Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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VIOLETTA NARAJO, JOSE MARTINEZ and ZOBEDIA BRIONES, Plaintiffs,	Motion Date April 9, 2008
-against-	Motion Cal. No. 21
INES M. VIVERO, Defendant.	Motion Sequence No. 4

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

Upon the foregoing cited papers, the Decision/Order on the Motion is as follows:

Defendant, Ines Vivero's motion for summary judgment dismissing the Complaint of plaintiff, Violetta Narajo 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 February 26, 2003. Defendant has submitted proof in admissible form of his defense. Specifically, *inter alia*, the affirmed medical reports from three independent examining and/or evaluating physicians (an orthopedic surgeon, a neurologist, and a radiologist) and plaintiff's own verified bill of particulars which indicates that plaintiff Narajo was not confined to a hospital as a result of the accident, was confined to bed for approximately four (4) days as a result of the accident, and was confined to her house for one (1) month as a result of the accident was sufficient to establish a case that the plaintiff has not sustained a serious injury as defined by Insurance Law § 5102 *(see* CPLR 3212(b); *Alvarez v. Prospect Hospital*, 68 NY2d 320; *Guardado v. Cortez*, 269 AD2d 425 [2d Dept 2000]).

In opposition to the motion, plaintiff submitted: an unsworn accident report, an unsworn narrative report of plaintiff's internal medicine physician, Gustave Drivas, M.D. dated June 10, 2003, an unsworn narrative report of plaintiff's orthopedic surgeon, Azriel Benaroya, M.D., an unsworn narrative report of plaintiff's physical medicine and rehabilitation physician, Vladimir Kirkorov, M.D. dated March 23, 2003, unsworn medical records, unsworn reports of plaintiff's neuroradiologist, Stephen Zinn, M.D., an attorney's affirmation, and plaintiff's own deposition 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 [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, and plaintiff's own verified bill of particulars, defendant established a *prima facie* case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d).

The affirmed report of defendant's independent examining orthopedic surgeon, Jacquelin Emmanuel, MD, indicates that an examination conducted on August 27, 2007, revealed that there is no disability. Dr. Emmanuel's diagnosis consists of: "[r]esolved sprain/strain of cervical, thoracic, and lumbar spine"; "[r]esolved sprain of bilateral elbows;" [r]esolved sprain of bilateral knees."

The affirmed report of defendant's independent examining neurologist, Maria Audrie de Jesus, M.D. indicates that an examination conducted on August 27, 2007 revealed that there is no objective evidence of any disability. Her diagnosis consists of "[s]tatus post cervical and lumbar sprain, resolved."

The affirmed report of defendant's evaluating radiologist, Jessica F. Berkowitz, M.D., revealed that an MRI of the plaintiff's right knee perfomed on April 11, 2003 revealed an unremarkable examination. She opines that "[t]here is no evidence of acute traumatic injury to the knee such as fracture, bone marrow edema, meniscal or ligamentous tear." Dr. Berkowitz concludes that there is no causal relationship between the alleged accident and the MRI findings.

Additionally, the plaintiff's verified bill of particulars indicates that plaintiff, Narajo was not confined to a hospital as a result of the accident, confined to bed for approximately four (4) days as a result of the accident, and confined to her house for one (1) month 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 defendant's 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*, 57 NY2d 230, *supra*).

B. Plaintiff fails to raise an issue of fact

In opposition to the motion, plaintiff submitted: an unsworn accident report, an unsworn narrative report of plaintiff's internal medicine physician, Gustave Drivas, M.D. dated June 10, 2003, an unsworn narrative report of plaintiff's orthopedic surgeon, Azriel Benaroya, M.D., an unsworn narrative report of plaintiff's physical medicine and rehabilitation physician, Vladimir Kirkorov, M.D. dated March 23, 2003, unsworn medical records, unsworn reports of plaintiff's neuroradiologist, Stephen Zinn, M.D., an attorney's affirmation, and plaintiff's own deposition testimony.

Plaintiff has failed to submit any competent medical evidence in admissible form. 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 plaintiffs' examining doctors will not be sufficient to defeat a motion for summary judgment (s *ee, Grasso v. Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]).

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]).

Moreover, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving deposition statement is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Finally, plaintiff has failed to raise a triable issue of fact as to 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, *Licari v Elliott*, 57 NY2d 230 [1982]; *Berk v. Lopez*, 278 AD2d 156 [1st Dept 2000], *lv denied* 96 NY2d 708 [2001]). Plaintiff failed to include any expert reports in admissible form whereby the expert renders an opinion on the effect the injuries claimed may have had on the plaintiff for the 180 day period immediately following the accident. Plaintiff's own deposition testimony was insufficient to establish a triable issue of fact as to whether he suffered from a medically determined injury that curtailed him from performing his usual activities for the statutory period (*Licari v. Elliott*, 57 NY2d 230 at 236). Accordingly, plaintiff's unsubstantiated 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]). In the absence of any medically objective evidence (*see, Toure v. Avis*, 98 NY2d 345, 357 [2002]), her subjective claims of pain and her unsubstantiated claim of inability to perform her customary daily activities are insufficient to raise a triable issue of fact (*see, Copeland v. Kasalica*, 6 AD3d 253 [1st Dept 2004]).

Therefore, plaintiff, Violetta Narajo'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 shall be granted against

plaintiff Violetta Narajo and the Complaint shall be dismissed as against plaintiff, Violetta Narajo.

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.

This constitutes the Decision and Order of the Court.

Dated: May 22, 2008

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Howard G. Lane, J.S.C.