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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

GUILLERMO PEREZ

INDEX NO. 113759/05

MOTION DATE 6-6-07

- v -

MOTION SEQ. NO. 002

PLANT FANTASIES and RICHARD M.OTERO

MOTION CAL. NO. 87

The following papers, numbered 1 to 3, were read on this motion by the defendants for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

On March 4, 2005, a delivery van owned by defendant Plant Fantasies, Inc., and operated by defendant Richard Otero struck the plaintiff, Guillermo Perez, a pedestrian, as he crossed 29th Street between Seventh and Eighth Avenue in Manhattan. According to the plaintiff, the van backed into him as he walked across the street. The 44-year-old plaintiff claims to have experienced immediate pain to his head, arm and back, and was transported to a hospital emergency room, where a CT scan revealed no evidence of disc herniation but only degenerative disease. He claims to have lost several days of work as a delivery driver and to have reduced his hours for several months. He underwent several months of physical therapy and reports continued pain in his back, neck and shoulder. The plaintiff commenced the instant action seeking damages for the injuries he allegedly sustained in the accident. The defendants now move for summary judgment dismissing the complaint on the ground that he did not sustain a "serious injury" as defined by Insurance Law § 5102(d).

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

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. If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with objective proof of his or her injury, in admissible form, to raise an issue of fact requiring a trial. See Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Dufel v Green, 84 NY2d 795 (1995). 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, supra; Licari v Elliot, 57 NY2d 230 (1982). A plaintiff's subjective complaints alone are not sufficient to defeat the motion . See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, 79 NY2d 955 (1992).

In support of their motion, defendants submit, *inter alia*, the pleadings in this case, the transcript of the plaintiff's deposition, MRI reports of plaintiff's spine, emergency room records from Bellevue Hospital and other medical records, the affirmed report of Dr. Robert Goldstein, a board certified orthopedist. Upon examining the plaintiff at the defendants' request on August 15, 2006, Dr. Goldstein concluded that there were no objective orthopedic findings. He opined that the plaintiff suffered mild cervical sprain at the time of the accident but that the condition "has completely resolved." Dr. Goldstein's visual range of motion tests showed all normal functioning. Dr. Goldstein states that he reviewed and relied upon, *inter alia*, the emergency room record of Bellevue Hospital dated March 4, 2005, which includes a CT scan of the plaintiff's cervical spine, and an MRI of the plaintiff's cervical spine taken on August 8, 2005, at Park Avenue Radiologists. The Bellevue CT report, included in the plaintiff's papers, notes "no evidence of disc herniation or intraspinal or paraspinal hemorrhage" but found "degenerative disc and facet disease" most prominently in the C5-C7 region. The August 8, 2005, MRI

report by Dr. Albert Messina states that "slight diminution in caliber and signal intensity are noted at C5-6 and C6-7 associated with minimal bulges of the discs causing no significant thecal or neuronal impingement" and gave a similar diagnosis of "minor degenerative disc disease as noted C5-6 and C5-7" with all other findings normal.

In opposition to the motion, the plaintiff has submitted his own affidavit, dated March 29, 2007, which, he states, was translated to him by his attorneys and not an official interpreter. In it, he alleges that since the accident he suffers pain in his head, neck and lower back which increases when he walks or sits for long periods of time. His headaches occur about three times per week. He can no longer lift more than 25 pounds; prior to the accident he could lift 100 pounds. He is still unable to work a full day and must hire assistants to operate his delivery business. He can no longer play soccer, baseball and other sports with his young sons as he did before the accident. He further states that he treated with a chiropractor, Dr. Steven Clarke, from June 2005 through September 2005 and stopped at that time only because he was notified that his insurance would no longer cover the cost, which he could not afford to pay on his own.

At his deposition on June 28, 2006, the plaintiff testified that he missed only two or three full days of work after the accident and returned on a reduced schedule, six to seven hours per day rather than ten or twelve, for four to six months. Contrary to his affidavit, he testified that he was back at work full-time at his delivery job. His assistant, whom he employed a few months before the accident, moved back to Mexico six or seven months after the accident. The plaintiff testified that he takes aspirin for pain a few times per week and, contrary to his affidavit, testified that he continues to see Dr. Clarke every two or three months, his next appointment being in September 2006.

The plaintiff also submits the treatment records and reports of Dr. Clarke, who treated him not only for the injuries arising from this accident but also several months prior to that for "muscle relaxation" of the entire body. A few weeks after

the accident, Dr. Clarke referred the plaintiff to Dr. Paul Magda, a board certified neurologist. Dr. Magda sent him for MRIs and for a procedure where fluid was drained from his spine. In a report dated December 12, 2005, Dr. Clarke describes the plaintiff's major symptoms as "sharp, spastic, burning, numbing and tingling pain" in the left side of the neck and in the lower back. Dr. Clarke describes the tests he performed and the deficits found, including severe muscle spasms in the left and right iliolumbar group of the lower back, detected by palpation, hypothesia in the nerve root, weakness in the lower extremities and a moderate deficiency in the spine curvature. He found "abnormal" results for the "low back hyperextension test" and positive results for the Kemp Test and Sitting Root Test, both of which indicate intervertebral disc syndrome.

Dr. Clarke described the plaintiff's course of treatment as conservative, intending to relieve pain and consisting of mild spinal manipulation and physiotherapy, once or twice per week. In his report, he diagnoses "post-traumatic lumbar syndrome with lumbo-sacral radiculopathy, myofascial pain syndrome with resultant losses of normal activities," including ability to lift heavy objects and to sit or drive for long periods, and opines that the injuries were permanent and caused by the accident. In a letter dated March 2, 2007, Dr. Clarke states that he re-examined the plaintiff and reaffirms that his injuries are permanent and that he will continue to have functional losses, specifically chronic pain and an inability to lift heavy objects.

The plaintiff also submits an affirmed report of Dr. Irving Friedman, a board certified neurologist, dated March 15, 2007. Upon his examination of the plaintiff and review of his medical records, Dr. Friedman concluded that as a result of the 2004 accident, the plaintiff suffered "chronic post-traumatic cervical myofascitis/spasm with left-sided radiculopathy; post-traumatic disc bulges at C5-C6 and C6-C7 and exacerbation and aggravation of a prior quiescent cervical process [based on MRIs of plaintiff's cervical spine taken March 18, 2004, a year prior to the accident, which are not included with the motion papers]; chronic post-traumatic lumbar myofascitis/spasm, cephalgia, migraine, and vertigo; and chronic pain syndrome with affective disturbances including anxiety and depression." It was Dr.

Friedman's further opinion that plaintiff suffered "restricted ranges of motion at the cervical and lumbar spine" - specifically "cervical rotation was guarded to 45 degrees out of 90; cervical flexion and extension were guarded to 22 degrees out of 45, i.e., diffuse 50% deficit at the cervical spine." He further found that plaintiff continues to suffer "persistent headaches and numbness of the left hand" and remains with a "significant and painful multi-level disability."

The court finds that 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, thereby shifting the burden of proof to the plaintiff. 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 plaintiff, in turn, has failed to come forward with objective proof to raise a triable issue. See Toure v Avis Rent A Car Systems, supra; Dufel v Green, supra. First, the court notes that the plaintiff fails to clearly articulate which particular category of "serious injury" he is claiming in this action. See Insurance Law § 5102(d). In any event, his proof falls short of satisfying any relevant category.

Dr. Clarke's reports and records alone do not establish any serious injury and, in any event, are based largely upon the plaintiff's own subjective complaints which, as stated above, are insufficient to meet his burden on this motion. See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, supra. Although Dr. Friedman finds restricted ranges of motions, he states only that that movement was guarded, indicating that they may be self-imposed. Further, he fails to state the objective tests he use, if any, in reaching his conclusion. See Palladino v Antonelli, – AD3d – (2nd Dept. May 22, 2007); Park v Champagne, 34 AD3d 274 (1st Dept. 2006); Taylor v Terrigno, 27 AD3d 316 (1st Dept. 2006); Nagbe v Mini Green Hacking Corp., 22 AD3d 326 (1st Dept. 2005). Additionally, while Dr. Friedman finds evidence of a disc herniation, he apparently bases that conclusion on an MRI which pre-dates the accident. Indeed, an MRI and a CT scan taken *after* the accident show no such injury, and are not adequately addressed in Dr. Friedman's report. Thus, Dr. Friedman's report does not further the plaintiffs' position.

Nor are the plaintiff's own affidavit or deposition testimony, which are frequently inconsistent, sufficient to establish a claim under the 90/180 category of Insurance Law §5102(d). To establish serious injury under the "90/180" category, the plaintiff must (1) demonstrate that his or her usual activities were curtailed for not less than 90 days of the 180 days immediately following the accident 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, supra; Gaddy v Eyler, supra. Although the plaintiff underwent chiropractic treatment for more than 90 days following the accident, he failed to establish that he was prevented from performing substantially all of the material acts constituting his customary daily activities during that time period. See Rodriguez v Herbert, 34 AD3d 345 (1st Dept. 2006).

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is granted, the complaint is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: August 13, 2007

Deborah Kaplan

Deborah A. Kaplan *J.S.C.*

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

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