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

PRESENT: HON. PAUL WOOTEN Justice

PART 22

INDEX NO. 117802/06

CYNTHIA LUIS

Plaintiff,

- v -

MOTION DATE

MOTION SEQ. NO. 002

CRESCENT CAB CORP., ADENISHA ALAGBE and JOSE A MALDONADO

Defendants.

MOTION CAL. NO. 74

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, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ☐ Yes ■ No

On August 20, 2005, a vehicle owned and operated by defendant Jose A. Maldona was involved in a collision with a vehicle owned by defendant Crescent Cab Corp. and operated by defendant Adeshina Alagbe. Plaintiff, Cynthia Luis was a passenger in defendant Maldona's vehicle at the time of the subject accident. The accident occurred on Grand Street at or near its intersection with Forsythe Street, New York, New York. Plaintiff commenced this action, to recover damages for alleged personal injuries suffered as a result of the subject motor vehicle accident. The parties completed discovery and a Note of Issue was filed. Defendant Maldonado now moves for an order pursuant to CPLR § 3212, granting summary judgment and dismissing the complaint on the basis that plaintiff cannot prove that he suffered a serious injury, pursuant to Insurance Law § 5102 (d). Defendants Crescent Cab Co. and Adenisha Alagbe join defendant Maldonado, by cross motion, requesting the same relief and moving to dismiss the complaint pursuant to CPLR § 3211.

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*).

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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 167 [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*).

In deciding a summary judgment motion, the court must bear in mind that issue finding rather that issue determination is the key to summary judgment. See *Sillman v Twentieth Century Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 489 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See *Kesselman v Lever House Restaurant*, 816 NYS2d 13, 29 AD3d 302,, [1

Dept 2006]; *Goldman v Metropolitan Life insurance Company*, 788 NYS2d 25, 13 AD3d 289, [1 Dept 2004].

DISCUSSION

In support of their motion, defendants submit, *inter alia*, the pleadings, plaintiff's deposition testimony and the affirmed medical reports of Dr. Drew A. Stein, an orthopedist and Dr. Edward M. Weiland a neurologist. Dr. Stein examined plaintiff on May 24, 2007, and determined that without examining plaintiff's medical records and after test examinations of plaintiff's thoracic and lumbar spine, plaintiff suffered from a " resolved lumbar sprain." Dr. Weiland examined plaintiff on July 19, 2007, without examining plaintiff's medical records, and with particular focus to the neck, shoulders, cervical spine and knee. Dr. Weiland found a resolved Lumbosacral sprain, resolved contusion to the right knee and "no neurologic residual or permanency."

Defendants also claim a prior injury to the plaintiff's right knee that is the cause of plaintiff's condition. Defendants submit, the unaffirmed medical records, by Dr. Allen Radin plaintiff's rheumatologist. Dr. Radin examined plaintiff on March 27, 2003, (more than two years before the subject accident) and his medical report indicated that plaintiff had been "complaining of severe knee pain" and that "the patient has lupus with associated arthritis."

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], as to; (1) a significant limitation of use of a body function or system; (2) a permanent consequential limitation of use of a body function or system. (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]).

Moreover, the Court of Appeals held in *Pommells v Perez*, 4 NY3d 566, (2005) at 580, 797 NYS2d 380, in a case, "with persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition, plaintiff had the burden to come forward with evidence addressing defendants' claimed lack of causation. In the absence of any such evidence, we conclude--as did the trial court and Appellate Division--that defendant was entitled to summary dismissal of the complaint (*See Franchini, 1 N.Y.3d at 537*; *see also Licari v Elliot, 57 N.Y.2d 230, 237, 441 N.E.2d 1088, 455 N.Y.S.2d 570 [1982]*)".

In opposition, plaintiff submits, *inter alia*, plaintiff's affidavit, the affirmations and medical reports of Dr. Marc Liebskind, a radiologist and Dr. Ramon Valderamma, a neurologist, and the affidavit of Dr. Alicia Klimkiewicz, a chiropractor. Plaintiff also submits, by themselves, various unaffirmed medical records from Beth Israel Hospital. These unaffirmed medical records from Beth Israel Hospital are inadmissible and will not be considered on this motion, (see CPLR §§ 2106, 4518, 2306, and *Grasso v Angerami*, *supra*; *Offman v Singh*, *supra*.)

Plaintiff first began treatment with Dr. Klimkiewicz, a chiropractor, on August 23, 2005 (three days after the accident) through July 20, 2008[1]. Dr. Klimkiewicz immediately referred plaintiff for an MRI examination. Dr. Liebskind's submits the MRI report of plaintiff's lumbar spine, dated August 26, 2005 (six days after the accident), which noted a "small disc bulge[s]" at L-4- L5 and L5-S1. The Court notes that a finding of bulging and herniated discs, by itself,

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[1]Dr. Klimkiewicz writes in his report concerning certain gaps in his records, "we misplaced the progress reports of Cynthia Luis. Thus, my precise, numerical measurements of her range of motion of the affected parts of her body are lost and cannot be replaced. Obviosly, I would not have treated the patient for almost half a year and her symptoms not been connected to the subject car accident. (See Dr. Klimkiewicz's medical report, plaintiff's exhibit c, paragraph 8.)

does not establish a *prima facie* case of serious injury under Insurance Law § 5102(d), (*Pommells v Perez*, 4 NY3d 566 [2005]; *Onishi v N & B Taxi, Inc.*, 51 AD3d 594 [1st Dept 2008]; *Kearse v New York City Transit Authority,* 16 AD3d 45 [2d Dept 2005]).

After reviewing the report, Dr. Klimkiewicz "note[s] [is] the fact that this MRI study did not reveal any degenerative or arthritic changes" and concluded plaintiff had sustained an injury caused by the accident. Dr. Klimkiewicz "advised [her] plaintiff to cease employment and refrain from strenuous activities. (See Dr. Klimkiewicz's medical report, plaintiff's exhibit c, paragraph 10 and 11.) After five months of treatment, Klimkiewicz determined that plaintiff had "reached maximum medical improvement", (Id, paragraph 13). Dr. Klimkiewicz, subsequently conducted a recent examination of plaintiff on July 17, 2008, and conducted range of motion tests and determined that plaintiff's injuries " are permanent in nature" and "are causally connected to the car accident of August, 20, 2005".

Dr. Klimkiewicz, also concluded in her affidavit, that Dr. Radin misdiagnosed plaintiff with Lupus in the right knee. In support of this argument, Dr. Klimkiewicz relies upon the unaffirmed medical records from Beth Israel Hospital. However, this is not persuasive to the court, because a chiropractor may not improperly rely "upon unsworn medical reports by other physicians in arriving at her diagnosis and conclusions", (see *Puerto v Omholt*, 794 N.Y.S.2d 117 [2 Dept. 2005]; *Friedman v U-Haul Truck Rental*, 627 NYS2d 765 [1995]).

Dr. Valderamma, a neurologist, referred by Dr. Klimkiewicz, examined plaintiff on October 26, 2005 (two months after the subject accident) and on July 17, 2008. Dr. Valderamma's affirmation, included his findings of limitations in plaintiff's range of motion tests in her lumbar spine, on both dates. Dr. Valderamma acknowledges that he was aware that after five months of therapy Dr. Klimkiewicz concluded plaintiff would not benefit from further treatment and the previous Lupus diagnosis. He also acknowledges that he was aware diagnosis of plaintiff's diagnosis with Lupus. Dr. Valderamma defines Lupus as " a disease

which affects the connective tissue in all parts of the body, causing arthritis conditions in the body." However, despite the Lupus diagnosis in plaintiff's knee, Dr. Valderamma determined that plaintiff's lumbar "injuries may be permanent, ...are causally connected to the subject car accident of August 20, 2005". Dr. Valderamma supports his lumbar spine injury conclusion based upon plaintiff's (August 26, 2005) "MRI study did not reveal any degenerative or arthritic changes" and his limited range of motion tests on October 26, 2005 and July 17, 2008.

We conclude, plaintiff's admissible proof satisfied the contemporaneous and recent examination and gap in treatment requirements to substantiate a claim of "serious injury" pursuant to Insurance Law § 5102 (d)" *(*See *Pommel v Perez, supra, Thompson v Abbasi,* 788 NYS2d 48 [1 Dept 2005]). Moreover, we also conclude with defendants' persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition such as Lupus, that plaintiff has met her burden to come forward with evidence addressing defendant's claimed lack of causation as to her lumbar spine. (See *Pommel v Perez, supra at 566, 579, Styles v Joseph,* 32 AD3d 212; 820 NYS.2d 26 [1 Dept 2008]; *Carter v Full Serv., Inc.,* 29 AD3d 342, 815 NYS2d 41 [1 Dept 2006]; *Montgomery v Pena,* 19 AD3d 288, 289-290, 798 NYS2d 17 [1 Dept 2005]; *Franchini,* 1 NY3d at 537; *Licari v Elliot,* 57 NY2d 230, 237, 455 NYS2d 570 [1982]).

Here, when we have "conflicting medical evidence [is] offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (*Martinez v Pioneer Transp. Corp.*, 48 AD3d 306, 307 [1st Dept 2008]). Thus, defendants' motion "must be denied since the court cannot pass on the credibility of witnesses on such a motion" (*Hourigan v McGarry, supra*, 106 AD2d at 845).

Finally, it was not until their reply that defendants raised new information not offered in their original motion regarding Dr. Valderamma's conclusions and the preparation of the medical evidence relied upon by him in opposition to the motion for summary judgment. A party

non-moving party of the opportunity to respond to the facts or arguments set forth for the first time in a reply affidavit (*see McNair v Lee*, 24 AD3d 159 [1st Dept 2005]; *Sanford v 27-29 W. 181st St. Assn.*, 300 AD2d 250 [1 Dept 2002]).

Accordingly, plaintiff has establish a triable issue of material fact as to whether or not she sustained a serious injury as a result of the subject motor vehicle accident as to her lumbar spine. *(See Zuckerman v City of New York, supra, Forrest v Jewish Guild for the Blind, supra).*

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

ORDERED that the defendant's motion for summary judgment missing the complaint is denied; and it is further,

ORDERED that plaintiff shall serve a copy of this order, with notice of entry within 30 days, upon defendants;

IT IS FURTHER ORDERED that upon service of a copy of this order with notice of entry, the Clerk of the Trial Support Office (Room 158) shall restore this action to its former place on the trial calendar.

This constitutes the Decision and ~~Order~~ of the Court.

Dated: 3-25-09
MAR 25 2009

Paul Wooten J.S.C.

Paul Wooten
J.S.C.

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

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