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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

DELIA ABREU

INDEX NO. 100111/05

MOTION DATE

- v -

MOTION SEQ. NO. 002

BOMBAY TAXI CORP., GNRMUKH SIDHU, and SANDRA JIMENEZ-PEREZ

MOTION CAL. NO. 1

The following papers, numbered 1 to 4 were read on this motion and cross-motion by defendants to dismiss plaintiff's complaint on the ground that she did not meet the 'serious injury' threshold requirement of New York State Insurance Law § 5102(d).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Notice of Cross-Motion/ Order to Show Cause — Affidavits — Exhibits ...	2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ☒ Yes ☐ No

On April 18, 2004, at the intersection of 39th Street and Northern Boulevard in Queens, plaintiff Delia Abreu was a restrained front-seat passenger in a vehicle owned and operated by defendant Sandra Jimenez-Perez, when it collided with a vehicle operated by Gnrmukh Sidhu and owned by Bombay Taxi Company.

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).

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, supra; Gaddy v Eyler, supra.

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 in the action, plaintiff's verified bill of particulars, deposition transcript, and the report of Dr. John T. Hughes, a neurologist, Dr. Joseph Y. Marguilies, an orthopedist and Dr. Burton S. Diamond, a board certified neurologist.

Dr. Hughes, who examined the plaintiff on July 27, 2005, reports that she claims to have sustained an injury to her neck, left shoulder and lower back, and experienced a headache as a result of the subject accident. He notes that no x-rays were performed when she was taken to New York Hospital after the accident, and no authenticated medical records were available for review at the time of examination. Based on his neurologic examination, plaintiff's bill of particulars, and the medical history provided by Abreu, he opines that there is no need for further neurological treatment, and that plaintiff may continue to go about her activities of daily living without restrictions or limitations. Further, he concludes that there is no evidence of a neurological disability or permanency.

Dr. Margulies, who examined the plaintiff on September 12, 2005, in addition to reviewing her medical records, concludes that there was little cooperation by the plaintiff during the examination, and as a result, most of the ranges of motion were inspected indirectly. As a result of his clinical examination, which included cervical and lumbar range of motion tests, and shoulder range of

motion tests, he concludes that she has no functional disability at the time.

Dr. Diamond, during the examination of plaintiff on September 15, 2005, performed a series of objective range of motion tests of her cervical and lumbar spine, in addition to reviewing her medical records. He diagnosis cervical and lumbar sprains which are resolved, and opines that she showed no sign of permanency or residuals from a neurological perspective.

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 report of Dr. Joseph Kelberman, a chiropractor, dated February 23, 2007, the report of Dr. John T. Rigney, a board certified radiologist, in addition to plaintiff's affidavit.

Dr. Kelberman states that he treated plaintiff from April 2004 until October 2004 during which time she primarily complained of injuries to her left shoulder and cervical spine. He states that he found restrictions in her ranges of motion in her left shoulder and cervical spine, disc bulges at C2-3, C4-5, C5-6 and herniations at C3-4 and C6-7. On February 22, 2007 Dr. Kelberman re-evaluated plaintiff in response to this motion, where he again found restrictions in her ranges of motion in the cervical spine and left shoulder. He opines that her condition should be considered permanent and she is totally disabled regarding work.

While there is no dispute that plaintiff's treatment with Dr. Kelberman terminated on October of 2004, the explanation tendered for the cessation in treatment, that her no-fault insurance was terminated, is supported by Dr. Kelberman's report. Where a gap or, more accurately, a cessation of treatment, may undermine a plaintiff's claim of serious injury under Insurance Law §5102(d), here, unlike in Pommels v Perez, supra, where the plaintiff provided no explanation as to the gap in treatment, this plaintiff does. However, fatal to plaintiff's opposition is that Dr. Kelberman, fails to causally relate the plaintiff's restrictions to the accident on April 18, 2004, nor does he submit any objective proof made contemporaneously with the accident to substantiate plaintiff's claim. Pommells v. Perez, supra; Toulson v. Young Han Pae, 13 A.D.3d 317 (1 Dept. 2004).

Dr. Rigney reviewed plaintiff's MRI of her cervical spine. His impression was straightening of curvature and lateral angulation to the right and disc bulge at C2-C3, C4-C5, C5-C6 and herniations at C3-4, C6-C7. Nevertheless, "proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury." See Pommels v Perez, supra at 574; Park v Champagne, 34 AD3d 274, 276 (1st Dept. 2006).

Further, plaintiff fails to present objective medical evidence of a medically determined injury or impairment which caused the alleged limitations in her daily activities. Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, supra. Though the plaintiff received regular medical treatment after the accident, there is no evidence that she was required or advised by a medical professional to refrain from her daily activities due to any injuries arising from the accident.

For these reasons and upon the foregoing papers, it is

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

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the defendants dismissing plaintiff's complaint, with costs and disbursements to defendants as taxed by the Clerk, and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: July 27, 2007

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST