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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

ASHTON LEARIE

INDEX NO. 114869-2005

MOTION DATE 9-5-07

- v -

MOTION SEQ. NO. 001

ALIOU FALL

MOTION CAL. NO. 59

KAPLAN, J.:

In this personal injury action, defendant Aliou Fall moves for summary judgment dismissing the complaint on the ground that the plaintiff Ashton Learie 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 5:00 p.m. on August 17, 2005, plaintiff Ashton Learie, while riding his bicycle was struck by a vehicle owned and operated by Aliou Fall. The collision occurred on Seventh Avenue near its intersection with West 145th Street, New York, New York. As a result of this incident, plaintiff claims to have sustained a serious injury to his right shoulder as well as his cervical and lumbar spines. Defendant Fall, now moves for summary judgment averring that plaintiff has 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 his motion, the defendant submits the affirmed report of Dr. Michael Katz, a board certified orthopedist, who performed an Independent Medical Exam (IME) on the plaintiff as part of this litigation. Defendants also proffer the deposition testimony of the plaintiff, as well as the complaint and various other filings.

Dr. Katz, who reviewed some of the plaintiff's prior medical records, before performing his examination on November 21, 2006, discusses in his report, his observations of the plaintiff's mobility and flexibility. He concludes that the orthopedic exam is within normal limits and Learie does not suffer any objective orthopedic disability or permanency, casually related to the accident. He indicates that Learie has a full and normal range of motion with regard to his shoulder and spine but fails to list any objective tests if any he employed during his examination. With regard to the accuracy of his measurements Dr. Katz reveals his conclusions are based solely on "visual observation." He also fails to review plaintiff's MRI film. He concludes Learie has merely resolved cervical and lumbar spine sprains as well

as a resolved right shoulder contusion.

In opposition to the motion, the plaintiff submits his affidavit as well as the affidavit of Dr. Bruce J. Paswell, the chiropractor, who he began treatment with on August 31, 2005, the affirmed report of Dr. Armin Tehrany, a board certified orthopedic surgeon who examined plaintiff shortly after the collision and more recently in February of 2007 and his MRI film reports. All of the plaintiff's submissions detail the injuries to his shoulder and spine.

Dr. Paswell, describes his initial examination of Learie which took place approximately two weeks after he was released from Harlem Hospital following the accident. Dr. Paswell provides details concerning restrictions in plaintiff's ranges of motion as compared to a stated norm ranging up to 25%. He also lists the objective tests he performed. He discusses in his report plaintiff's MRI results (which are included in his submissions) which reveal bulging discs at L4-5, C3-4, C4-5 and C5-6, impinging on the thecal sac as well as a straightening of the lumbar lordosis. With regard to Learie's right shoulder the MRI reveals a tear of the tendon as well as significant restrictions of motion. His most recent exam with Dr. Paswell on February 27, 2007 revealed restrictions in the range of motion of his cervical spine between 20-25%. Dr. Paswell concludes that Learie has suffered permanent and significant limitations of his right shoulder and spine which are casually related to the accident. He also explains any gap in treatment as result of the cessation of No-Fault benefits and opines that Leary has reached his maximum medical improvement.

Dr. Tehrany who also examined Learie over the same period of time confirms that he has suffered an articular tear of the distal posterior tendon at its junction with the infraspinatus, consistent with a SLAP tear (Superior Labrum Anterior to Posterior). This type of tear takes place at the point the tendon of the biceps muscle inserts on the labrum. He finds restrictions in the shoulder range of motion up to 25% as compared to the norm. He concludes that this impairment is permanent and has recommended surgery as a possible means to alleviate some of the pain associated with this injury. He also discusses the MRI film results. The plaintiff's affidavit describes the accident and his subsequent treatment. He also discusses his limitations at work and at home as a result of 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 not 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. Dr. Katz fails to review or rebut the results of plaintiff's MRI. 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). Nor does Dr. Katz utilize any objective tests in reaching his conclusions. Madatov v Madatov, 27 AD3d 531

(2d Dept 2006); Vasquez v Reluczo, 28 AD3d 365 (1st Dept. 2006). As such, it is not necessary to consider the plaintiff's proof presented in opposition to the motion. See Facci v Kaminsky, 18 AD3d 806 (2d Dept. 2005). However, were the Court to consider plaintiff's proof it is clear that Learie has satisfied his burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact. Garner v Tong, 27 AD3d 401 (1st Dept. 2006); Priviteria 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). Plaintiff has also sufficiently addressed the gap in his course of treatment by presenting evidence that he could not continue as a result of termination of his medical benefits. See Pommells v Perez, Brown, Dunlap, Carasco v Mendez, 4 NY3d 566 (2005); Garner v Tong, supra; Neuberger v Gill, 19 AD3d 561 (2d Dept. 2005).

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

ORDERED that the defendants' motion for summary judgment is denied in its entirety.

The parties are directed to appear on November 26, 2007, Part 40, 60 Centre Street, New York, New York, at 9:30 a.m. for trial.

This constitutes the Decision and Order of the Court.

Dated: October 4, 2007

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

DEBORAH A. KAPLAN
J.S.C.

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