[* 1]

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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

AQIL AHMED and YOLANDA AHMED

INDEX NO. 107277-2005

MOTION DATE

- v -

MOTION SEQ. NO. 001

WOO Y. KWAK and SEUNG D. KWAK

MOTION CAL. NO. 1

The following papers, numbered 1 to 3, were read on the motion by defendants to dismiss the complaint on the ground that plaintiff Aqil Ahmed 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 (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 Aqil Ahmed did not sustain a "serious injury" within the meaning of Insurance Law 5102(d).

At approximately 5:08 a.m. on May 26, 2002, plaintiff Aqil Ahmed was operating a vehicle which was struck in the rear by a vehicle operated by defendant Seung D. Kwak and owned by defendant Woo K. Kwak on West Street near its intersection with Thames Street in New York County. As a result of this accident plaintiff claims to have sustained a serious injury to his lumbar and thoracic spine, as well as herniated discs with resulting limitations on his range of motion as well as other injuries. Defendants, now move for summary judgment averring that plaintiff has failed to establish a serious injury as defined by Insurance Law §5102.

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, defendants seek summary judgment on the threshold "serious injury" issue under "No-Fault threshold" issue (Insurance Law § 5102[d]), they bear 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 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).

In cases such as these, where the plaintiff claims serious injury under the "90/180" category of Insurance Law §5102(d), he 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 their motion the defendants submit the affirmed reports of Dr. Robert April, a board certified neurologist, Dr. Robert Israel, a board certified orthopedist and Dr. Stephen Lastig, a board certified radiologist. Defendants also proffer the deposition testimony of the plaintiff, as well as copies of various pleadings. Doctors April and Israel each performed an Independent Medical Examination (IME) on the plaintiff as part of this litigation. Dr. Lastig reviewed and interpreted his MRI films.

Dr. April performed a neurological examination of the plaintiff on October 25, 2006. He indicates in his report that he reviewed Ahmed's prior medical records. He notes that Ahmed complained of back pain and was limited in his ability to raise his legs past 30 degrees during the exam. Ahmed also complained of back pain when Dr. April was manually examining his back. Despite these restrictions Dr. April concludes that the plaintiff does not need any treatment from a neurological perspective, and suffers no disability, limitation or is in need of any further neurological treatment.

Dr. Israel examined the plaintiff on October 6, 2006. In his report he indicates he reviewed Ahmed's prior medical records including his MRI films and x-rays. Dr. Israel includes the objective tests he performed during his exam and correlates the results to a stated norm. These tests revealed a normal range of motion. He concludes that plaintiff has merely suffered a suffered a sprain injury to his lumbar spine which has resolved.

Dr. Lastig reviewed plaintiff's lumbar spine MRI film where he found a disc protrusion at L4-L5,. However, Dr. Lastig attributes this finding to degenerative disc disease and not the subject accident.

Plaintiff's deposition testimony establishes that he refused medical attention at the scene of the accident but went to Metropolitan Hospital approximately one week later because of pain. He has continued working as a taxi driver since the accident, reducing his schedule when he feels back pain.

In opposition, plaintiff submits the pleadings, his own deposition testimony and affidavit, the affirmations of Dr. Gideon Hedrych, board certified in emergency medicine, Dr. David Delman, board certified in internal medicine and emergency medicine and Dr. Robert Diamond, a radiologist.

Dr. Hedrych first examined plaintiff approximately six weeks after the accident on July, 8 2002, where he conducted range of motion tests of plaintiff's dorsolumbar spine which revealed pain during flexion greater than 30-35 degrees, extension greater than 0 degrees, lateral flexion to the right greater than 5 degrees, to the left greater than 0-5 degrees, rotation to the right greater 5-10 degrees and

to the left 0-5 degrees. His impressions were lumbosacral derangement, lumbar radiculopathy and dorsal spine sprain/strain, which are causally related to the subject accident. On September 30, 2002 Dr. Hedrych conducted a follow-up examination where he again conducted range of motion tests on plaintiff's dorsolumbar spine where he found pain and significant limitations in his ranges of motion. Dr. Hedrych does not state what objective tests he employed during his examination, nor does he offer a stated norm to compare his assessment of plaintiff's range of motion to.

Dr. Delman examined Ahmed on May 11, 2004. After administering a series of range of motion tests during his physical examination he concluded that plaintiff's lumbar spine flexion was decreased to 55 degrees and extension was decreased to 10 degrees. Dr. Delman diagnosed plaintiff with lumbar spine sprain/strain, disc herniations at L4-L5,L5-S1, L2-L3 , L3-L4 and L4-L5 foraminal narrowing.

On April 5, 2007 Dr. Delman again examined the plaintiff and found restrictions in his lumbar spine. The range of motion in his forward flexion was decreased to 60 degrees, extension was decreased to 20 degrees and bending to the right and left was restricted to 25 degrees. Dr. Delman's diagnoses was disc herniations at L4-L5, L5-S1, L2-L3, L3-L4, L4-L5, foraminal narrowing and post traumatic lumbar spine myofascial derangement.

Here, 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. See Toure v Avis Rent A Car Systems supra; Gaddy v Eyler, supra. However, plaintiff has failed to satisfy his burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact on any of the claimed sections of serious injury pursuant to Insurance Law §5102 (d). 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's medical submissions are devoid of any objective medical basis to substantiate the claimed disabilities. Smith v Brito, 23 AD3d 273

(1st Dept. 2005) Picott v Lewis, 26 AD3d 319 (2d Dept. 2006). Dr. Delman's affidavit, while setting forth a numerical finding of limitation fails to state any objective tests performed to enable him to reach his conclusions, nor does he provide a stated norm for comparison. Henry v. Rivera, 34 AD3d 352 (1st Dept. 2006); Nagbe v. Mini Green Hacking Group, 22 AD3d 326 (1st Dept. 2005); Taylor v. Terrigno, 27 AD3d 316 (1st Dept. 2006); Rivera v. Benaroti, 29 AD3d 340 (1st Dept. 2006). Nor does plaintiff submit any evidence of objective tests performed contemporaneously with the occurrence of the accident to substantiate his claim. Pommells v. Perez, supra; Toulson v. Young Han Pae, 13 A.D.3d 317 (1 Dept. 2004).

Additionally, Ahmed fails to explain his cessation of treatment. According to his own submissions he never sought any treatment after October 2004 and only visited Dr. Delman in April 2007 for an exam in response to this motion. This gap of two and half years or, more accurately, a complete stoppage of treatment, further undermines the plaintiff's claim of serious injury under Insurance Law §5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Milazzo v Gesner, supra; Berete v Ford Motor Credit Co., 29 AD3d 452 (1st Dept. 2006); Rubensccastro v Alfaro, 29 AD3d 436 (1st Dept. 2006); Vasquez v Reluzco, supra; Perez v Rodriguez, 25 AD3d 506 (1st Dept. 2006); Baez v Rahamatali, 24 AD3d 256 (1st Dept. 2005); Agramonte v Marvin, 22 AD3d 322 (1st Dept. 2005).

Although Dr. Diamond reviewed plaintiff's MRI film of his lumbar spine and found disc herniations at L4-L5 and L5-S1, he fails to causally relate these injuries to the subject accident. In fact, "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).

Additionally, the plaintiff fails to submit credible medical 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.

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment is granted, and the complaint is dismissed; and it is further,

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

This constitutes the Decision and Order of the Court.

Dated: October 12, 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**