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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

MARY FRANTZ

INDEX NO. 120886/02

MOTION DATE

- v -

MOTION SEQ. NO. 002

UNITE, DL PATTERSON TRUST, JOSEPH BLOUNT and REGINALD CLERIE

MOTION CAL. NO. 34

The following papers, numbered 1 to 5 were read on the Motion and Cross-motion by defendants for summary judgment on the threshold "serious injury" issue (Insurance Law 5102[d]) and this Cross-motion by plaintiff for summary judgment on liability.

	PAPERS NUMBERED
Notice of Motion – Affidavits — Exhibits	1
Notice of Cross Motion – Affidavits — Exhibits	2
Answering Affidavits — Exhibits (Memo)	3
Affirmation in Reply	4
Affirmation In Reply	5

Cross-Motion: ■ Yes ☐ No

In this action to recover damages for injuries sustained in a motor vehicle accident, it is alleged that on August 9, 2001, on Route 59 near its intersection with West Nyack Road in Rockland County, a vehicle being driven by defendant Reginald Clerie in which plaintiff was a passenger, was struck in the rear by a vehicle driven by defendant Joseph Blount and owned by defendant D. L. Peterson Trust.

Plaintiff commenced the instant action claiming, *inter alia*, that she sustained 'serious injuries' as defined by Insurance Law § 5102(d) - i.e. "permanent consequential limitation of use of a body function or system" and a "medically determined injury or impairment of a non-permanent nature which prevented [her] from performing substantially all of the material acts which constitute his usual and customary daily activities for at least 90 days during the180 days immediately following the occurrence of the injury or impairment." The defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not

sustain a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff cross-moves for summary judgment on the issue of liability.

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).

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).

Where, as here, the plaintiff claims serious injury under the "90/180" category of Insurance Law §5102(d), she must (1) demonstrate that her usual activities were curtailed during the requisite time period and (2) submit competent credible evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in plaintiff's daily activities. Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Gaddy v Eyler, 79 NY2d 955 (1992).

In this case, the defendants have produced 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. Specifically, they produced the pleadings, plaintiff's

deposition testimony, the affirmed reports of Dr. Michael J. Katz, a board certified orthopedic surgeon, who examined the plaintiff on January 7, 2005, Dr. Evan H. Dillon, a board certified diagnostic radiologist, who reviewed plaintiff's MRI on August 31, 2003 and the affidavit of Dr. Caren Jahre, a board certified radiologist, who reviewed plaintiff's MRI's on August 14, 2003.

The deposition testimony establishes that plaintiff was employed as a babysitter before the accident. In addition, she was advised by her physician, Dr. Klein after the subject collision "to avoid any strenuous activities such as, lifting, carrying or pushing heavy weights." Consequently, plaintiff claims she could not work after the accident and was incapacitated from her usual daily activities for at least the first six months after the accident.

In his report, Dr. Katz states that the 29 year-old plaintiff, reported that she had lower back pain. He performed a number of objective tests, all of which are described in his report and all of which indicated normal ranges of motion in her spine and knees. In particular, his report states that "she shows no signs or symptoms of permanence on a causally related basis." Dr. Katz concludes that she had a cervical and lumbosacral strain in addition to a bilateral knee contusion which are now resolved.

Dr. Dillon reviewed plaintiff's MRI report of her right knee, dated September 18, 2001, and finds no evidence of meniscal or ligamentous tear. On August 14, 2003, Dr. Jahre who reviewed plaintiff's cervical spine MRI's dated August 16, 2001, and found that "the study was of poor quality and as a result, was of limited diagnostic utility" but concludes that there were no disc herniations only a slight straightening of the normal lordosis.

The defendants' proof entitles them to judgment as a matter of law on the threshold issue of "serious injury", thereby shifting the burden to the plaintiff. In opposition to the motion, the plaintiff submits the affirmation and medical reports of Dr. Steven S. Klein, an orthopedist, dated March 1, 2007, in addition to plaintiff's affidavit and defendant Joseph Blount's deposition testimony. Plaintiff also submits various unaffirmed medical reports and records. Unaffirmed medical reports are not admissible and as such will not be considered on this motion. Grasso v. Angerami, 79 N.Y.2d 813 (1991); Pagano v. Kinsbury, 182 A.D.2d 268 (2nd Dep't 1992); CPLR 2106.

Dr. Klein, states that he performed an orthopedic examination in addition to reviewing the plaintiff's MRI results, along with the records maintained in his office. Dr. Klein explains that when he first examined the plaintiff on October 10, 2001, he found restriction in range of motion - cervical spine extension was decreased to 20 degrees, lateral rotation decreased to 40 degrees, lateral bending decreased to 20 degrees and cervical flexion was decreased to 50 degrees. Dr. Klein's impression at that time was the plaintiff suffered a cervical strain/sprain, lumbar radiculopathy and right medial meniscal tear. He suggested that the plaintiff undergo physical therapy, arthroscopic surgery and avoid any strenuous activities.

Dr. Klein states that he last examined plaintiff on February 8, 2002, where he concluded "that her disability was continuing and that her condition remained guarded." The plaintiff submits credible medical evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in plaintiff's daily activities. Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Gaddy v Eyler, 79 NY2d 955 (1992). Thus, plaintiff has met her burden.

Accordingly, the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is denied.

The plaintiff also moves for summary judgment on the issue of liability. It is also well settled that the driver of a motor vehicle must maintain a safe distance between his vehicle and the one in front of him, taking into account the weather and road conditions. See Vehicle and Traffic Law §1129(a); Francisco v Schoepfer, 30 AD3d 275 (1st Dept. 2006); Malone v Morillo, 6 AD3d 324 (1st Dept. 2004). Any rear-end collision with a stationary vehicle creates a prima facie case of liability against the operator of the moving vehicle and, to rebut the presumption, the operator of the moving vehicle must come forward with an adequate, non-negligent explanation for the collision. See Mariano v NYCTA, – AD3d –, 2007 SlipOp 01806 (1st Dept. March 6, 2007); Woodley v Ramirez, 25 AD3d 451 (1st Dept. 2006); Garcia v Bakemark Ingredients (East) Inc., 19 AD3d 224 (1st Dept. 2005).

In support of plaintiffs' motion for liability, they reference plaintiff's deposition testimony which is annexed to defendants' moving papers, plaintiff's affidavit and the deposition testimony of defendant Joseph Blount, which establishes that plaintiff was a passenger in the subject vehicle, which was stopped in traffic when it was struck in the rear by the vehicle driven by defendant Joseph

Blount. This proof satisfied the plaintiff' s burden on the motion and created a prima facie case of liability against the defendants. Nothing in the proof submitted indicates any negligence on the part of the plaintiff. Indeed, it shows that defendant Joseph Blount simply failed to exercise due care to avoid colliding with her.

In opposition to the motion, the defendants challenge plaintiff's credibility. However, they have failed to come forward with evidentiary proof in admissible form that would raise a triable issue of fact as to those or any other issues. See Alvaraz v Prospect Hospital, supra; Zuckerman v City of New York, supra. Specifically, they have failed to identify any significant inconsistency in her testimony or other proof to create a triable issue as to her credibility. See McFadden v Bruno, —AD3d ---, 2007 Slip.Op. 00989 (1st Dept. February 6, 2007); Natale v Woodstock, 35 AD3d 1128 (3rd Dept. 2006); Silverman v Clark, 35 AD3d 1 (1st Dept. 2006). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to meet the requirement of tender in admissible form. Zuckerman v City of New York, supra at 562; see Cilli v Resjefal Corp., 16 AD3d 339 (1st Dept. 2005); Garcia v Verizon New York, Inc., 10 AD3d 339 (1st Dept. 2004). Therefore, the plaintiff is entitled to summary judgment on the issue of liability.

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

ORDERED that the motion of the defendants for summary judgment on the issue of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is denied, and it is further,

ORDERED that the plaintiff's motion for summary judgment on the issue of liability is granted, and it is further,

ORDERED that, upon the filing of a note of issue, the matter will be set down for a trial on the issue of damages, and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED
AUG 09 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: ~~July 20, 2007~~ August 3, 2007

Deborah A. Kaplan
DEBORAH A. KAPLAN
J.S.C.

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