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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice

PART 22

403881

INDEX NO. ~~103881/06~~

MURAT ABALI,

Plaintiff,

MOTION DATE

- v -

MOTION SEQ. NO. ~~001~~ 002

EDWARD REYES, MICHELLE MELENDEZ and JOHN BRULL,

Defendant.

MOTION CAL. NO. 1

The following papers, numbered 1 to 3, were read on this motion by defendant for summary judgment on the threshold "serious injury" issue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	3

Cross-Motion: ■ Yes ☐ No

On October 31, 2003, plaintiff Murat Abail was involved in a motor vehicle collision with a vehicle operated by the defendant Edward Reyes, while in the employ of Michelle Melendez and owned by the defendant John Brill. The collision took place northbound on the Cross Island Parkway near the Union Turnpike exit, Queens County, New York. On or about October 14, 2004 plaintiff commenced this action, to recover damages for alleged personal injuries suffered as a result of the of the automobile accident The defendants filed an answer timely and issue was joined. The parties completed discovery and a Note of Issue was filed on February 15, 2007. Defendants Edward Reyes and Michelle Melendez move for an order pursuant to CPLR § 3212, granting summary judgment dismissing the complaint on the basis that plaintiff cannot prove that he suffered a serious injury, pursuant to Insurance Law § 5102 (d).

SERIOUS INJURY THRESHOLD

Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now

Insurance Law § 5101, *et seq.* - the "No Fault" statute), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*Marquez v New York City Tr. Auth.*, 686 NYS2d 18 [1 Dept 1999]; *DiLeo v Blumberg*, 672 NYS2d 319 [1 Dept 1998]).

Insurance Law § 5102 (d) defines "serious injury" as:

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a on-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less that ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

It is indisputable that five of the nine categories of serious physical injuries discussed by Insurance Law 5102 (d) are not applicable herein as there is no allegation of death, dismemberment, significant disfigurement, fracture or a loss of a fetus. Therefore, the court must determine if the injuries asserted by plaintiff constitute either: (1) a permanent loss of use of a body organ, member, function, or system; (2) a significant limitation of use of a body function or system; (3) a permanent consequential limitation of use of a body function or system; (4) or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Serious injury is a threshold issue, and thus, a necessary element of plaintiff's prima facie case (*Licari v Elliott*, 57 NY2d 230 [1982]; *Toure v Harrison*, 775 NYS2d 282 [1 Dept 2004]; Insurance Law § 5104 [a]). This is in accord with the purpose of the "No-Fault" law,

which was to "'weed out frivolous claims and limit recovery to significant injuries'" (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]; *Licari v Elliott*, 57 NY2d 234 [1982]; *Rubensccastro v Alfaro*, 815 NYS2d 514 [1 Dept 2006]).

In order to satisfy the statutory threshold, the plaintiff must submit competent objective medical evidence of his or her injuries, based on the performance of objective tests (*Grossman v Wright*, 707 NYS2d 233 [2 Dept 2000]; *Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]; *Scheer v Koubek*, 70 NY2d 678, 679 [1987]).

A CT scan or MRI may constitute objective evidence to support subjective complaints (*see Arjona v Calcano*, 776 NYS2d 49 [1 Dept 2004]; *Lesser v Smart Cab Corp.*, 724 NYS2d 49 [1 Dept 2001]). The plaintiff's medical submissions must show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiff' s limitations were significant (*see Milazzo v Gesner*, 822 NYS2d 49 [1 Dept 2006]; *Vasquez v Reluzco*, 814 NYS2d [1 Dept 2006]).

With respect to the categories of significant limitation of use of a body function or system and permanent consequential limitation of use, "'[w]hether a limitation of use or function is "'significant'" or "'consequential'" (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part'" (*Toure v Avis Rent A Car Sys.*, *supra* quoting *Dufel v Green*, *supra*).

SUMMARY JUDGMENT STANDARD

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the courts which may decide the issue on a motion for summary judgment (*Perez v Rodriguez*, 809 NYS2d 15 [1 Dept 2006]). On a motion for summary

judgment based upon a failure to sustain a serious injury, the defendants bear the initial burden of establishing the absence of a serious injury by tendering evidentiary proof in admissible form eliminating any material issues of fact from the case (*Toure v Avis Rent A Car Sys.*, *supra*; *see also Gaddy v Eyler*, *supra*; *Pirrelli v Long Is. R.R.*, 641 NYS2d 240 [1 Dept 1996]).

Defendant may rely either on the sworn or affirmed statements of their examining physician, plaintiff's deposition testimony and plaintiff's unsworn physician's records (*Fragale v Geiger*, 733 NYS2d 901 [2 Dept 2001]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). An affirmed physician's report demonstrating that plaintiff was not suffering from any disability or consequential injury resulting from the accident is sufficient to satisfy a defendant's burden of proof (*see Gaddy v Eyler*, *supra*). In addition, the Courts have unanimously held that a party may not use an unsworn medical report prepared by the parties' own physician on a motion for summary judgment (see *Grasso v Angerami*, 79 NY2d 813 [1991]; *Offman v Singh*, 813 NY2d 56 [1 Dept 2006]). Moreover, CPLR § 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury.

Once a defendant has made such a showing, the burden shifts to the plaintiff to come forward with prima facie evidence, in admissible form, to rebut the presumption that there is no issue of fact as to the threshold question (*see Pommells v Perez*, 797 NYS2d 380 [2005]; *Gaddy v Eyler*, *supra*; *Perez v Rodriguez*, *supra*). A medical affirmation or affidavit based on a physician's own examination, tests, and review of the record, can support the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co.*, 668 NYS2d 16 7 [1 Dept 1998]).

DISCUSSION

In support of their motion for summary judgment, defendants proffer the pleadings, plaintiff's deposition testimony and the affirmed medical report of Michael J. Katz, MD, a board certified orthopedic surgeon and the affirmed MRI medical report by Jessica Berkowitz, MD, a

radiologist. The MRI report indicates "no disc bulges or heriations are present. There is no evidence of acute traumatic injury to the cervical spine..."(see deft Reyes affirmation in support, EX. F, p.1, last paragraph). This evidence establishes that the defendants have come forward with sufficient evidence in admissible form to warrant as a matter of law a finding that plaintiffs have not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d] (*See, Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]; *Lowe v Bennett*, 511 NYS2d 603 [1 Dept 1986], *Affd*, 69 NY2d 700 [1 Dept 1986]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). Thus, the burden shifts to plaintiffs to produce evidentiary proof in admissible form to warrant the showing of the existence of a serious injury creating a triable issue of fact. *(See Zuckerman v City of New York*, *supra*; *Forrest v Jewish Guild for the Blind, supra*).

In opposition, plaintiffs have submitted, an attorney affirmation and the November 24, 2003, unaffirmed MRI medical report by Dr. Mark Freilich. The Courts have unanimously held that a party may not use an unsworn medical report prepared by the parties' own physician on a motion for summary judgment (*See Grasso v Angerami*, 79 NY2d 813 [1991]; *Offman v Singh*, 813 NY2d 56 [1 Dept 2006]) Moreover, CPLR § 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury). Plaintiff's unaffirmed medical reports are inadmissible and will not be considered on this motion. Moreover, the plaintiff submits no medical evidence of injury or treatment for the past *four* years.

Plaintiff has not produced any admissible or credible evidentiary proof to indicate the existence of a "serious injury" as a result of the subject accident. Consequently, plaintiff has failed to demonstrate the existence of a triable issue of fact.

For these reasons and upon the foregoing papers, it is,

ORDERED that the defendants' motion for summary judgment is granted, and it is further,

ORDERED that the defendant John Brull's cross motion for summary judgment is

granted, and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants, dismissing the complaint in its entirety, with costs and disbursements to defendants as taxed by the Clerk, and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: November 24, 2008

Paul Wooten J.S.C.

Paul Wooten
J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**