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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

DELIA C. BROWN

INDEX NO. 101701-2005

MOTION DATE 5-16-07

- v - MOTION SEQ. NO. 001

CARL A. SHIMKIN, ELAINE CAB CORP., NEW YORK STANDEN CAB CORP. And 55 STAN OPERATING CORP.

MOTION CAL. NO. 14

KAPLAN, J.:

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Delia C. Brown 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 7:00 p.m. on November 28, 2004, as she was crossing East 63rd Street within the pedestrian crosswalk and with the green light at its intersection with First Avenue in Manhattan, plaintiff Delia C. Brown, was struck by a livery vehicle operated by Carl A. Shimkin. The Shimkin vehicle was making a left turn from First Avenue onto East 63rd Street at the time of the collision. As a result of this incident, plaintiff claims to have sustained a serious injury to her cervical and lumbar spine, shoulder, wrist, and arm as well as various other injuries including carpal tunnel syndrome. 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 Orlandi, board certified in neurology and psychiatry, as well as Dr. C.M. Sharma, board certified in orthopedics.

Dr. Orlandi, who performed an Independent Medical Examination of the plaintiff on December 6, 2005, discusses in his report various observations of the plaintiff's mobility, flexibility and reactions and concludes that she has a normal neurological examination. While Dr. Sharma finds plaintiff, now some eighty years

old, can only do some of the requested movements without complaint of pain and restriction, her results are within the normal range for a person of her age. While Dr. Orlandi notes that her "range of motion is normal" in her cervical spine he does find a restriction in her lumbar spine. However, it is unclear what the actual restriction is, or even what the norm is, as Dr. Orlandi fails to state either, rather choosing instead to offer his conclusions of "normal" or "restricted" without giving the basis of comparison. Further, while Dr. Orlandi states he reviewed Brown's prior medical records, a careful reading of his report reveals that he merely read the proffered bill of particulars in the case. He failed to review or to consider the EMG studies, which are pertinent to plaintiff's claims of tremors and paresthesia relating to her diagnosis of carpal tunnel syndrome as a result of trauma sustained in the accident. While Dr. Orlandi states he performed a detailed neurological examination on Brown, his report is devoid of any detail about the objective tests he employed or how he reached his conclusions.

Dr. Sharma, who examined the plaintiff on October 11, 2006, finds a "mild tremor" in both of her hands, "mild kyphosis of her dorsal spine and subjective cervical and lumbar pain." However, he fails to further discuss his diagnosis of kyphosis, a spinal deformity or curvature of the spine which can result from trauma, developmental problems or be degenerative. And, although certified as a neurologist, he fails to review her EMG test results, despite his findings of spasm and her complaints of tingling in her hand, wrist and arm coupled with her claim of carpal tunnel syndrome. Rather under the heading "[r]eview of medical records" in his reports he lists only the bill of particulars and the report of Dr. Orlandi.

In opposition to the motion, the plaintiff submits her examination before trial testimony, providing the details of the accident, her course of treatment and the impact of her injuries on her daily activities. Brown also includes an affirmed report from her physician Dr. Jennifer Solomon, who has treated her since the time of the collision. The plaintiff argues that the defendants have failed to meet their initial burden on the motion, pointing out many perceived weaknesses.

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 reports of Dr. Robert Orlandi as well as Dr. C.M. Sharma fail to set forth the objective test or tests relied upon in reaching their conclusions. Park v Champagne, 34 AD3d 274 (1st Dept. 2006); Madatov v Madatov, 27 AD3d

531 (2d Dept 2006); Vasquez v Reluczo, 28 AD3d 365 (1st Dept. 2006). Nor did either doctor employed by the defendants ever examine plaintiff's EMG test results despite her claims and their "objective findings." See Wadford v Gruz, 35 AD3d 258 (1st Dept. 2006); Nix v Yang Gao Xing, 19 AD3d 227 (1st Dept. 2005); Dixon v Pena, 5 AD3d 283 (1st Dept. 2004). 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).

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, and it is further

ORDERED that the plaintiff Delia C. Brown is granted a trial preference based on age.

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 5, 2007

Deborah Kaplan

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

DEBORAH A. KAPLAN

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