Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

ZHONG LIN, TOBY LIN, an infant, by his mother and natural guardian, YA LING OU and YA LING OU, individually, Plaintiffs, -against- NEW YORK CITY TRANSIT AUTHORITY and MICHAEL RODRIGUEZ, Defendants.	Index No. 14168/04 Motion Date November 25, 2008 Motion Cal. No. 10 and 11 Motion Sequence No. 1 and 2

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Upon the foregoing papers it is ordered that the motions by defendants, New York City Transit Authority and Michael Rodriguez for summary judgment dismissing the complaint of plaintiffs, Zhong Lin, Toby Lin, an infant, by his mother and natural guardian, Ya Ling Ou, and Ya Ling Ou, individually pursuant to CPLR 3212, on the ground that plaintiffs have not sustained a serious injury within the meaning of the Insurance Law § 5102(d) are decided as follows:

This action arises out of an automobile accident that occurred on July 4, 2003. It is alleged that at the time of the accident, plaintiff Zhong Lin was the driver of a motor vehicle in which plaintiff Toby Lin and Ya Ling Ou were passengers; and that plaintiffs' vehicle was rear-ended by defendants' vehicle.

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]).

Zhong Lin

DISCUSSION

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

Defendants have submitted proof in admissible form in support of the motion for summary judgment, against plaintiff Zhong Lin for all categories of serious injury, except for the category of "90/180-days." The defendants submitted, *inter alia*, affirmed reports from two independent examining physicians (an orthopedist and a neurologist).

The affirmed report of defendants' independent examining orthopedist, Wayne J. Kerness, MD, indicates that an examination conducted on June 7, 2007 revealed a diagnosis of: "status-post cervical, thoracic and lumbar sprain/strain" and "status-post right knee injury." He opines that claimant does not need any treatment or testing from an orthopedic perspective. Dr. Kerness concludes that the claimant has "no disability or work restriction."

The affirmed report of defendants' independent examining neurologist, Sarasavani Jayaram, MD, indicates that an examination conducted on June 7, 2007 revealed a diagnosis of: normal neurological examination, no focal deficits, neurologically intact, resolved cervical, thoracic, and lumbar sprain/strain, claimant's knee complaints are deferred to the appropriate specialty. He opines that claimant does not need any treatment or testing from a neurological perspective. Dr.

Jayaram further opines that there is no disability at the present time. Finally, Dr. Jayaram concludes that there are no restrictions of activities of daily living, including work, at the present time.

Defendants have 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]). Defendants' experts examined plaintiff, Zhong Lin on June 7, 2007 almost 4 years after the date of plaintiff's alleged injury and accident on July 4, 2003. Defendants' 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 IME's relied upon by defendants 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, defendants has failed to meet their initial burden of proof and, therefore, has not shifted the burden to plaintiff to lay bare its evidence with respect to this claim. As defendants have failed to establish a *prima facie* case with respect to the ninth category, it is unnecessary to consider whether the plaintiff, Zhong Lin's papers in opposition to defendants' motion on this issue were sufficient to raise a triable issue of fact (*Manns v. Vaz*, 18 AD3d 827 [2d Dept 2005]). Accordingly, defendants are not entitled to summary judgment with respect to the ninth category of serious injury, regarding the plaintiff, Zhong Lin.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiff did not sustain a "serious injury," with regards to all categories except for the ninth category of "90/180-days." Thus, the burden then shifted to plaintiff, Zhong Lin 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]), as to all categories except for the ninth category of "90/180-days." 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, Zhong Lin raises a triable issue of fact

In opposition to the motion, plaintiff, Zhong Lin

submitted: an uncertified police accident report, pleadings, unsworn medical records, an affirmation and narrative report of plaintiff's physiatrist, Ki Y. Park, MD, an affirmation and MRI report of plaintiff's radiologist, Eric Lubin, MD, an MRI report of plaintiff's radiologist, Sidney D. Bogart, MD, an affirmation and MRI report of plaintiff's radiologist, Richard J. Rizzuti, MD, an attorney's affirmation, plaintiff, Zhong Lin's own examination before trial transcript testimony, and plaintiff, Zhong Lin'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 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]). Plaintiff has established a causal connection between the accident and the injuries. The affirmation submitted by plaintiff's treating physiatrist, Ki Y. Park, MD, sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered "significant range of motion deficits in the plaintiff's neck and lower back." Dr. Park's affirmation details plaintiff's symptoms, including, neck pain and lower back pain, and right knee pain." He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of July 4, 2003. Additionally, plaintiff's radiologist, Eric Lubin, MD, interpreted MRI films of plaintiff's cervical spine taken on July 7, 2003 and found a disc bulge and herniation of the cervical spine. Additionally, plaintiff's radiologist, Richard J. Rizzuti, MD, interpreted MRI films of plaintiff's lumbar spine taken on August 12, 2003 and found herniations of the lumbar spine. Furthermore, plaintiff has provided a recent medical examination detailing the status of his injuries at the current point in time (*Kauderer v. Penta*, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Park provides that a recent examination by Dr. Park on August 19, 2008 sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: "[c]ervical strain-sprain, with MRI evidence of bulging disc at C4-5 and herniated disc at C4-5 and herniated disc at C5-6. Lumbar strain-sprain, with MRI evidence of herniated discs at L3-4 and L4-5. Right knee strain-sprain, with MRI evidence of meniscal tear." He further opines that the injuries are permanent in nature, significant, causally related to the motor vehicle accident of July 4, 2003, and result in a permanent

consequential impairment of the patient's abilities. Clearly, the plaintiffs' experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (*DiLeo v. Blumber*, *supra*, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]).

Therefore, plaintiff Zhong Lin has raised a triable issue of fact and accordingly, the defendants' motion for summary judgment is denied in its entirety as against plaintiff Zhong Lin.

Toby Lin

DISCUSSION

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

Defendants have submitted proof in admissible form in support of the motion for summary judgment, against plaintiff Toby Lin for all categories of serious injury, except for the category of "90/180-days." The defendants submitted, *inter alia*, affirmed reports from three independent examining physicians (an orthopedist, a neurologist, and a plastic surgeon).

The affirmed report of defendants' independent examining orthopedist, Wayne Kerness, MD, indicates that an examination conducted on June 7, 2007 revealed a diagnosis of: resolved cervical sprain/strain. He opines that claimant does not need any orthopedic treatment or testing. Dr. Kerness concludes that there is no disability and no restrictions of normal daily activities.

The affirmed report of defendants' independent examining neurologist, Freddie M. Martin, MD, indicates that an examination conducted on June 8, 2007 revealed a "grossly non-focal neurological examination" with "a posterior scalp laceration which has been treated and resolved." He opines that there is no neurological disability. Dr. Martin concludes that there is no indication of any further testing and treatment.

The affirmed report of defendants' independent examining plastic surgeon, Ignatius Daniel Roger, MD, indicates that an examination conducted on June 5, 2007 revealed a diagnosis of two scalp scars which "are visible only with difficulty and not at a

normal scalp distance." He opines that there is no disability. Dr. Roger concludes that with regard to permanency, he anticipates continued fading and blending with the passage of time.

Defendants have 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]). Defendants' experts examined plaintiff, Toby Lin on in June, 2007 almost 4 years after the date of plaintiff's alleged injury and accident on July 4, 2003. Defendants' 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 IME's relied upon by defendants 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, defendants has failed to meet their initial burden of proof and, therefore, has not shifted the burden to plaintiff to lay bare its evidence with respect to this claim. As defendants have failed to establish a *prima facie* case with respect to the ninth category, it is unnecessary to consider whether the plaintiff, Toby Lin's papers in opposition to defendants' motion on this issue were sufficient to raise a triable issue of fact *(Manns v. Vaz*, 18 AD3d 827 [2d Dept 2005]). Accordingly, defendants are not entitled to summary judgment with respect to the ninth category of serious injury, regarding the plaintiff, Toby Lin.

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 a triable issue of fact

In opposition to the motion, plaintiff Toby Lin submitted: an uncertified police accident report, pleadings, an affirmation and narrative report of plaintiff's physiatrist, Ki Y. Park, MD,

unsworn medical records, and an attorney's affirmation, and a guardian affidavit of Ya Ling Ou, Toby Lin's mother and natural guardian.

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 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]). Plaintiff has established a causal connection between the accident and the injuries. The affirmation submitted by plaintiff's treating physiatrist, Dr. Park sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from a "parietal-occipital scalp laceration (3cm long)." Dr. Park's affirmation details plaintiff's symptoms, including, neck pain and pain in the parieto-occipital scalp. He opines that the scars on plaintiff's head are permanent and are causally related to the motor vehicle accident on July 4, 2003. Clearly, the plaintiffs' experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (*DiLeo v. Blumber, supra*, 250 AD2d 364, 672 NYS2d 319 (1st Dept 1998]).

Additionally, plaintiff established a *prima facie* case that the scars on plaintiff, Toby Lin's head as a result of the accident constitutes a significant disfigurement under the statute, and therefore constituted a serious injury. The Court finds that upon viewing the color photographs of Toby Lin's head that has been submitted in opposition to the motion, a reasonable person would "regard the condition as unattractive, objectionable, or as the object of pity or scorn." (*Lynch v. Iqbal*, 56 AD3d 621 [2d Dept 2008]).

Therefore, plaintiff, Toby Lin has raised a triable issue of fact and accordingly, the defendants' motion for summary judgment is denied in its entirety, as against plaintiff Toby Lin.

Ya Ling Ou

DISCUSSION

A. *Defendants established a prima facie case that plaintiff Ya*

Ling Ou did not suffer a "serious injury" as defined in Section 5102(d), for all categories.

Defendants have submitted proof in admissible form in support of the motion for summary judgment, against plaintiff Ya Ling Ou for all categories of serious injury, except for the category of "90/180-days." The defendants submitted, *inter alia*, affirmed reports from four independent examining and/or evaluating physicians (an orthopedist, a neurologist, a dentist and a radiologist).

The affirmed report of defendants' independent examining orthopedist, Wayne Kerness, MD, indicates that an examination conducted on June 7, 2007 revealed a diagnosis of: status-post resolved cervical and lumbar sprain/strain. He opines that claimant does not need any orthopedic treatment or testing. Dr. Kerness concludes that there is no disability and no work restrictions or restrictions of normal daily activities.

The affirmed report of defendants' independent examining neurologist, Sarasavani Jayaram, MD, indicates that an examination conducted on June 7, 2007 revealed a diagnosis of a [n]ormal [n]eurological [e]valuation with no focal deficits" and "[r]esolved cervical, thoracic, and Lumbo-sacral-sprain and strain." He opines that there is no neurological disability. He further opines that the claimant can work at this time. Dr. Jayaram concludes that there is no need for any treatment or testing.

The affirmed report of defendants' independent examining dentist, Even Temkin, DMD, indicates that an examination conducted on June 5, 2007 revealed an impression of: "TMJ discomfort, mostly resolved." He opines that from a dental perspective, there is no disability related to the accident. Dr. Temkin concludes that the claimant is not precluded from activities of daily living, including work.

The affirmed report of defendants' independent examining radiologists, Joseph and Jane Tuvia indicates that an examination of the MRI of the cervical spine dated July 7, 2003 revealed an impression of: "[straightening of the normal cervical lordosis, otherwise normal study. The finding may be positional or reflect muscular spasm. No spinal stenosis is seen." The affirmed report of defendant's independent examining radiologists, Joseph and Jane Tuvia indicates that an examination of the MRI of the lumbar spine dated July 21, 2003 revealed an impression of: a normal study of the lumbar spine with no findings suggesting trauma or sequela of such.

Defendants have 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]). Defendants' experts examined plaintiff, Toby Lin on in June, 2007 almost 4 years after the date of plaintiff's alleged injury and accident on July 4, 2003. Defendants' 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 IME's relied upon by defendants 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, defendants have failed to meet their initial burden of proof and, therefore, has not shifted the burden to plaintiff to lay bare its evidence with respect to this claim. As defendants have failed to establish a *prima facie* case with respect to the ninth category, it is unnecessary to consider whether the plaintiff, Toby Lin's papers in opposition to defendants' motion on this issue were sufficient to raise a triable issue of fact *(Manns v. Vaz*, 18 AD3d 827 [2d Dept 2005]). Accordingly, defendants are not entitled to summary judgment with respect to the ninth category of serious injury, regarding the plaintiff, Toby Lin.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiff did not sustain a "serious injury" with regards to all categories except for the ninth category of "90/180-days." Thus, the burden then shifted to plaintiff, Zhing Lin 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]), as to all categories except for the ninth category of "90/180-days." 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, Ya Ling Ou raises a triable issue of fact

In opposition to the motion, plaintiff Ya Ling Ou submitted: an uncertified police accident report, an affirmation and sworn narrative report of plaintiff's physiatrist, Ki Y. Park, MD, an affirmation and MRI report of plaintiff's radiologist, Eric Lubin, MD, an affirmation and MRI report of plaintiff's radiologist, Richard J. Rizzuti, MD, an attorney's affirmation, plaintiff, Ya Ling Ou's own affidavit, and plaintiff, Ya Ling

Ou's own examination before trial transcript testimony.

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 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]). Plaintiff submitted medical proof that was contemporaneous with the accident showing bulges, and range of motion limitations *(Pajda v. Pedone*, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the injuries. The affirmation submitted by plaintiff's treating physiatrist, Dr. Ki Y. Park sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit: "post traumatic cervical strain-sprain, post traumatic lumbosacral strain-sprain, headaches, and pain in the temporomandibular joint. Dr. Park's affirmation details plaintiff's symptoms, including, neck pain, low back pain, and pain in the left temporomandibular joint. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of July 4, 2003. Additionally, plaintiff's radiologist, Eric Lubin, MD, interpreted MRI films of plaintiff's cervical spine taken on July 7, 2003 and found a disc bulge of the cervical spine. Additionally, plaintiff's radiologist, Richard J. Rizzuti, MD interpreted MRI films of plaintiff's lumbar spine taken on July 21, 2003 and found a disc bulges of the lumbar spine. Furthermore, plaintiff has provided a recent medical examination detailing the status of her injuries at the current point in time (*Kauderer v. Penta*, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Park provides that a recent examination by Dr. Park on August 19, 2008 sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: "cervical strain-sprain, with MRI evidence of bulging disc at C5-6, lumbosacral strain-sprain, with MRI evidence of bulging discs at L4-5. L5-S1." He further opines that the injuries are permanent in nature, significant, causally related to the motor vehicle accident of July 4, 2003, and result in a permanent limitation in the plaintiff's range of motion. Clearly, the plaintiffs' experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (*DiLeo v. Blumber*, *supra*, 250 AD2d 364, 672 NYS2d 319 (1st Dept 1998]).

Therefore, plaintiff, Ya Ling Ou has raised a triable issue of fact and accordingly, the defendants' motion for summary is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: February 23, 2009

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Howard G. Lane, J.S.C.