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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

JAELYN REYES, JASMIN REYES and DULVA REYES

INDEX NO. 114625/04

MOTION DATE 7-25-07

- v -

MOTION SEQ. NO. 004

JOHN V. BRULL, TANYIN SOEU, MURAT ABALI, EDWARD A. REYES and MICHELLE MELENDEZ

MOTION CAL. NO.

The Notice of Motion and two Notices of Cross-Motion, with Affidavits and Exhibits, Affirmations in Opposition and a Reply Affirmation were read on this motion and cross-motions for summary judgment dismissing the complaint as to plaintiff Dulva Reyes on the ground that she did not sustain "serious injury" as defined by Insurance Law 5102(d).

Cross-Motion: ■ **Yes** ☐ **No**

In this action to recover damages for injuries sustained in a three-vehicle accident, all defendants move for summary judgment dismissing that portion of the complaint which concerns plaintiff Dulva Reyes on the ground that she did not sustain "serious injury" as defined by Insurance Law § 5102(d). The motion is granted.

The complaint alleges that on October 31, 2003, on the Cross Island Parkway at Union Turnpike in Queens, a vehicle being operated by defendant Edward Reyes and owned by defendant Michelle Melendez collided with the rear of a vehicle operated by defendant Murat Abali and owned by defendant Tanyin Soeu. After that impact, a vehicle owned and operated by defendant John Brull struck the rear of the Reyes vehicle, in which the plaintiffs were passengers. Plaintiff Jaelyn Reyes, an infant, sustained a fracture, which indisputably falls within the statutory definition of "serious injury." See Insurance Law § 5102(d). Plaintiff Dulva Reyes, 48-years old, claims to have suffered, *inter alia,* herniated or bulging discs and other spinal injuries. Defendants Abali and Soeu now move for summary judgment dismissing the complaint insofar as it concerns plaintiff Dulva Reyes on the ground that her injuries do not meet the statutory threshold requirement. Defendants Reyes and Melendez and defendant Brull cross-move, separately, for the same relief.

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).

"Although a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law § 5102(d), a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration." Monette v Keller, 281 AD2d 523 (2nd Dept. 2001); see Pommels v Perez,4 NY3d 566 (2005). The plaintiff's medical submissions must show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiffs' limitations were significant. See Milazzo v Gesner, 33 AD3d 317 (1st Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1st Dept. 2006).

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, the deposition testimony of plaintiff Dulva Reyes, and the affirmed reports of *Dr. Charles Bagley,* a board certified neurologist, *Dr. Pierce Ferriter*, a certified orthopedic surgeon, both of whom examined the plaintiff at the request of defendants Abali and Soeu, and the affirmed report of *Audrey Eisenstadt*, a board certified radiologist, who reviewed the plaintiff's MRI films.

In her deposition testimony, Dulva Reyes states that she felt pain in her neck, back

and legs at the accident scene and was taken to the hospital by ambulance. She underwent x-rays and was released with the painkiller Motrin. She was not given a collar, brace or cane. Later the same week, she appeared at a local clinic where she had MRIs taken of her neck and back and underwent a three-month course of physical therapy, which consisted of manual massage, hot towels and home exercise. She felt pain in her entire back every day after the accident, but it decreased with therapy. According to the plaintiff, for two months after the accident, she was unable to stand for long periods of time but walked around her neighborhood and shopped. She confined herself to home for only two weeks. At the time of the deposition in October 2006, she continued to experience pain in her lower back and hips when she sits or stands for long periods of time. She had no further appointments for therapy or medical treatment.

In his report, dated November 21, 2006, Dr. Bagley lists the objective tests he administered and found all normal ranges of motion in the spine except a deficit in flexion of the lumbosacral spine (50 of 90 degrees). He concludes that plaintiff Dulva Reyes had a "normal neurological exam" with no "prominent neurological complaints or objective evidence of involvement of her nervous system on testing" and is not neurologically impaired.

In her report, Dr. Eisenstadt states that she reviewed an MRI scan of the plaintiff's lumbar spine taken five weeks after the accident and found "early L4-5 osteophyte formation; desiccation and bulging L3-4 and L4-5 intervertebral disc level." Dr. Eisenstadt explains that the scan showed "early degenerative disc disease in the lower lumbar spine" at the most common level in the population for degenerative disc disease to occur. She also found that the osteophyte formation, or bony overgrowth, was greater than six months in origin, and the diseccation or drying out of disc material was greater than three months in origin, thus clearly predating the accident. Dr. Eisenstadt found no vertebral disc changes attributable to the accident and further explains that the bulging revealed in the scan was not the result of any trauma but was "degeneratively induced and related to ligamentous laxity."

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. However, the plaintiff has failed to meet her burden to come forward with proof in admissible form to raise a triable issue of fact requiring a trial.

Specifically, the plaintiff has submitted an affirmation of Dr. Larry Newman, who treated the plaintiff several days after the accident until February 2004, when, according to Dr. Newman, she reached maximum level of improvement and discontinued treatment. Dr.

Newman noted that the plaintiff was 5'4" tall and weighed 184 pounds and was "in moderate distress" when she first appeared at his office complaining of shoulder, knee and back pain. He states that he prescribed analgesics, muscle relaxants, orthotic devices and a program of rehabilitative physiotherapy to alleviate pain and restore function to the affected areas. Although Dr. Neuman's report also states that he found certain range of motion deficits in the cervical and lumbar spines during a "series of physical examinations" performed in the months following the accident, he does not indicate what, if any, objective tests he used to reach his conclusions. Consequently, he fails to show any contemporaneous testing to reveal any deficit or injury attributable to the accident.

Dr. Newman next examined the plaintiff on March 24, 2007, 3 ½ years after the accident, and found muscle spasms and significant range of motion deficits in the cervical (33-60%) and lumbar (33%) spines. He concluded that these deficits were caused by the accident and were permanent. Again, Dr. Newman failed to specify what, if any, objective tests he used to reach those conclusions. Nor do the submissions attached to Dr. Newman's affirmation serve to meet the plaintiff's burden on proof since they are not in admissable form. They consist only of an uncertified police report, uncertified ambulance report, uncertified hospital records and unsworn medical files and record of other doctors and a copy of one of plaintiff's health insurance claim forms.

The affirmation of Dr. John Rigney, the radiologist who supervised the plaintiff's MRI in November 2003, states that the MRI showed a "straightening of curvature" and a disc herniation at L4-5 and posterior disc bulge at L4-5, but that the remaining lumbar levels were unremarkable. This affirmation does not vary in any significant way from Dr. Eisenstadt's interpretation of the MRI and does not establish or even assert that the disc abnormalities were caused by the accident, as opposed to being degenerative in nature.

Finally, the court notes that the plaintiff's Bill of Particulars states that the "serious injury" she allegedly sustained constituted a "consequential limitation of use of a body organ or member which prohibited her from engaging in he usual and customary activities for a period of at least 90 days of the 180 days immediately following the accident." To the extent plaintiff attempts to allege the "90/180" category of Insurance Law § 5102(d), she wholly fails to meet her burden of proof. Indeed, her own deposition testimony refutes that claim.

Accordingly, the defendants' motion and cross-motions for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is granted.

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

ORDERED that the defendants' motion and cross-motions for summary judgment are granted in their entirety and the complaint is dismissed insofar as it asserts claims on behalf of plaintiff Dulva Reyes, with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that the action is severed and dismissed as to plaintiff Dulva Reyes and in all other respects shall continue.

This constitutes the Decision and Order of the Court.

Dated: October 5, 2007

Deborah K

Deborah A. Kaplan, A.J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

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