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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

JOHN R. LINTON and LAURA LINTON

- v -

MUHAMMAD NAWAZ and CHIRE TAXI, INC.

INDEX NO. 104906/04

MOTION DATE 9-19-07

MOTION SEQ. NO. 002

MOTION CAL. NO. ___

The following papers, numbered 1 to 3, were read on this motion by the defendants for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits (and Memo)	1
Affirmation in Opposition	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ■ No

In this action to recover damages for injuries arising from a motor vehicle accident, the undisputed facts establish that at approximately noon on August 29, 2002, at Broadway and 86th Street in Manhattan, a northbound taxi owned by the defendant Chire Taxi, Inc. and driven by defendant Muhammad Nawaz struck the 43-year-old plaintiff, a pedestrian, as he was crossing Broadway in and onto the sidewalk, where he landed on his buttocks and hands. The taxi mounted the sidewalk, dislodged at least one mailbox and came to rest near the plaintiff. The plaintiff, unable to stand, bleeding from the knee and ankle, and badly bruised, was transported to Mt. Sinai Hospital by ambulance and released the same day with pain medication. He returned to work as an engineer on November 16, 2002, and only on a part-time basis.

A few days after the accident, the plaintiff began a course of physical therapy to alleviate pain, tenderness, muscle spasms and other symptoms. An MRI of the right shoulder performed on September 19, 2002, revealed a right rotator cuff tear and other abnormalities; an MRI of the left knee taken on October 3, 2002, revealed a left medial meniscus tear and other abnormalities; an MRI of the cervical spine taken on October 10,

2002, showed multiple disc herniations and other abnormalities; and an MRI of the lumbar spine, taken on January 28, 2003, revealed further herniations.

The defendants move for summary judgment dismissing the complaint pursuant to CPLR 3212 on the ground that the plaintiff did not sustain a "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 the "No-Fault" Law (Insurance Law § 5102[d]), he or she bears the initial burden of establishing the absence of a "serious injury" as a matter of law.

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, 98 NY2d 345 (2002); 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, "[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.

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key. See Sillman vTwentieth Century Fox Film Corp., 3 NY2d 395 (1957). 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).

Furthermore, a torn meniscus may constitute a "serious injury" within the meaning

of Insurance Law § 5102(d). See Noriega v Sauerhaft, 5 AD3d 121 (1st Dept. 2004); compare Medley v Lopez, 7 AD3d 470 (1st Dept. 2004). It is also well settled that a torn rotator cuff (see Grullon v Perez, 41 AD3d 783 [2nd Dept. 2007]) or a herniated or bulging disc may constitute a serious injury within the meaning of the statute. See Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., 22 AD3d 326 (1st Dept. 2005); Ariona v Calcano, 7 AD3d 279 (1st Dept. 2004). While "a plaintiff must still offer some objective evidence of the extent or degree of the alleged physical limitations, and their duration, resulting from the disc injury" (Ariona v Calcano, 7 AD3d 279 [1st Dept. 2004]; 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]), 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).

In this case, the moving defendants have failed to meet their burden in the first instance of submitting 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. They submit the pleadings, including the plaintiff's Bill of Particulars, and the affirmed report of Dr. Nicholas Stratigakis, a board-certified orthopedic surgeon, who examined the plaintiff in February 2005, at the request of the defendants. Dr. Stratigakis found all normal functioning and no deficits in range of motions in the cervical, thoracic and lumbar spines, right shoulder, bilateral hand and knees, right hip and right ankle. He diagnosed all resolved sprains in those areas and found no permanency or need for further treatment. However, Dr. Stratigakis failed to address the above-described MRIs which reveal a torn rotator cuff, torn meniscus and disc herniations. 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). Dr. Stratigakis also concludes that the plaintiff had full range of motion in all tested areas but fails to identify the objective range of motion test(s) he used, if any, in reaching those conclusions. See Palladino v Antonelli, 40 AD3d 944 (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).

The defendants also submit an affirmed report of Dr. Audrey Eisenstadt, a radiologist, who, in September 2004, reviewed the MRIs taken on September 19, October 3 and October 10, 2002, which were interpreted by Dr. Mark Freilich, a board-certified radiologist. Dr. Eisensadt found, inter alia, a small bone contusion on the left knee, a partial tear of the distal supraspinatus tendon in the right shoulder, straightening of the cervical spine with discogenic disc ridging and bulging and areas of disc degeneration. Dr. Eisensdat was of the view that these conditions were of uncertain etiology or were degenerative in nature, predate the subject accident and do not indicate traumatic injury. While Dr.

Eisenstadt's submission may cure Dr. Stratigakis' failure to address the MRIs, it does not cure his failure to identify the range of motion tests he used to reach his conclusions.

Since the defendants have failed to meet their burden on this motion in the first instance, the court need not consider the sufficiency of the plaintiff's opposition papers. In any event, the plaintiff's submissions present factual issues sufficient to defeat the motion. The plaintiff's papers include the plaintiff's deposition testimony, which establishes the facts set forth above, an affirmation and reports of Dr. Noel Fleischer, a board-certified neurologist and the plaintiffs' treating physician since September 6, 2002, as well as the MRI reports discussed above. Dr. Fleischer examined the plaintiff on that date, sent him for the MRI studies, and examined him subsequently on January 8, 2003, and March 25, 2003. He found impaired range of motion in the spine and other deficits and permanent conditions arising from the injuries sustained by the plaintiff in the subject accident.

The plaintiff's deposition testimony belies the defendants' "gap in treatment" argument. See Pommels v Perez, 4 NY3d 566 (2005). Further, "[t]hat the MRI[s] [were] unsworn is not fatal to the threshold showing of serious injury, insofar as the [plaintiff's] physician related his own observations and findings regarding the injuries and loss of range of motion (Rosario v Universal Truck & Trailer Serv., 2 AD3d 362, 364 [1st Dept. 2003]) and the defendants' expert referred to and relied upon them to challenge the claimed injuries. See Silkowski v Alvarez, 19 AD3d 476 (2nd Dept. 2005); Rosario v Universal Truck & Trailer Serv., supra.

As such, even if the defendants had met their burden in the first instance, the plaintiff's proof would raise triable issues as to whether he sustained permanent consequential limitation of use of a body organ or member" and/or"significant limitation of use of a body function or system." See Insurance Law § 5102(d). Contrary to the defendants' further contention, the plaintiff's proof also presented triable issues as to whether he sustained a "medically determined injury or impairment of a non-permanent nature which precluded him from engaging in substantially all of his usual and customary daily activities for at least 90 days during the180 days immediately following the accident." See Insurance Law §5102(d).

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

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

ORDERED that the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d) is denied; and it is further,

ORDERED that the parties shall appear for a compliance conference on January 30, 2007, at 9:30 a.m. at DCM, 80 Centre Street, room 103.

This constitutes the Decision and Order of the Court.

Dated: December 10, 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**