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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

NATALIE WATSON, JOSE PLAZA, FRANCIS PLAZA, JANESTY VIERA and JOSVANNI VIERA

INDEX NO. 115806-2004

MOTION DATE 6-15-07

- v -

MOTION SEQ. NO. 004

KHASRU ZAMAN, PRIMITIVO MENDEZ, DIONSIO ESTREMADA 3RD and GO AUTOMOTIVE LEASING, INC.

MOTION CAL. NO.

KAPLAN, J.:

In this personal injury action, the defendants Khasru Zaman and Primitivo Mendez move for summary judgment dismissing the complaint on the ground that neither Natalie Watson, Jose Plaza, Francis Plaza, Janesty Viera nor Josvanni Viera sustained a "serious injury" within the meaning of Insurance Law 5102(d).

At approximately 10:00 p.m. on February 15, 2003, plaintiffs accompanied by other members of their immediate family were passengers in a limousine operated by defendant Dionsio Estremada 3rd. Earlier on the day of the occurrence Janesty and Josvanni Viera were married in New Jersey. After a brief dinner celebrating the marriage, the couple accompanied by their family members boarded a rental limousine to drive to Manhattan to celebrate. They did not have a specific destination in mind other then driving around the midtown Times Square area, but did stop at a bar recommended by the driver Estremada. After leaving the bar, the car proceeded on West 47th Street towards Broadway in Manhattan. During the ride, Josvanni, Janesty and other members of the group took turns standing inside the vehicle with the upper portions of their torsos protruding out of the car's open sun roof. After stopping at a red light at the intersection of Broadway and West 47th Street, the driver noticed a parked news truck bearing the logo Channel Seven News. According to the plaintiffs the driver backed up, suggesting to the parties that if they called out to the people in the truck, they might be able to get on television. While backing down the street to access the news truck behind them, the limousine was involved in a collision with another vehicle. As a result of this incident, all five plaintiffs claim to have sustained a medically determined injury or

impairment of a non-permanent nature which prevented them from performing substantially all of the material acts which constituted their usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment. Defendants now move for summary judgment averring that all plaintiffs have 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 reports of Dr. Edward Weiland, a board certified neurologist, who performed an Independent Medical Exam (IME) on each of the plaintiffs as well as a transcript of each one's deposition as well as the pleadings.

Dr. Weiland, who reviewed plaintiffs' prior medical records, prior to performing his examinations, discusses in his report, various observations after testing of each plaintiff's mobility and flexibility.

With regard to Natalie Watson, who was evaluated on June 22, 2006, Dr. Weiland indicates that while taking her medical history he learned that she did not immediately seek medical treatment but several days later was seen by Dr. Bert Schneider, a chiropractor at his New Jersey office, and remained under chiropractic care for approximately six months. He describes the objective tests he used during his exam and details her ranges of motion as compared to a stated norm. He concludes that she has full ranges of motion in her cervical and lumbar spines as well as her shoulders. He concludes that she has merely a resolved lumbosacral sprain/strain and suffers no neurological impairments. Ms. Watson's deposition testimony reveals that at the time of the accident in 2003, she was in the eighth grade. She did not miss any school as a result of the accident but felt she was somewhat impaired as a member of the school's cheerleading squad, in that she could no longer lift another member of the team without restriction.

Dr. Weiland examined Jose Plaza on June 22, 2006. Mr. Plaza, also declined treatment at the scene of the collision, beginning a course of chiropractic treatment later with Dr. Schneider. Dr. Weiland reviewed Plaza's prior medical reports including his MRI. During his exam, Mr. Plaza, who is currently employed as an independent truck driver complained of periodic pain in his lower back. All of the objective tests conducted by Dr. Weiland resulted in normal results. He also

measured Mr. Plaza's ranges of motion and found them all to be unrestricted as compared to a stated norm. Dr. Weiland concludes that Mr. Plaza suffered from sprains/strains to his cervical, lumbar and thoracic spine as well as head trauma, all of which are resolved. He concludes that plaintiff suffers from no neurological disabilities. At his deposition Mr. Plaza could not recall exactly how long he was out of work from his employment as a packer for United Stationary, estimating it was about two months. He is the only plaintiff seeking any lost wages. He did however indicate he was able to leave his home during that period to take his daughter to school and do shopping and other errands.

Francis Plaza was examined by Dr. Weiland on June 22, 2006. Ms. Plaza, like the other plaintiff's declined medical treatment at the scene, choosing to later begin a course of chiropractic care with Dr. Schneider. Dr. Weiland reviewed her prior medical records including her MRI and EMG/NCV studies. During her exam Ms. Plaza indicated she suffers pain in her posterior spine. All of the objective tests performed by Dr. Weiland were negative for any neurological impairment or difficulty. All of her ranges of motion as compared to a stated norm were unrestricted. He concludes that she suffered from cervical, thoracic and lumbosacral sprains/strains which have resolved. Her deposition testimony reveals that she treated with Dr. Schneider for approximately one month and then began treatment with Dr. Shan Nagendra, whose office is located closer to her home. At the time of the accident Ms. Plaza was employed as a phlebotomist at a hospital in Edison, New Jersey. She indicates she did not miss any work as a result of the subject collision.

Ms. Janesty Viera was also examined by Dr. Weiland on June 22, 2006. Like the others, she declined medical attention at the scene, choosing to begin chiropractic care with Dr. Schneider at a later date. Dr. Weiland reviewed her prior medical records including her MRI and NCV/EMG reports. Ms. Viera who was unemployed at the time of the accident now works as a customer service representative. All of the objective tests performed by Dr. Weiland were negative for any neurological impairment or difficulty. All of her ranges of motion as compared to a stated norm were unrestricted. He concludes that she suffered from lumbosacral sprains/strains as well as closed head trauma, which have resolved. Ms. Viera's deposition testimony reveals she was standing upright in the limousine at the time of impact. She indicated she has pain in her back if she sits or stands for a lengthy period of time. She restricted her daily activities for about a month

after the collision but was able to do her shopping. At the time of the deposition she asserts she is no longer restricted form performing any of her usual tasks and activities.

Mr. Josavanni Viera, who was also standing with the upper portion of his torso protruding out of the limousine's sun roof at the time of the impact was also seen by Dr. Weiland on June 22, 2006. Prior to conducting the examination, Dr. Weiland reviewed the prior medical records. In his report he details his neurological examination and lists the objective tests he used in determining that Mr. Viera does not suffer from any neurological disabilities. Although Mr. Viera said he experienced blunt trauma, Dr. Weiland finds no correlating physical evidence to support that claim during his examination. At his deposition, Mr. Viera details his chiropractic treatment with Dr. Schneider which lasted approximately six months. He also states he did not lose any time from work as a result of the subject accident.

In opposition to the motion, the plaintiffs Jose Plaza, Janesty Viera and Josvanni Viera submit their affidavits (written in the third person) as well as a letter from Dr. Bert Schneider, their treating chiropractor which is "certified" pursuant to "Automobile Insurance Cost Reduction Act of 1998." With regard to Mr. Plaza, Dr. Schneider discusses reports and MRI films taken, but these documents are not submitted with his papers. Nor are the "history and physical reports" he refers to as necessary and must be read in conjunction with his letter. Although he gives some ranges of motion measurements he does not state how they were determined nor does he relate them to a standard norm. He diagnosis Mr. Plaza with disc injuries which "can cause much pain and difficulties." He also advises him to refrain from any usual work which causes him pain until he has a "reasonable amount of relief." Dr. Schneider's letter submitted on behalf of Janesty Viera is in similar form and has the same marked deficiencies. Dr. Schneider advised her with regard to her activities in the same way. Finally with regard to Josvanni Viera, Dr. Schneider concludes he suffers from a herniated disc as well as thoracic and lumbosacral sprains. He refers to the MRI film which is not submitted or affirmed in any apparent way. He also advises him to refrain from activities which cause him pain.

Plaintiff's Natalie Watson and Francis Plaza submit in opposition their own affidavits (written in the third person) as well as a report in the form of a letter from Dr. Shan Nagendra, a board certified neurologist. His report is also "certified." With regard to Watson's ranges of motion he concludes she is restricted in her lumbar

spine but does not say to what extent, what the normal range of motion should be, nor does he indicate what objective tests if any he used to make his determination. He also advises her to refrain from "heavy physical activities," and diagnoses her with lumbar myofascial pain and lumbar sprain and strain. While he causally relates her condition to the subject accident he does not indicate her injuries are permanent. With regard to Francis Plaza, Dr. Nagendra, in his letter indicates she has some back pain and restrictions in the range of motion in her lumbar spine. As with Ms. Watson, the physician does not indicate the extent of any restriction or how it was calculated. He diagnosis her with a herniated disc and advises her to avoid "heavy physical activities" and casually relates her condition to the accident.

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, plaintiff has failed to satisfy his burden by presenting sufficient admissible medical evidence which would establishes a triable issue. Garner v Tong, 27 AD3d 401 (1st Dept 2006); Privitera 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). Neither Dr. Schneider's letter report nor Dr. Nagendra's letter report are in admissible form. CLPR 2106; Ramos v Dekhtyar, 301 Ad2d 428 (1st Dept 2003); Feintuch v Grella, 209 AD2d 377 (2d Dept 1994), lv. denied 85 NY2d 803 (1995). Neither physician relied upon by the five plaintiff's states how they made their determinations, what objective tests if any were employed, what the range of motion actually is and how it compares to the norm. It is well settled that "[a]lthough a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law 5102(d), a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration." Monette v Keller, 281 AD2d 523 (2nd Dept 2001); see Pommels v Perez, 4 NY3d 566 (2005); Meija v DeRose, 35 AD3d 407(2d Dept 2006);

Kearse v New York City Transit Authority, 16 AD3d 45 (2d Dept 2005); Silkowski v Alvarez, 19AD3d 476 (2d Dept 2005); Diaz v Turner, 306 AD2d 241 (2d Dept 2003). Thus, the letter reports fail to adequately address any range of motion deficiencies claimed. Vasquez v Reluzco, 28 AD3d 117 (1st Dept 2006). The proffered submissions fail to provide any foundation for the physician's conclusions. Franchi v. Palmieri, 1 NY3d 536 (2003); Stevens v Homiak Transport, 21 AD3d 300 (1st Dept 2005). None of the plaintiff's in either their deposition testimony or in their affidavits make a sufficient showing that they were confined to bed or home or that their injuries prevented them from performing substantially all of the material acts constituting their customary daily activities during at least ninety of the one hundred and eighty days following the accident. Alexander v Garcia, 40 Ad3d 274 (1st Dept. 2007); Uddin v Cooper, 32 AD3d 270 (1st Dept 2006), lv. denied, 8 NY3d 808 (2007); Hasner v Budnick, 35 AD3d 366 (2d Dept 2006).

Accordingly, the motion by defendants Khasru Zaman and Primitivo Mendez for summary judgment dismissing the complaint on the ground that none of the plaintiffs sustained a "serious injury" within the meaning of Insurance Law 5102 (d) is granted, and the complaint against these defendants is dismissed.

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

ORDERED that the motion for summary judgment is granted in its entirety, and the complaint against defendants Khasru Zaman and Primitivo Mendez only is dismissed in its entirety, and it is further

ORDERED that the Clerk of the court is to enter judgment accordingly.

Remaining parties to appear for a Conference on Sept. 4, 2007 9:30, Rm. 1166, 80 Centre Street.

This constitutes the Decision and Order of the Court.

FILED
AUG 16 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 8, 2007

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

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**