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SCANNED ON 8/1/2007

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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

SELENA S. HARRIS

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INDEX NO. 103988-2005

MOTION DATE

- v - MOTION SEQ. NO. 002

ARIEL TRANSPORTATION CORP., FALLOU DIOP and PAUL BARDOLF

MOTION CAL. NO. 55

KAPLAN, J.:

In this personal injury action, the defendant Paul Bardolf moves for summary judgment dismissing the complaint on the ground that the plaintiff Selena S. Harris did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). He also moves for summary judgment on the issue of liability. Defendants Fallou Diop and Ariel Transportation Corp., cross move for summary judgment as against Harris on her serious injury claim and oppose the granting of summary judgment on liability to Bardolf. Plaintiff Harris opposes all motions.

At approximately 9:30 p.m. on December 24, 2004 on West 79th Street between Riverside Drive and West End Avenue, New York, New York, Harris was seated in the rear of a taxi operated by Diop and owned by Ariel Transportation Corp. which was involved in a collision with a motorcycle owned and operated by Bardolf. Bardolf contends that as he was traveling eastbound in the left lane on West 79th Street, Diop suddenly turned from the right lane directly in front of him in an attempt to execute an illegal U-turn to go westbound on West 79th Street, causing the collision. It appears that after exiting the West Side Highway at West 79th Street, Diop wished to go northbound on Riverside Drive to drop plaintiff and her friend Larry Staley at a holiday party. As left turns are not permitted at that intersection he attempted a U-turn instead of proceeding north on a less direct route. In any event, as a result of this incident, plaintiff claims to have sustained a serious injury to her shoulder and back. 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. Bardolf also moves for summary judgment on liability.

I. The Serious Injury Summary Judgment Motion

In support of their motions, the defendants submit the affirmed reports of Dr. Renat Sukhov, board certified in Physical Medicine and Rehabilitation and Dr. Christopher Ferrante, a chiropractor, who each examined plaintiff as part of her No-fault claim. They also submit the affirmed reports of Dr. Daniel Feurer, a board certified neurologist, Dr. Charles Totero, a board certified orthopedic surgeon, Dr. Robert Zaretsky, board certified in orthopedics, Dr. Ravi Tikoo, a board certified neurologist and Dr. John Rigney, a board certified radiologist who reviewed the plaintiff's MRI films. 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, Paul Bardolf, Fallou Diop and Larry Staley as well the records of plaintiff's attendance at Bally's gym, the New York City police report filled out in conjunction with this case, various medical records, the complaint and various other filings. The defendants also include medical records concerning plaintiff's prior injuries which resulted from a fall at a gym, a motor vehicle accident and two workers compensation claims.

Dr. Sukahov, who examined the now forty-three year old plaintiff on March 22, 2005, some three months after the subject accident found all of her ranges of motion to be normal and concluded she suffered a resolved sprain of her cervical spine and a resolved contusion to her left shoulder. He espouses that she was not disabled and could perform all daily living activities without any restriction. Dr. Ferrante, a chiropractor submits an affirmed letter in which he finds all of Harris' ranges of motion to be normal and details the objective tests he employed in making his findings. However, this letter which is not in admissible form will not be considered by the court.

Dr. Feurer, who performed his medical examination on April 10, 2006, discusses in his report, various observations of the plaintiff's mobility and flexibility and concludes that his neurological exam is within normal limits. He opines that Harris does not suffer any objective neurological disability or neurological permanency, casually related to the accident. After reviewing plaintiff's prior medical records and tests and conducting his own examination he states there is no basis to support any claims of "dorsal radiculopathy"or "cervical radiculoneuritis." He also concludes that the MRI film is devoid of any evidence of "spinal cord or root impingement."

Dr. Totero, performed his examination of plaintiff on April 17, 2006, after reviewing her prior medical records including her MRI and x-ray films. During her examination he finds all ranges of motion to be normal except for a "mild

decrease in forward flexion" of the cervical spine which is accompanied by some tenderness. All objective tests administered were negative. His findings are similar to those of Dr. Feurer with regard to the MRI, in that he finds no evidence of herniated discs or nerve root impingement. He concludes there is no orthopedic findings with regard to either her cervical spine or shoulder. Nor can he find any evidence in his review of her prior records that a shoulder injury actually ever occurred. He concludes that she is neurologically intact and that any sprain caused by the subject accident has long resolved.

Dr. Robert Zaretsky, a board certified orthopedic surgeon examined plaintiff on July 18, 2007. He indicates that while he was taking her medical history she complained of "improved pain" in her neck, back, shoulder, hip and knee. She denied ever being involved in a prior motor vehicle accident or any work related injuries. Dr. Zaretsky lists the objective tests he employed during his examination, and concludes that there are no restrictions in her cervical, lumbar or thoracic spine. She did not complain of tenderness or inability to perform any test due to pain. Her shoulders, elbows, hips and knees were all examined with objective tests and normal ranges of motion were found. He, like the defendant's other physicians reviewed her prior medical records including her MRI and x-ray films, prior to conducting his examination. Dr. Zaretsky concludes that she has resolved sprains and strains of her shoulder, lumbar, thoracic and cervical spine.

Dr. Ravi Tikoo, who examined Harris on July 28, 2006 concludes that she suffers no neurological impairments. All of the objective tests listed as performed by Dr. Tikoo resulted in normal findings. Although she complained of tenderness in her cervical spine there were no correlating spasms leading Dr. Tikoo to conclude that her complaints were in fact subjective. He also reviewed her prior medical reports and films, before concluding that she does not exhibit any evidence of "neuropathy, radiculopathy or disc herniation."

Defendant's final medical submission is from Dr. John Rigney, a board certified radiologist who reviewed Harris' CT brain scan, cervical spine x-rays and MRI films of her cervical spine. The CT Brain scan taken on December 29, 2004 shows no evidence of injury. With regard to the cervical spine x-rays and MRI taken on December 30 and December 28, 2004, he concludes there are degenerative disc changes at C5-6 and C6-7 but no evidence of either posterior disc bulge or herniation. He concludes his report by stating "there is no evidence of injury having been suffered by this patient's brain or cervical spine as a result of the accident in question."

A review of Selena Harris' deposition testimony reveals that at the time of

the collision she was a seasonal employee of Radio City Music Hall as a member of the background ensemble cast of the "Christmas Spectacular." Specifically, she played the role of a dancing bear. Harris indicates that the bear head weighed approximately ten pounds and the rest of the costume between ten and fifteen pounds. She stated she rehearsed some forty hours and performed some sixteen shows each week in this costume while wearing four inch heels. She had been employed as a seasonal dancer in similar capacities at Radio City in the past.

On the evening of the accident she was treated and released from St. Luke's Roosevelt Hospital. The next day Harris left her apartment, walked down four flights of stairs and traveled cross town by train unassisted to Radio City Music Hall. There she met with a physical therapist employed to assist the performers who she knows only by the first name of "Elaine" and the assistant choreographer Tim Santos. She recounts that Elaine shined a pencil flashlight into her eyes and concluded she was not able to perform. Harris was advised that she would have to meet with the company physician a "Dr. Matthews" on a future date. Later that day she was excused from performing by Mr. Santos. She then commuted back to her apartment by the same means. Plaintiff repeated this routine several times over the following days until she met with Dr. Matthews on the following Wednesday. Plaintiff asserts that Dr. Matthews also shined a light into her eyes and checked her reflexes, and on the basis of this exam diagnosed her with "whiplash and concussion" and released her from the show. At the time of the accident, the "Christmas Spectacular" was in it's final two weeks.

Approximately one week later she visited her chiropractor Dr. Concetta Butera, who oversaw all of plaintiff's medical treatment as a result of the December 2004 accident. She did not receive any orthopedic, neurological or any other medical care. Ms. Harris has been a regular patient of Dr. Butera's treating with her for a period of more than fifteen years for various back, neck, leg and other injuries related to her dancing. She would see Dr. Butera each month as needed for various treatments and adjustments. Ms. Harris detailed her prior work experience as a dancer which included ensemble entertainment work on a cruise line where she was required among other responsibilities to perform a dancing routine wearing a headdress weighing approximately six pounds and later entertaining at bar mitzvahs and similar celebrations. She had also performed briefly at Madison Square Garden as a "Knicks City Dancer."She did some acting but explained that her work varied greatly because she did not have an agent and would respond to open casting calls. She also revealed that she had a prior injury to her back from a fall at a gym for which she received treatment from Dr. Butera approximately five years before the subject accident. Ms. Harris also related that she had trained as a body builder. She indicated that she was unable to continue her entertainment career as a result

of the accident, but later revealed that she did not appear at any auditions because she did lacked an agent to send her out on auditions.

Ms. Harris also claimed that she was bed-ridden and unable to leave her home for approximately five months after the collision, that she could not continue her usual schedule of dance classes and that she had not been able to utilize her membership at Bally's gym until early 2006. Finally she stated that she had never previously injured any of the parts of her body she is claiming were injured here.

The defendant's final submissions in support of their motion to dismiss for failure to sustain a "serious injury" include Ms. Harris' attendance records from Bally's gym which show that she visited the facility some fifty-two times during the five month period she claimed to be housebound, and made some one hundred and thirty one visits during the course of 2005, in contrast to her deposition testimony in which she testified she had abstained from the gym until early 2006, as well as evidence that plaintiff had a prior motor vehicle accident in 2002 and suffered two work related accidents at Radio City for which she claimed injuries compensable by Worker's Compensation.

In opposition to the motion, the plaintiff proffers her affidavit as well as an affidavit of Dr. Concetta Butera and the affirmed reports of Dr. Leena Doshi and Dr. Aric Hausknecht. The report by Dr. Butera indicates that she has treated Harris for over fifteen years in her Brooklyn office for injuries related to her dancing and other entertainment jobs, as well as for prior back and knee injuries. On her first visit to Dr. Butera after the subject accident, she indicates Harris exhibited restrictions in her range of motion in her spine and compares them to a stated norm. However Dr. Butera's report does not indicate the objective tests used in determining these restrictions or how they were measured. She referred Harris back to St. Luke's-Roosevelt Hospital for x-rays and an MRI of her cervical spine, as well as a head CT scan. The MRI revealed the presence of bulging discs. At her next visit Dr. Butera states Harris claimed she was "confused" about her daily activities and unable to perform her daily activities. Dr. Butera continued to treat Harris over the next three months with ice, heat and chiropractic adjustments. Dr. Butera indicates that Harris reduced her treatment after that period due to the cessation of no-fault benefits. Dr. Butera has continued to treat Harris until the present time with the same therapies. She notes that Harris is in more pain after taking a dance class. The Court notes that Harris stated in her deposition testimony that she has not engaged in any dance classes since the accident. Dr. Butera indicates that although she has treated Harris in the past for trauma and or pain to her back, knee, neck and for prior muscle spasms it is only since the accident of December 2004 that plaintiff claims to be unable to perform her normal activities. She further

concludes that plaintiff is limited in that she is unable to do certain activities including heavy lifting of objects, reaching, repetitive movements of her head, extremities and neck for "more than three consecutive hours at a time." Dr. Butera concludes by stating Harris will have to continue chiropractic treatment indefinitely and is permanently disabled from all types of work.

Plaintiff also offers the affirmed report of Dr. Aric Hausknecht, who examined her for the first time on March 21, 2006. He indicates that during his examination he objectively measured her cervical spine rotation and found her left lateral flexion to be 30 as compared to a stated norm of 50 and her right lateral flexion to be limited to 35. He indicates this is the only restriction in her range of motion. He reviews the MRI films which indicate a disc bulge and contradicts both plaintiff's and defendant's radiologists by opining the existence of a disc herniation at C4-C5. He indicates that as Ms. Harris has no prior history of any neck injuries (in contrast to Dr. Butera's recitation of her past treatment of plaintiff) and as such casually relates her restrictions to the subject accident. He concludes by stating Harris suffers from a permanent injury which has caused a permanent consequential limitation of her cervical spine.

The plaintiff has also submitted the affirmed report of Dr. Leena Doshi which authenticates her MRI report taken by an another physician who left Dr. Doshi's employ and confirms the presence of a bulging disc. Ms. Harris' affidavit details the circumstances of the accident and her subsequent treatment. In it she also corrects her deposition testimony in which she stated she had not had any accidents in work, referencing defendant's submissions as having refreshed her recollection. She does not address the plaintiff's submissions with regard to the other apparent inconsistences in her deposition testimony.

II. 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, 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, it is clear that plaintiff has failed to satisfy her burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact on any of the claimed sections of serious injury pursuant to Insurance Law §5102(d). 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). Plaintiff's medical submissions from Dr. Butera are devoid of any objective medical basis upon which to conclude she suffered the claimed disabilities. Smith v Brito, 23 AD3d 273 (1st Dept. 2005); Picott v Lewis, 26 AD3d 319 (2d Dept. 2006). Dr. Butera's report which fails to set forth the objective tests performed to substantiate her conclusions about the asserted restrictions, is also devoid of detail as to how they were actually measured. Henry v Rivera, 34 AD3d 352 (1st Dept. 2006); Taylor v Terrigno, 27 Ad3d 316 (1st Dept. 2006); Rivera v Benaroti, 29 AD3d 3400 (1st Dept. 2006); Nagbe v. Mini Green Hacking Group, 22 AD3d 326 (1st Dept. 2005); Teodoro v Conway, 19 Ad3d 479 (2d Dept. 2005). As such, Harris has failed to submit evidence that would establish any initial range of motion limitations contemporaneous with the accident. Li v Yun, 27 AD3d 624 (2d Dept. 2006).

Plaintiff has also failed in light of the submissions proffered, to establish that she was unable to perform substantially all of the material acts that constitute her usual and customary duties for 90 of the 180 days following the accident. Otero v 971 Only U, Inc., 36 Ad3d 430 (1st Dept. 2007). Plaintiff failed to object to any of defendant's submissions other then the chiropractor report of Dr. Ferrante, which the Court has discounted. Accordingly, she has waived any objection to the other evidence submitted in support of defendant's summary judgment motion and as such they will be considered on their merits. Akamnonu v Rodriguez, 12 AD3d 187 (1st Dept. 2004); Shinn v Catazaro, 1 AD3d 195 (1st Dept. 2003); Scuder v Mahbuber 299 AD2d 535 (2d Dept. 2002); Sam v Town of Rotterdam, 248 AD2d 850 (3rd Dept. 1998), lv. denied 92 NY2d 804 (1998); Thomas v Wilkes, 2007 Slip Op. 50810U (App. Term 1st Dept. 2007).

Although Dr. Hausknecht's report dated March 21, 2006, attributes the alleged range of motion deficits to the subject accident, he fails to explain the basis for this conclusion, or how they are unrelated to either her prior motor vehicle accident, work related accidents or her other injuries as reported by Dr. Butera. Pommells v Perez, 4 NY3d 566 (2005); Hernandez v Almanzar, 32 AD3d 360 (1st Dept. 2006). Rodriguez v Cesar, 40 AD3d 731 (2d Dept. 2007).

III. Conclusion

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

ORDERED that the defendants' motion for summary judgment is granted in its entirety and the complaint of Selena S. Harris is dismissed in its entirety, and it

is further,

ORDERED that in light of the dismissal of the complaint in its entirety it is not necessary for the Court to address the defendants remaining motions, and it is further,

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: July 25, 2007

JUL 25 2007

Deborah Kaplan

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN J.S.C.

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