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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

DAWN B. STOKEM

INDEX NO. 102251-2005

MOTION DATE 5-16-07

- v -

MOTION SEQ. NO. 004

SHELDON JAMES

MOTION CAL. NO. 115

KAPLAN, J.:

In this personal injury action, defendant Sheldon James moves for summary judgment dismissing the complaint on the ground that the plaintiff Dawn B. Stokem did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). Plaintiff Stokem cross moves for summary judgment on the issue of liability.

At approximately 10:30 p.m. on October 17, 2004, plaintiff was stopped at a red light at the intersection of West 57th Street and Lexington Avenue in Manhattan when her vehicle was struck from behind by a vehicle owned and operated by James Sheldon. As a result of this incident, plaintiff claims to have sustained a serious injury to her cervical and lumbar spine as well as her shoulder which required surgery. Defendant now moves 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.

I. The "Serious Injury" Summary Judgment Motion

In support of their motion, the defendants submit the affirmed reports of Dr. Robert April, a neurologist and Dr. Robert Israel, board certified in orthopedics. Each of these doctors, performed an Independent Medical Exam (IME) on the plaintiff as part of this litigation. Defendants also proffer the deposition testimony of the plaintiff, the complaint and various other filings.

Dr. April, who performed his examination of the plaintiff on April 18, 2006, discusses in his report his observations of her mobility and flexibility. He states that he reviewed Stokem's prior medical records and concludes that any impairment she may suffer is related to an automobile accident of 1999. The Court notes, that while Stokem was involved in a prior motor vehicle accident it took place in 2003 not 1999. Dr. Israel, who examined Stokem on August 18, 2006 also reviewed

her prior medical records including her MRI films before conducting his examination. As part of the examination he measured the ranges of motion in her cervical and lumbar spine as well as her shoulder. In his report, he includes the objective tests he employed in making his determination that her ranges of motion are unrestricted and that she suffers from resolved sprains and strains and does not suffer any disability. In further support of their motion, the defendants also submit a portion of the plaintiff's deposition, discussing her treatment and activities subsequent to the accident.

In opposition to the motion, the plaintiff proffers the affidavit of Dr. Robert Kramberg, board certified in Physical Medicine and Rehabilitation, who has overseen her care for both the 2002 and 2003 accidents, various other medical reports, the New York City Police Report, her affidavit as well as her own and defendant James' complete deposition testimony. The plaintiff's submissions detail the injuries to her neck, back and shoulder as well as her course of treatment which began at Chilton Memorial Hospital the day after the accident. Dr. Kramberg's detailed report discusses his diagnosis of a herniated disc at C6-7 which indents on the thecal sac and a labral tear of her left shoulder upon which she had arthroscopic surgery in February of 2004.The report details notable restrictions in her ranges of motion and discusses the many objective tests Dr. Kramberg used in making his findings, including the MRI/CT scans which confirmed the presence of herniated and bulging discs and EMG testing that confirmed a radiculopathy at C7. Dr. Kramberg cites the extent of plaintiff's limitations and concludes that some thirty percent of her current condition is casually related to the collision of 2003. After seeing her on March 19, 2007 he concludes that it is his professional opinion, that plaintiff has suffered a permanent injury to her neck, lower back and shoulder. Plaintiff has also submitted proof that any lapses in her course of treatment were as a result of the denial of PIP benefits in New Jersey where she resides.

II. The Liability Summary Judgment Motion

A review of the plaintiff's submissions in support of her motion for summary judgment on liability reveals that as she was stopped on the westbound side of East 57th Street at its intersection with Lexington Avenue at a red light, her car was struck in the rear by a car owned and operated by Sheldon James. Ms. Stokem, accompanied by a relative was returning home to New Jersey after dinner at the Olive Garden restaurant. Mr. James was returning home alone from a concert. He acknowledges in his deposition testimony that he struck plaintiff's stopped vehicle but avers that it was a soft impact which occurred when his foot slipped off the brake pedal. In opposition to the motion Mr. James offers only the affirmation of his attorney who has no actual knowledge of the events, and as such is without

any probative value.

III. Analysis

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, on the issue of "serious injury" 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 satisfied her burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact. 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. Kramberg's affidavit establishes that the accident had a complicating and objectively determined impact upon the pre-existing conditions in her shoulder and back. See Davis v Giria, 40 AD3d 272 (1st Dept. 2007); Carter v Full Serv. Inc., 29 AD3d 342 (1st Dept. 2006), lv. denied 7 NY3d 709 (2006); Style v Joseph 32 AD3d 212 (1st Dept. 2006); D'Angelo v Bryk, 205 AD2d 935 (3rd Dept. 19940; Countermine v. Galka, 189 AD2d 1043 (3d Dept. 1992).

It is well settled law that the driver of a motor vehicle must maintain a safe distance between his vehicle and the one in front of him, and that a rear end collision with a stopped 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 vehicle can come forth with an adequate, non-negligent explanation for the collision. See Mariano v New York City Transit Authority, et. al., 2007 NY Slip Op 1806, 2007 N.Y. App. Div. Lexis 2532 (1st Dept. 2007); Francisco v Schoepfer, 30 AD3d 275 (1st Dept. 2006); Garcia v Bakemark Ingredients (East), 19 AD3d 244 (1st Dept. 2005).

Here, Stokem has established a prima facie entitlement to summary judgment on the issue of liability. The defendant does not offer any evidence sufficient to warrant a denial of this application. The defendant has merely submitted the affirmation of his attorney, who claims no personal knowledge of the accident. Thus, the affirmation is without probative value. See Zuckerman v City of New York, supra at 563; Johnson v Rudolph, 34 AD3d 338 (1st Dept. 2006); Diaz v New York City Tr. Auth., 12 AD3d 316 (1st Dept. 2004). While an attorney's affirmation may serve as the vehicle for submitting documentary evidence or other

proof in admissible form as an attachment (see Alvarez v Prospect Hospital, supra at 325; Zuckerman v City of New York, supra at 563), there are no relevant attachments submitted. There is no affidavit of defendant driver or any other witness to the accident to contradict the plaintiff's account. Further, defendant's deposition testimony supports plaintiff's recitation of the facts, as such there is no basis to speculate as defendant's counsel does that there were conditions present which could have negated his client's responsibility and established a comparative negligence defense. Cf. Ramos v Shendell Realty Group, Inc., 8 AD 3d 41 (1st Dept. 2004).

IV. Conclusion

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

ORDERED that the motion for summary judgment by defendant James Shelton is denied in its entirety, and it is further,

ORDERED that the cross-motion of plaintiff Dawn Stokem is granted in its entirety, and it is further

ORDERED that the matter be set down for trail on the issue of damages.

This constitutes the Decision and Order of the Court.

Dated: July 17, 2007

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

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