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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

JUDD RUBIN

INDEX NO. 112489-2005

MOTION DATE

- v -

MOTION SEQ. NO. 001

SMS TAXI CORP., AHMED LACHHEB, RAZ TAXI CORP. and SINGH MANWINDER

MOTION CAL. NO.

KAPLAN, J.:

In this personal injury action, the defendants move for summary judgment dismissing the complaint on the ground that the plaintiff Judd Rubin did not sustain a "serious injury" within the meaning of Insurance Law 5102(d). The motion is denied for the reasons set forth below.

On June 16, 2005, plaintiff Judd Rubin, was a passenger in a vehicle operated by Ahmed Lachheb and owned by SMS Taxi Corp.. On that day near the intersection of west 79th street and West End Avenue, New York, New York, that vehicle was involved in an accident with a vehicle operated by Singh Manwinder and owned by RAZ Taxi Corp. The force of the collision propelled the plaintiff's vehicle onto the sidewalk and into a street pole. As a result of this incident, plaintiff claims to have sustained a serious injury *inter alia* to his head and lacerations to his face requiring stitches which resulted in a permanent disfigurement as well as herniated and bulging discs in his spine. Defendants SMS and Lachheb, 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. Defendants RAZ and Manwinder cross move for summary judgment, on the same grounds.

In support of their motion, the defendants submit the affirmed reports of Dr. Bryan Farley, a board certified plastic and reconstructive surgeon, Dr. Audrey Eisenstadt a board certified radiologist and Dr. Iqbal Merchant, a board certified neurologist. Each of these doctors, performed a Independent Medical Exam (IME) on the plaintiff as part of this litigation. Defendants also proffer a single color photograph of a portion of the plaintiff's face, as well as the complaint and various other filings.

Dr. Farley, who did not review plaintiff's prior medical records, prior to performing his examination on January 29, 2007, discusses in his report, various physical observations of the plaintiff and details the 3 cm. scar on his face above his left eye. He concludes that although it has healed well the scar is permanent. He adds that the "sensitivity of the scar may diminish over time." Dr. Merchant who examined plaintiff on March 22, 2007, concludes his motor, cranial and mental exam results are all within normal range. He further opines that he does not suffer any objective neurological disability or neurological permanency, casually related to the accident. Dr. Merchant did not review either plaintiff's MRI or prior medical records, listing the Bill of Particulars and police report as records reviewed.

Dr. Audrey Eisenstadt, who reviewed plaintiff's MRI films concludes that the disc bulges as well as lumbar and cervical spine straightening displayed in the films are degenerative conditions and unrelated to the accident.

In opposition to the motion, the plaintiff, submits his affidavit, which details the injuries he suffered, the treatment he received, including twenty-one stitches to close the wound on his forehead as well as his feelings regarding his appearance. He has also appended recent photos of the affected area. He proffers the affirmed reports of Dr. Jerry Lubliner, Dr. Thomas Treyvio and Dr. Ramon Valderrama. Dr. Lubliner's report details the results of plaintiff's MRI which showed several herniated and bulging discs as well as his examination of plaintiff's wound and resulting scar on his forehead. Neither Dr. Lubliner's report nor the reports of the other physicians who saw plaintiff shortly after the accident, and which assert that he has restrictions in the mobility and ranges of motion in his spine, detail the objective tests if any that were employed in making that determination. Nor are any specific measurements or stated norms listed to substantiate the claim that his impairments are significant. The plaintiff also includes a series of physical therapy treatment bills and records. The most recent exam by Dr. Lubliner, discusses among his other findings the scar on plaintiff's face, which he casually relates to the accident and states is permenant.

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).

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 his burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact on the significant disfigurement claim. Tugman v. PJC Sanitation Service, 23 AD3d 457 (2d Dept 2005). His submissions have established that his scar is permanent, discolored and that no treatment can improve it. Abdulaj v Roy, 232 AD2d 735 (1st Dept. 1996). A triable issue has been established, in that a jury may conclude that a reasonable person would view her physical appearance as "unattractive", "objectionable" or that she would be the "object of pity or scorn." Insurance Law §5102(d), Zulawski

v. Zulawski, 170 AD2d 979 (4th Dept. 1991).

However, the plaintiff's submissions do not substantiate his other claims in that he has failed to satisfy his burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact on any of the remaining claimed sections of serious injury pursuant to Insurance Law §5102 (d). Garner v Tong, 27 AD3d 401 (1st Dept. 2006); Privitera 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). The very modest submissions tendered by the plaintiff are devoid of information as to substantiate his claim of a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which made up his usual and customary daily activities for ninety of the one hundred and eighty days after the accident. Rodriguez v Virga, 24 AD3d 650 (2d Dept. 2005). The plaintiff's affirmed medical reports as well as unsworn medical records and bills lack any probative value as to the other provisions of Insurance Law §5102(d) claimed. Hernandez v Ramirez, 19 AD3d 192 (1st Dept. 2005); Zeigler v Ramadhan, 5 AD3d 1080 (4th Dept. 2004); James v Yoen Wah Rental, Inc., et al., (1st Dept. 2003).

Even if the Court were to consider the plaintiff's medical submissions, they are devoid of any objective medical basis to substantiate the other claimed disabilities. Smith v Brito, 23 AD3d 273 (1st Dept. 2005) Picott v Lewis, 26 AD3d 319 (2d Dept. 2006). With regard to plaintiff's medical submissions, other than his most recent examination which substantiates his serious disfigurement claim, they do not show if, when or what tests were performed, the objective nature of the tests, what the normal range of motion should be and that the plaintiff's limitations if any were significant. See Milazzo v Gesner, 33 AD3d 317 (1st Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1st Dept. 2006), Henry v. Rivera, 34 AD3d 352 (1st Dept. 2006); Nagbe v. Mini Green Hacking Group, 22 AD3d 326 (1st Dept. 2005); Taylor v. Terrigno, 27 AD3d 316 (1st Dept. 2006); Rivera v. Benaroti, 29 AD3d 340 (1st Dept. 2006). Nor do they address the gap in treatment. A gap or, more accurately, a cessation of treatment, may undermine a plaintiff's claim of serious injury under Insurance Law §5102(d). See Pommels v Perez, supra, Gonzalez v Beale, 37 AD3d 278 (1st Dept. 2007); Navedo v Jaime, 32 AD3d 788 (1st Dept. 2006);Mullings v. Huntwork, 26 A.D.3d 214 (1st Dept. 2006); Quezada v. Luque, 27 A.D.3d 205 (1st Dept. 2006).

For these reasons and upon the foregoing papers as well as oral argument

held, it is

ORDERED that the motion of defendants SMS Taxi Corp. and Ahmed Lachheb, for summary judgment is granted to the extent that all claims except that for significant disfigurement are dismissed, and its further

ORDERED that the cross motion by defendants, RAZ Taxi Corp. and Singh Manwinder for summary judgment is granted to the extent that all claims except that for significant disfigurement are dismissed.

The parties are directed to appear on February 5, 2008, Part Med-2, 80 Centre Street, 9:30 a.m., for their scheduled mediation.

This constitutes the Decision and Order of the Court.

Dated: January 28, 2008

Deborah Kaplan

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

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

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