Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

IBRAHIM GONZALEZ-JIMENEZ,	Index No. 9540/07
Plaintiff,	Motion Date October 28, 2008
-against-	Motion Cal. No. 19
MARIO IDIATRE and NEW YORK CITY TRANSIT AUTHORITY,	Motion
Defendants.	Sequence No. 1

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Upon the foregoing papers it is ordered that the motion by defendants, Mario Idiarte and New York City Transit Authority for summary judgment dismissing the complaint of plaintiff, Ibrahim Gonzalez-Jimenez pursuant to CPLR 3212, on the grounds that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d) and that defendants have no liability with respect to the happening of the subject accident is decided as follows:

I. Summary Judgment Motion on the ground of "Serious Injury"

This action arises out of an automobile accident that occurred on January 22, 2006.

Defendant has submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. The defendant submitted *inter alia*, affirmed reports from two independent examining physicians (an orthopedist and a neurologist) and plaintiff's verified bill of particulars which indicates that he was only confined to bed for one (1) week directly following the accident and that he was only confined to home for one (1) month directly following the accident.

In opposition to the motion, plaintiff submitted: an affirmation of plaintiff's physician, David Zelefsky, M.D. dated September 11, 2008, an affirmation of plaintiff's radiologist, Richard J. Rizzuti, M.D. dated September 8, 2008, sworn MRI reports of the cervical spine and left elbow by Dr. Rizzuti, dated February 14, 2006 and March 3, 2006, respectively, an attorney's affirmation, plaintiff's own examination before trial transcript testimony, and plaintiff's own affidavit.

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 b(*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. Defendant established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d), for all categories

The affirmed report of defendant's independent examining orthopedist, Michael P. Rafiy, M.D., indicates that an examination conducted on October 23, 2007 revealed a diagnosis

of: "status post sprain/strain injuries to the cervical spine, thoracic spine, lumbar spine and left elbow which have now resolved." He opines that plaintiff is not disabled from an orthopedic point view of it. Dr. Rafiy concludes that plaintiff can carry on his regular activities, including work, without restriction; and he concludes that no permanent injury has been sustained as a result of the accident.

The affirmed report of defendant's independent examining neurologist, Dr. Guoping Zhou, M.D., indicates that an examination conducted on October 23, 2007 revealed "status post sprain/strain injuries to the cervical, thoracic and lumbar spine which have now resolved." He opines that plaintiff is not disabled form a neurological perspective. Dr. Zhou concludes that plaintiff has sustained no permanent injury as a result of the accident and can perform all activities of daily living without restrictions.

Additionally, defendants established a *prima facie* case for the category of "90/180 days." Plaintiff's verified bill of particulars indicates that he was only confined to bed for one (1) week directly following the accident and that he was only confined to home for one (1) month directly following 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 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 raises an issue of fact for all categories except for the ninth category of "90/180" days

In opposition to the motion, plaintiff submitted: an affirmation of plaintiff's physician, David Zelefsky, M.D. dated September 11, 2008, an affirmation of plaintiff's radiologist, Richard J. Rizzuti, M.D. dated September 8, 2008, sworn MRI reports of the cervical spine and left elbow by Dr. Rizzuti, dated February 14, 2006 and March 3, 2006, respectively, an attorney's affirmation, plaintiff's own examination before trial transcript testimony, and plaintiff's own affidavit.

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation of plaintiff, is an acceptable method to provide a doctor's opinion regrading the existence and extent of a plaintiff's serious injury. (*O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418, 688 NYS2d 167 [1st Dept 1980]). The affirmed report submitted by plaintiff's treating physician, Dr. David Zelefsky sets forth the objective examination and tests which were performed to support his conclusion contemporaneous with the accident that the plaintiff suffers from significant injuries, to wit: "neck pain with motor weakness in the left upper extremity; post concussion syndrome; dizziness; left medial epicondylitis; left lateral epicondylitis; left elbow contusion; and whiplash" and to support his conclusion based upon a recent examination that the plaintiff suffers from significant injuries, to wit: "cervical radiculopathy, herniated disc at C4-5; cervical myofascitis; tear of the radial collateral ligament in the left elbow; left elbow derangement; left medial epicondylitis; left lateral epicondylitis; post concussion syndrome; headaches; and dizziness." He provided specifics of loss of range of motion. Dr. Zelefsky's report details plaintiff's symptoms, including neck pain and left elbow pain. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident on January 22, 2006, are permanent in nature, and result in a permanent limitation in the plaintiff's range of motion. Furthermore, the affirmation of Dr. Richard Rizzuti indicates that an MRI of the cervical spine taken contemporaneously with the accident indicates a disc herniation and an MRI of the left elbow indicates findings consistent with a tear of the radial collateral ligament. Clearly, the plaintiff's experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion for all categories except for the category of "90/180-days." (*DiLeo v. Blumber*, *supra*, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]).

However, 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 him from performing substantially all of the material acts which constituted his 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 customary activities (*Watt v. Eastern Investigative Bureau, Inc.*, 273 AD2d 226 [2d Dept 2000]). 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 her 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 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, plaintiff submits the affirmation of Dr. Zelefsky dated September 11, 2008 wherein Dr. Zelefsy states in a conclusory, hindsight fashion: "It was further my medical opinion that the injuries as diagnosed would inhibit the patient's ability to carry out normal activities of daily living . . ." 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 him from performing his usual activities for the statutory period (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claim that his injuries prevented him from performing substantially all of the material acts constituting his 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]).

Moreover, plaintiff's self-serving affidavit and deposition statements are "entitled to little weight" and are insufficient to raise triable issues of fact on the "90/180-days" category. (*See, Zoldas v Louise Cab Corp.*, 108 AD2d 378, 383 [1st Dept 1985]; *Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Conclusion

Therefore, plaintiff's submissions are sufficient to raise a triable issue of fact as to all categories except for the ninth category of "90-180-days." Accordingly, defendants', Mario Idiarte and New York City Transit Authority's motion for summary judgment dismissing the complaint of plaintiff, Ibrahim Gonzalez-Jimenez 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 denied 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.

II. Summary Judgment Motion on the ground of No Liability.

That branch of defendants' Mario Idiarte and New York City Transit Authority's motion for summary judgment pursuant to CPLR 3212, dismissing the plaintiff, Ibrahim Gonzalez-Jiminez's complaint against defendants on the grounds that defendants have no liability with respect to the happening of the accident is hereby denied.

This action arises out of a an accident brought to recover damages for personal injuries sustained as a result of alleged negligence. The subject accident occurred on January 22, 2006 on Roosevelt Avenue at or near its intersection with 58th Street, in the County of Queens, City and State of New York. Pursuant to plaintiff's Verified Complaint, a bus owned by defendant New York City Transit Authority and operated by defendant Mario Idiarte negligently made contact with plaintiff's motor vehicle, causing plaintiff to suffer severe physical injuries and causing property damage to plaintiff's vehicle.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against. (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]).

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Defendants established their *prima facie* entitlement to summary judgment by showing that despite the fact that plaintiff, after he parked his car, saw the bus approaching his vehicle, opened his door into oncoming, moving traffic without looking

first to make sure that it was safe to do so, and thereby caused the bus to scratch his door. In support of this branch of the motion, defendants' submitted, *inter alia*, the sworn examination before trial transcript testimony of plaintiff himself and the examination before trial transcript testimony of bus operator, defendant Mario Idiatre. Section 1214 of the Vehicle and Traffic Law states: "No person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, and can be done without interfering with the movement of other traffic, nor shall any person leave a door open on the side of a vehicle available to moving traffic for a period of time longer than necessary to load or unload passengers." Defendants have established that plaintiff's actions were the proximate cause of the accident and that defendants' actions did not contribute to the happening of the accident. Defendants established that there are no triable issues of fact.

In opposition, plaintiff has presented sufficient evidence to demonstrate that there are triable issues of fact precluding summary judgment. Through the submission of such evidence as plaintiff's own examination before trial transcript testimony and the examination before trail transcript testimony of defendant, bus operator, Mario Idiarte, plaintiff established that there are triable issues of fact in connection with, *inter alia*, how the accident happened, whether the bus was traveling too close to plaintiff's vehicle, and whether the plaintiff was contributorily negligent. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendants' motions for summary judgment are denied.

Accordingly, that branch of defendants' Mario Idiarte and New York City Transit Authority's motion for summary judgment pursuant to CPLR 3212, dismissing the plaintiff, Ibrahim Gonzalez-Jiminez's complaint against defendants on the grounds that defendants have no liability with respect to the accident is hereby denied.

The foregoing constitutes the decision and order of this Court.

Dated: December 1, 2008

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Howard G. Lane, J.S.C.