102799/05

MOTION DATE 4-25-07

MOTION SEQ. NO. 001/~~002~~

MOTION CAL. NO. 123

The following papers, numbered 1 to 3 were read on this motion by defendants for summary judgment on the threshold "serious injury" issue (Insurance Law 5102[d]) against plaintiffs Cynthia Seymour and Nekia Seymour.

	PAPERS NUMBERED
Notice of Motion – Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2
Affirmation in Reply	3

Cross-Motion: ☐ Yes ■ No

In this action to recover damages for injuries sustained in a motor vehicle accident, it is alleged that on June 24, 2002, on Park Avenue near its intersection with East 96th Street in Manhattan, a vehicle driven by plaintiff Cynthia Seymour was struck by a vehicle driven by defendant Daniel Furman and owned by defendant Ricale Taxi. Plaintiff Nekia Seymour was a passenger in the Seymour vehicle.

Plaintiffs commenced the instant action claiming, *inter alia*, that they sustained serious injuries as defined by Insurance Law § 5102(d) - i.e. "permanent consequential limitation of use of a body organ or member." Defendants separately move against both plaintiffs Cynthia Seymour and Nekia Seymour for summary judgment dismissing the complaint on the ground that nether sustained a serious injury within the meaning of Insurance Law § 5102(d).

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 defendants 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).

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).

In this case, the defendants have produced 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. Specifically, they produced the pleadings, plaintiffs' deposition testimony, the affirmed report of Dr. Andrew Bazos, a board certified orthopedic surgeon, and the affirmed report of Dr. Edward Weiland, a board certified neurologist.

In his reports, Dr. Bazos states that he examined plaintiff Cynthia Seymour on December 21, 2006 and plaintiff Nekia Seymour on November 30, 2006. Dr. Bazos performed a number of objective tests on both plaintiffs, all of which are described in his reports and all of which indicated a normal range of motion in the areas plaintiffs' claimed were injured. In particular, his reports states that plaintiffs' had "no muscle spasms, tenderness or loss of lordosis in the cervical spine... no atrophy or muscle wasting was present." Dr. Bazos further states that plaintiffs' had no "motor or sensory deficits in upper or lower extremities." He found neither plaintiff suffered from an orthopedic disability.

In his report, Dr. Weiland states that he examined plaintiff Cynthia Seymour on December 21, 2006, where he performed a number of objective tests all of which are described in his report and all of which indicated full range of motion of her neck and shoulders. In particular, his report states that she had "no evidence of any lateralizing neurological deficits at the present time." He opines that she does not suffer from any neurologic residual or permanency based upon her physical examination. Dr. Weiland did not examine plaintiff Nekia Seymour.

Cynthia Seymour stated at her deposition that she was out from work for five to six weeks. Plaintiff Nekia Seymour testified at her deposition that she had been confined to

bed for two days and missed half a week of work after the accident.

The defendants' proof entitles them to judgment as a matter of law on the threshold issue of "serious injury," thereby shifting the burden to the plaintiffs. In opposition to the motion, the plaintiffs submits the affirmed reports of Dr. Aric Hausknecht, a board certified neurologist, dated February 7, 2007, and various unaffirmed medical reports and records. Unaffirmed medical reports are not admissible and as such will not be considered on this motion. Grasso v. Angerami, 79 N.Y.2d 813 (1991); Pagano v. Kinsbury, 182 A.D.2d 268 (2nd Dep't 1992). CPLR 2106.

Dr. Hausknecht who first examined plaintiff Cynthia Seymour on February 6, 2007 in response to this motion, found restrictions of her ranges of motion, in that her cervical spine left lateral flexion was decreased from 50 to 30 degrees, right lateral flexion was decreased from 50 to 40 degrees, and thoracic lumbar spine forward flexion was decreased from 90 to 65 degrees. Dr. Hausknecht determined that there was objective evidence of cervical and lumbosacral impairment including loss of mobility, positive Spurling maneuver and positive straight leg raise testing. He concludes that the MRI imaging reveals objective evidence of structural pathology, and that the NCV/EMG studies show objective evidence of physiological impairment in the cervical and lumbar nerve roots. Dr. Hausknecht concludes that "with a reasonable degree of medical certainty Ms. Seymour has sustained permanent consequential limitation of use of her cervical and lumbosacral spine." He espouses that her "condition is permanent with a permanent partial disability casually related to the accident of June 24, 2002." Plaintiff Cynthia Seymour's medical submissions show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiff's limitations were significant. See Milazzo v Gesner, 33 AD3d 317 (1st Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1st Dept. 2006). However, Dr. Hausknecht's examination occurred over four years after the accident. As such there is no objective medical proof made contemporaneously with the subject accident of June 24, 2002 to substantiate plaintiffs' claim. Pommells v. Perez, supra; Toulson v. Young Han Pae, 13 A.D.3d 317 (1 Dept. 2004). Thus, plaintiff Cynthia Seymour has not met her burden.

Dr. Hausknecht also examined the plaintiff Nekia Seymour on February 6, 2007, in response to this motion. Dr. Hausknecht found that she had restrictions of her ranges of motion in that her cervical spine left lateral flexion was decreased from 50 to 45 degrees associated with pain, right lateral flexion was decreased from 50 to 45 degrees associated with pain, her thoracic lumbar spine forward flexion was decreased from 90 to 70 degrees, associated with pain. Dr. Hausknecht concludes that there was objective evidence of cervical and lumbosacral impairment including a loss of mobility. He finds that "with a reasonable degree of medical certainty she has sustained permanent consequential limitation of use of her cervical and lumbosacral spine" and that her "condition is

permanent with a permanent partial disability casually related to the accident of June 24, 2002." However, the limitations are slight, and as such are not significant enough to meet the serious injury threshold of 5102(d). Bandoian v. Bernstein, 254 AD2d 205 (1st Dept. 1998); Waldman v. Dong Kook Chang, 175 AD2d 204 (2nd Dept. 1991). Like, plaintiff Cynthia Seymour, Nekia Seymour has failed to submit any medical proof made contemporaneously with the accident to substantiate her claim. See Toulson v. Young Han Pae, supra; Pommells v. Perez, supra.

Accordingly, the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted as to plaintiffs Cynthia Seymour and Nekia Seymour.

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment against plaintiffs Cynthia Seymour and Nekia Seymour is granted, and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the defendants dismissing plaintiffs' complaint, with costs and disbursements to defendants as taxed by the Clerk, and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: July 03, 2007

Deborah A. Kaplan

DEBORAH A. KAPLAN J.S.C.

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST