

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22  
Justice

-----	Index No. 23913/04
ROCHELLE FIGUR,	
	Motion
Plaintiff,	Date April 21, 2009
-against-	Motion
	Cal. No. 6
NEW YORK CITY TRANSIT AUTHORITY,	
Defendant.	Motion
-----	Sequence No. 2

	<u>PAPERS</u>
	<u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Opposition.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the branch of defendant, New York City Transit Authority's motion for summary judgment dismissing the complaint of plaintiff, Rochelle Figur, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d) is decided as follows:

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This action arises out of an automobile accident that occurred on July 25, 2003. Defendant has submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury except for the ninth category of "90/180." The defendant submitted inter alia, an affirmed report from an independent examining orthopedist.

In opposition to the motion, plaintiff submitted: an affirmation of plaintiff's physician, Robert Donadt, M.D., an attorney's affirmation, and plaintiff's own affidavit.

## **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 defendants 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 [3d 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. Defendant established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d), for all categories except for the ninth category of "90/180" days.**

The affirmed report of defendant's independent examining orthopedist, Raz Winiarsky, M.D., indicates that an examination conducted on March 26, 2008 revealed a diagnosis of: resolved right knee sprain/strain, resolved left knee sprain/strain, preexisting right hip surgery in 2001," and resolved left hip sprain/strain. He opines that no orthopedic treatment, diagnostic testing, or physical therapy is necessary. Finally, Dr. Winiarsky concludes that the claimant is already disabled and on SSI benefits.

Defendant, however, has failed to raise a triable issue of fact as to the 90/180-day claim. When construing the statutory definition of a 90/180-day claim, the words "substantially all" should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment (see, *Gaddy v. Eyler*, 79 NY2d 955, *supra*; *Licari v. Elliot*, 57 NY2d 23, *supra*; *Berk v. Lopez*, 278 AD2d 156 [2000], *lv denied* 96 NY2d 708 [2001]). Defendant's expert examined plaintiff more than 4½ years after the date of plaintiff's alleged injury and accident. Defendant's expert failed to render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180 day period immediately following the accident. With respect to the 90/180-day serious injury category, defendant has failed to meet its initial burden of proof and, therefore, has not shifted the burden to plaintiff to lay bare its evidence with respect to this claim. The report of the IME's relied upon by defendant fails to discuss this particular category of serious injury, and further, the IME's took place well beyond the expiration of the 180-day period (*Lowell v. Peters*, 3 AD3d 778 [3d Dept 2004]). As defendant has failed to establish a prima facie case with respect to the ninth category, it is unnecessary to consider whether the plaintiff's papers in opposition to defendant's motion on this issue, are sufficient to raise a triable issue of fact (*Manns v. Vaz*, 18 AD3d 827 [2d Dept 2005]). Accordingly, defendant is not entitled to summary judgment with respect to the ninth category of serious injury.

The aforementioned evidence amply satisfied defendant's initial burden of demonstrating that plaintiff did not sustain a "serious injury," for all categories except for the ninth category of "90/180" days. 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]), for all categories except for the category of "90/180" days. Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint (see, *Licari v. Elliott*, *supra*).

#### **B. Plaintiff fails to raise a triable issue of fact**

In opposition to the motion, plaintiff submitted: an affirmation of plaintiff's physician, Robert Donadt, M.D., an attorney's affirmation, and plaintiff's own affidavit.

Plaintiff submitted no proof of objective findings contemporaneous with the accident. The only admissible medical

proof submitted by plaintiff is the affirmed narrative report of plaintiff's examining physician, Robert Donadt, M.D. who examined plaintiff initially on November 18, 2003, more than five (5) years after the accident. Plaintiff failed to submit any medical proof that was contemporaneous with the accident showing any bulges, herniations, or range of motion limitations (*Pajda v. Pedone*, 303 AD2d 729 [2d Dept 2003]). Plaintiff has failed to establish a causal connection between the accident and the injuries. 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]). An examination more than five (5) years after the accident is insufficient to establish a causal connection between the accident and the injuries.

Furthermore, in his narrative report, Dr. Donadt states that he reviewed medical reports of another doctor, Dr. Michael Drew and affirms that he made his diagnosis subsequent to his examination and review of medical records, however, no medical records or reports of Dr. Drew have been submitted to the Court. The probative value of Dr. Donadt's affidavit is reduced by the doctor's reliance on medical reports that are not in the record before the court. Since Dr. Donadt's conclusions improperly rested on another expert's work product, it is insufficient to raise a material triable factual issue (see, *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]; *Codrington v. Ahmad*, 40 AD3d 799 [2d Dept 2007]).

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 (*Sloan v. Schoen*, 251 AD2d 319 [2d Dept 1998]).

Moreover, plaintiff's self-serving affidavit is "entitled to little weight" and is insufficient to raise triable issues of fact (see, *Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 383 [1st Dept 1985]; *Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

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, the defendant's motion for summary judgment is granted as to all categories, except for the category of "90/180" days and the plaintiff's complaint is dismissed as to all

categories, except for the ninth category of "90/180" days.

The clerk 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 clerk. If this order requires the clerk to perform a function, movant is directed to serve a copy upon the appropriate clerk.

That branch of plaintiff's motion seeking an order pursuant to CPLR 3212 granting the defendant, New York City Transit Authority, summary judgment and dismissing the complaint of the plaintiff on the basis of liability is hereby denied.

In this action, plaintiff, Rochelle Figur seeks to recover damages from defendant for personal injuries arising from an incident on July 25, 2003, wherein plaintiff was a passenger on a Q46 bus which was being driven east along Union Turnpike at or near its intersection with 236th Street in the County of Queens, City and State of New York. Pursuant to plaintiff's verified Complaint: "A few minutes before the incident in question took place, the plaintiff boarded defendant's said bus while in a wheelchair. . . After being helped to board the said bus by the defendant's employee, using a mechanical lift, said employee-bus driver secured the plaintiff's said wheelchair to the bus by using a clamping device. . . Said employee so negligently, carelessly, and/or recklessly secured said wheelchair to the bus that the said clamping device came loose causing plaintiff's said wheelchair to break free from the clamp and to roll into the steel seat immediately in front of the plaintiff" causing serious personal injuries.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue. (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see*,

*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

Defendant established a prima facie case that there are no triable issues of fact. In support of the motion, defendant presents, inter alia, the examination before trial transcript testimony of bus operator, Richard Hodges, who testified regarding the New York City Transit Authority procedures of boarding wheelchair bound passengers and that he fully adhered to the procedures; and the deposition testimony of plaintiff, herself, wherein she testified that her aide was not a competent aide, that the aide was playing around with the brakes which caused the wheelchair to become loose, and that the wheelchair was not put in place too well before the accident.

The evidence in plaintiff's opposition papers demonstrates that there are controverted issues of fact in connection with, inter alia, whether the bus driver had a duty to secure the clamps on plaintiff's wheelchair, whether the bus driver was aware of the loosening clamps, whether the bus driver followed the appropriate rules and procedures regarding a wheelchair bound passenger, whether the bus driver was negligent, and whether any negligence on the part of the bus driver proximately caused the accident. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendant's motion for summary judgment on the issue of liability is denied.

This constitutes the decision and order of the Court.

Dated: May 19, 2009

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**Howard G. Lane, J.S.C.**