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

PRESENT: HON. PAUL WOOTEN Justice

PART 22

KIM BROUSSARD,

Plaintiff,

- v -

MAGIC LIMO and GEORGE DURAN,

Defendant.

INDEX NO. 400723/07

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO. 18

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	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

On November 30, 2004, plaintiff was injured, while attempting to exit a motor vehicle owned by New York City Department of Transportation and operated by Eusebio Arias. Such vehicle was struck by a second vehicle owned by defendant Magic Limo and operated by defendant George Duran. The accident occurred on 1st Avenue at or near its intersection with Broadway. On or about January 6, 2006, plaintiff commenced this action, to recover damages for alleged personal injuries suffered as a result of the of the subject motor vehicle accident. The defendant timely filed an answer and issue was joined. The parties completed discovery and a Note of Issue was filed. Defendants now move for an order pursuant to CPLR § 3212, granting summary judgment dismissing the complaint on the basis that plaintiff cannot prove that she 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.

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 than 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 the motion for summary judgment, defendant proffers, *inter alia*, a copy of the pleadings and the affirmed medical reports of Dr. Elizabeth Lazarra, a radiologist, Dr. Maurice Carter, an orthopedist and Dr. Marianna Golden, a neurologist. Defendants also submit the medical reports of plaintiffs doctors, Dr. Ravindra Shah, an orthopedic surgeon, Neville Flowers, a physical therapist, plaintiff's worker's compensation file, and medical records from Nash Hospital, where plaintiff was treated for injuries related to a previous accident. (See *Fragale v Geiger, supra; Pagano v Kingsbury, supra*).

Among the injuries sustained as a result of the subject accident, plaintiff claims that she sustained a tear of her left rotator cuff. Dr. Lazarra, examined plaintiff on January 18, 2006. Dr. Lazarra observed " supraspinatus calcific tendinitis" and a "tear of the distal supraspinatus tendon". Dr. Lazarra, determined that plaintiff's supraspinatus tendinitis was "unlikely to be due to the accident of 11/30/04". Dr. Lazarro concluded that in order to determine whether the tear in plaintiff's rotator cuff is related to the subject accident, a "comparison with a previous left shoulder MRI or correlation with medical examination at the time of the accident" was needed. According to Dr. Lazarra's medical report, plaintiff was referred for and MRI following the subject accident and plaintiff's initial MRI radiology report was unavailable for review. Thus, without reviewing such medical documents, Dr. Lazarro failed to render an opinion as to whether or not plaintiff's injuries were caused by the subject accident.

Dr. Carter examined plaintiff on August 29, 2007. Dr. Carter observed limitations in plaintiff's range of motion in her left shoulder. However, Dr. Carter's affirmation also fails to render an opinion as to the cause of plaintiff's injuries. Dr. Golden examined plaintiff on August 29, 2007. Dr. Golden concluded that plaintiff was " not disabled from a neurological point of view." Dr. Golden did not examine plaintiff's left shoulder and stated " I defer

evaluation of the left shoulder to the appropriate specialty." Thus, Dr. Golden was also unable to render an opinion as to plaintiff's left shoulder injury.

In addition, the medical reports of plaintiffs doctors, plaintiff's worker's compensation file, and medical records from Nash Hospital, submitted by defendant, fail to establish that plaintiff's alleged injuries were sustained as a result of the subject accident or were pre-existing injuries.

Accordingly, defendants have not 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]).

"As a result, it is unnecessary to reach the question of whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact" (*Krayn v Torella*, 40 AD3d 588 [2d Dept 2007]; *Offman v Singh*, *supra*; *Winegrad v New York Univ. Med Ctr., supra*). Plaintiff is only required to make out a *prima facie* case that he sustained a serious injury within the ambit of Insurance Law § 5102(d) if defendants first establish through competent evidence that plaintiff does not have a sustainable cause of action (*DeAngelo v Fidel Corp. Services, Inc.*, *supra*, 171 AD2d at 589; *Rubensccastro v Alfaro*, 29 AD3d 436, 437 [1st Dept 2006],

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

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

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

This constitutes the Decision and Order of the Court.

Dated: March 27, 2009

MAR 27 2009

Paul Wooten J.S.C.

Paul Wooten J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

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