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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

FERMIN BELLO

- v -

PAMELA MONTALVO

INDEX NO. 100847-06

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO. 7

The following papers, numbered 1 to 3, were read on this motion by the defendant 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).

PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1
Answering Affidavits — Exhibits (Memo) 2
Affirmation in Reply 3

Cross-Motion: ☐ Yes ■ No

On January 5, 2006, as he was driving on Little Neck Parkway near its intersection with Grand Central Parkway in Queens, plaintiff was struck by a vehicle operated by defendant. Plaintiff commenced the instant action claiming, *inter alia*, that he 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 [him] 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 defendant now moves for summary judgment, pursuant to CPLR 3212 dismissing the complaint in its entirety on the ground that the plaintiff did not sustain a "serious injury" within the meaning of the statute.

It is settled law that 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, defendant seeks summary judgment on the threshold "serious injury" issue under "No-Fault threshold" issue (Insurance Law § 5102[d]), 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 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 v Twentieth 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).

Additionally, where the plaintiff claims serious injury under the "90/180" category of Insurance Law §5102(d), she must (1) demonstrate that his 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 his daily activities. Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, supra.

In support of her motion, defendant proffers the pleadings, plaintiff's deposition testimony, and the affirmations of Dr. Irving M. Etkind, a board certified orthopedic surgeon, Dr. Robert S. April, a neurologist and Dr. Stephen W. Lastig, a board certified radiologist.

Dr. Etkind examined the plaintiff on December 28, 2006 where he reviewed his medical records and performed a number of objective tests, all of which are described in his report and all of which revealed a normal range of motion as compared to the stated norm. He concludes that plaintiff has a normal orthopedic examination of his cervical, dorso-lumbar spine and upper and lower extremities, and suffers no disabilities.

Dr. April reviewed the plaintiff's medical records and conducted a neurological examination on December 27, 2006. In his report, Dr. April concludes

that plaintiff showed normal ranges of motion in his legs, spine and upper limbs. He concludes that there are no objective neurological findings and that the subject accident did not produce any neurological diagnosis, disability, limitation or need for further intervention.

Dr. Lastig, who reviewed the MRI studies of the plaintiff's cervical and lumbar spine, dated February 16, 2006, states, *inter alia*, that there is degenerative disc disease of the lumbar and cervical spine, disc bulges at C3-C4, C6-C7 and disc desiccation at L5-S1. He concludes that the multi-level disc bulges and desiccation are degenerative in nature and unrelated to the subject accident.

Accordingly, defendants have met their burden on a motion for summary judgment thereby shifting the burden to the plaintiffs. In opposition, plaintiffs submit the pleadings, plaintiff's deposition testimony, plaintiff's affidavit, the affirmed report of Dr. Gideon Hedrych, board certified in emergency medicine, the affidavits of Dr. Samuel Mayerfield and Dr. Robert Diamond, radiologists and various unaffirmed medical records and reports. 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.

Plaintiff's deposition testimony and affidavit establishes that he is a cook, waiter and manger at a restaurant where he worked 13 hours a day, seven days a week. He states that before the accident he would have to lift heavy objects such as vegetable boxes, beer boxes and wine boxes, but can no longer lift these objects due to the injuries sustained in the accident. Dr. Hedrych's report supports these allegations.

Dr. Hedrych first examined plaintiff on January 23, 2006, where he conducted range of motion tests of his cervical and lumbar spine and found significant restrictions in all areas compared to the stated norms. On February 8 and 24, 2006, Dr. Hedrych observed restrictions of range of motion of plaintiff's cervical and lumbar spine in addition to finding disc herniations at C3-C4, C4-C5, C5-C6, C6-C7, lumbosacral radiculopathy with L5-S1 disc herniation and bulges at L2-L3, L3-L4 and L4-L5. On March 26, 2007, Dr. Hedrych re-evaluated plaintiff in response to this motion, where he again found significant restrictions compared to the stated norms in his ranges of motion of his cervical and lumbar spine. He concludes that plaintiff's usual and daily activities are curtailed to a great extent due to his injuries caused by the subject accident, and that these restrictions include an inability to lift or carry objects. In addition, Dr. Hedrych states that there has been no gap in treatment, as the plaintiff is still treating.

Dr. Mayerfield states in his affidavit that an MRI of the cervical spine was performed on February 16, 2006, which reveled, disc herniations at C3-C4, C4-C5, C5-C6, C6-C7 as well as straightening cervical lordosis and no degenerative condition. Dr. Diamond states in his affidavit that an MRI of the lumbar spine was performed on February 16, 2006, which reveled, L5-S1 posterior disc herniation

and disc bulges at L2-L3, L3-L4 and L4-L5 and no degenerative condition.

Thus, the plaintiff presents objective medical evidence of a medically determined injury or impairment which caused the alleged limitations in his daily activities. See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, supra. Accordingly, the defendant's 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.

ORDERED that the defendant's motion for summary judgment dismissing the complaint is denied; and it is further,

ORDERED that the parties shall appear for a pre-trial conference on October 30, 2007, at Part 22, 80 Centre Street, Room 136, at 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: August 7, 2007

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**