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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

JUSTIN MATRULLO and SARAH MOREY

- v -

VAUGHN OLIVER, HELEN OLIVER, LEDO CAB CORP. and AMIR MOURKOS

INDEX NO. 110095/05

MOTION DATE 11-7-07

MOTION SEQ. NO. 003

MOTION CAL. NO. 62

The following papers, numbered 1 to 3, were read on this motion by defendants Ledo Cab Corp. and Amir Mourkos for, inter alia, summary judgment dismissing Justin Matrullo's claims against them on the ground that he did not sustain a serious injury as defined by Insurance Law §5102(d).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ■ No

This personal injury action arises from a motor vehicle accident which occurred on October 10, 2004, at the intersection of 126th Street and Madison Avenue in Manhattan. A taxi driven by defendant Amir Mourkos and owned by defendant Ledo Cab Corp. collided with a vehicle operated by Vaughn Oliver, which he owned with defendant Helen Oliver. The plaintiffs, Jason Matrullo and Sarah Morey, passengers in the taxi, were transported to St. Luke's Roosevelt Hospital emergency room. Justin Matrullo was released later the same morning with a prescription for pain medication, and thereafter underwent a three-month course of physical therapy and acupuncture treatment at a chiropractic office.

Defendants Ledo Cab Corp and Amir Mourkos now move (1) to dismiss Justin Matrullo's claims as against them on the ground that he did not sustain a serious injury as defined by Insurance Law § 5102(d)[1] and (2) for leave to move for summary judgment as against the plaintiffs on the issue of liability at the close of discovery.

[1]Defendants Vaughn Oliver and Helen Oliver move for the same relief by separate motion (seq. # 004), which is decided herewith.

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, defendants seek summary judgment on the threshold "serious injury" issue under "No-Fault threshold" issue (Insurance Law § 5102[d]), they bear 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).

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 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 support of their motion, defendants Ledo Cab Corp and Amir Mourkos submit the affirmed reports of Dr. Isaac Cohen, a board certified orthopedic surgeon, Dr. R.C. Krishna, a board certified neurologist, and Dr. Sheldon Feit, a board certified radiologist. Defendants also proffer the deposition testimony of Justin Matrullo, and copies of the pleadings, including a bill of particulars which alleges various spinal injuries.

At his deposition, the plaintiff testified that he felt pain in his back, neck and knee immediately following the accident. He was examined by doctors in the emergency room, underwent x-rays, and was given a prescription for pain medication. He missed three or four days of work. Two days after the accident, referred by his attorney, he presented at Grand Concourse Chiropractic, PC., where he underwent physical and heat therapy and acupuncture treatment several times per week for three months. He was referred for MRI studies of his spine and left knee. The plaintiff testified that he received no treatment

thereafter. The plaintiff, who had terminated his gym membership prior to the accident, continued to exercise at home but at a reduced level. At the time of his deposition, on July 14, 2006, the plaintiff had resumed his gym membership, even though he felt pain in his shoulders and back when weight training.

Drs. Cohen and Krishna each performed a physical examination of the 27-year-old plaintiff in September 2006 at the moving defendants' request and in the presence of his attorney. These doctors found no permanent injury or deficits and all normal functioning and range of motion in the plaintiff's spine, shoulders and left knee. Dr. Cohen's orthopedic diagnosis was "multiple soft contusions" and "cervical, lumbosacral, shoulder and knee strains, resolved." In his report, Dr. Krishna describes the testing he performed, including range of motion testing of the cervical spine, and concludes that the plaintiff "has no objective evidence of a disability from a neurological standpoint concerning the activities of daily living." Dr. Krishna notes that the plaintiff "may have sustained a cervical and lumbar strain and post-traumatic cephalgia" but opines that these conditions have resolved and "do not require any further diagnostic testing or treatment."

Dr. Feit, the radiologist, examined the MRI of the plaintiff's lumbosacral spine performed on November 8, 2004, approximately one month after the accident. He found "no evidence of any disc bulges or focal herniations", "no significant abnormalities" and "no abnormalities causally related to the [subject accident]." Dr. Feit also examined the MRI of the plaintiff's left knee performed on October 22, 2004, and found "no evidence of meniscal injury or fracture."

With this proof, the moving defendants have met their initial burden by producing evidentiary proof in admissible form sufficient to show the absence of any material issue of fact, thereby shifting the burden to the plaintiff. However, the plaintiff has failed to satisfy his burden of coming forward with proof in admissible form to raise any triable issue.

In opposition to the motion, the plaintiff submits the sworn medical report of his chiropractors at Grand Concourse Chiropractic, PC , dated August 8, 2007, two reports of Dr. Robert Schepp, a board certified neuroradiologist, dated November 11, 2004, interpreting the MRI examinations of the plaintiff's lumbosacral spine and cervical spine, and a neurological report and medical records of Dr. Osairadu Opam, dated November 1, 2004. The plaintiff argues that this proof establishes that he suffered a "permanent consequential limitation of use" (Insurance Law § 5102[d]) of his neck and spine, including

bulging discs, straightening of the lordotic curve and restricted range of motion.

A herniated or bulging disc may constitute a serious injury within the meaning of Insurance Law §5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., 22 AD3d 326 (1st Dept. 2005); Arjona v Calcano, 7 AD3d 279 (1st Dept. 2004). Furthermore , 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)], so long as the plaintiff offers "some objective evidence of the extent or degree of the alleged physical limitations, and their duration, resulting from the disc injury." Arjona v Calcano, supra; 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). The plaintiff has failed in that regard. Neither the MRI reports and records of Dr. Opam nor the report of Dr. Schepp, all dated 2004, are sworn and, in their report, the plaintiff's chiropractors at Grand Concourse Chiropractic rely upon the unsworn MRI reports. See Hernandez v Ramirez, 19 AD3d 192 (1st Dept. 2005); Simms v APA Truck Leasing Corp., 14 AD3d 322 (1st Dept. 2005). Thus, even though the Grand Concourse Chiropractic report states that the plaintiff's injuries from the accident were permanent, it is without probative value on this motion.

Moreover, by his own deposition testimony, the defendant established that he ceased treatment for his injuries in early 2005, and he fails to proffer any cognizable explanation for this cessation in treatment in his opposition papers. See Pommells v Perez, 4 NY3d 566 (2005); DeLeon v Ross, 44 AD3d 545 (1st Dept. 2007); Yagi v Corbin, 44 AD3d 440 (1st Dept. 2007); Ortega v Maldonado, 38 AD3d 388 (1st Dept. 2007); Gonzalez v Beale, 37 AD3d 278 (1st Dept. 2007).

Accordingly, the defendants' motion for summary judgment is granted. In light of the dismissal, the defendants' further application for leave to move for summary judgment on the issue of liability at the close of discovery is denied as moot.

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion is granted and the complaint is dismissed, and it is further,

ORDERED that the defendants' application for leave to move for summary

judgment as against the plaintiffs on the issue of liability at the close of discovery is denied as moot, and it is further,

ORDERED that the Clerk shall enter judgment in favor of defendants Ledo Cab Corp and Amir Mourkos, dismissing the complaint as against them.

This constitutes the Decision and Order of the Court.

Dated: February 4, 2008

FEB 15 2008

Deborah Kaplan

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

DEBORAH A. KAPLAN
J.S.C.

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

Check if appropriate: ☐ **DO NOT POST**

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The Notice of Motion, with Affidavits and Exhibits, was read on this motion by defendants Vaughn Oliver and Helen Oliver for summary judgment dismissing Justin Matrullo's claims against them on the ground that he did not sustain a serious injury as defined by Insurance Law §5102(d).

Cross-Motion: ☐ Yes ■ No

Upon the foregoing papers and for the reasons set forth in this Court's Decision and Order under sequence #3, decided herewith, it is,

ORDERED that the motion is granted and the complaint is dismissed as to defendants Vaughn Oliver and Helen Oliver, and it is further,

ORDERED that the Clerk shall enter judgment in favor of those defendants,

This constitutes the Decision and Order of the Court.

FILED
FEB 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: February 15, 2008

FEB 15 2008

Deborah Kaplan

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

DEBORAH A. KAPLAN
J.S.C.

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