SUPREME COURT OF THE STATE OF NEW YORK **Index No. 013097/04**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 001**

EDELMIRO MALDONADO, JR.

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

ON FOO CO., INC. and HUI MAN GAO

Defendant

The following items were considered in the review of this motion for summary judgment.

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

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants' motion for an order dismissing plaintiff's complaint pursuant to CPLR § 3212 on the grounds that the plaintiff did not sustain a "serious injury" as required by Insurance Law § 5102(d) is denied in its entirety.

Facts

This action arises out of an automobile accident that occurred on June 9, 2004 at the Brooklyn/Queens Expressway. The plaintiff was a passenger in a vehicle allegedly hit by defendant Hui Man Gao, employed by co-defendant On Foo Co., Inc.[1] The plaintiff alleges that

[1] Maldonado Transcript at 15 and 16.

the accident caused injuries that limited movement in his back; he attests that he can "hardly walk."[2] As a result, he is prevented from performing usual and ordinary activities that include, among other things, dressing, bending, lifting, and getting out of bed.[3] The plaintiff was unemployed at the time of the accident.

The defendants move to dismiss plaintiff's complaint on the ground that the plaintiff failed to demonstrate a "serious injury" as defined by *Insurance Law* § 5102(d). In support of their motions, the defendants rely on the affirmed statements of Dr. Ravi Tikoo, a neurologist, Robert J. Orlandi, an orthopedic surgeon, and Natalio Damien, a radiologist.

In response, the plaintiff offers the sworn affidavit of Dr. John Piazza, a chiropractor, an affirmed statement by Dr. Parekh, and a statement by Dr. Bhim Nangia.

Discussion

The defendants seek summary judgment on the ground that the plaintiff has not sustained a "serious injury" as defined in *Insurance Law* § 5102(d).[4] The serious injury threshold set forth in Insurance Law § 5104(a) can only be established under these categories.[5] Thus, the mere fact

---

[2] *Id.* at 113.

[3] affidavit of plaintiff at 2.

[4] 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]).

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

that one has been injured, even seriously, does not establish that a "serious injury" has been sustained.[6] Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness, or disease,[7] that results in one of the nine serious injury threshold categories.[8]

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.[9] It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of "serious injury."[10]

A defendant can establish that a 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. In the case before this court, the defendants came forward with reports from independent medical exams. They presented the affirmed statements of Dr. Ravi Tikoo, a neurologist, Robert J. Orlandi, an orthopedic surgeon, and Natalio Damien, a radiologist. All three doctors proffered evidence that indicates that the plaintiff is not injured within the statutory definition.

Where defendants' 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

---

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

[7] 11 NYCRR §65-2.1[e].

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

[9] *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].

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

in admissible form in support of his or her allegations.[11] The burden, in other words, shifts to the 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.[12] The plaintiff in such a situation must present objective evidence of the injury.

In order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of *Insurance Law* § 5102 (d), the plaintiff's expert must submit **quantitative objective findings** in addition to an opinion as to the significance of the injury.[13] The plaintiff submits various items of proof in an attempt to meet his burden.

The plaintiff alleges injuries that are consistent with a permanent consequential limitation of his cervical spine. This category of injury involves 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.[14] 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.[15] 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.

---

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

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

[13] *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000].

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

[15] *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].

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.[16] An unspecified percentage or degree of restricted range of motion is not enough.[17] The plaintiff submits the sworn affidavit of Dr. John P. Piazza, a chiropractor. Dr. Piazza declared that he examined the plaintiff on June 11, 2004, treated him until November 30, 2004, and re-examined him on March 28, 2008. His examinations are based on reviews of MRI reports conducted by Dr. Parekh, an EMG report performed by Dr. Nangia, the goniometer method, and X-Ray examinations. Dr. Piazza's examination of June 11, 2004 reveals that the plaintiff's range of motion is below a normal person's range. His lumbar spine's flexion is 50 degrees, whereas a normal person's range is 80+ degrees, the extension is 5 degrees compared to 30+ degrees in a normal person, his left later bending is 10 degrees compared to a normal 30+ degrees, and his right lateral bending is 10 degrees compared to a normal 30+ degrees. The plaintiff's lumbar spine re-examination of March 28, 2008 also exposes a range of motion that is below normal findings. His flexion is 40 degrees compared to a normal finding of 60+ degrees, his extension is 10 degrees compared to a normal 25+ degrees, and his left and right lateral bending are at 15 degrees compared to a normal 25+ degrees. Furthermore, Dr. Piazza attests that the injuries occurred after the June 9, 2004 automobile accident and confirms that the plaintiff suffered a permanent partial disability as a result of the accident.

Dr. Bhim Nangia, a neurologist, also saw the plaintiff shortly after the accident, on June 18, 2004, and again on August 7, 2004. The results of Dr. Nangia's exams show a left C5-6 radiculopathy and a mild bilateral C.T.S. In addition, Dr. H. Parekh, a radiologist, examined the

---

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

[17] *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].

plaintiff on August 22, 2004 by performing an MRI that revealed a desiccation and posterior herniation of C5-C6 disc associated with anterior disc bulge and bony hypertrophy, a posterior bulge of C4-C5 disc, and loss of normal lordotic curvature. On August 27, 2004, Dr. Parekh found that the plaintiff has a posterior herniated disc at L2-L3 level as well as desiccation and posterior herniation of disc at L5-S1 level. Dr. Parekh's findings were all affirmed.

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.[18]

Where it is claimed that the limitation of use is "consequential" or "significant," which terms are synonymous, it is required that there must be proof that the limitation is more than a "minor, mild, or slight" limitation of use.[19] It must be "important" or "meaningful."

This requirement relates to the medical significance of the claimed limitation of use. The analysis 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.[20] In other words, a medical expert must describe the qualitative nature of the plaintiff's limitation based on the normal function, purpose, or use of the plaintiff's affected body part.[21]

As to the causation element, it will be necessary for the plaintiff to establish this element

---

[18] *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].

[19] *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].

[20] *See, Route v. Avis Rent A Car System*, 98 NY2d at 353, *supra*.

[21] *Id.* at 355.

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.[22]

All reports point to a significant loss of plaintiff's range of motion with regard to the areas alleged to have been injured. 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]

While all examinations demonstrate that the plaintiff continues to suffer from the injuries of the accident, there is a four-year gap in treatment. A plaintiff must present corroborative evidence when there is a gap in treatment due to a lack of medical insurance.[24] In an affidavit, the plaintiff explains that the lapse of time is owed to a denial of his No-Fault benefits and inability to afford medical services.[25] Plaintiff's chiropractor, Dr. Piazza, also stated that the lapse in treatment is due to a denial of No-Fault benefits. The defendants cite *Gomez v. Ford Motor,* which requires an explanation either from the insurer carrier why plaintiff no longer receives insurance or from the plaintiff himself why he could not pay treatment out of his own pocket.[26] The case at bar, which is outside of the jurisdiction of the *Gomez* court, does not present such problems since the plaintiff never carried insurance nor was employed at the time of

---

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

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

[24] See, *Paul v. Allstar Rentals*, 22 AD3d 476, 477-478 [2005]; *Borukhob v. Abraham*, 5 Misc.3d 138[A], 2004 NY Slip Op. 51579 [U], *1.

[25] affidavit of plaintiff at 2.

[26] *See*, *Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900, 903 [2005].

the accident or thereafter. Thus, the plaintiff has satisfactorily explained the reason why there is a four-year gap in treatment.

Conclusion

The defendants' motion for summary judgment is denied. A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact.[27] 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."[28] 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.[29] Here, there is an issue of fact as to whether or not the plaintiff has suffered a "serious injury" as defined in Insurance Law §5102(d).

Accordingly, it is hereby:

ORDERED, that defendant's motion for summary judgment is denied; and it is further

ORDERED, that the parties appear for a final conference at **DCM Part 3** on **November 9, 2008 at 9:30 A.M.**

ENTER,

DATED: September 22, 2008

Joseph J. Maltese

[27] CPLR §3212[b].

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

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

Justice of the Supreme Court