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Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

-----X  
KENRICK H. PORTER and ANN PORTER,

Index No: 25392/98

Plaintiffs,

Motion Date: 5/3/00

-against-

Motion Cal. No: 28

REGIS CAB CORP. and SYED ABBAS,

Defendants.

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The following papers numbered 1 to 8 read on this motion for an order, pursuant to CPLR § 3212, granting defendants summary judgment as plaintiffs failed to meet the serious injury threshold requirement as mandated by Insurance Law 5102(d).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1- 4
Answering Affidavits-Exhibits.....	5- 6
Reply Affidavits.....	7- 8

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is a personal injury action for damages allegedly sustained by plaintiff Kenrick H. Porter arising from an automobile accident that occurred on June 6, 1997. Defendants move for summary

judgment on the ground that plaintiff did not sustain a “serious injury” within the definition of Insurance Law 5102(d). The aforementioned statute states, in pertinent part, that a “serious injury” is defined as:

a personal injury which results in ...significant disfigurement; ...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 non-permanent nature which prevents the injured party from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

At issue is whether the injuries allegedly sustained by plaintiff fall within the definition of a “serious injury,” which, in the first instance, must be decided by the court. See, Licari v. Elliot, 57 N.Y.2d 230, 238. As such, inherent in the court’s consideration of a motion for summary judgment for lack of serious injury is the requisite determination that there are no issues of fact with regard to the injuries sustained by a plaintiff. This is not an inquiry that should be taken lightly. “There can be little doubt that the [legislative] purpose of enacting an objective verbal definition of serious injury was to significantly reduce the number of automobile personal injury accident cases litigated in the courts...” Licari v. Elliot, 57 N.Y.2d 230, 237. “The result of requiring a jury trial where the injury is clearly a minor one would perpetuate a system of unnecessary litigation, and

subvert the intent of the Legislature [by] destroy[ing] the effectiveness of the statute.” Id. at 237. See, also, Dufel v. Green, 84 N.Y.2d 795; Grossman v. Wright, \_\_ A.D. \_\_, 2000 WL 563150 at p.3. Moreover, as it is incumbent upon the court to determine the threshold question, it is equally incumbent upon the parties to proffer evidence, in admissible form, which sufficiently supports their contentions. It is a waste of judicial resources for the courts to entertain evidence purported to be probative on the issue of serious injury, when said evidence is clearly deficient. Thus, in the interest of judicial economy, and the spirit of the statute, the parties need to proffer evidence that comport with judicial standards of sufficiency.

In order for a defendant to establish that plaintiff failed to sustain a serious injury within the purview of the statute, defendant must “submit the affidavits or affirmations of medical experts who examined the plaintiff, and conclude that no objective medical findings support the plaintiff’s claim.” Grossman v. Wright, \_\_ A.D. \_\_, 2000 WL 563150 at p.3. These affidavits or affirmations should be facially sufficient in that they contain original signatures of the affiant. Moreover, any medical reports submitted as evidentiary proof must be sworn. See, Grasso v. Angerami, 79 N.Y.2d 813; Williams v. Hughes, 256 A.D.2d 461; Fernandez v. Shields, 223 A.D.2d 666. Once defendant has proffered competent evidence that meets the sufficiency standard, the burden is shifted to the plaintiff to rebut the presumption that there is no issue of fact as to the threshold question. See, Gaddy v. Eyler, 79 N.Y.2d 955, 956-957; Licari v. Elliott, 57 N.Y.2d 230, 238; Grossman v. Wright, \_\_ A.D. \_\_, 2000 WL 563150 at p.3; Echeverri v. Happe, 256 A.D.2d 304.

Plaintiff’s burden of proof, much like that of defendant’s, requires the submission of evidence

in the form of original affidavits or affirmations. “Where the treating physician, in an affidavit supported by [sworn] exhibits, has set forth the injuries and course of treatment, identified a limitation of movement... and on that predicate expressed the opinion that there was a significant limitation of use of a described body function, such evidence is sufficient for the denial of summary judgment to the defendant.” Lopez v. Senatore, 65 N.Y.2d 1017. [See, also, Grossman v. Wright, \_\_ A.D. \_\_, 2000 WL 563150 at p.4, holding that an affidavit or affirmation simply setting forth the observations of the affiant are not sufficient unless supported by objective proof such as X-rays, MRIs, straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on a neurological examination (citation omitted)]. The annexation to affidavits of copies of said unsworn reports are to no avail. Plaintiff may not rely on unsworn medical reports to establish that she sustained a serious injury. See, Pagano v. Kingsbury, 182 A.D.2d 268. Additionally, “plaintiff’s verified objective medical findings must be based on a recent examination of the plaintiff (citation omitted). In that vein, any significant lapse of time between the cessation of the plaintiff’s medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained (citation omitted).” Grossman v. Wright, \_\_ A.D. \_\_, 2000 WL 563150 at p.4; Marin v. Kakivelis, 251 A.D.2d 462; O’Neill v. Rogers, 163 A.D.2d 466; Philpotts v. Petrovic, 160 A.D.2d 856; Covington v. Cinnirella, 146 A.D.2d 565. The foregoing is sufficient for plaintiff to defeat a motion for summary judgment.

In the case at bar, plaintiff Kenrick H. Porter contends that he suffered a serious injury in that he sustained neck, back and shoulder injuries which resulted in: (1) permanent loss of use of a body organ; (2) significant limitation of use of a body function or system; and (3) medically determined

injury or impairment of a non-permanent nature which prevents the injured party from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

In support of this motion, defendants submitted documentary evidence in the form of a medical report of Dr. Jacob Lichy, a radiologist, and the sworn report of Dr. Naunihal S. Singh, a neurologist. Dr. Lichy, referencing an MRI of the plaintiff's spine taken July 26, 1997, found that "the discs and vertebrae are normal. The contents of the thecal sac are not remarkable." Dr. Singh, in his report dated August 10, 1999, found that plaintiff "suffered from cervical, lumbar, and thoracic spine sprain as a result of the accident...[and] in my opinion, he has achieved maximum neurological improvement. [Plaintiff] is not disabled and can resume his normal duties without restriction."

Generally, if defendant's proffered evidence is sufficient to establish, prima facie, that the plaintiff did not sustain a serious injury within the confines of section 5102(d)[see, Grebleski v. Mace, 241 A.D.2d 888; Fuller v. Steves, 235 A.D.2d 863], plaintiff has the burden of coming forward with sufficient evidentiary proof, in admissible form, to raise a triable issue of fact as to whether she has suffered a serious injury within the meaning of the No-Fault Law. See, Gaddy v. Eyler, 79 N.Y.2d 955, 956-957; Licari v. Elliott, 57 N.Y.2d 230, 238; Grossman v. Wright, \_\_ A.D. \_\_, N.Y.L.J., May 12, 2000, p. 25, c.2; Echeverri v. Happe, 256 A.D.2d 304. However, where defendant fails to proffer evidence which establishes that plaintiff's injuries are not serious as defined by statute, the need for plaintiff to rebut said evidence is circumvented. Here, the Court's

analysis ends with defendants' evidence because they did not meet their burden.

Dr. Lichy's proffered evidence, in the form of an unsworn doctor's report is clearly inadmissible. See, Grasso v. Angerami, 79 N.Y.2d 813; Williams v. Hughes, 256 A.D.2d 461; Fernandez v. Shields, 223 A.D.2d 666; Pagano v. Kingsbury, 182 A.D.2d 268. This evidence is insufficient to eliminate a genuine issue of material fact. See, Friedman v. U-Haul Truck Rental, 216 A.D.2d 266. Medical reports without the annexation of an affidavit of the examining doctor specifically substantiating his objective findings, are insufficient to prove lack of serious injury. What is required to meet the sufficiency standard are affidavits with objective medical findings which have annexed sworn medical reports, or which incorporate by reference, sworn medical reports. Such proof is not presented here. Thus, Dr. Singh's sworn medical report standing alone, does not rise to the level of proof needed to resolve the issue with regard to the threshold question. Accordingly, defendants' motion for summary judgment is denied..

This constitutes the decision and order of the court.

Dated: June 26, 2000

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J.S.C.