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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

SULAY TEJADA

INDEX NO. 113990-2004

MOTION DATE 5-23-07

MOTION SEQ. NO. 003

- v -

CLARTON E. BUBECK and MELISSA L. BUBECK

MOTION CAL. NO. 84

KAPLAN, J.:

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Sulay Tejada did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). The motion is denied for the reasons set forth below.

At approximately 5:00 p.m. on March 3, 2003, plaintiff Sulay Tejada was driving westbound on West 41St Street with her young daughter Brittany seated in the rear. After stopping at a red light at the intersection of Eleventh Avenue and West 41st Street she proceeded across the intersection when the light turned green in her favor. Approximately halfway across the avenue her vehicle was struck from the left by a vehicle driven by Melissa Bubeck and owned by Clarton Bubeck which had failed to stop at the red light signal. Her car was towed from the scene and subsequently deemed incapable of repair by her insurance company. As a result of this incident, Ms.Tejada, who was expecting and in the first trimester of her pregnancy claims to have sustained a serious injury, in that she miscarried and lost the fetus. 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 report of Dr. Robert Israel, a board certified orthopedic surgeon who performed an Independent Medical Examination of plaintiff as part of this litigation. They also proffer the report of Dr. Lawrence Cutler, who reviewed Tejada's medical records but did not examine her, Tejada's deposition testimony transcript and the pleadings. As the plaintiff has represented both in her opposition papers submitted in response to this motion as well as at oral argument that she has withdrawn all claims of "serious injury" under the Insurance Law originally pled except for her "loss of

fetus" claim, the Court need not consider Dr. Israel's report.

Dr. Cutler, in his report reveals that four days before the collision, Tejada had visited her primary physician for care of a mouse bite. During that visit she had a urine test which confirmed that she was pregnant, and based on the date of her last menstrual period, was in the first trimester. After being struck by the Bubeck vehicle, she was transported by ambulance to St. Clare's Hospital and Health Center. While there, she complained of lower quadrant pain, and after a gynecological exam was released later that day, with explicit instructions to immediately report to an emergency room if she was in pain or experienced any vaginal bleeding. Just over twenty-four hours later, she went to the emergency room of Trinitas Hospital with abdominal pain and vaginal bleeding. After a sonogram and other tests, she was informed that she had sustained a spontaneous abortion. She was given medication to prevent Rh isoimmunization and for pain relief and was discharged. Dr. Cutler states that his review of her records indicates that she had a very low HCG (human chorionic gonadotropin) serum level, which leads him to theorize that either Tejada was less advanced in her pregnancy than reported, a conclusion he discounts based on her report of regular menstrual periods, or that her HCG level was actually higher than reported in the hospital records, which he also discounts based on her anecdotal report of the type of vaginal bleeding she experienced. Rather he opines that the low HCG level indicates that Tejada's pregnancy could not have been sustained to its complete term and that she would have eventually miscarried.

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 failed to meet 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. Specifically, the affirmed report of Dr. Lawrence Cutler, fails to set forth with any certainty that the miscarriage suffered by Tejada was not the result of the collision which occurred on March 9, 2003. He also fails to provide any objective proof to support his chosen hypothesis, or to show how he was able to discount his other considered explanations. Instead, Dr. Cutler relies on anecdotal reporting attributed to Tejada. Madatov v Madatov, 27 AD3d 531 (2d Dept 2006); Vasquez v Reluczo, 28 AD3d 365 (1st Dept. 2006). His report does however confirm that Tejada was pregnant at the time of the accident and that just over twenty-four hours after the collision, she had suffered a miscarriage. As such, it is not necessary to consider

the plaintiff's proof presented in opposition to the motion. See Facci v Kaminsky, 18 AD3d 806 (2d Dept. 2005). The question of whether the plaintiff suffered a miscarriage as a result of the defendants' conduct is an issue properly determined at trial. Lawman v The Gap, 38 AD3d 670 (2d Dept. 2007); Brannan v Brownsell, 23 AD3d 1106 (4th 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 at Med-2, 80 Centre Street, New York, New York, on July 30, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: July 12, 2007

Deborah Kaplan

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

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

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