SUPREME COURT OF THE STATE OF NEW YORK **Index No.:103109/2005**
COUNTY OF RICHMOND DCM PART 3 **Motion No.:003**

YEFIM KOTLYAR,

Plaintiff

against

DECISION & ORDER

SUFFOLK MATERIALS CORP., and ALBERT M. DESTEFANO

HON. JOSEPH J. MALTESE

Defendants

The following items were considered in the review of this motion to

Papers	Numbered
Notice of Motion and Affidavits Annexed	**1**
Order to Show Cause	
Answering Affidavits	**2**
Replying Affidavits	**3**
Exhibits	**Attached to Papers**

Defendants' motion for summary judgment pursuant to CPLR § 3212 asserting that plaintiff did not sustain a serious injury as defined by New York State Insurance Law § 5102 is granted in its entirety.

Defendants seeks summary judgment on the ground that the plaintiff has not sustained a "serious injury" as defined in Insurance Law §5102(d).[1] The serious injury threshold set forth in Insurance Law §5104(a) can only be established under these categories.[2] Thus, the mere fact that

[1] A serious injury must be a personal injury, "[W]hich results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitutes such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" (Insurance Law *§5102* [d]).

[2] *Coon v. Brown*, 192 AD2d 908 [3rd Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3rd Dept 1982].

one has been injured, even seriously, does not establish that a "serious injury" has been sustained.[3] Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness or disease,[4] that results in one of the nine serious injury threshold categories.[5]

It is important to keep in mind the policies underlying the enactment of the No-Fault Law and the law's structure when litigating no-fault related issues. Courts have consistently held that the No-Fault Law must be interpreted to fulfill the policies the legislature had in mind.[6] It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of "serious injury."[7]

A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law *§5102*(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations.[8]. The burden, in other words, shifts to plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury.[9] The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient[10]. Additionally, a plaintiff's subjective claim of pain and limitation

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[3] *Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff'd* 63 NY2d 645 [1984].

[4] 11 NYCRR §65-2.1[e]

[5] *See, Van Norstrand v. Regina*, 212 AD2d 883 [3rd Dept 1995].

[6] *See, Oberly v. Bangs Ambulance*, 96 NY2d 295 [1991]; *Scheer v. Koubek*, 70 NY2d 678 [1987]; *Maida v. State Farm*, 66 AD2d 852 [2d Dept 1978].

[7] *See*, e.g., *Licari v. Elliott*, 57 NY2d 230, 237.

[8] *See*, *Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848.

[9] *See*, *Gaddy v. Eyler*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000]

[10] *Id.*

of motion must be sustained by verified objective medical findings which are based on a recent examination of the plaintiff.

In this case defendants have come forward with the affirmed reports of Philip K. Keats, M.D. an orthopedist conducted on June 13, 2007; and Marshall Keilson, M.D. a neurologist conducted on or before May 17, 2007. These reports affirmed by medical doctors meet defendants' burden. To counter the opinions set forth by defendants experts plaintiff submits the affirmation of Dr. Randolph Rosarion who specializes in pain management and rehabilitation. Plaintiff's examination by Dr. Rosarion is characterized as a follow up examination that was conducted on November 21, 2007.

Plaintiff argues that he sustained permanent consequential limitation of use of a body member and significant limitation of a body function. Namely, plaintiff argues that he has lost full range of motion of his neck. Both of these categories involve an injury result in any "limitation" of use which is more than "minor, mild or slight," as contrasted to the loss-of-use category which requires proof of a "total loss" of use.[11] There are, however, differences between them. The "consequential limitation of use" category requires that the limitation be permanent, whereas the "significant limitation of use" category does not require that the limitation be permanent.[12] Furthermore, the "consequential limitation of use" must be with respect to a body organ or member, whereas the "significant limitation of use" must be with respect to a body function or system.

A designation set forth by medical proof of a numeric percentage or degree of a plaintiff's loss of range of motion can be used to establish a limitation of use.[13] An unspecified percentage

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[11] *See, Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295 [2001]; *Gaddy v. Eyler*, 79 NY2d 955 [1992].

[12] *See, Lopez v. Senatore*, 65 NY2d 1017 [1985]; *Lanuto v. Constantine*, 192 AD2d 989 [3rd Dept 1993]; *Decker v. Rassaert*, 131 AD2d 626 [2nd Dept 1987].

[13] *Toure v. Avis Rent a Car Systems*, 98 NY2d 345 [2002]; *Molina v. Nosa Choi*, 298 AD2d 508 [2nd Dept 2002].

or degree of restricted range of motion is not enough.[14]

Alternatively, medical proof of a functional impairment not involving a loss of range of motion can suffice. This will involve a medical expert's qualitative assessment of the plaintiff's condition which will compare the plaintiff's impairment or limitation to the normal function, purpose and use of the affected body organ, member, function or system.[15]

For the claimed limitation of use to be "consequential" or "significant," which terms are synonymous, there must be proof that it is more than a "minor, mild or slight" limitation of use.[16] It must be "important" or "meaningful."

This requirement relates to the limitation of use's medical significance, and involves a comparative determination of the degree or qualitative nature of the limitation based on the normal function, purpose and use of the affected body part. In other words, a medical expert must describe the qualitative nature of plaintiff's limitation based on the normal function, purpose or use of plaintiff's affected body part.[17]

As to the causation element, it will be necessary for the plaintiff to establish this element by expert opinion, namely, that the specified degree or percentage of loss of range of motion or limitations in plaintiff's physical activities are a natural and expected medical consequence of plaintiff's injuries, which injuries are demonstrated by competent medical proof.[18]

Where range of motion tests are employed, such as straight-leg raising, Soto-Hall, Foramina-compression, Valsalva, Yeoman, their results are considered objective medical

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[14] *See, Herman v. Church*, 276 AD2d 471 [2nd Dept 2000]; *Barbarulo v. Allery*, 271 AD2d 897 [3rd Dept 2000]; *Owens v. Nolan*, 269 AD2d 794 [4th Dept 2000].

[15] *Toure v. Avis Rent A Car Systems, supra; Dutel v. Green*, 84 NY2d 795 [1985]; *June v. Gonet*, 298 AD 2d 811, [3rd Dept 2002].

[16] *See, Toure v. Avis Rent A Car, supra; Gaddy v. Eyler, supra; Nolan v. Ford*, 64 NY2d 681 [1984]; *Licari v. Elliott*, 57 NY2d 230, 235 [1982].

[17] *Id.* at 355.

[18] *See, Toure v. Avis Rent A Car System*, 98 NY2d at 353, 355, *supra*.

findings provided there is some objective component to them.[19] If their results rest solely upon the subjective inputs of plaintiff, they are insufficient.[20] Where, however, there is some objective process to rule out false inputs, the results will be sufficient.[21]

Notably, the failure to state and describe the tests used will render the opinion insufficient.[22] In this case, defendants' expert Dr. Keats' evaluation of plaintiff's range of motion was accomplished with the use of a goniometer as well as visual observations. However, Dr. Keilson failed to state how he measured plaintiff's range of motion. The court can only assume that Dr. Keilson's tests were visually observed with the input of plaintiff.

When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact. By contrast, an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily-insignificant injuries or frivolous claims.[23]

The medical proof must be based upon an examination that was conducted close to the time the opinion is rendered.[24] Substantial delays between cessation of plaintiff's medical treatments post-accident and an expert examination must be explained.[25] Over four years elapsed between the end of plaintiff's treatment in August 2003 and his follow up appointment in November 2007. However, plaintiff's attorney's affirmation fails to state why there was such a prolonged delay. Also, plaintiff fails to aver any facts in the form of an affidavit either 1)

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[19] *See, Toure v. Avis Rent a Car, supra.*

[20] *Id.*

[21] *Cf., Dugan v. Sprung*, 280 AD2d 736 [3rd Dept 2001].

[22] *See, Hernan v. Church*, 276 AD2d 471 [2nd Dept 2000]; *Barbarulo v. Allery,* 271 AD2d 897 [3rd Dept 2000].

[23] *Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002].

[24] *See, Grossman v. Wright, supra; Yamin v. Brougham Bus Transp. Co.*, 220 AD2d 739 [2nd Dept 1995].

[25] *Grossman*, 268 AD2d at 84.

explaining the delay in examination; or 2) setting forth the continued pain in suffering he is enduring.

Instead, the deposition of plaintiff reveals that after the accident he received approximately four months of treatment.[26] After the accident plaintiff states that he never missed any work, nor was he confined to his home or bed as result of his injuries.[27] When asked specifically:

> Q. After this accident happened, are there certain things that you still can do but maybe not do as well or do with limited involvement?
> A. No.[28]

While this court recognizes that plaintiff sustained injuries as a result of his accident, he did not sustain serious injuries as defined by New York State Insurance Law § 5102.

Conclusion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact.[29] Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."[30] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[31] Here, defendants demonstrated as a matter of law that the reduced range of motion experienced by plaintiff does not raise itself to the level of serious injury as prescribed by New York State

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[26] Kotlyar Transcript at 11.

[27] Kotlyar Transcript at 18 and 19.

[28] Kotlyar Transcript at 19.

[29] CPLR §3212[b].

[30] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2nd Dept 1990].

[31] *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

Insurance Law § 5102.

Accordingly, it is hereby:

ORDERED, that defendants's motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of defendants.

ENTER,

DATED: February 20, 2008

Joseph J. Maltese
Justice of the Supreme Court