Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

MARINA RUSANOV,
Plaintiff,

-against-

DAWN M. LEONBRUNO,
Defendant.

Index No. 7835/06

Motion
Date July 1, 2008

Motion
Cal. No. 19

Motion
Sequence No. 1

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

Upon the foregoing papers it is ordered that the motion by defendant 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 hereby decided as follows:

This action arises out of an automobile accident that occurred on June 25, 2004. Defendant has submitted proof in admissible form in support of the motion for summary judgment for all categories of serious injury. Specifically, *inter alia*, the defendant submitted affirmed reports from two independent examining and/or evaluating physicians (an orthopedist and a radiologist) and plaintiff's own examination before trial transcript testimony wherein plaintiff testifies that she only missed about one week to ten days of work as a result of the accident.

In opposition to the motion, plaintiff submitted, *inter alia*, sworn affirmations and narrative reports of plaintiff's treating and evaluating physicians, plaintiff's own examination before trial transcript testimony, plaintiff's own affidavit, 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 [3d 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 examination before trial transcript testimony, 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 orthopedist, Michael J. Katz M.D., indicates that an examination conducted on November 5, 2007 revealed a diagnosis of resolved cervical strain, thorocolumbosacral strain, and bilateral shoulder contusions. He opines that plaintiff "shows no signs or symptoms of permanence relative to the musculoskeltal system and relative to 06/25/04." He further opines that there is no disability and that she is capable of gainful employment and of her activities of daily living. Dr. Katz concludes that with regard to causality, "the mechanism injury of described is a competent causative mechanism for production of soft tissue injuries that have resolved over the passage of time."

The affirmed report of defendant's independent evaluating radiologist, Joseph J. Macy, MD, indicates that an MRI of the lumbosacral spine taken on July 26, 2004 indicates narrowing of the disc space at L3-L4 believed to be on a congenital basis and not related to trauma. Dr. Macy attests that there are no bulges or herniated lumbar discs. Additionally, an MRI of the right shoulder taken on August 6, 2004 revealed a normal MRI of the right shoulder with no findings of a rotator cuff tear injury.

In addition, defendant submitted the plaintiff's own examination before trial transcript testimony wherein plaintiff testifies that she missed work for a week to ten days after the accident.

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 uncertified and unsworn police accident report, a sworn affirmation and narrative reports of plaintiff's treating osteopath, John J. McGee, D.O., unsworn medical records and reports, a sworn affirmation and narrative report of plaintiff's physician, Michael Bley, M.D., a sworn narrative report of examining physician, Michael J. Katz, M.D., sworn narrative reports of plaintiff's evaluating radiologist, Joseph J. Macy, M.D., plaintiff's own examination before trial transcript testimony, plaintiff's own affidavit, and an attorney's affirmation.

There exists an unexplained gap or cessation in treatment. It is undisputed that plaintiff began receiving medical treatment on July 7, 2004 and ceased receiving medical treatment on November 30, 2004. The Court of Appeals held in *Pommells v. Perez*, 4 NY3d 566 (2005), that a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so *(see also, Perilla v. Akanda*, 828 NYS2d 751 [Bronx Cty 2006]). Courts applying the *Pommels* standard have consistently held that in order for the explanation to be considered reasonable it must be "concrete and substantiated by the record." (*Gomez v. Ford Motor Credit Co.*, 10 Misc 3d 900 [Sup. Ct., Bronx Cty 2005]). The affirmed medical reports submitted by plaintiff's physicians do not provide any information concerning an explanation for the approximately 3½ year gap in treatment *(Medina v. Zalmen Reis & Assocs.*, 239 AD2d 394 [2d Dept 1997]). Here, plaintiff's doctors provide no explanation as to why plaintiff failed to pursue any treatment during the period from November 30, 2004 – April 2008. In the instant case, plaintiff herself fails to provide any explanation in her affidavit as to why she stopped treatment. Plaintiff's

attorney states that plaintiff has provided an explanation to the Court via affidavit, which explanation consists of the fact that she felt further treatment would not help and that her No-Fault benefits were cut-off. However, her affidavit appears to be completely silent on all matters relating to a gap or cessation in treatment.

Also, the plaintiff 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). The record must contain objective or credible evidence to support the plaintiff's claim that the injury prevented her form performing substantially all of her 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 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 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 [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]).

Moreover, 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]).

Additionally, plaintiff's self-serving deposition statement

concerning treatment is "entitled to little weight, and [is] certainly insufficient to raise a triable issue of fact" (*Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 383 [1st Dept 1985]).

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 on all categories 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.

The foregoing constitutes the decision and order of this Court.

Dated: August 12, 2008

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Howard G. Lane, J.S.C.