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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

ELVIRA SOSA, JUAN RAMIREZ and MARIELY MENDEZ

- v -

RAFAEL MONTILLA and RICARDO RODRIGUEZ

INDEX NO. 115297-2004
MOTION DATE 12-11-07
MOTION SEQ. NO. 001
MOTION CAL. NO. 90

KAPLAN, J.:

In this personal injury action, the defendants move for summary judgment dismissing the complaint as to Elvira Sosa and Mariely Mendez on the ground that neither sustained a "serious injury" within the meaning of Insurance Law 5102(d).

On the afternoon of February 10. 2004 near the intersection of Cooper Street and 207th Street, New York, New York a vehicle owned and operated by Juan Ramirez in which Sosa and Mendez were passengers was involved in a collision with a vehicle operated by Ricardo Rodriguez and owned by Rafael Montilla. As a result of this incident, both plaintiff Sosa and plaintiff Mendez claim to have sustained a serious injury to the lumbar and cervical spine. Defendants, now move for summary judgment averring that neither 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. Robert Israel an orthopedist and Dr. Harvey Lefkowitz a radiologist. Defendants also proffer the deposition testimony of each woman, as well as the complaint and various other filings. Dr. Israel performed an Independent Medical Exam (IME) on both Sosa and Mendez on January 4, 2006 and Dr. Lefkowitz reviewed each plaintiff's MRI films and reports.

Before examining the plaintiffs Dr. Israel reviewed Sosa and Mendez's prior medical reports, including their MRI's. In his report, Dr. Israel details the independent tests he employed during his examinations as well as the ranges of motion in both plaintiffs lumbar and cervical spine, which he finds are normal as compared to a stated norm. Dr. Israel concludes each suffers from resolved cervical and lumbar sprains and strains only and that neither has any permanent orthopedic disabilities or limitations.

The deposition testimony of Sosa reveals that she was seated in the front passenger seat of the Ramirez vehicle which was stopped behind a police car when struck from behind by the defendant's vehicle. Emergency personnel responded to the scene and she was transported by ambulance to Harlem Hospital, at which she was treated and later released. At the time of the collision she was a senior at Westside High School and had to miss just over a month of school as a result of the accident. She began a course of physical therapy which lasted several months. As a result of the time she missed from school, she was unable to graduate with her class and graduated several months later. Mendez's testimony indicates she too was a student at the time of the accident but missed only two days of school. She underwent a four month course of physical therapy which she claimed ended upon the cessation of No-Fault benefits. She was seated in the rear of the vehicle at the time of the accident.

In opposition to the motion, the plaintiffs offer the affidavits of Dr. Humphrey Iroku who examined each on February 18, 2004 some eight days after the collision. Dr. Iroku indicates that each woman has restrictions in her range of motion. He lists some of the objective tests he employed in making his diagnosis including the MRI films which show each woman sustained disc herniations. Dr. Iroku casually relates each plaintiff's injuries and limitations to the subject collision. Dr. Iroku also states that both Sosa and Mendez had received the maximum medical benefit at the time they ceased treatment. When each plaintiff again visited Dr. Iroku on June 14, 2007 he again found restrictions in their ranges of motion. The plaintiffs also proffer the affirmed reports of Dr. David Stemmerman, a radiologist who interpreted the MRI films and diagnosed each with disc herniations.

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.

Additionally, where the plaintiff claims serious injury under the "90/180" category of Insurance Law §5102(d), she must (1) demonstrate that her 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 her daily activities. Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, 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 v Twentieth 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, with the exception of their claim that each was unable to perform their usual customary activities for ninety of the one hundred and eighty days following the accident, each plaintiff has satisfied her burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact under 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 SlipOp 50214U, 2007 N.Y. Misc. Lexis 333(App. Term 1ST Dept. 2007). In this case both Sosa and Mendez have each failed to present legally sufficient evidence to raise a triable issue of fact as to the claim of not being able to perform substantially all of their usual and customary duties for not less then ninety of the one hundred and eighty

days following the accident. Lopez-Carpio-Ceballo ,20 AD3d 336 (1st Dept. 2005), Mejia v Rodriguez, 13 Misc 3d 136A (App. Term 1st Dept. 2006). Plaintiffs have also sufficiently addressed the gap in the course of treatment by presenting evidence that neither could continue as a result of no insurance benefits being withdrawn as well as having reached a maximum medical benefit in that any other 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, it is

ORDERED that the defendants motion for summary judgment is granted to the extent that the plaintiff's Elvira Sosa's claim that she was unable to perform substantially all of her usual and customary activities for not less then ninety of the one hundred and eighty days following the accident is dismissed; and it is further

ORDERED that the defendants motion for summary judgment is granted to the extent that the plaintiff's Mariely Mendez's claim that she was unable to perform substantially all of her usual and customary activities for not less then ninety of the one hundred and eighty days following the accident is dismissed; and it is further

ORDERED that the remaining branches of the motion and cross-motion for summary judgment are denied, and the remainder of the action shall continue.

The parties are directed to appear for a pre-trial conference, Part 22, 80 Centre Street, New York, New York, Room 136 on January 17, 2008, 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: December12, 2007

Deborah A. Kaplan J.S.C.
DEBORAH A. KAPLAN

Check one: FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST