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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

YAN RONG ZHEN

INDEX NO. 102483-2006

MOTION DATE 11-28-07

- v -

MOTION SEQ. NO. 002

A-ONE TRANSPORTATION INC. and MOHAMMED MUSAH

MOTION CAL. NO. 96

A-ONE TRANSPORTATION INC. and MOHAMMED MUSAH

-v-

ALBERT ZI ZHANG ZHEN and YAN CHI CHONG

KAPLAN, J.:

In this personal injury action, defendants A-One Transportation Inc. and Mohammed Musah move for summary judgment dismissing the complaint on the ground that the plaintiff Yan Rong Zhen did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). Third-party defendants Albert Zi Zhang and Yan Chi Chong cross-move seeking the same relief. Both the motion and cross-motion are denied for the reasons set forth below.

At approximately 8:10 a.m. on December 3, 2003, near the intersection of Seventh Avenue and West 115th Street, New York, New York the plaintiff was a passenger in a van involved in a three car accident with defendant's vehicles. As a result of this incident, plaintiff claims to have sustained *inter alia* a serious injury to her cervical and lumbar spine and head trauma. Defendants and third- party 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. Edward Weiland a board certified neurologist and Dr. Audrey Eisenstadt, a board certified radiologist who reviewed plaintiff's MRI films. Defendants also proffer a portion of the deposition testimony of the plaintiff, as well as the complaint and various other filings. In support of the cross-motion Zhen and Chong also offer the affirmed report of Dr. S.W. Bleifer.

Dr. Weiland, who did not review any of the plaintiff's prior medical records, before performing his examination on May 24, 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. Eisenstadt in her report finds no evidence of either disc herniations or bulges as claimed by plaintiff. 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.

The report of Dr. Bleifer indicates that he examined the plaintiff on June 19, 2007, after reviewing both her MRI films and prior medical records. Dr. Bleifer, like Dr. Weiland finds that plaintiff has a full and complete range of motion as compared to a stated norm. He concludes that she suffers only from resolved sprains and strains in her spine.

In opposition to the motion, the plaintiff submits her affidavit as well as the affirmed reports of Dr. Miklos Weinberger, the radiologist who interpreted her films, Dr. Mengjia Zhao who treated her shortly after the accident and re-evaluated her on July 27, 2007, and Dr. Randolph Rosarion, with whom plaintiff treated for a period of time after the accident. She also proffers various other medical records and reports including an un-affirmed report from Dr. Jianping Chen, a psychiatrist. These submissions detail the injuries to her back.

The submission detailing the most recent exam on July 27, 2007 by Dr. Zhao, who reviewed plaintiff's other medicals reports, films, and his own prior examination records indicates, among his findings a deficit in the plaintiff's movement of her cervical spine ranging from 20 to 33% 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 50% as compared to a stated norm. He casually relates these impairments to the subject collision and concludes that it is his professional opinion, that plaintiff has suffered a permanent, consequential limitation in her lower back. He explains the gap in her treatment by stating she had reached maximum benefit from her current course of treatment including physical therapy and that any additional treatment would be palliative. Dr. Rosarion provides the details of his examination of plaintiff and the significant restrictions he found in her ranges of motion shortly after the subject collision. Dr. Weinberger confirms the presence of bulging discs and casually relates his findings to the accident. As discussed above, the report from Dr. Chen detailing his psychiatric examination of the plaintiff is not in admissible form. Hernandez v. Ramirez, 19 AD3d 192 (1st Dept. 2005).

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 four months following the accident. She also avers that she is still unable to perform many of her usual daily activities such as cooking, cleaning, lifting objects weighing more than five pounds and distance running.

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' A-One Transportation Inc. and Mohammed Musah motion for summary judgment is denied in its entirety, and it is further,

ORDERED that the cross-motion by third-party defendants Albert Zi Zhen and Yan Chi Chong 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 February 28, 2008, 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: January 8, 2008

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN J.S.C.

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

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