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

PRESENT: HON. PAUL WOOTEN Justice

PART 22

INDEX NO. 113864/06

NINA RABINOVICH,

Plaintiff,

- v -

MOTION DATE

MOTION SEQ. NO. 001

METRO LOFT MANAGEMENT, LLC. and NATHAN BERMAN,

Defendants.

MOTION CAL. NO. 96

The following papers, numbered 1 to 2, 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
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

On August 16, 2006, plaintiff, was involved in a two vehicle by a vehicle with defendants on the westbound Grand Central Parkway at or near its intersection with Long Island Expressway Exit, Queens, New York. Plaintiff was taken to New York Hospital Medical Center Plaintiff commenced this action, on December 20, 2006, 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 on January 8, 2008. Defendants now move 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).

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]).

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 their motion, defendants submit, *inter alia*, plaintiff's deposition testimony and the affirmed medical reports of Dr. Bender, a neurologist, Dr. Robert Israel, an orthopedic surgeon. Dr. Israel's independent medical examination on December 4, 2007, cover the plaintiff's cervical and lumbar spine, right shoulder, right hip and leg. Dr. Bender's independent

medical examination on December 3, 2007, covers the plaintiff's head spine, and neck. Dr. Bender determined, after reviewing plaintiff's unidentified medical records from Healthmakers and New York Queens Hospital, that "there is no disability due to any neurological problem." However, Dr. Bender noted in his report plaintiff's various medical treatments from the following: New York Queens Hospital; by Dr. Shekib, from Healthmakers; and, Dr. Delos Reyes, a chiropractor. Dr. Bender also referenced plaintiff's "September 1, 2006 MRI of the lumbar spine [which] showed, 'central herniations at L5-S1, creating impringment on the thecal sac;" (See defendants' exhibit 9, p 2.)

Dr. Israel concluded, after reviewing plaintiff's various identified medical records from New York Queens Hospital and Healthmakers and an "MRI of the lumbar spine, 9/1/06 " that plaintiff's "has no disability as a result of the accident of record" subjective complaints there were no objective findings to support them." (See defendants' exhibit 8, p 1, record review, p 3, disability.)

Defendants also submit an affirmed medical report from Dr. Stephan Lustag's, a radiologist, who on November 14, 2007, reviewed plaintiff's September 1, 2006 "MRI study" (taken two weeks after the subject accident). He concludes "unequivocal evidence of degernerative disc disease with disc desiccation at L5-S1 level...in my opinion [it] is most likely degenerative in origin and, therefore, unrelated to the accident of 8/16/2006." (See defendants' exhibit 10, p 2, para. 2.) Dr. Lustag does not attach the plaintiff's September 1, 2006 MRI study to his report, but instead incorporate's its finding in his report. A contrary opinion that plaintiff suffered from a chronic degenerative condition rather than injuries caused by the accident, even assuming it is true, is not dispositive since the exacerbation of such a condition by the accident could constitute a serious injury under the statute (see *Cebularz v. Diorio*, 32 AD3d 975 [2d Dept 2006]), but may be taken with other proof.

The plaintiff does not contest that the defendants have met their burden of proof, thus, 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, *inter alia*, plaintiff's deposition testimony, the affirmed medical report of Dr. Aric Hausknecht[1], a physician and plaintiff's "MRI study" taken on September 1, 2006. Plaintiff's MRI records are not included in plaintiff's proof, but incorporated or referenced in Dr. Lustag's and Dr. Bender's opinions that were offered as apart of defendants' proof.

Dr. Hausknecht conducted his initial examination of plaintiff on September 18, 2006 (thirty-two days after the accident) continued treatment with plaintiff on July 2, 2007 and July 9, 2007 and Dr. Hausknecht conducted and allegedly reviewed various tests in the April 29, 2008 examination (one year and eight months after the accident). (See Dr. Hausknecht's medical report, plaintiff's exhibit b.) He concludes that plaintiff has sustained significant limitations of

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[1] Dr. Hausknecht's medical report (p 1, paragraph 5-6) refers to Dr. Shekib Kambiz and Dr. Valerie Delos Reyes who perform some medical treatment at the Healthmaker's facility. Plaintiff counsel's affirmation (paragraph 7) and plaintiff's deposition testimony claims these medical persons performed some medical treatment at the Healthmaker's facility, however, there are no medical records or affirmations supporting their activity. Moreover, Dr. Hausknecht's medical report recites as part of plaintiff's medical history these medical persons, but does not indicate he ever reviewed any of their medical records. However, defendants' referenced and reviewed their records within their proffered medical proof. The Court notes, that the plaintiff did not contest defendants meeting their burden of proof, but proffers instead, only that plaintiff has raised a triable issue of fact in opposition to this motion. Thus, Dr. Shekib Kambiz and Dr. Valerie Delos Reyes' medical records, if admissible, are admissible only to the extend indicated referenced and legally admissible by the defendants' medical proof.

functions of her neurological and musculoskeletal system. She has a permanent partial disability that is consequentially related to the motor vehicle accident of 8/16/06 and I have advised her to restrict her activities."

However, Dr. Hausknecht's medical report and conclusions are flawed. He does not review the medical records of Dr. Shekib Kambiz and Dr. Valerie Delos Reyes' or the other Hospital records indicated[2] that he relied upon. He also does not review the plaintiff's NCV/EMG studies on September 18, 2006. Nor does he attach any of these records to incorporate them by reference so that they are admissible proof on their own. And when he conduct his own tests on April 29, 2009, including a Range of Motion Test, he does not address what effect, if any, plaintiff's 8th month pregnancy[3] may have had on the result, except to indicate that the most significant test result is "partially limited by abdominal girth" (See Dr. Hausknecht's medical report (p 3, paragraph labeled Range of Motion). Under the totality of circumstances Dr. Hausknecht's conclusions are based upon incomplete and/or inadmissible and flawed medical evidence.

In conclusion, plaintiff's "September 1, 2006 MRI of the lumbar spine showed, 'central herniations at L5-S1, creating impringment on the thecal sac;" (See defendants' exhibit 9, p 2.) however, "proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommels v Perez*, 4 N.Y.3d 566, 574 [2005]; *Park v Champagne*, 824 NYS2d 84, 86 [1 Dept 2006]). Plaintiff in her subsequent proof, fails to submit sufficient credible or admissible evidence of a recent evaluation in order to establish that her alleged limitations still exist (*Thompson v Abbasi*, 788 NYS2d 48 [1 Dept 2005]), hence, plaintiff's admissible proof

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[2]Dr. Hausknecht's writes in his medical report (p 1, paragraph 1)"I personally performed a comprehensive history and physical examination of this patient on the date above. All available records and diagnostic testing have been reviewed. " This reference is vague and insufficient to indicate which medical records he did or did not review.

[3]Dr. Hausknecht's writes in his medical report (p 2, paragraph 12), "Abdominal exam [taken on April 29, 2009] is consistent with 8 month pregnancy." (Also see October 19, 2007 Deposition p. 60, 62)

does not satisfied the contemporaneous and recent examination requirements to substantiate a claim of "serious injury" pursuant to Insurance Law § 5102 (d)" *(See Pommel v Perez, supra, Thompson v Abbasi, supra*).

Accordingly, plaintiff has not demonstrated by admissible or credible evidentiary proof, the existence of a triable issue of fact as to whether or not he sustained a "serious injury" as a result of the subject accident. *(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 to dismiss is granted; and it is further,

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

This constitutes the Decision and Order of the Court.

Dated: April 6/2009

Paul Wooten J.S.C.

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

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