

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 22

GODWIN SAETIA and JOHN PALOMARIA,
Plaintiffs,

-against-

VIP RENOVATIONS CORP. and CHRISTOS
KONSTANS,
Defendants.

Index No. 801/07

Motion
Date May 27, 2008

Motion
Cal. No. 19

Motion
Sequence No. 1

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	1-4
Defendants' Memorandum of Law.....	5
Affirmation in Opposition.....	6-12
Reply Affirmation.....	13-14
Cross Motion-Affidavits.....	15-18
Affirmation in Opposition.....	19-21
Cross Motion-Affidavits.....	22-25
Affirmation in Opposition.....	26-27

Upon the foregoing papers it is ordered that the motion by defendants, VIP Renovations Corp. and Christos Konstans for summary judgment dismissing the Complaint against plaintiffs, Godwin Saetia and John Palomaria, pursuant to CPLR 3212, on the ground that plaintiffs have not sustained a serious injury within the meaning of the Insurance Law § 5102 (d) and plaintiffs' cross motion seeking partial summary judgment against the defendants pursuant to CPLR 3212 on the grounds that there are no triable issues of fact and plaintiff John Palomaria's cross motion for summary judgment dismissing the cross claim against him (which motion is improperly denominated as one seeking summary judgment on the counterclaim) are hereby decided as follows:

Godwin Saetia

This action arises out of an automobile accident that occurred on September 9, 2006. Defendants have submitted proof in admissible form in support of the motion for summary judgment for all categories of serious injury. Specifically, *inter alia*,

the defendants submitted affirmed reports from three independent examining and/or evaluating physicians (a neurologist, an orthopedist, and a radiologist) and plaintiff, Godwin Saetia's verified bill of particulars which indicates that plaintiff was confined to bed for approximately two days and confined to home for approximately one week.

In opposition to the motion, plaintiff submitted: an affirmation and sworn narrative report of plaintiff's treating physiatrist, Ki Y. Park, MD, unsworn MRI reports of the left knee, cervical spine, and lumbar spine, an unsworn police accident report, 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 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 [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, defendants established a prima facie case that plaintiff, Godwin Saetia did not suffer a "serious injury" as defined in Section 5102(d).

The affirmed report of defendants' independent examining neurologist, Edward M. Weiland, M.D., indicates that an examination conducted on November 29, 2007 revealed a normal neurologic examination. He opines that claimant is not in any need of any neurological treatment, testing, or medical supplies. Dr. Weiland concludes that plaintiff can "perform normal

activities of daily living, as well as occupational duties, without any restrictions" and that there is no permanency.

The affirmed report of defendants' independent examining orthopedist, Salvatore Corso, M.D., indicates that an examination conducted on November 29, 2007 revealed an impression of resolved cervical and lumbar sprains and chondromalacia of the patellar left (unrelated to the incident under review). He opines that the claimant has no disability referable to his left knee and that the claimant is able to continue activities of daily living without limitations. Dr. Corso concludes that no further orthopedic treatment is indicated, and that there is no permanency from the accident.

The affirmed MRI Report of the cervical spine of Robert Tantleff, M.D. indicates that an MRI taken on September 27, 2006 revealed an impression of a normal and unremarkable MRI examination. The affirmed MRI Report of the lumbar spine of Robert Tantleff, M.D. indicates that an MRI taken on October 4, 2006 revealed an impression of a normal MRI of the lumbar spine. The affirmed MRI Report of the left knee of Robert Tantleff, M.D. indicates that an MRI taken on January 5, 2007 revealed an impression of: "nonspecific myxoid degeneration of the medial and lateral menisci without definable evidence of tear. Degenerative changes of the patella are present as well. There is no evidence of acute or recent injury. The findings represent mild nonspecific degenerative changes of the knee consistent with the aging process."

In addition, defendants submitted the plaintiff's verified bill of particulars which indicates that plaintiff was confined to bed for approximately two days and confined to home for approximately one week.

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: an affirmation and sworn narrative report of plaintiff's treating physiatrist, Ki Y. Park, M.D., unsworn MRI reports of the left knee, cervical spine, and lumbar spine, an unsworn police

accident report, and an attorney's affirmation.

Plaintiff was treated by Ki Y. Park, M.D. from September 11, 2006 - April 2, 2008. In his sworn affidavit of April 15, 2008, Dr. Park states: "I incorporate the MRI reports dated January 5, 2007 of Mr. Saetia's left knee, cervical spine dated September 27, 2006 and lumbosacral spine dated October 4, 2006, all of which I have reviewed." However, said reports are not before this Court in admissible form. Therefore, the probative value of Dr. Park's affirmation is reduced by his reliance on MRI reports and records that are not before the Court in admissible form. It is well-established law that since Dr. Park'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]).

Plaintiff submitted no proof of objective findings contemporaneous with the accident. Plaintiff's doctor only includes range of motion restrictions determined one and a half 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. Park'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. Park's report does he explain how the automobile accident caused plaintiff's injuries (see, *Shepley v. Helmerston*, 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 plaintiff's cervical and lumbar spine and left knee. Dr. Park fails to indicate that he performed range of motion tests on plaintiff's spine and/or knee, or to compare the plaintiff's range of motion to the normal range of motion (see, *Durham v. N.Y. East Travel, Inc.*, 2 AD3d 1113 [3d Dept 2003] [stating that a finding of reduced range of motion alone is insufficient to support a finding of serious injury, because such a determination is based on subjective complaints of pain . . .]).

Also, the defendants 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 him from

performing substantially all of the material acts which constituted his 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 him from performing substantially all of his customary activities (*Watt v. Eastern Investigative Bureau, Inc.*, 273 AD2d 226). The plaintiff's doctors fail to state any restriction of the plaintiff's daily and customary activities caused by the injuries sustained in the subject accident during the statutory period. Plaintiff's experts fail 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. 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, Saetia Godwin suffered from a medically determined injury that curtailed him from performing his usual activities for the statutory period (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's unsubstantiated claim that his injuries prevented him from performing substantially all of the material acts constituting his 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]).

"The plaintiff's remaining submissions [are] without probative value in opposing the motion since they [are] unsworn, unaffirmed, or uncertified." (See, *Codrington, supra*). 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, *Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

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 Godwin Saetia on all categories except and the complaint is dismissed on all categories.

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.

John Palomaria

This action arises out of an automobile accident that occurred on September 9, 2006. Defendants have submitted proof in admissible form in support of the motion for summary judgment for all categories of serious injury. Specifically, *inter alia*, the defendants submitted affirmed reports from four independent examining and/or evaluating physicians (a neurologist, an orthopedic surgeon, and two radiologists) and plaintiff, John Palomaria's verified bill of particulars which indicates that plaintiff was confined to bed for approximately two days and confined to home for approximately one week.

DISCUSSION

A. Through the submission of affirmed experts' reports, defendants established a prima facie case that plaintiff, John Palomaria did not suffer a "serious injury" as defined in Section 5102(d).

The affirmed report of defendants' independent examining neurologist, Edward M. Weiland, M.D., indicates that an examination conducted on November 29, 2007 revealed a normal neurologic examination. He opines that claimant is not in any need of any further neurological treatments. Dr. Weiland concludes that plaintiff can "perform normal activities of daily living, as well as educational responsibilities, without limitations and without any restrictions" and that there is no permanency.

The affirmed report of defendants' independent examining orthopedic surgeon, Michael J. Katz M.D., indicates that an examination conducted on January 14, 2008 revealed an impression of resolved cervical and lumbosacral strains and status post successful arthroscopy right knee. He opines that there are no signs or symptoms regarding the neck or back and there is an excellent surgical outcome regarding the right knee. Dr. Katz concludes that claimant is capable of his activities of daily living and is capable of gainful employment. Dr. Katz also includes an addendum to his report wherein he states that he

reviewed the radiology reports of Dr. Tantleff dated December 10, 2007 regarding the right knee MRI of December 11, 2006, the lumbar spine MRI of October 4, 2006, and cervical spine MRI of September 27, 2007, and that the reports indicate that there is no causation for the pathology found for the neck, back or right knee related to the accident.

The affirmed MRI Report of the cervical spine of Robert Tantleff, M.D. indicates that an MRI taken on September 27, 2007 revealed an impression of: "[d]iffuse discogenic changes of the Cervical Spine most prominently noted at C5/6 as described, unrelated to the date of the incident of 9/9/06. The affirmed MRI Report of the lumbar spine of Robert Tantleff, M.D. indicates that an MRI taken on October 4, 2006 revealed an impression of a normal MRI of the lumbar spine. The affirmed MRI Report of the right knee of Robert Tantleff, M.D. indicates that an MRI taken on December 11, 2006 revealed an impression of a normal MRI of the right knee without evidence of recent injury.

The affirmed MRI Report of the cervical spine of Robert Tantleff, M.D. indicates that an MRI of the right knee taken on December 11, 2006 revealed an impression of "tear anterior cruciate ligament; tears posterior horn and body lateral meniscus."

In addition, defendants submitted the plaintiff's verified bill of particulars which indicates that plaintiff was confined to bed for approximately two days and confined to home for approximately one week.

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: an affirmation and sworn narrative report of plaintiff's treating physiatrist, Ki Y. Park, M.D., an unsworn operative report, unsworn MRI reports of the right knee, cervical spine, and lumbar spine, an unsworn police accident report, and an attorney's affirmation.

Plaintiff was treated by Ki Y. Park, M.D. from September 12, 2006 - April 1, 2008. In his sworn affidavit of April 15, 2008,

Dr. Park states: "I incorporate the MRI reports dated December 11, 2006 of Mr. Palomaria's right knee, cervical spine dated September 27, 2006 and lumbosacral spine dated October 4, 2006, all of which I have reviewed." However, said reports are not before this Court in admissible form. Therefore, the probative value of Dr. Park's affirmation is reduced by his reliance on MRI reports that are not before the Court in admissible form. It is well-established law that since Dr. Park'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]).

Plaintiff submitted no proof of objective findings contemporaneous with the accident. Plaintiff's doctor only includes range of motion restrictions determined one and a half 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. Park'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. Park's report does he explain how the automobile accident caused plaintiff's injuries (see, *Shepley v. Helmerson*, 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 and right knee. Dr. Park fails to indicate that he performed range of motion tests on plaintiff's spine and/or knee, or to compare the plaintiff's range of motion to the normal range of motion (see, *Durham v. N.Y. East Travel, Inc.*, 2 AD3d 1113 [3d Dept 2003] [stating that a finding of reduced range of motion alone is insufficient to support a finding of serious injury, because such a determination is based on subjective complaints of pain . . .]).

Also, the defendants 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 him from performing substantially all of the material acts which constituted his 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 him from performing substantially all of his customary activities (*Watt v. Eastern Investigative Bureau, Inc.*, 273 AD2d 226). The plaintiff's doctors fail to state any restriction of the plaintiff's daily and customary activities caused by the injuries sustained in the subject accident during the statutory period. Plaintiff's experts fail 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. 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, John Palomaria suffered from a medically determined injury that curtailed him from performing his usual activities for the statutory period (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's unsubstantiated claim that his injuries prevented him from performing substantially all of the material acts constituting his 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]).

"The plaintiff's remaining submissions [are] without probative value in opposing the motion since they [are] unsworn, unaffirmed, or uncertified." (See, *Codrington, supra*). 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, *Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

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 defendants against plaintiff John Palomaria on all categories of serious injury.

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.

As the Complaint has been dismissed as against plaintiffs, Godwin Saetia and John Palomaria, pursuant to CPLR 3212, on the ground that plaintiffs have not sustained a serious injury within the meaning of the Insurance Law § 5102 (d), plaintiffs' cross motion seeking partial summary judgment pursuant to CPLR 3212 on the grounds that there are no triable issues of fact is hereby rendered moot.

As the Complaint has been dismissed as against plaintiffs, Godwin Saetia and John Palomaria, pursuant to CPLR 3212, on the ground that plaintiffs have not sustained a serious injury within the meaning of the Insurance Law § 5102 (d), plaintiff John Palomaria's cross motion for summary judgment dismissing the cross-claim against him (which motion is improperly denominated as one seeking summary judgment on the counterclaim) is hereby denied as moot.

The foregoing constitutes the decision and order of this Court.

Dated: July 10, 2008

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