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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

DIANA XIAOYU DAI

- v -

NINJA ONE SERVICE CORP. and JOSE A. ROSADO

INDEX NO. 106023-2006
MOTION DATE 8-28-07
MOTION SEQ. NO. 001
MOTION CAL. NO. 41

KAPLAN, J.:

In this personal injury action, defendants Ninja One Service Corp. and Jose A. Rosado move for summary judgment dismissing the complaint on the ground that the plaintiff Diana Xiaoyu Dai 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 9:16 p.m. on August 3, 2004, on Tenth Avenue near its intersection with West 58th Street, New York, New York a vehicle operated by Jose A. Rosado and owned by Ninja One Service Corp. was involved in an accident with a vehicle operated and owned by plaintiff Diana Xiaoyu Dai. As a result of this incident, plaintiff claims to have sustained inter alia a serious injury to her jaw, cervical and lumbar spines. Defendants, now move 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 their motion, the defendants submit the affirmed reports of Dr. Sarsasavani Jayaram, a board certified neurologist and Dr. Evan Temkin, a board certified dentist. Each of these doctors, performed a Independent Medical Exam (IME) on the plaintiff as part of this litigation. Defendants also proffer a portion of the deposition testimony of the plaintiff, as well as the complaint and various other filings. They also include a report prepared by Dr. Audrey Eisenstadt, a radiologist who reviewed plaintiff's MRI films.

Dr. Jayaram, who did not review any of the plaintiff's prior medical records, before performing his examination on March 1, 2007, discusses in his report, the objective tests he employed during his examination and his observations of the

plaintiff's mobility and flexibility. He concludes that her neurological exam is within normal limits and she does not suffer any objective neurological disability or neurological permanency, casually related to the accident. Dr. Temkin, who also did not review plaintiff's prior medical records as prepared by her physicians, before conducting his examination on April 10, 2007, indicates that Dia exhibits a full and normal range of motion with regard to her jaw, mouth and tongue. He concludes that there is no dental disability casually related to the to the accident.
Dr. Eisenstadt in her report finds both bulging discs and disc desiccation (drying out) at C5-6 and C6-7 but concludes these are that there is no evidence of "disc herniation" and that there are only "mild degenerative changes", not casually related. In further support of their motion, the defendants also submit a portion of the plaintiff's deposition, discussing her treatment and activities subsequent to the accident.

In opposition to the motion, the plaintiff submits her affidavit as well as the affirmed reports of Dr. Ayoob Khodadadi, the radiologist who interpreted her films and Dr. Tsai Chao who treated her for a period of eight months following the accident. These submissions detail the injuries to her spine and neck. She has also included a copy of the New York City Police report filled out in conjunction with this case. The most recent exam on June 11, 2007 by Dr. Chao, who reviewed plaintiff's other medicals as well as films, indicates, among his findings a deficit in the plaintiff's movement of her cervical spine ranging from 12 to 40% as compared to a stated norm. He also finds that the movement of her lumbar spine is also significantly restricted with impairments ranging up to 20% as compared to a stated norm. He indicates that he directed Dai to stay home and refrain from work and her normal activities for at least three months following the accident. He casually relates her impairments to the subject collision and concludes that it is his professional opinion, that plaintiff has suffered "a permanent, consequential limitation of her lumbar spine affecting the lumbar muscles and ligaments resulting in limitation of motion of the lumbar spine." He explains the gap in her treatment by stating she had reached maximum benefit and that any additional treatment would be palliative. Dr. Khodadadi confirms the presence of bulging discs as well as a straightening of the cervical spine with a reversal of the lordotic curve.

The plaintiff in her affidavit provides details about the collision and her subsequent treatment. She claims that she could not perform any of her job responsibilities nor perform her daily activities for over three months following the accident. She also avers that she is unable to perform daily activities such as cooking, cleaning and playing with her children.

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 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 satisfied her 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 her course of treatment by presenting evidence that she had reached maximum medical benefit under her course of treatment and that any further treatment would be merely palliative. 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 for a pre-trial conference, Part 22, 80 Centre Street, New York, New York, on November 20, 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: October 23, 2007

Deborah A. Kaplan J.S.C.

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

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