

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

| | |
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| ----- | Index No. 11538/06 |
| DEBORAH MOSS, | Motion |
| Plaintiff, | Date November 18, 2009 |
| -against- | Motion |
| NEW YORK CITY TRANSIT AUTHORITY, et | Cal. No. 27 |
| al., | Motion |
| Defendants. | Sequence No. 1 |
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|---|-----------------|
| | <u>PAPERS</u> |
| | <u>NUMBERED</u> |
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| Opposition..... | 5-7 |
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Upon the foregoing papers it is ordered that this motion by defendants, New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority and Ernest D. Smith for summary judgment dismissing the complaint of plaintiff, Deborah Moss, 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:

This action arises out of an automobile accident that occurred on March 9, 2005. Defendants have submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. The defendants submitted *inter alia*, an affirmed report from an independent examining neurologist, plaintiff's verified bill of particulars

In opposition to the motion, plaintiff submitted: an affirmation of plaintiff's radiologist, Robert Diamond, M.D.; an affirmation, sworn narrative reports, and sworn medical records of plaintiff's psychiatrist, Joseph Gregorace, D.O.; a No-Fault denial of claim form; an attorney's affirmation; and plaintiff's own examination before trial transcript testimony.

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. Defendants established a *prima facie* case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d), for all categories.

The affirmed report of defendants' independent examining neurologist, Moshin Ali, M.D., indicates that an examination conducted on November 14, 2006 revealed a diagnosis of: "[c]ervical spine sprain/strain" and "[l]eft mild Carpal Tunnel Syndrome. He opines that the claimant has no neurological disability related to the accident. He opines that claimant does not need any further treatment or testing from a neurological perspective. Finally, Dr. Ali concludes that the claimant's prognosis is good and claimant is not disabled from working or from carrying on activities of daily living.

Additionally, defendants established a *prima facie* case for

the category of "90/180 days." The plaintiff's verified bill of particulars indicates: that she was only confined to the hospital for one day, that she was only confined to bed for approximately four (4) days, that she was not confined to home for approximately one week, plaintiff's own examination before trial transcript testimony wherein she testified that she only missed four (4) days from work as a result of the accident. Such evidence shows that the plaintiff was not curtailed from nearly all activities for the bare minimum of 90/180, required by the statute.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiff did not sustain a "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*, *supra*).

B. Plaintiff raises a triable issue of fact, except for the category of "90-180 days."

In opposition to the motion, plaintiff submitted: an affirmation of plaintiff's radiologist, Robert Diamond, M.D.; an affirmation, sworn narrative reports, and sworn medical records of plaintiff's physiatrist, Joseph Gregorace, D.O.; a No-Fault denial of claim form; an attorney's affirmation; and plaintiff's own examination before trial transcript testimony.

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation 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, 688 NYS2d 167 (1st Dept. 1980)). 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]). Plaintiff submitted medical proof that was contemporaneous with the accident showing bulges, herniations, and range of motion limitations (*Pajda v. Pedone*, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the injuries. The affirmation submitted by plaintiff's treating physiatrist, Dr. Joseph Gregorace, sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident to support his conclusion that the plaintiff

suffered from significant injuries, to wit: "lumbar spine pain with bulging disc at T12-L1, L2-3 and L3-4 with disc herniation at L4-5 and left L5 radiculopathy and cervical spine pain with bulging disc at C2-3 and disc herniation at C3-4, C4-5, C5-6 and C6-7 and left C6 radiculopathy." Dr. Gregorace's affirmation details plaintiff's symptoms, including neck pain, lower back pain, and numbness and tingling in the left arm and left hand and pain and tingling in the left leg and left foot. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of March 9, 2005. Additionally, plaintiff's radiologist, Robert Diamond, M.D., interpreted MRI films of plaintiff's cervical and lumbar spines taken on March 30, 2005 and found disc herniations and bulges of the cervical and lumbar spines. Furthermore, plaintiff has provided a recent medical examination detailing the status of her injuries at the current point in time (*Kauderer v. Penta*, 261 AD2d 265 (2d Dept 1999)). The affirmation of Dr. Gregorace provides that a recent examination by Dr. Gregorace on October 16, 2008 sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: "herniated discs at levels C3-4, C4-5, C5-6 and C6-7 with left C6 radiculopathy and herniated disc at level L4-5 and bulging discs at levels L2-3 and L3-4 with left L5 radiculopathy." He further opines that the injuries are permanent in nature, significant, causally related to the motor vehicle accident of March 9, 2005, and result in a permanent limitation in the plaintiff's range of motion. Clearly, the plaintiffs' experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (*DiLeo v. Blumber, supra*, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]).

Additionally, despite defendants' contentions, plaintiff adequately explained the gap in treatment through the affirmation of Dr. Gregorace which states that it is his opinion that plaintiff reached maximum medical improvement on June 15, 2005 and also explained that the plaintiff's No-Fault benefits were terminated.

Regarding the category of "90-180 days" the plaintiff has failed to come forward with sufficient evidence to create an issue of fact as to whether she 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 [2d Dept 2001]). The record must contain objective or

credible evidence to support the plaintiff's claim that the injury prevented plaintiff from performing substantially all of her customary activities (*Watt v. Eastern Investigative Bureau, Inc.*, 273 AD2d 226 [2d Dept 2000]). 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 her usual activities to a great extent, rather than some slight curtailment (see, *Gaddy v. Eyler*, 79 NY2d 955, *Licari v Elliott*, 57 NY2d 230 (1982); *Berk v. Lopez*, 278 AD2d 156 [1st Dept 2000], *lv denied* 96 NY2d 708 [2001]). Plaintiff fails to include experts' reports or affirmations which render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident. As such, 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 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 [1st Dept 2001]; *Hernandez v. Cerda*, 271 AD2d 569 [2d Dept 2000]; *Ocasio v. Henry*, 276 AD2d 611 [2d Dept 2000]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact on the category of "90-180 days." (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Accordingly, the defendants' motion for summary is denied as to all categories except for the category of "90/180 days" and the plaintiff's Complaint is dismissed as to the category of "90-180 days" only.

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.

The foregoing constitutes the decision and order of this Court.

Dated: January 26, 2009

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Howard G. Lane, J.S.C.

