

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

-----	Index No. 7842/07
MICHELLE G. CHRISTIAN,	Motion
Plaintiff,	Date July 29, 2008
-against-	Motion
INGRID R. GIORDANO,	Cal. No. 2
Defendant.	Motion
-----	Sequence No. 1

	<u>PAPERS</u>
	<u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Affirmation in Opposition.....	5-9
Reply Affirmation.....	10-11

Upon the foregoing papers it is ordered that the motion by defendant, Ingrid R. Giordano, for summary judgment dismissing the Complaint against plaintiff, Michelle G. Christian pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law 5102(d) and defendant's motion for summary judgment pursuant to CPLR 3212, on the ground that there are no triable issues of fact are hereby decided as follows:

This action arises out of an automobile accident that occurred on June 13, 2006. Defendant has submitted proof in admissible form in support of the motion for summary judgment for all categories of serious injury. Specifically, *inter alia*, the defendant submitted affirmed reports from three independent examining and/or evaluating physicians (an orthopedist, a neurologist, and a radiologist) and plaintiff's own examination before trial transcript testimony wherein plaintiff testifies that she did not miss any time from work as a result of the accident, and plaintiff's verified bill or particulars wherein she states that she was not confined to bed after the accident and not confined to home after the accident.

In opposition to the motion, plaintiff submitted: a sworn

affidavit and narrative report of plaintiff's examining orthopedist, Emmanuel Hostin, MD, unsworn MRI reports of plaintiff's radiologist, Jessica Berkowitz, MD and Allen Rothpearl, MD, and an unsworn medical report of plaintiff's general surgeon, Prasad Chalasani, MD, plaintiff's own examination before trial transcript testimony, plaintiff's own affidavit, and an attorney's affirmation.

APPLICABLE LAW

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (*Licari v. Elliot*, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." (*Lowe v. Bennett*, 122 AD2d 728, 511 NYS2d 603 [1st Dept 1986], *affd*, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (*Licari v. Elliot*, *supra*; *Lopez v. Senatore*, 65 NY2d 1017, 494 NYS2d 101 [1985]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418, 668 NYS2d 167 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (*Gonzalez v. Vasquez*, 301

AD2d 438 [1st Dept 2003]; *Ayzen v. Melendez*, 749 NYS2d 445 [2d Dept 2002]). However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (see, CPLR 2106; *Pichardo v. Blum*, 267 AD2d 441, 700 NYS2d 863 [2d Dept 1999]; *Feintuch v. Grella*, 209 AD2d 377, 619 NYS2d 593 [2d Dept 2003]).

In any event, the findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law § 5102(d) (*Marquez v. New York City Transit Authority*, 259 AD2d 261, 686 NYS2d 18 [1st Dept 1999]; *Tompkins v. Budnick*, 236 AD2d 708, 652 NYS2d 911 [3rd Dept 1997]; *Parker v. DeFontaine*, 231 AD2d 412, 647 NYS2d 189 [1st Dept 1996]; *DiLeo v. Blumberg*, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]). For example, in *Parker, supra*, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitations were objectively measured and observed by the physician, was sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations." Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

DISCUSSION

A. Through the submission of affirmed experts' reports, plaintiff's own examination before trial transcript testimony, and plaintiff's verified bill of particulars defendant established a *prima facie* case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d).

The affirmed report of defendant's independent examining orthopedist, Alan J. Zimmerman, indicates that an examination

conducted on October 3, 2007 revealed a diagnosis of resolved cervical and lumbar sprains. He opines that the shoulder complaints are cervical in origin, that the leg complaints are lumbar in origin except for chondromalacia which is preexisting, and that there is no correlation fo the MRI or EMG findings. Dr. Zimmerman concludes that there is no disability or permanency and that the plaintiff may continue to work.

The affirmed report of defendant's independent evaluating neurologist, Charles Bagley, MD, indicates that an examination conducted on October 3, 2007 revealed a normal neurological examination. He opines that "[s]he is working full duty in her physical job and does not appear to have any limitations in her employment." Dr. Bagley concludes that plaintiff is not neurologically disabled.

The affirmed report of defendant's independent evaluating radiologist, Jacques Romano, MD, indicates that an MRI of the cervical spine taken on August 6, 2006 indicates : [t]here are subligamentous posterior protrusions/herniations at C5-6 and, to a lesser extent, C4-5. The findings are not indicative of the sequela of acute trauma. Clinical correlation may be obtained. Additionally, an MRI of the lumbosacral spine taken on August 20, 2006 indicates that:[t]here are degenerative changes at the L4-5 level, with disc dessication, minimal bordering endplate osteophytes, discogenic signal changes and mild spinal and bilateral foraminal stenosis. The findings are not indicative of the sequela of acute trauma.

In addition, defendant submitted the plaintiff's own examination before trial transcript testimony wherein plaintiff testifies that she did not miss any time from work as a result of the accident, and plaintiff's verified bill or particulars wherein she states that she was not confined to bed after the accident and not confined to home after the accident.

The aforementioned evidence amply satisfied defendant's initial burden of demonstrating that plaintiff did not sustain a "serious injury" under all categories of serious injury. Thus, the burden then shifted to plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, *Gaddy v. Eyler*, 79 NY2d 955 [1992]). Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint (see, *Licari v. Elliott*, 57 NY2d 230, *supra*).

B. Plaintiff fails to raise an issue of fact

In opposition to the motion, plaintiff submitted: a sworn affidavit and narrative report of plaintiff's examining orthopedist, Emmanuel Hostin, MD, unsworn MRI reports of plaintiff's radiologist, Jessica Berkowitz, MD and Allen Rothpearl, MD, and an unsworn medical report of plaintiff's general surgeon, Prasad Chalasani, MD, plaintiff's own examination before trial transcript testimony, plaintiff's own affidavit, and an attorney's affirmation.

Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (*see also Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Therefore, unsworn records of plaintiff's examining doctors will not be sufficient to defeat a motion for summary judgment (*see, Grasso v. Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]).

Plaintiff was examined by Emmanuel Hostin, MD, only one time, on May 12, 2008. In his sworn affidavit Dr. Hostin states: "[m]y medical assessment of Ms. Christian's physical condition, and my opinion as to the injuries she has sustained as a result of the motor vehicle accident in which she was involved in on June 30, 3-6 ("subject accident"), are based upon the results of the medical examination, as set forth in the annexed Report and upon a review of Ms. Christian's treatment records from Hollis Medical." However, said records are not before this Court in admissible form. Therefore, the probative value of Dr. Hostin's affirmation is reduced by his reliance on records that are not before the Court in admissible form. It is well-established law that since Dr. Hostin's conclusions improperly rested on other experts work products which are not before this Court, his affidavit and report is insufficient to raise a material triable factual issue (*see, Codrington v. Ahmad*, 40 AD3d 799 [2d Dept 2007], *Constantinou v. Surinder*, 8 AD3d 323 [2d Dept 2004], *Claude v. Clements*, 301 AD2d 432 [2d Dept 2003]; *Dominguez-Gionta v. Smith*, 306 AD2d 432 [2d Dept 2003]).

Furthermore, plaintiff submitted no proof of objective findings contemporaneous with the accident. Plaintiff's doctor only includes range of motion restrictions determined almost two years after the accident. Plaintiff failed to submit any medical proof in admissible form that was contemporaneous with the accident showing any bulges, herniations, or range of motion limitations (*Pajda v. Pedone*, 303 AD2d 729 [2d Dept 2003]). The causal connection must ordinarily be established by competent

medical proof (see, *Kociocek v. Chen*, 283 AD2d 554 [2d Dept 2001]; *Pommels v. Perez*, 772 NYS2d 21 [1st Dept 2004]). Dr. Hostin's affirmation fails to state what, if any, objective tests were performed contemporaneous with the accident (*Nemchyonok v. Ying*, 2 AD3d 421 [2d Dept 2003]; *Ifrach v. Neiman*, 306 AD2d 380 [2d Dept 2003]). Nowhere in Dr. Hostin's report does he explain how the automobile accident caused plaintiff's injuries (see, *Shepley v. Helmersen*, 306 AD2d 267 (1st Dept 2003)). As such, the plaintiff failed to submit objective medical proof in admissible form that was contemporaneous with the accident showing any initial range of motion restrictions of plaintiffs cervical and lumbar spine.

Specifically, the record is devoid of any competent evidence of plaintiff's treatment, other than one visit to Dr. Hostin. Courts have held that a gap in treatment goes to the weight of the evidence, not its admissibility (see, *Brown v. Achy*, 9 AD3d 30 at 33). Here, however, there is not just a gap in treatment, but, apparently, a total lack of competent proof of any treatment whatsoever by a health care professional which is related to any condition allegedly caused by this accident. Plaintiff has inexplicably provided no competent supporting documentation of medical treatment as required by *Friends of Animals v Associated Fur Mfrs.* (46 NY2d 1065 [1979]).

The affirmation submitted by Dr. Hostin does not provide any information concerning the nature of the plaintiff's medical treatment or any explanation for the almost 2 year gap between plaintiffs' purported initial medical treatment in 2006 and plaintiffs' medical examination by Dr. Hostin in May, 2008. (*Medina v. Zalmen Reis & Assocs.*, 239 AD2d 394 [2d Dept 1997]).

Also, the defendant failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiff sustained a medically-determined injury which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 of the 180 days immediately following the underlying accident (*Savatarre v. Barnathan*, 280 AD2d 537). The record must contain objective or credible evidence to support the plaintiff's claim that the injury prevented her from performing substantially all of her customary activities (*Watt v. Eastern Investigative Bureau, Inc.*, 273 AD2d 226). Plaintiff's doctor merely makes the bald, conclusory assertion (almost two years after the accident) that plaintiff's "treatment records indicate that she did also sustain other injuries of a non-permanent nature that would provide medical support for any claimed limitations in her

ability to perform her usual and customary duties for at least ninety (90) out of the first one hundred eighty (180) days after the accident." The plaintiff's doctor fails to state any specific restriction on of the plaintiff's daily and customary activities caused by the injuries sustained in the subject accident during the statutory period. Plaintiff has not submitted any competent evidence from any treating physician confirming plaintiff's representations concerning the effects of the injuries for the statutory period. Plaintiff's submissions were insufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed her from performing her usual activities for the statutory period (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's unsubstantiated claim that her injuries prevented her from performing substantially all of the material acts constituting her customary daily activities during at least 90 of the first 180 days following the accident is insufficient to raise a triable issue of fact (see, *Graham v. Shuttle Bay*, 281 AD2d 372 [2001]; *Hernandez v. Cerda*, 271 AD2d 569 [2000]; *Ocasio v. Henry*, 276 AD2d 611 [2000]).

Furthermore, plaintiff's attorney's affirmation is not admissible probative evidence on medical issues, as plaintiff's attorney has failed to demonstrate personal knowledge of the plaintiff's injuries (*Slona v. Schoen*, 251 AD2d 319 [2d Dept 1998]).

Moreover, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact. (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Additionally, plaintiff's self-serving deposition statement concerning treatment is "entitled to little weight, and [is] certainly insufficient to raise a triable issue of fact" (*Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 383 [1st Dept 1985]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Accordingly, summary judgment is granted in favor of defendant against plaintiff on all categories and the complaint is dismissed on all categories.

As the Complaint has been dismissed as against plaintiff, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance

Law § 5102(d), plaintiff's motion seeking summary judgment pursuant to CPLR 3212 on the ground that there are no triable issues of fact is hereby rendered moot.

The Clerk of the County of Queens is directed to enter judgment accordingly.

Movant shall serve a copy of this order with Notice of Entry upon the other parties of this action and on the Office of the Clerk of the County of Queens. If this order requires the Clerk of the County of Queens to perform a function, movant is directed to serve a copy upon the appropriate clerk.

This constitutes the decision and order of the Court.

Dated: September 12, 2008

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Howard G. Lane, J.S.C.