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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

JOHN COPPAGE

INDEX NO. 113650/04

MOTION DATE 3-21-07

- v -

MOTION SEQ. NO. 003

RAYMOND PLUNKETT, P.T. PETROLEUM CORP. and GETTY PETROLEUM MARKETING, INC.

MOTION CAL. NO. 23

The following papers, numbered 1 to 3, were read on this motion by the defendants for summary judgment dismissing the complaint on the ground that the plaintiff did not meet the serious injury threshold requirement of Insurance Law § 5102(d) and cross-motion by the plaintiff for summary judgment on the issue of liability.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Notice of Cross-Motion - Affidavits — Exhibits (and Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ■ Yes ☐ No

In this action to recover damages for injuries arising from a motor vehicle accident, the undisputed facts establish that on October 12, 2003, a gas tanker driven by defendant Raymond Plunkett and owned by the corporate defendants struck the rear of a vehicle driven by the plaintiff, John Coppage, as the plaintiff was making a left turn at the intersection of Boston Road and Waring Avenue in the Bronx. The plaintiff's car was owned by Maggie Smallwood, a North Carolina resident who was a passenger at the time. The 56-year-old plaintiff and Ms. Smallwood were transported by ambulance to Bronx Lebanon Hospital and released the same day. He alleges that he suffered, inter alia, multiple disc herniations.

There are two motions now before the court - (1) the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law §5102(d), and the plaintiff's cross-motion for summary judgment as against all defendants on the issue of liability.

(1) Motion for Summary Judgment on the Issue of "Serious Injury"

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 the "No-Fault" Law (Insurance Law § 5102[d]), he or she bears the initial burden of establishing the absence of a "serious injury" as a matter of law.

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, 98 NY2d 345 (2002); Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient to defeat the motion . See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, 79 NY2d 955 (1992). However, "[w]here 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., supra.

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key. 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).

It is also settled law that a herniated or bulging disc may constitute a serious injury within the meaning of Insurance Law §5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., 22 AD3d 326 (1st Dept. 2005); Arjona v Calcano, 7 AD3d 279 (1st Dept. 2004). Furthermore , a CT scan or MRI may constitute objective evidence to support subjective complaints. (see Arjona v Calcano, supra; Lesser v Smart Cab Corp., 283 AD2d 273 [1st Dept. 2001)], so long as the plaintiff offers "some objective evidence of the extent or degree of the alleged physical limitations, and their duration, resulting from the disc injury." Arjona v Calcano, supra; see Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., supra; Simms v APA Truck Leasing Corp., 14 AD3d 322 (1st Dept. 2005).

In this case, the moving defendants have failed to meet their burden in the first instance of submitting proof in admissible form sufficient to show the absence of any material issue of fact. They submit the pleadings, including the plaintiff's Bill of Particulars, the plaintiff's deposition testimony, and the affirmed reports of Dr. Daniel Feuer, a board-certified neurologist, and Dr. Michael Katz, a board-certified orthopedic surgeon, both of whom examined the plaintiff in August 2006, at the request of the defendants.

Dr. Feuer's diagnosis was "normal neurological examination" and Dr. Katz found only *resolved* strains of the cervical and thoracic spine. Both physicians state that they reviewed the reports of Dr. Radna dated 5/19/04 and 11/03/04. The latter report states that Dr. Radna examined MRIs taken July 20, 2004, which showed herniations in the plaintiff's cervical and lumbar spines at C3-4, C4-5, C6-7 and L5-S1. However, neither Dr. Feuer nor Dr. Katz make any attempt to explain that report or its findings. See Wadford v Gruz, 35 AD3d 258 (1st Dept. 2006); Nix v Yang Gao Xiang, 19 AD3d 227 (1st Dept. 2005); Dixon v Pena, 5 AD3d 283 (1st Dept. 2004). Contrary to the defendants' contention, that the MRIs were taken nine months after the accident is not a basis to disregard them entirely. Drs. Feuer and Katz also conclude that the plaintiff had full range of motion in all tested areas, including the cervical spine, but neither identifies the objective range of motion test(s) he used in reaching those conclusions. See Palladino v Antonelli, – AD3d – (2nd Dept. May 22, 2007); Park v Champagne, 34 AD3d 274 (1st Dept. 2006); Taylor v Terrigno, 27 AD3d 316 (1st Dept. 2006); Nagbe v Mini Green Hacking Corp., 22 AD3d 326 (1st Dept. 2005). Thus, the reports of Drs. Feuer and Katz do not further the defendant's position on this motion.

Nor does the plaintiff's deposition testimony suffice to meet the defendant's burden on the motion. While it may not support a claim under the "90/180" category of Insurance Law § 5102(d) or indicate a likelihood of success at trial, the testimony alone does not establish, as a matter of law, that he did not suffer a "serious injury" under any other category of the statute.

Since the defendants failed to meet their burden in the first instance, the court need not consider the sufficiency of the plaintiff's opposition papers. Nonetheless, the court notes that the plaintiff's papers include the affirmation of Dr. Robert Radna, dated January 9, 2007, in which he opines that the plaintiff's disc herniations were caused by the accident and are permanent; Dr. Radna's reports dated 5/19/04 and 11/03/04, as well as a follow-up report dated 11/21/04, which also refers to the MRI reports, all of which were sent to the plaintiff's carrier, the North Carolina Bureau Insurance Group; and the affirmed reports of Dr. Jacob Lichy, the radiologist who reviewed the MRI studies of the plaintiff's cervical and lumbar spine and found the herniatons.

In his opposition papers, the plaintiff argues that he never collected No-Fault benefits from North Carolina Farm Bureau Insurance Group, Ms. Smallwoods' carrier, and therefore, he is not a "covered person" within the meaning of Insurance Law § 5104, making the "serious injury" threshold requirement inapplicable to him. That is, he contends that he may maintain an action against the defendants regardless of whether he suffered a "serious injury."

Insurance Law § 5104(a) provides that "in an action by or on behalf of a covered person for personal injuries arising out of the use or operation of a motor vehicle, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss." Insurance Law § 5102(j) defines "covered person" as "any owner, operator or occupant of, a motor vehicle which has in effect the financial security required by article six or eight of the vehicle and traffic law, or which is referred to in subdivision two of section three hundred twenty-one of such law, or any other person entitled to first party benefits." "Proof of financial security' is defined as "proof of ability to respond in damages for liability arising out of the ownership, maintenance or use of a motor vehicle as evidenced by an owner's policy of liability insurance." Vehicle and Traffic Law § 311 (2). An "owner's policy of liability insurance" means a policy "affording coverage as defined in the minimum provisions prescribed in [regulations

promulgated by the Superintendent of Insurance]." Vehicle and Traffic Law § 311 (4). These rules also apply to policies issued by other states to vehicles driven in New York. See Nationwide Insurance Co. V Morigerato, 214 AD2d 994 (3rd Dept. 1995).

Throughout the litigation, the plaintiff represented that he received No-Fault benefits from North Carolina Farm Bureau Insurance Group. In response to the defendants' discovery demands, he signed an authorization on December 27, 2004, granting the defendants access to his "No-Fault file claim #2329-17094." However, now, more than two years later, in response to the defendants' motion for summary judgment, the plaintiff submits a letter sent by North Carolina Farm Bureau Insurance Group to his attorney, dated August 10, 2005, which states that Ms. Smallwood's policy does not provide no-fault coverage. He also submits a copy of her liability policy.

Contrary to the plaintiff's assertion, as an occupant of Smallwoods' vehicle, he is a "covered person" so long as her insurance policy meets the financial security requirement set forth in the statute. The plaintiff does not demonstrate, or even allege, that Ms. Smallwoods' policy does not meet those requirements. i.e. that she did not maintain a liability policy complying with Vehicle and Traffic Law § 311. The fact that he may not have collected, or collected very little, no-fault benefits under the policy dose not take him outside the No-fault statutory scheme. "A 'covered person' is not defined solely by his or her ability to collect first-party benefits." See Canfield v Beach, 305 AD2d 440 (2nd Dept. 2003); Fireman's Insurance Co. of Newark v Compte, 194 AD2d 918 (3rd Dept. 1993); Soriano v Martin, 8 Misc 3d 854 (Civil Ct, Kings County 2005). Thus, the plaintiff failed to demonstrate that he is not a "covered person" within the meaning of the Vehicle and Traffic Law so as to render the "serious injury" threshold requirement inapplicable to him.

In any event, since the defendants failed to demonstrate the absence of any triable issues as to whether the plaintiff sustained a"serious injury" within the meaning of Insurance Law § 5102(d), their motion to for summary judgment dismissing the complaint on that ground is denied.

(2) Cross-Motion for SummaryJudgment on the Issue of Liability

The plaintiff cross-moves for summary judgment on the issue of liability as against all three defendants. In support of the cross-motion, the plaintiff submits the transcript of defendant Raymond Plunkett in an effort to show that he was liable as a matter of law for this rear-end collision. However, Plunkett testified that the plaintiff's vehicle suddenly crossed over into his lane and stopped to turn left, causing him to strike it in the rear. According to Plunkett, he approached the intersection driving at approximately 25 mph, and the light remained green. He observed the plaintiff's vehicle in the turning lane to his left and, when he was only three or four feet from it, it moved into his lane directly in front of him. He applied his brakes but could not avoid the collision.

The plaintiff's testimony, submitted on the defendants' motion, was that he had slowed to 5-10 mph to make a left-hand turn from the left-hand lane at a green light but could not recall if there was a separate turning lane. He had first noticed the truck in his rear view mirror, when it was directly behind him in the same lane but still a"good distance" from him. A few cars that were between them safely passed by the plaintiff as he was turning but the defendants' truck struck him from behind, pushing him all the way across the lanes of oncoming traffic to the other side of the road. He testified that the truck was "speeding."

It is settled law that the driver of a motor vehicle is expected to drive at a safe rate of speed and to maintain a safe distance from the vehicle in front of him (see Vehicle and Traffic Law §§1129[a];1180[a]; Mitchell v Gonzalez, 269 AD2d 250 [1st Dept. 2000]). Furthermore, a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver who strikes the vehicle in front, unless the operator of the rear vehicle can come forth with an adequate, non-negligent explanation for the collision. See Somers v Condlin, 39 AD3d 289 (1st Dept. 2007); Francisco v Schoepfer, 30 AD3d 275 (1st Dept. 2006); Garcia v Bakemark Ingredients (East) Inc., 19 AD3d 224 (1st Dept. 2005); Grimes-Carrion v Carroll, 13 AD3d 125 (1st Dept. 2004);Johnson v Phillips, 261 AD2d 269, 271 (1st Dept. 1999).

Here, although the fact of the collision being a rear-end collision established a prima facie case of negligence, the defendant came forward with an adequate, non-negligent explanation to defeat the plaintiff's motion. The testimony of the plaintiff

and defendant present triable issues as to, *e.g*, whether the defendant was traveling at safe rate of speed and distance from vehicles in front and whether the plaintiff suddenly pulled into the defendant's lane while executing the turn, thereby creating an emergency situation. See Edwards v New York City Transit Authority, 37 AD3d 157 (1st Dept. 2007); Sing-Lam Ng v Beatty, 300 AD2d 648 (2nd Dept. 2002). The issue of how the accident actually occurred may turn on the credibility of the plaintiff and defendant Plunkett, an issue properly left for the trier of fact. See Ramos v Rojas, 37 AD3d 291 (1st Dept. 2007); Skibola v Structure-Tine Inc., 16 AD3d 238 (1st Dept. 2005).

The demonstrated existence of triable issues of fact as to the circumstances of the collision preclude the granting of the plaintiff's cross-motion for summary judgment on the issue of liability.

For these reasons and upon the foregoing papers, it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint on the ground that plaintiff did not sustain "serious injury" as defined by Insurance Law § 5102(d) is denied; and it is further,

ORDERED that the cross-motion by the plaintiff for summary judgment as against all defendants on the issue of liability is denied, and it is further,

ORDERED that the parties shall appear at Mediation-2, 80 Centre Street, on July 11, 2007, at 9:30 a.m., as previously scheduled.

Dated: June 29, 2007

Deborah Kaplan

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**