Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

JOSEPHINE DEL TORO,
Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY and EDGAR LEWIS,
Defendants.

Index No. 14352/05

Motion Date June 12, 2007

Motion Cal. No. 3

Motion Sequence No. S002

The following papers numbered 1 to 9 read on this motion by defendants for summary judgment dismissing the complaint against plaintiff pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d).

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

Upon the foregoing papers it is ordered that the motion by defendants New York City Transit Authority ("NYCTA") and Edgar Lewis for summary judgment dismissing the complaint against plaintiff 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 May 11, 2004. Defendants have submitted proof in admissible form in support of the motion for summary judgment. Specifically, *inter alia*, the defendants submitted affirmed reports from two independent examining physicians (an orthopedist and a neurologist), plaintiff's bill of particulars which indicates that she was only confined to bed and home for one week each and then intermittent periods thereafter, and plaintiff's own examination before trial transcript testimony which indicates that she missed "about 30 days on and off" from work.

In opposition to the motion, plaintiff submitted: defendant, Edgar Lewis' examination before trial transcript

testimony, an Application for Motor Vehicle No-Fault Benefits, a New York Motor Vehicle No-Fault Insurance Law Denial of Claim Form, 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, plaintiff's bill of particulars, and plaintiff's examination before trial transcript testimony, 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 orthopedist, Robert J. Orlandi, M.D., indicates that an examination conducted on September 19, 2006 revealed a diagnosis of left knee strain resolved. He opines that there is a normal range of motion, no quadriceps atrophy, no soft tissue swelling, and no symptoms or physical findings to suggest a meniscal tear. Dr. Orlandi concludes that there is no permanent residuals or a musculoskeletal disability, and the prognosis is excellent.

The affirmed report of defendants' independent examining neurologist, E. Kojo Essuman, M.D., indicates that an examination conducted on September 22, 2006 revealed an entirely normal

neurological examination, with no evidence of radiculopathy. "[T]he diagnosis is soft tissue injury, which is minor, resolved and without sequelae." Dr. Essuman concludes that the plaintiff can continue full time employment and activities of daily living.

Additionally, the plaintiff's bill of particulars reveals that plaintiff was only confined to bed and home for one week each, and then intermittently thereafter; and plaintiff's examination before trial transcript testimony indicates that plaintiff missed "about 30 days on and off" from work; and defendants' neurologist's report which indicates in the "Occupational History and Status" section that plaintiff was out of work for five days post-accident and then resumed full-time work as an assistant school teacher; and defendant's orthopedist's report which indicates under the "History of the Present Illness" section that plaintiff lost two weeks of work as an assistant teacher. 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 fails to raise an issue of fact*

In opposition to the motion, plaintiff submitted: Defendant, Edgar Lewis' examination before trial transcript testimony, an Application for Motor Vehicle No-Fault Benefits, a New York Motor Vehicle No-Fault Insurance Law Denial of Claim Form, and an attorney's affirmation.

Plaintiff maintains that on May 11, 2004, while she was a passenger on a bus operated by the defendant, NYCTA, and driven by defendant, Edgar Lewis, the bus was involved in an accident with a van and she was injured. Plaintiff then filed an application for statutory "No-Fault" benefits but that the claim was "Denied for claim loss not proven. There is no corroboration this accident occurred." Accordingly, the NYCTA allegedly refused to afford plaintiff any "No-Fault" insurance coverage or benefits. Plaintiff contends that defendants cannot request summary judgment "pursuant to a statute that their determinations and actions have intentionally undermined and circumvented." Plaintiff fails to provide any case law or other legal authority

in support of its position.

The Court finds that plaintiff's defense is in the nature of a liability argument, whereas defendants' motion seeks dismissal based on the claim that the plaintiff has not sustained a " serious injury" within the meaning of the Insurance Law § 5102(d).

Furthermore, plaintiff fails to submit any affidavits or narrative medical reports whatsoever of any examining or treating physicians. Plaintiff submitted no proof of objective findings contemporaneous with the accident. Plaintiff failed to submit any medical proof that was contemporaneous with the accident showing any injuries 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]).

Additionally, the record is devoid of any competent evidence in admissible form of plaintiff's treatment or need for treatment. In the instant matter, there is 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 provided no competent supporting documentation of any medical treatment as required by *Friends of Animals v. Associated Fur Mfrs.* (46 NY2d 1065 [1979]). Plaintiff proffers no admissible opinions of any treatment providers.

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]).

Also, the plaintiff has 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 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 his/her customary activities (*Watt v. Eastern Investigative Bureau, Inc.*, 273 AD2d 226 [2d Dept 2000]). 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. Instead, to support it's contention that the plaintiff satisfied the 90/180 day serious injury category, plaintiff relied in part on the plaintiff's bill of particulars which established that she was confined to bed and home for one week each and intermittently thereafter (*see*, *Candia v. Omoria Cab. Corp.*, 6 AD3d 641 [1st Dept 2004]). 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 (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Accordingly, the defendants' motion for summary judgment is granted and the plaintiff's Complaint is dismissed.

The clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of this Court.

Dated: June 26, 2007

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Howard G. Lane, J.S.C.