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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

HASAN MAZREKAJ

INDEX NO. 111199-2006

MOTION DATE 8-29-07

- v -

MOTION SEQ. NO. 002

JAMAL Y. AHMED and JOSEPH KLEIN

MOTION CAL. NO. 113

The following papers, numbered 1 to 3, were read on this motion by defendants Jamal Y. Ahmed and Joseph Klein 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
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ■ No

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Hasan Mazrekaj did not sustain a "serious injury" within the meaning of Insurance Law §5102(d). The motion is denied for the reasons set forth below.

At approximately 12:45 p.m. on June 25, 2006, as he was crossing at the intersection of Lexington Avenue and East 77th Street within the pedestrian crosswalk and with the green light, plaintiff Hasan Mazrekaj, was struck by a vehicle owned by Joseph Klein and operated by Jamal Y. Ahmed. He was removed by ambulance to Lenox Hill Hospital where he treated, given crutches and released. The next day he began treatment with his primary care physician. As a result of this incident, plaintiff claims to have sustained a serious injury to his lumbar spine as well as torn ligaments and a fracture of his left knee. Defendants now move for

summary judgment averring that plaintiff has failed to establish a serious injury as defined by Insurance Law §5102(d), and as such any recovery should be limited to that provided by No-Fault insurance.

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. 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).

Once 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). However, "[w]here 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., supra.

It is well settled that a herniated or bulging disc may constitute a serious injury within the meaning of Insurance Law §5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., 22 AD3d 326 (1st Dept. 2005); Arjona v Calcano, 7 AD3d 279 (1st Dept. 2004). Furthermore , a CT scan or MRI may constitute objective evidence to support subjective complaints. (see Arjona v Calcano, supra; Lesser v Smart Cab Corp., 283 AD2d 273 [1st Dept.

2001)], so long as the plaintiff offers "some objective evidence of the extent or degree of the alleged physical limitations, and their duration, resulting from the disc injury." Arjona v Calcano, supra; see Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., supra; Simms v APA Truck Leasing Corp., 14 AD3d 322 (1st Dept. 2005).

The defendants rely upon the report of Dr. Robert Israel, a board-certified orthopedic surgeon, who examined the plaintiff on November 13, 2006. Dr. Israel found that the plaintiff had suffered sprains of the lumbar spine, and knee, but concluded that all of the sprains had resolved and that the plaintiff suffered no restriction in range of motion in any of the affected areas. He fails to address either the fracture or torn ligaments claimed by the plaintiff. Nor did he examine any of the plaintiff's prior medical records including the MRI studies of the plaintiff's left knee taken on June 29, 2006 some four days after the incident, which showed both a compression fracture and torn medial ligaments in plaintiff's left knee. Although he cryptically refers to an MRI as "reportedly prescribed" by plaintiff's physician he fails to review it or any other medical report. See Wadford v Cruz, 35 AD3d 258 (1st Dept. 2006); Nix v Yang Gao Xiang, 19 AD3d 227 (1st Dept. 2005); Dixon v Pena, 5 AD3d 283 (1st Dept. 2004). The only "records" Dr. Israel reviewed in connection with his examination of Mazrekaj were the Bill of Particulars, the police report and a Department of Motor Vehicles report. None of these could possibly be construed as medical records. The defendant also submits the deposition testimony of plaintiff in which he details the circumstances of the accident as well as his subsequent care and physical condition.

The defendant is not entitled to summary judgment as he failed to present competent evidence that the plaintiff did not sustain a serious injury. Not only is Dr. Israel's report conclusory and devoid of detail, it wholly fails to address plaintiff's claims of serious injury including a fracture of his left knee.

Since the defendant failed to meet it burden in the first instance, the court need not consider the sufficiency of the plaintiff's opposition papers. See, Facci v Kaminsky, 18 AD3d 806 (2d Dept. 2005).

For these reasons and upon the foregoing papers, it is

ORDERED that the defendant's motion for summary judgment is denied. The parties are directed to appear on October 18, 2007, Part 22, 80 Centre Street, Room 136 at 9:30 a.m. for a pre-trial conference.

This constitutes the Decision and Order of the Court.

Dated: September19, 2007

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

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

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