Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
**Justice**

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ANN BRADSHAW,
Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY and MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY,
Defendants.

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Index No. 1761/04

Motion Date March 6, 2007

Motion Cal. No. 1

Motion Sequence No. S001

The following papers numbered 1 to 9 read on this motion by defendants for an order pursuant to CPLR 3212 granting the defendants summary judgment and dismissing the complaint of the plaintiff on the basis of liability, or, in the alternative, granting the defendants summary judgment and dismissing the complaint of plaintiff on the grounds that the plaintiff has not sustained a serious injury as defined in Insurance Law § 5102(d) and does not have a cause of action under Insurance Law § 5104(a).

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion-Affidavits-Exhibits..... | 1-4 |
| Answering Affirmation..... | 5-7 |
| Reply Affirmation..... | 8-9 |

Upon the foregoing papers it is ordered that this motion is determined as follows:

That branch of defendants', New York City Transit Authority ("NYCTA") and Manhattan and Bronx Surface Transit Operating Authority's ("MABSTOA") motion for summary judgment, dismissing the complaint of plaintiff, Ann Bradshaw, on the basis of liability is denied. In this action, plaintiff seeks to recover damages from defendants for personal injuries arising from a " slip-and-fall" type accident, occurring on October 26, 2002. Plaintiff alleges that she was a passenger on a bus, and that as she was attempting to exit the bus, she was caused to fall due to an unsafe, wet, and slippery condition that existed upon the floor of the bus.

Defendants' motion for summary judgement on the basis of liability is denied as defendants have failed to show that there is no substantial issue of fact in this case and therefore nothing to try. 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 evidence in plaintiff's opposition papers demonstrate that there are controverted issues of fact in connection with, *inter alia*, whether the defendants exercised reasonable care under the circumstances, and whether the plaintiff was contributorily negligent. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendants' motion for summary judgment on the basis of liability is denied.

That branch of defendants', New York City Transit Authority ("NYCTA") and Manhattan and Bronx Surface Transit Operating Authority's ("MABSTOA") motion for summary judgment and dismissal of the complaint against plaintiff, Ann Bradshaw 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 October 26, 2002. Defendants have submitted proof in admissible form in support of the motion for summary judgment for all categories except the ninth category of "90/180-days." Specifically, *inter alia*, the defendants submitted affirmed reports from four independent examining and/or evaluating physicians (i.e., an orthopedic surgeon, a neurologist, a psychiatrist, and a radiologist) and plaintiff's own examination before trial transcript testimony.

In opposition to the motion, plaintiff submitted: an unsworn an uncertified accident report, defendants' deposition testimony, an inadmissible narrative report of plaintiff's chiropractor, Warren S. Albert, D.C., unsworn MRI reports of plaintiff's radiologist, Daniel Schlusselberg, M.D., unsworn narrative reports of plaintiff's physician, Fronson Young, M.D., an unsworn narrative report of plaintiff's neurologist, Y.L. Gao, M.D., unsworn medical records, an attorney's affirmation, and plaintiff's 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*, supra; *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*, *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, 647NYS 2d 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, except for the ninth category of "90/180," defendants established a *prima facie* case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d).**

The affirmed report of defendants' independent examining orthopedic surgeon, Frank M. Hudak, M.D., indicates that an examination conducted on April 7, 2006 revealed that there are no objective findings to confirm any disability or permanency. He opines that plaintiff can perform all activities of daily living, including employment. Dr. Hudak concludes that his diagnosis is one of: "status post cervical sprain, left shoulder sprain, lumbosacral sprain, and contusion to the left knee superimposed upon pre-existing degenerative disc disease of the claimant's cervical and lumbosacral spines, as well as pre-existing arthritis of the claimant's left acromioclavicular joint."

The affirmed report of defendants' independent examining neurologist, John Kelemen, M.D., indicates that an examination conducted on April 7, 2006 revealed that there is no permanency from a neurological perspective. He opines that there is no objective evidence of any neurological disability or abnormality.

Dr. Kelemen concludes that his impression is one of: “status post musculoskeletal strains and contusions, with cervical and lumbar strain.”

The affirmed report of defendants’ independent examining psychiatrist, Alain De La Chapelle, M.D. indicates that an examination conducted on June 26, 2006 revealed that plaintiff’s concentration, computational ability, memory, attention, judgment, and insight were all good. He opines that there is no disability or permanency and that plaintiff is capable of performing her usual daily activities without restrictions. Dr. De La Chapelle concludes that the diagnosis is one of: “ Adjustment Disorder with Mixed Anxiety and Depressed Mood, Resolved.”

The affirmed report of defendants’ independent evaluating radiologists, Jane Tuvia, M.D. and Joseph Tuvia, M.D., dated August 10, 2005, indicate that: an MRI of the left shoulder taken on November 21, 2002 revealed an impression of “[m]ild degenerative changes about the acromioclavicular joint resulting in mild impingement; otherwise unremarkable study. There are no findings to suggest trauma or sequela such”; an MRI of the cervical spine taken on December 12, 2002 revealed an impression of “[d]egenerated, bulging L5-S1 disc in association with productive bony changes.” The doctors state that the findings are consistent with chronic degenerative spinal disease which is a pre-existing condition; and an MRI of the cervical spine taken on January 10, 2003 revealed an impression in relevant part, of: “[s]traightening of the normal cervical lordosis . . . [m]ultilevel disc dessication and degeneration, and posterior disc bulges as described in association with productive bony changes . . .a degenerative ideology.”

The aforementioned evidence amply satisfied defendant’s initial burden of demonstrating that plaintiff did not sustain a "serious injury” under all categories except for the “90/180-day” category.

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. Defendant has failed to establish a prima facie case with respect to the ninth category of "90/180.**”

Defendant 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 Elliott*, 57 NY2d 230, *supra*; *Berk v. Lopez*, 278 AD2d 156 [2000], *lv denied* 96 NY2d 708 [2001]). Defendants' experts 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. The reports of the IME's relied upon by defendant fail 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]). With respect to the 90/180-day serious injury category, defendants have failed to meet their initial burden of proof and, therefore, have not shifted the burden to plaintiff to lay bare its evidence with respect to this claim. As defendants have 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 defendants' motion on this issue were sufficient to raise a triable issue of fact [*Manns v. Vaz,* 18 AD3d 827 [2d Dept 2005]). Accordingly, defendants are not entitled to summary judgment with respect to the ninth category of serious injury.

**C. Plaintiff fails to raise an issue of fact**

In opposition to the motion, plaintiff submitted: an unsworn an uncertified accident report, defendants' deposition testimony, an inadmissible narrative report of plaintiff's chiropractor, Warren S. Albert, D.C., unsworn MRI reports of plaintiff's radiologist, Daniel Schlusselberg, M.D., unsworn narrative reports of plaintiff's physician, Fronson Young, M.D., an unsworn narrative report of plaintiff's neurologist, Y.L. Gao, M.D., unsworn medical records, an attorney's affirmation, and plaintiff's deposition testimony.

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 and treating doctors will not be sufficient to defeat a motion for summary judgment *(see Grasso v. Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]).

While the narrative report of plaintiff's treating chiropractor, Warren S. Albert, D.C. includes an affirmation, 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]). Accordingly, the narrative report of Dr. Albert is inadmissible.

Plaintiff submitted no admissible proof of objective findings contemporaneous with the accident that would indicate causality between the injuries allegedly sustained in the accident and the accident itself (*Pajda v. Pedone*, 303 AD2d 729 [2d Dept 2003]; *Ifrach v. Neiman, 306 AD2d 380* [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]).

Additionally, plaintiff has failed to rebut evidence of a preexisting degenerative condition. Although defendants' independent experts conclude in their affirmed reports that plaintiff's MRI films showed evidence of degenerative changes, and chronic degenerative spinal disease which is a pre-existing condition, plaintiff failed to attach evidence from any experts indicating their awareness that plaintiff was suffering from such condition and failed to address the effect of these findings on plaintiff's claimed accident injuries (*Francis v. Christopher,* 302 AD2d 425 [2d Dept 2003]; *Monette v. Keller*, 281 AD2d 523 [2d Dept 2001]; *Ifrach v. Neiman*, 306 AD2d 380 [2d Dept 2003]). Hence, plaintiff failed to rebut defendants' claim sufficiently to raise a triable issue of fact (s*ee Pommells v. Perez*, 4 NY3d 566 [2005]) (where the court affirmed the trial court's granting of summary judgment where the defendant presented evidence that plaintiff had a pre-existing condition and plaintiff failed to rebut the defendant's allegation).

Moreover, there is an unexplained gap in treatment or cessation of treatment. Specifically, the record is devoid of any competent evidence from any health care professional of plaintiff's treatment, need for treatment, or if and why plaintiff's treatment ceased. 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]). Plaintiff has failed to submit an affirmation which provides any information concerning the nature of the plaintiff's medical treatment or any explanation for the several year gap between plaintiff's medical treatment which appears to have ceased in 2003 and the date of the opposition

papers to the instant motion in 2007 *(Medina v. Zalmen Reis & Assocs.*, 239 AD2d 394 [2d Dept 1997]). Plaintiff proffered no excuse for her failure to submit sworn medical records and doctor's reports in admissible form concerning her treatment.

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]).

Accordingly, partial summary judgment is granted in favor of defendants on all categories except for the "90/180" day category and the complaint is dismissed on all categories except for the "90/180" days category.

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: March 13, 2007

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