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

PRESENT: HON. PAUL WOOTEN PART 22
Justice

INDEX NO. 103992/06

MARLING SONE,

Plaintiffs,

MOTION DATE

- v -

MOTION SEQ. NO. 002

CHERYL QAMAR,

Defendants.

MOTION CAL. NO. 108

The following papers, numbered 1 to 3, were read on this motion by defendant for summary judgment on the threshold "serious injury" issue.

	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

On April 12, 2003, while traveling on Ft. Washington Avenue in New York County, New York, plaintiff's vehicle was struck by defendant's vehicle. Plaintiff commenced this action on April 19, 2008, to recover damages for alleged personal injuries suffered as a result of the subject accident. The Defendant filed an answer and issue was joined. Defendant now moves for an order pursuant to CPLR § 3212, granting summary judgment on the issue of "serious injury" as defined by New York Insurance Law § 5102(d).

SERIOUS INJURY THRESHOLD

Defendants seek to dismiss the complaint on the ground that plaintiffs fail to satisfy the threshold requirement of suffering a "serious injury" under Insurance Law § 5102 (d). Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101, *et seq.* - the "No Fault" statute), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the

categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*Marquez v New York City Tr. Auth.*, 259 AD2d 261 [1st Dept 1999]; *DiLeo v Blumberg*, 250 AD2d 364 [1st Dept 1998]).

> Insurance Law § 5102 (d) defines "serious injury" as, inter alia:
> a personal injury which 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 on-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less that ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Serious injury is a threshold issue, and thus, a necessary element of plaintiff's prima facie case (*Licari v Elliott*, 57 NY2d 230 [1982]; *Toure v Harrison*, 6 AD3d 270 [1st Dept 2004]; Insurance Law § 5104 [a]). This is in accord with the purpose of the "No-Fault" law, which was to "'weed out frivolous claims and limit recovery to significant injuries'" (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]; *Licari v Elliott*, 57 NY2d at 234-235; *Rubensccastro v Alfaro*, 29 AD3d 436 [1st Dept 2006]).

In order to satisfy the statutory threshold, the plaintiff must submit competent objective medical evidence of his or her injuries, based on the performance of objective tests (*Grossman v Wright*, 268 AD2d 79 [2d Dept 2000]; *Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]; *Scheer v Koubek*, 70 NY2d 678, 679 [1987]).

A CT scan or MRI may constitute objective evidence to support subjective complaints (*see Arjona v Calcano*, 7 AD3d 279 [1st Dept 2004]; *Lesser v Smart Cab Corp.*, 283 AD2d 273 [1st Dept 2001]). The plaintiff's medical submissions must show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiff' s limitations were significant (*see Milazzo v Gesner*, 33 AD3d 317 [1st Dept

2006]; *Vasquez v Reluzco*, 28 AD3d 365 [1st Dept 2006]). With respect to the categories of significant limitation of use of a body function or system, and permanent consequential limitation of use, "'[w]hether a limitation of use or function is "'significant'" or "'consequential'" (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part'" (*Toure v Avis Rent A Car Sys.*, 98 NY2d at 353, quoting *Dufel*, 84 NY2d at 798). There must be objective proof of plaintiff's injury (id. at 350). In addition, the expert must provide either "a numeric percentage of a plaintiff's loss of range of motion" or a "qualitative assessment of a plaintiff's condition . . . provided that the evaluation . . . compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*id.*).

The issue of whether plaintiff's alleged injuries fall within the definition of a serious injury in the first instance, must be decided by the court (*see Licari v Elliott*, 57 NY2d 230, *supra*). On a motion for summary judgment based upon a failure to sustain a serious injury, the defendants bear the initial burden of establishing the absence of a serious injury by tendering evidentiary proof in admissible form eliminating any material issues of fact from the case (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*; *see* also *Gaddy v Eyler*, 79 NY2d 955, *supra*; *Pirrelli v Long Is. R.R.*, 226 AD2d 166 [1st Dept 1996]).

In support of their argument that plaintiff failed to sustain a serious injury, defendants may rely either on the sworn statements of the defendants' examining physician, or plaintiff's deposition testimony and the unsworn reports of the plaintiff's examining physician (*Fragale v Geiger*, 288 AD2d 431 [2d Dept 2001]; *Pagano Kingsbury*, 182 AD2d 268 [2d Dept 1992]). An affirmed physician's report demonstrating that plaintiff was not suffering from any disability or consequential injury resulting from the accident is sufficient to satisfy a defendant's burden of proof (*see Gaddy v Eyler*, 79 NY2d 955, *supra*).

Once defendant has made such a showing, the burden shifts to the plaintiff to come forward with prima facie evidence, in admissible form, to rebut the presumption that there is no issue of fact as to the threshold question (*see Pommells v Perez*, 4 NY3d 566 [2005]; *Gaddy v Eyler*, 79 NY2d 955, *supra*; *Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]). A medical affirmation or affidavit based on a physician's own examination, tests, and review of the record, can support the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1998]).

SUMMARY JUDGMENT STANDARD

It is well settled that the "'legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to serious injuries.'" (*Toure v. Avis Rent-A-Car Sys., Inc., 98* N.Y.2d 345, 350 [2002] quoting *Dufel v. Greene,* 84 N.Y.2d 795, 798 [1995]) The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the courts which may decide the issue on a motion for summary judgment. (*Perez v. Rodriguez,* 25 A.D.3d 506, 507 [1st Dept 2006]).

The proponent of a motion for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Fin. Corp.,* 795 NY2d 502 [2005]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986];*Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]; *Thomas v Holzberg*, 751 NY2d 433, 434 [1st Dept 2002]; *Silverman v. Perlbinder,* 762 NY2d 386 [1st Dept 2003]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Medical Center, supra*). The motion must be supported "by affidavit...from a person having knowledge

of the facts, by a copy of the pleadings and by other available proof . . ." (CPLR § 3212 [b]). A conclusory affidavit, expressions of hope, unsubstantiated allegations or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden (*Winegrad v New York Univ. Medical Center*, *supra*). A party may also demonstrate a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New York*, *supra*; *Prudential Securities Inc. v Rovello*, 692 NYS2d 67 [1st Dept 1999]).

Where the proponent of the motion has made a *prima facie* showing, the burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a triable issue of fact (*Vermette v Kenworth Truck Co.*, 68 NY2d 714 [1986]; *Zuckerman v City of New York*, *supra*; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Forrest v Jewish Guild for the Blind*, 765 NY2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in to sufficiently establish the existence of a "serious injury," which mandate's resolution by trial. If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978].

DISCUSSION

In support of her motion defendant proffers the pleadings, plaintiff's deposition testimony and the affirmed medical reports of Dr. Daniel J. Feuer, a neurologist and Dr. Herbert S. Sherry, an orthopedist. Dr. Feuer observed limitations in plaintiff's range of motion of the lumbar spine in his examination (Report of Dr. Feuer, deft. Amended Notice of Motion, Ex G,P. 3), however, he concluded that plaintiff did not demonstrate an objective neurological disability. Dr. Herbert Sherry medical report is ruled in admissible because the reports does not indicate the name of any objective medical tests used to support his conclusion nor indicate what the normal range

should be for any such test. Nonetheless, the admissible evidence establishes that plaintiff has not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d]. (*See, Gaddy v Eyler, supra; Lowe v Bennett*, 511 NYS2d 603 [1 Dept 1986], *Affd*, 69 NY2d 700 [1 Dept 1986]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). Thus, the burden is shifted to plaintiff to show the existence of a triable issue of fact. *(See Taynisha Baez v Imamally Rahamatali*, 817 NYS2d 204 [2006]*; Franchini v Palmieri*, 775 NYS2d 232 [2003]; *Gaddy v Eyler , supra*; *Zuckerman v City of New York*, *supra*; *Shinn v Catanzaro*, 767 NYS2d 88 [1 Dept 2003]; *Forrest v Jewish Guild for the Blind, supra*).

In opposition plaintiff has submitted only the affirmation of her attorney, without any medical evidence, challenging that the plaintiff has failed to establish a prime facie case of the defendant. Thus, plaintiff has failed to sufficiently establish the existence of a serious injury pursuant to Insurance Law § 5102 (d).

Accordingly, it is,

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

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant, dismissing the complaint in its entirety, with costs and disbursements to defendant as taxed by the Clerk, and it is further,

ORDERED that defendant shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: ~~September 11, 2008~~ November 17, 2008

NOV 17 2008

Paul Wooten J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST