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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

JINA EISAKHARIAN and YOEL EISAKHARIAN

INDEX NO. 116977/05

MOTION DATE 10-24-07

- v -

MOTION SEQ. NO. 003

QUEENS MUSIC SCHOOL INC. and LUNG LUNG CHIH

MOTION CAL. NO. 28

The following papers, numbered 1 to 3, were read on this motion by defendants 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

This is an action for damages arising from a motor vehicle accident which occurred on November 23, 2005, wherein a vehicle driven by plaintiff Jina Eisakharian and owned by plaintiff Yoel Eisakharian collided with a vehicle driven by defendant Lung Lung Chih and owned by defendant Queens Music School, Inc. The plaintiff, a college student, claims she sustained a disc herniation and other injuries to her neck, back and shoulders, and underwent a course of physical therapy and chiropractic treatment. The defendants move for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain any "serious injury" as defined by Insurance Law § 5102(d).

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).

Based upon these principles, the defendants' motion must be denied.

The defendants rely upon the affirmed reports of Dr. Iqbal Merchant, a board certified neurologist, and Dr. Shariar Sotudeh, a board certified orthopedic surgeon, who both examined the plaintiff on February 22, 2007, at the defendants request, and found all normal functioning with no range of motion or other deficits. Both doctors diagnosed resolved sprain/strain of the cervical, thoracic and lumbar spine and Dr. Sotudeh found resolved sprains in both shoulders and the right hand.

However, neither doctor states the objective tests he used, if any, in reaching his conclusions. See Palladino v Antonelli, – AD3d – (2nd Dept. May 22, 2007); Park v Champagne, 34 AD3d 274 (1st Dept. 2006); Taylor v Terrigno, 27 AD3d 316 (1st Dept. 2006); Nagbe v Mini Green Hacking Corp., 22 AD3d 326 (1st Dept. 2005). Nor did these doctors review the plaintiff's medical history, which includes an MRI indicating a disc herniation at C6-7, as well as other testing. See Wadford v Gruz, 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). As stated above, MRI studies constitute objective evidence of a herniated disc. See Arjona v Calcano, supra; Lesser v Smart Cab Corp., supra.

The defendant's further submission of a two-page excerpt from the plaintiff's deposition testimony, in which he states she that she missed one week of classes and cut her work hours after the accident, is not in admissible form (see CPLR 3116; McDonald v Mauss, – AD3d – , 2007 WL 853030 [2nd Dept. March 20, 2007]; Reilly v Newireen Associates, 303 AD2d 214 [1st Dept. 2003]).

Since the defendants failed to meet their burden in the first instance, the court need not consider the sufficiency of the plaintiff's opposition papers. However, the court notes that the plaintiff's submissions include an affirmation and medical reports of Dr. Ali Guy, her treating physician specializing in physical medicine and rehabilitation. Upon examining the plaintiff on November 30, 2005, Dr. Guy found 50% range of motion deficits "in all planes" as well as severe muscle spasms and multiple trigger points in the neck and moderate muscle spasms and multiple trigger points in the upper back. Dr. Guy further states that his findings were similar when he examined the plaintiff on January 31, 2006. On that day, he performed an EMG study of her upper extremities which suggested a right C5-6 cervical radiculopathy, and recommended continued rehabilitative therapy. A third

examination on June 5, 2007, again revealed a 50% range of motion deficit in the cervical spine. Dr. Guy opined that the plaintiff's injuries were caused by the subject accident and were permanent. The plaintiff also submitted the affirmed report of Dr. Samuel Mayerfield, who performed the MRI on November 3, 2006, which revealed a disc herniation at C6-7.

In any event, the defendants' failed to meet their initial burden of establishing the absence of a "serious injury" as a matter of law. See Pommells v Perez, supra; Toure v Avis Rent A Car Systems, supra; Licari v Elliot, supra.

For these reasons and upon the foregoing papers, it is

ORDERED that the defendant's motion for summary judgment is denied, and it is further,

ORDERED that the parties are to appear for a pre-trial conference on February January 24, 2008, 9:30 a.m. at Part 22, 80 Centre St., Room 136.

This constitutes the Decision and Order of the Court.

Dated: December 7, 2007

Deborah Kaplan

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

DEBORAH A. KAPLAN

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

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