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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

JOSE R. MANON,

Plaintiff,

-against-

DIABY DOUCOURE and CHEICK DOUCOURE,

Defendants.

INDEX NUMBER: **14122/2004**

Present:
HON. **SALLIE MANZANET-DANIELS**
Justice

The following papers numbered 1-3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of **8/13/07**

Notice of Motion -Exhibits and Affidavits 1

Affirmation in Opposition and Exhibits 2

Reply Affirmation 3

Upon the foregoing papers, defendants' motion for summary judgment is granted for the reasons set forth herein.

The within action arises from a motor vehicle accident on July 6, 2003 in which plaintiff alleges to have sustained serious injuries. Defendants move for summary judgment on the grounds that plaintiffs did not sustain a serious injury as required by §5102(d) of the Insurance Law.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York,

49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Licari v Elliot, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985).

Defendants move for summary judgment arguing that plaintiff has not suffered a serious injury pursuant to §5102 of the Insurance law. Defendants submit the affirmed reports of Dr. Gabriel L. Dassa, an orthopedic surgeon, and Dr. Robert D. Roe, a neurologist, both who examined plaintiff and found no evidence of serious injury. The reports pertain to physical examinations of the plaintiffs that were performed in July and August of 2006. For the sake of brevity, as the reports are very detailed regarding the objective testing performed on plaintiff, defendants have established by their submission of evidentiary proof in admissible form an issue of whether a "serious injury" has been sustained by any of the plaintiffs. Contrary to plaintiff's arguments, the physicians set forth the objective tests that they performed on plaintiff (Spurling maneuver, Valsalva maneuver Straight Leg Raising maneuver, Kemp's test and Millgram's test) which were all negative. In addition, Dr. Dassa conducted range of motion testing of plaintiff's cervical and lumbar spine which resulted in normal findings. Dr. Dassa specifies the range of motion tests done (i.e., flexion, extension); provides the normal degrees for such testing and provides the degrees that plaintiff was measured at which were all normal.

With respect to plaintiff's contention that defendants' physicians failed to address the 80/190 category of the threshold law, it should be noted that it is the Second Department that holds that defendants' doctors must specifically address this category in their opinions. See, Jocelyn v. Singh Airport Service, 826 N.Y.S.2d 434 (2d Dept. 2006); Talabi v. Diallo, 820 N.Y.S.2d 904 (2d Dept. 2006); Sayers v. Hot, 805 N.Y.S.2d 571 (2d Dept. 2005). However, the First and Fourth Departments have both held that a defendant can meet his or her prima facie proof under this category from the plaintiff's testimony. See, Lopez v. Carpio-Ceballo, 799 N.Y.S.2d 191 (1st Dept. 2005); Robinson v. Polasky, 822 N.Y.S.2d 183 (4th Dept. 2006).

Consequently, plaintiff's contention that defendants did not make a prima facie showing of entitlement to summary judgment on the 90/180 category is unavailing.

Plaintiff's affidavit, which is the equivalent of testimony, establishes that plaintiff does not raise an issue of fact with respect to this category. Plaintiff states that immediately following the accident, he was admitted to the hospital for two days for pain in his neck and left shoulder. Thereafter, plaintiff states that he began treatment with Dr. Pasqua continuously from July, 2003 until the end of September, 2003 and was reevaluated in April, 2004. His treatment involved physical therapy, message, electrical stimulation and various tests. Plaintiff further states that the pain in his neck radiated to both arms and caused and continues to cause him tingling and partial numbness down his left arm to his fingers. In addition, plaintiff states that for approximately five months after the accident, he was unable to leave his home except to receive medical treatment. During the first nine months following the accident, plaintiff claims that he could not engage in any of his usual daily activities including visiting friends, playing softball, lifting anything weighing more than 10 pounds or performing household chores including cleaning the house, vacuuming, mopping or carrying laundry. Plaintiff additionally states that he could not work and could not give dancing lessons. Plaintiff claims that he is still in pain and unable to perform his usual daily activities. Moreover, plaintiff states that he stopped his treatment because his no-fault benefits were cut-off in April, 2004.

Plaintiff's submissions are insufficient to create an issue of fact on serious injury. Plaintiff submits the affidavit of Dr. Gregory S. Pasqua which sets forth the dates that plaintiff received treatment which was from July 10, 2003 through September 30, 2003. Dr. Pasqua apparently saw plaintiff on one occasion in April, 2004 and on June 12, 2007, presumably for purposes of opposing the instant motion. In his affidavit, Dr. Pasqua references an MRI report that he reviewed that purportedly revealed that plaintiff sustained multiple level of disc herniations in the cervical spine. However, Dr. Pasqua's commentary plaintiff's MRI findings are without any probative value. Dr. Pasqua does not indicate that he reviewed the films. Medical conclusions based on unaffirmed reports of other treating doctors do not constitute admissible evidence and are insufficient to defeat a "well-supported summary judgment motion." Hernandez v. Almanzar, 821 N.Y.S.2d 30 (1st Dept. 2006); Lora v. Calle, 793 N.Y.S.2d 19 (1st Dept. 2005). Thus, any opinions regarding the findings of the MRIs are without probative value as he relied on unsworn medical and MRI reports with no indication that he reviewed the MRI films. Vargas v. Ahmed, 837 N.Y.S.2d 654 (1st Dept, 2007); Ortega v. Maldonado, 837

N.Y.S.2d 654 (1st Dept. 2007). Furthermore, the MRI report submitted by plaintiff is unsworn and inadmissible. Ortega, *supra*; Black v. Regalado, 828 N.Y.S.2d 29 (1st Dept. 2007); Hernandez v. Ramirez, 796 N.Y.S.2d 605 (1st Dept. 2005). The same is true of Dr. Pasqua's discussion regarding the emergency room treatment and records pertaining to same as those records are not in admissible form and, therefore may not be considered by the Court. Id.

In addition, Dr. Pasqua fails to adequately explain the gap or total cessation of plaintiff's treatment. A gap or cessation of treatment may override a plaintiff's objective medical proof evidencing a serious injury. Here, there is a total cessation of medical treatment and the burden is on plaintiff to adequately explain it. See, Pommells v. Perez, 4 N.Y.3d 566 (2005). Bent v. Jackson, 788 N.Y.S.2d 56 (1st Dept. 2005). The explanation must be substantiated by the medical records in order to be deemed reasonable. For instance, an explanation that further treatment would be futile or merely palliative has been deemed insufficient where based solely upon a plaintiff's own subjective beliefs, uncorroborated by medical evidence. See e.g., McNamara v. Wood, 797 N.Y.S.2d 606 (3d Dept.2005). Evidence contemporaneous with the cessation of treatment, such as a doctor's recommendation that further treatment would be merely palliative, is required. Shapurkin v. SSI Services, FLQ, Inc.2005 WL 2002452 (E.D.N.Y.2005); Stein v. Bentor, 2005 WL 2244831 (E.D.N.Y.2005). Plaintiff's gap in treatment has not been explained. Dr. Pasqua's statement that plaintiff stopped treatment after his no-fault benefits were terminated and that he could no longer afford treatment is insufficient. Plaintiff has not offered the Court any proof regarding the discontinuation of medical coverage. Gomez v. Ford Motor Company, 810 N.Y.S.2d 838 (Sup. Ct. Bx Cty. 2005). In addition, plaintiff failed to offer proof that he could not have continued to receive treatment through private insurance or other means. As such, Dr. Pasqua's statement and plaintiff's claim that he could not continue treatment on this ground is without probative value.

Plaintiff also fails to satisfy the statutory 90 out of 180 day requirement. In support of this claim, plaintiff offers a self-serving affidavit that is not supported by medical evidence. Plaintiff does not provide a report from Dr. Pasqua contemporaneous with the accident in which Dr. Pasqua advised plaintiff to avoid any activities. Without competent medical proof, plaintiff cannot establish the existence of a serious injury under the 90/180 category. See, Lopez v. Mendoza, 40 A.D.3d 436 (1st Dept. 2007). Dr. Pasqua's statement that the "treatment was not providing him with long term relief" is indicative that the statement came from plaintiff. Moreover, Dr. Pasqua's commentary regarding the activities that plaintiff allegedly could not perform merely

parrots the language in plaintiff's affidavit. In fact, Dr. Pasqua acknowledges that he obtained that information from plaintiff's affidavit.

Accordingly, defendants' motion for summary judgment must be granted.

This constitutes the decision and order of this Court.

Dated: December 12, 2007

Hon. Sallie Manzanet-Daniels