Cekic v Zapata
2009 NY Slip Op 30935(U)
April 21, 2009
Supreme Court, New York County
Docket Number: 110704/06
Judge: Paul Wooten
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[* 1]
SCANNED ON 4/23/2009

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

PRESENT: HON. PAUL WOOTEN Justice

PART 22

INDEX NO. 110704/06

ASIM CEKIC and ALMERA CEKIC,
Plaintiff,

- v -

CARLOS E. ZAPATA,
Defendant.

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO. 19

The following papers, numbered 1 to 3, were read on this motion by defendant for summary judgment on the threshold "serious injury" issue and cross-motion by plaintiff to amend her bill of particulars.

FILED
APR 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

On September 25, 2005, plaintiff Asim Cekie and his wife Almera Cekic were the driver and passenger, respectively, in a motor vehicle that was rear ended in a collision with a vehicle owned and operated by defendant. The accident occurred Southbound on I-87 (New York Thruway) near the intersection South Kingston in the Town of Rosedale, New York. On or about July 10, 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 parties completed discovery and a Note of Issue was filed. Defendant now moves for an order pursuant to CPLR § 3212, granting summary judgment dismissing the complaint, on the threshold issue of "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.

It is indisputable that five of the nine categories of serious physical injuries discussed by Insurance Law 5102 (d) are not applicable herein as there is no allegation of death, dismemberment, significant disfigurement, fracture or a loss of a fetus. Therefore, the court must determine if the plaintiffs' constitute either: (1) permanent loss of use of a body organ, member, function or system; (2) a permanent consequential limitation of use of a body function or system; (3) a significant limitation of use of a body function or system; and (4) a medically determined injury or impairment of a non-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 than 90 days during the 180 days immediately following the occurrence of the injury or impairment. (See defendant's motion, plaintiffs' bill of particulars, exhibit c, paragraph 23)

Serious injury is a threshold issue, and thus, a necessary element of plaintiffs' 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 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

FACTUAL ALLEGATIONS

On September 25, 2005, plaintiffs Asim and Almeric Cekic, husband and wife, respectively, allegedly sustained injuries after being involved in a car accident while traveling Southbound on I-87 (New York Thruway) near the intersection South Kingston, Town of Rosedale. The Cekic's vehicle, operated by Asim Cekic was struck in the rear by a car owned and operated by defendant. On the date of the accident, Asim Cekic was 44 years old and employed as a superintendent. Almeric Cekic, was 30 years old and employed as an office cleaner. After the accident, Almeric Cekic was taken to the emergency room at Benedictine Hospital and later released. Asim Cekic was not treated at the scene or at the emergency room. As a result of the impact, plaintiff Asim Cekic complained of head, neck, back, right shoulder pain and teeth injury. Almeric Cekic complained of head, neck, back, shoulder pain.

Plaintiff Asim Cekic had been involved in two previous motor vehicle accidents. The first

accident occurred on August 12, 2003[1] and the second accident occurred on June 28, 2005[2]. The June 28, 2005 accident is the subject of a case pending in the New York State Supreme Court, Queens County, index no. 26624/2006. The defendant has submitted a copy of both plaintiffs' deposition in that case, to their opposition papers here.

I. *Plaintiff Asim Cekic*

In support of the motion for summary judgment, defendants proffer, *inter alia*, the plaintiff's deposition testimony and the affirmed medical reports of Dr. Adam M. Bender, a neurologist and Dr. Salvatore Lenzo, an orthopedist. Dr. Bender concluded, after a medical examination on January 10, 2008 and after reviewing plaintiff's medical records, including records from the two previous motor vehicle accidents on August 12, 2003 and June 28, 2005, that plaintiff '"neurological examination is normal with no objective evidence of any neurological problems that would explain his persistent subjective complaints" (See defendants' motion, Dr. Bender's report, exhibit e, p 8, para. 1.) Dr. Lenzo concluded, also reviewing the plaintiff's medical records that " at this time [there] is mild mechanical low back and neck pain with mild radicular symptoms into the right lower extremity... I believe he has reached maximum medical improvement from treatment since this is now over 21/2 years from the time of injury. He is working at the present time. He, in my opinion, has a very mild degree of disability with regard to his lower back, but there are no restrictions with regard to his working." (See Dr. Corso's report, exhibit f, p 2, para 2.)

The defendant proffers they meet their burden of proof on the plaintiff's 90/180-day claim, because the plaintiff's bill of particulars (see plaintiff's motion, bill of particulars, exhibit c,

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[1]See plaintiff's affirmation in opposition, Dr. Bonnie Gassman's medical report, dated 9/28/2005, p 1, which states "previous wc open lawsuits: injuries to his neck, mid back and left hand were sustained as a bicyclist on 8/12/2003." Also see defendants motion for summary judgment, exhibit e, Dr. Bender's medical report, p 2, para. 3, "On August 12, 2003, he was in a accident where he was struck while on a bicycle."

[2]See, (1) defendants' motion for summary judgment, exhibit e, Dr. Bender's medical report, p 3, para. 8, "On June 28, 2005, he was in a second motor vehicle accident...he complained persistent headaches, neck pain and finger pain after the accident."; (2) defendants' motion for summary judgment, exhibit c, affidavit of Asim Cekic, p 64, line 20.

paragraph 12), supported by his deposition testimony from the subject accident (exhibit c) and the previous June 8, 2005 accident case (exhibit l), indicates that plaintiff was confined to bed for three days, and after returning to work as a superintendent, does not meet the 90/180-day standard for curtailment. Defendant also proffers that in the absence of contrary information, including defendant's medical evidence that plaintiff was not medically injured per the 90/180-day period, they need no other information to meet their burden of proof.

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*, the affirmed MRI report of the plaintiff's cervical and lumbar spine performed by Dr. Glenn Schwatz, on October 21, 2005 (24 days from the subject accident), the affidavit of Dr. Bonnie Gassman, plaintiff's treating Chiropractor. Plaintiff also submits Dr. Gassman's medical reports dated September 28, 2005 and August 6, 2008. However, such reports are not certified pursuant to CPLR § 4518 nor are they referenced or annexed by Dr. Gassman's affidavit.

The Courts notes that unaffirmed or uncertified medical reports and records are normally inadmissible and will not be considered on a motion for summary judgment (*Grasso v Angerami, supra*; *Offman v Singh, supra*; CPLR § 2106). However, unaffirmed or uncertified medical records may be admissible where they were properly referenced by defendants'

medical experts (See *Pommells v Perez*, 4 NY3d 566, 577 n 5 [2005]; *Navedo v Jaime*, 32 AD3d 788, 822 NYS2d 43, [1 Dept 2004]; Brown v Achy, 9 AD3d 30 [1 Dept 2004]; supra; Gonzalez v Vasquez, 301 AD2d 438 [1 Dept 2003] *Ayzen v Melendez*, 299 AD2d 381 [1 Dept 2002].) In addition, a plaintiff's medical reports that are properly referenced in defendants motion and contain evidence adduced by a persons own first-hand observations are admissible (*See Rice v Moses*, 752 NYS2d 318 [1 Dept 2002]; *see Iacobazzo v Asad*, 776 NYS2d 464 [1 Dept 2004]). Dr. Gassman's medical reports dated September 28, 2005, were properly referenced by defendant's medical expert, in his sworn affirmation, thus, such records are admissible.[3]

Dr. Scwartz's MRI report indicated that plaintiff had a "L4-L5 diffuse bulging posterior [disc]...L5-S1 left posterior disc herniation" Dr. Gassman affidavit indicated he conducted physical examinations and range of motion tests to the plaintiff's cervical and lumbar spine at his initial examination on September 28, 2005 (three days after the accident), on February 3, 2006 and at his recent examination on August 6, 2008. All three examinations indicated significant limitations in plaintiff's range of motion. Plaintiff was treated with chiropractic adjustments, exercises and therapy from September 28, 2005 until February 3, 2006 and subsequently

The plaintiff's opines that these tests revealed injuries to plaintiff's cervical and lumbar spine, supported by Dr. Gassman' affidavit which concludes that plaintiff's injuries were causally related to the motor vehicle accident of September 25, 2005[4]. But this conclusion is contradicted by plaintiff's own initial medical report from his medical examination on September

[3]The admissibility of Dr. Gassman's two page August 6, 2008-examination medical record is not dispositive. Dr. Gassman's August 6, 2008 examination results, among other things, including the object test are included in Dr. Gassman's affidavit. For argument sake, the court finds that if the August 6, 2008 medical records were admissible, they would not change the Court's conclusion.

[4]Dr. Gassman's affidavit indicates "that all of the injuries, symptoms and findings as to the above are a directs results of the motor vehicle accident on September 5, 2005 " *not September 25, 2005, the date indicated in plaintiff's complaint and bill of particulars.* Dr. Gassman's attached medical report dated September 28, 2005 indicates the date of the accident as September 25, 2005.

28, 2005. The plaintiff's initial medical examination report (by Dr. Gassman dated 9/28/2005) indicates he was involved in a previous motor vehicle accident on a bicycle on 8/12/03, with injuries to the neck and mid back. Defendant's medical evidence (affirmation by Dr. Bender) indicated plaintiff's complaint of neck and back injuries from the June 8, 2005 motor vehicle accident. Dr. Gassman, in his affidavit, concludes that the defendants' September 25, 2005 subject accident is the cause of plaintiff's injuries is rendered suspect and not supportable when Dr. Gassman fails to mention the effect of either one or both of the previous motor vehicle accidents from August 12, 2003 and June 8, 2005 injuries in his conclusion. Such an omission is fatal.

The Court of Appeal in *Pommells v Perez, 797 NYS2d 380 (2005),* has held the even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and the claimed injury, such as gap in treatment, an intervening medical problem or pre-existing condition, summary dismissal of the complaint may be appropriate. Thus, once the defendant has presented admissible evidence of a pre-existing injury, plaintiff must present proof to meet the defendant's claim that plaintiff's injury lacks causation to the subject accident, but instead to the pre-existing injury. *Sky v Tabs,* --- N.Y.S.2d ----, [1 Dept. 2008], 2008 N.Y. Slip Op. 09475, *Brewster v FTM Servo Corp.*, 844 NYS2d 5, [1 Dept. 2007]; *Yvonne Style v Christopher K. Joseph*, 820 NYS2d 26; [1 Dept 2006];

In addition, plaintiff's 90/180-day claim proof is insufficient. 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." *Thompson v Abbasi*, 15 AD3d 95, 100-101 [1st Dept 2005]. (See *Gaddy v Eyler*, 79 NY2d 955, 958 [1992], citing *Licari v Elliott*, 57 NY2d 230, 236 [1982],) Plaintiff's bill of particulars, supported, by his deposition indicated, that he was confined to bed and home for approximately three days of work, as a result of his injuries. The

proffered plaintiff proof does not demonstrate that plaintiff suffered an injury which limited "substantially all" his daily activities for 90 of the 180 days immediately after the accident. (See *Uddin v Cooper*, 32 AD3d 270, 272 [2006], lv denied 8 NY3d 808 [2007]; *Arrowood v Lowinger*, 294 A.D.2d 315, 316-317 [2002]).

In addition, Dr. Schwatz's October 21, 2005 MRI report and Dr. Gassman's objective tests, proffered in support of Dr. Schwatz's MRI examination and performed within the 90/180-day period, do not support plaintiff's 90/180-day claim. Dr. Schwatz's report indicates plaintiff suffered a "L4-L5 diffuse bulging posterior [disc]...L5-S1 left posterior disc herniation" 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]). Dr. Gassman's objective tests, proffered in support of Dr. Schwatz's MRI examination, does not mention the effects of the August 6, 2003 or June 8, 2005 accidents. Dr. Gassman's medical reports also fail to specify plaintiff's medical condition and how he is sufficiently limited during the 90/180-day to satisfy as medical proof. (See *Gorden v Tibulcio*, 50 AD3d 460, 463 [2008].) Hence, plaintiff's' admissible evidence, concerning the first six months after the subject accident, is insufficient to raise a triable issue of fact on plaintiff's 90/180-day claim. (See *Morris v Ilay Cab Corp.*, --- N.Y.S.2d ----, [1 Dept. 2009], 2009 N.Y. Slip Op. 02668, 2009 WL 910847 and Insurance Law § 5102 [d] [5])

Finally, the defendants, in their reply, attach additional medical records from Dr. Gassman's medical examinations dated 9/02/2003[5], 11/03/2003, 1/05/2004 and 3/12/2004. These medical records are further evidence that Dr. Gassman, not only knew about the plaintiff's previous motor vehicle accident on August 12, 2003, but treated him for the accident

[5]The report dated 9/02/2003 states that plaintiff "on 8/12/2003 injuries were sustained while riding a bicycle when the driver of a car opened his door, striking the patient [plaintiff]... Immediate onset of headache, neck pain, mid back pain....patient was taken to North Shore hospital" and released.

as well. Hence, this evidence further establishes that the plaintiff's submission in opposition is insufficient, as Dr. Gassman did not address plaintiff's pre-existing injury. See *Pommell v Perez*, supra, *Sky v Tabs,* --- N.Y.S.2d ----, [1 Dept. 2008], 2008 N.Y. Slip Op. 09475.

The plaintiff's submit a sur-reply dated January 14, 2008, after the oral argument and the motion submission date of January 7, 2008. The defendants oppose the sur-reply by letter dated January 16, 2008. However, the court declines to consider sur-reply papers, which are not permitted under CPLR 2214 (b) (See *Graffeo v Paciello*, 46 AD3d 613 (2d Dept 2007).

Thus, plaintiff Asim Cekic has failed to meet his burden to raise a triable issue of material fact as to whether or not he sustained a "serious injury", pursuant to Insurance Law § 5102 (d).

II. Plaintiff Almera Cekic

In support of the motion for summary judgment, defendants proffer, *inter alia*, the plaintiff's deposition testimony and the affirmed medical reports of Dr. Adam M. Bender, a neurologist and Dr. Salvatore Lenzo, an orthopedist. Dr. Bender concluded, after a medical examination on January 21, 2008 and after reviewing plaintiff's medical records, that "there is no disability due to neurological problems" (See defendants' motion, Dr. Bender's report, exhibit g, p 5, para. 7.) Dr. Lenzo concluded, also reviewing the plaintiff's medical records states his "diagnosis at this time is mild mechanical low back pain with a herniated disc. I don't see any specific objective findings. She has a mild degree of causality related disability. I believe at this time, however, she has reached maximum medical improvement. (See Dr. Corso's report, exhibit h, p 2, para 2.)

The defendant argues that he has met his burden of proof on the plaintiff"s 90/180-day claim, because the plaintiff's bill of particulars (see plaintiff's motion, bill of particulars, exhibit c, paragraph 12), and plaintiff's deposition testimony from the subject accident (exhibit d) and concerning the previous June 8, 2005 accident (exhibit I). In plaintiff's deposition testimony

concerning the June 8, 2005 accident, she admitted that she now does the job of her husband because he is unable. Thus, defendants claim, that plaintiff is unable to establish a claim for a 90/180-day disabilty. Defendants argue that in the absence of contrary information they need no other information, including defendant's medical evidence that plaintiff was not injured per the 90/180-day period to meet their burden of proof.

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*, the affirmed MRI report of the plaintiff's cervical and lumbar spine performed by Dr. Glenn Schwatz, on October 21, 2005 (24 days from the subject accident) and the affidavit of Dr. Bonnie Gassman, plaintiff's treating Chiropractor. Dr. Scwartz's report indicated "L5-S1 central and left posterior disc herniation" Dr. Gassman's affirmation indicated that he conducted physical examinations and range of motion tests to the plaintiff's cervical and lumbar spine at his initial examination on September 28, 2005 (three days after the accident), and recent examination on August 6, 2008. Plaintiff has submitted Dr. Gassman's medical reports dated September 28, 2005 and August 6, 2008. However, such reports are not certified pursuant to CPLR § 4518 nor referenced or annexed by Dr. Gassman's affidavit.

As stated above, the Courts notes that unaffirmed or uncertified medical reports and

records are normally inadmissible and will not be considered on a motion for summary judgment (*Grasso v Angerami*, *supra*; *Offman v Singh*, *supra*; CPLR § 2106). However, unaffirmed or uncertified medical records may be admissible where they were properly referenced by defendants' medical experts (See *Pommells v Perez*, 4 NY3d 566, 577 n 5 [2005]; *Navedo v Jaime*, 32 AD3d 788, 822 NYS2d 43, [1 Dept 2004]; Brown v Achy, 9 AD3d 30 [1 Dept 2004]; supra; Gonzalez v Vasquez, 301 AD2d 438 [1 Dept 2003] *Ayzen v Melendez*, 299 AD2d 381 [1 Dept 2002].) In addition, a plaintiff's medical reports that are properly referenced in defendants motion and contain evidence adduced by a persons own first-hand observations are admissible (*See Rice v Moses*, 752 NYS2d 318 [1 Dept 2002]; *see Iacobazzo v Asad*, 776 NYS2d 464 [1 Dept 2004]). Dr. Gassman's medical reports dated September 28, 2005, were properly referenced by defendant's medical expert, in his sworn affirmation, thus, such records are admissible.

Dr. Gassman medical reports dated September 28, 2005 and August 6, 2008, both indicated significant limitations in plaintiff's range of motion. Dr. Gassman claims "I treated Mrs. Cekic over many months and then saw her at an examination on August 6, 2008" However, Dr. Gassman's affidavit and medical records do not support any such office visits, examinations or treatment. "While a cessation of treatment is not dispositive–the law surely does not require a record of needless treatment in order to survive summary judgment--a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so" (*Pommells v Perez*, 4 NY3d 566 [2005]). In this instance, plaintiff has not offered a sufficient explanation for the gap in treatment. Such an omission is fatal. The Court of Appeal in *Pommells v Perez, 797 NYS2d 380 (2005),* has held the even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and the claimed injury, such as gap in treatment, an intervening medical problem or pre-existing condition,

summary dismissal of the complaint may be appropriate. Thus, once the defendant has presented admissible evidence of a gap in treatment, plaintiff must present proof to meet the defendant's claim that gap in treatment.

In addition, plaintiff's 90/180-day claim proof is insufficient. 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." *Thompson v Abbasi*, 15 AD3d 95, 100-101 [1st Dept 2005]. Plaintiff's bill of particulars, supported, by her deposition indicated, that she was confined to bed and home for approximately three days of work, as a result of her injuries , thus, she does not satisfy the limitation of "substantially all' of his usual activities. Dr. Schwatz's MRI dated October 21, 2005, indicates "L4-L5 diffuse bulging posterior [disc]...L5-S1 left posterior disc herniation". 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]).

Moreover, Dr. Gassman's objective tests, in support performed within the 90/180-day period are suspect and insufficient because they do the specify plaintiff's medical condition or specify that she was sufficiently limited during the 90/180-day period (see *Gorden v Tibulcio*, 50 AD3d 460, 463 [2008]). Hence, plaintiff does not demonstrate that plaintiff suffered an injury which limited "substantially all" of her daily activities for 90 of the 180 days immediately after the accident. (See *Morris v Ilay Cab Corp.*, --- N.Y.S.2d ----, [1 Dept. 2009], 2009 N.Y. Slip Op. 02668, 2009 WL 910847 and Insurance Law § 5102 [d] [5]).

Thus, plaintiffs have not met their burden to raise a triable issue of material fact as to whether or not they sustained "serious injuries", pursuant to Insurance Law § 5102 (d).

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

ORDERED that the defendants motion for summary judgment is granted and the complaint is dismissed; and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiffs.

This constitutes the Decision and Order of the Court.

FILED
APR 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 21, 2009

APR 21 2009

Paul Wooten J.S.C.

Paul Wooten J.S.C.

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

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