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

PRESENT: HON. PAUL WOOTEN Justice

PART 22

INDEX NO. 102934/06

JOSE NIVAR and AUSTRALIANA LUNA,
Plaintiffs,

- v -

EKOW A . MICAH and TOMER HACKING CORP.,
Defendants.

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 3, were read on this motion by defendants 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)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ■ No

On September 2, 2005, plaintiff Nivar was driving his vehicle on Grand Central Parkway near its intersection with 72nd Road in Queens County, New York, when it collided with defendants' vehicle. On or about March 2, 2006 plaintiffs commenced this action, to recover damages for alleged personal injuries suffered as a result of the of the subject motor vehicle accident. The defendants filed an answer timely and issue was joined. The parties completed discovery and a Note of Issue was filed. On August 28, 2007, defendants moved for an order pursuant to CPLR § 3212, granting summary judgment dismissing Jose Nivar's complaint on the basis that he cannot prove that he suffered a serious injury, pursuant to Insurance Law § 5102 (d). The motion was granted, without opposition on September 28, 2007. Court order dated March 12, 2008, vacated said order and gave leave of court to defendants to resubmit the original summary judgment motion.

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.

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]).

It is well settled that positive MRI results may constitute a serious injury within the

meaning of Insurance Law §5102(d) (*see Pommels v Perez*, 797 NYS2d 380 [2005]; *Nagbe v Mimigreen Hacking Group, Inc.*, 802 NYS2d 416 [1 Dept. 2005]). Furthermore, 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]).

A 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, supra*; *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]). However, "where a defendant fails to meet his initial burden of establishing a *prima facie* case that the plaintiff did not sustain a serious injury, it is not necessary to consider whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact" (*see Offman v Singh, supra*; *Winegrad v New York Univ. Med Ctr., supra*).

DISCUSSION

In support of the motion for summary judgment, defendants proffer the Drew A. Stein Pitman, an orthopedist and Dr. Edward M. Weiland, a board certified neurologist. Dr. Stein noted that plaintiff's ranges of motion were inconsistent throughout the examination, however, he inferred that the restrictions were volitional. Based on the foregoing, defendants have submitted evidence in legally admissible form to meet their *prima facie* burden, entitling them to summary judgment and a finding that plaintiff has not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d] (*see, Gaddy v Eyler, supra; Lowe v Bennett*, 511 NYS2d

603 [1 Dept 1986], *Affd*, 69 NY2d 700 [1 Dept 1986]). Thus, the burden shifts to plaintiff to produce evidentiary proof in admissible form in order to establish the existence of a serious injury *(see Taynisha Baez v Imamally Rahamatali*, 817 NYS2d 204 [2006]*; Franchini v Palmieri*, 775 NYS2d 232 [2003]; *Gaddy v Eyler, supra; Shinn v Catanzaro*, 767 NYS2d 88 [1 Dept 2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Forrest v Jewish Guild for the Blind,* 765 NYS2d 326 [1 Dept 2003]).

In opposition, plaintiff submits the affirmations and affirmed reports of Dr. Larry Neuman and Dr. Robert S. Solomon, a board certified radiologist along with various unaffirmed or uncertified medical reports and records. As mentioned above unsworn medical report are inadmissible and will not be considered on this motion *(see Grasso v Angerami, supra; Offman v Singh, supra*; CPLR § 2106). However, plaintiff's admissible medical evidence, Dr. Neuman's examination, which was conducted shortly after the subject accident constitutes objective medical evidence performed contemporaneously with the occurrence of the accident to substantiate plaintiff's claim (*Pommells v. Perez, supra*). Dr. Neuman also re-evaluated plaintiff on April 16, 2008, where he once again concluded that plaintiff's injuries were permanent. In addition, Dr. Solomon found a disc herniation at C4-C5 with cord impingement and flattening.

For these reasons and upon the foregoing papers, it is

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

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff. Conference To Be Held on January 23, 2009, Rm 103, 9:30 A.M. 80 Centre St.

This constitutes the Decision and Order of the Court.

FILED
JAN 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: December 3, 2008

Paul Wooten J.S.C.

Paul Wooten J.S.C.

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

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