Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

GANIU AKANNI and AYODELE OJO,

Plaintiffs,

-against-

ANSELMO SANDOVAL,

Defendant.

Index No. 3707/07

Motion
Date October 14, 2008

Motion
Cal. No. 1

Motion
Sequence No. 1

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
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Upon the foregoing papers it is ordered that the motion by defendant, Anselmo Sandoval for summary judgment dismissing the complaint of plaintiff, Ganiu Akanni pursuant to CPLR 3212, on the ground that said 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 June 11, 2006. Defendant has submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury except for the category of 90/180 days. The defendant submitted *inter alia*, affirmed reports from three independent examining and/or evaluating physicians (an orthopedist, a neurologist, and a radiologist).

In opposition to the motion, plaintiff submitted: unsworn and uncertified hospital records, an affirmed radiology report of Howard J. Gelber, M.D. of the cervical and lumbar spines, a sworn affidavit of plaintiff's treating chiropractor, Andrew Susi, DC, an affirmed report from plaintiff's treating physical medicine and rehabilitation doctor, John McGee, D.O., an attorney's affirmation, the examination before trial transcript testimony of plaintiff, Ganiu Akanni, plaintiff's own affidavit, and an affidavit of plaintiff's wife, Wuosilat Akanni.

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. Defendant established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d), for all categories except for the category of "90/180 days."

The affirmed report of defendant's independent examining orthopedist, Leon Sultan, M.D., indicates that an examination conducted on January 16, 2008 revealed that plaintiff is orthopedically stable and neurologically intact. He opines that "[t]he only significant positive clinical finding to note it the profound atrophy involving his right calf muscle and tightness involving the right Achilles tendon dating back to early childhood and unrelated to the occurrence of 6/11/06." Dr. Sultan concludes that clinically, there is no correlation between the spinal examination and the spinal MRI readings.

The affirmed report of defendant's independent examining neurologist, Marina Neystat, M.D., indicates that an examination conducted on February 26, 2008 revealed a diagnosis of normal neurologic examination and resolved cervical and lumbar sprains. She opines that the plaintiff does not need any further testing and or treatments. Ms. Neystat concludes that the claimant can

continue with normal working and daily living activities without limitation.

The affirmed report of defendant's independent evaluating radiologist, Stephen W. Lasting, M.D. indicates that an MRI study of the cervical spine on July 31, 2006, revealed "unequivocal evidence of advanced multilevel degenerative disc disease with multilevel intervertebral disc space narrowing and disc dessication. Disc space narrowing and disc dessication are the hallmarks of degenerative disc disease." He concludes that the multilevel disc pathology is degenerative in nature and is unrelated to the accident. The affirmed report of plaintiff's independent evaluating radiologist, Stephen W. Lasting, M.D. indicates that an MRI study of the lumbar spine on August 7, 2006 revealed "unequivocal evidence of degenerative disc disease with disc dessication at both the L4-L5 levels, more pronounced at L5-S1." He opines that the annular bulging at L5-S1 is degenerative in nature and unrelated to the accident. Dr. Lastig concludes that he see no evidence of disc bulging at the L4-L5 level, and no evidence of formal narrowing.

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]). Defendant's experts examined plaintiff in 2008, more than 1½ years after the date of plaintiff's alleged injury and accident on June 11, 2006. Defendant's 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 IMEs 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, defendant has failed to meet his initial burden of proof and, therefore, has not shifted the burden to plaintiff to lay bare his evidence with respect to this claim. As defendant has 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 defendant's motion on this issue were sufficient to raise a triable issue of fact (*Manns v. Vaz*, 18 AD3d 827 (2d Dept 2005]). Accordingly, defendant is not entitled to summary judgment with respect to the ninth category of serious injury.

The aforementioned evidence amply satisfied defendant's initial burden of demonstrating that plaintiff did not sustain a

"serious injury" for all categories except for the ninth category of "90/180-days." 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]) for all categories except for the "90/180-day" category. 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 a triable issue of fact

In opposition to the motion, plaintiff submitted: unsworn and uncertified hospital records, an affirmed radiology report of Howard J. Gelber, M.D. of the cervical and lumbar spines, a sworn affidavit of plaintiff's treating chiropractor, Andrew Susi, DC, an affirmed report from plaintiff's treating physical medicine and rehabilitation doctor, John McGee, D.O., an attorney's affirmation, the examination before trial transcript testimony of plaintiff Ganiu Akanni, plaintiff's own affidavit, and an affidavit of plaintiff's wife, Wuosilat Akanni.

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, the unsworn and uncertified hospital records of plaintiff are inadmissible and will not be sufficient to defeat a motion for summary judgment *(see, Grasso v. Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]).

Additionally, plaintiff has failed to rebut evidence of a preexisting degenerative condition. Although defendant's independent evaluating radiologist concludes in his affirmed reports that plaintiff's MRI films showed evidence of degenerative disc disease of the cervical and lumbar spines, which disc pathology is unrelated to the accident of June 11, 2006, 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 (*see, 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).

As plaintiff has failed to rebut evidence of a

preexisting degenerative condition, 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]). 2003).

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 (*Sloan v. Schoen*, 251 AD2d 319 [2d Dept 1998]).

Moreover, plaintiff's self-serving affidavit and deposition statements are "entitled to little weight" and are insufficient to raise triable issues of fact (*see, Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 383 [1st Dept 1985]; *Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact on all categories except for the ninth category of "90-180" days (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Accordingly, the defendant's motion for summary is granted for all categories except for the category of "90/180 days" and the plaintiff's Complaint is dismissed as to all categories except for the category of "90/180-days."

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.

The foregoing constitutes the decision and Order of this Court.

Dated: November 14, 2008

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Howard G. Lane, J.S.C.