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

PRESENT: HON. PAUL WOOTEN Justice — PART 22

INDEX NO. 111234/06

ROY WILBERFORCE GRAY,
Plaintiff,
- v -
JACKIE RAMOS, JUAN E. SOUFFRAIN and FREDDIE IMBERT,
Defendant.

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO. 41

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 October 12, 2004, plaintiff was a passenger in a motor vehicle owned and operated by the defendant Juan E. Souffrain, which was involved in a collision with the defendants' vehicle. The accident occurred at the intersection of Morningside Drive and Amsterdam Avenue in New York County, New York. On or about August 10, 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 parties completed discovery and a Note of Issue was filed. Defendants now move and cross move 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 plaintiff's injuries 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 defendants' motion, plaintiff's bill of particulars, exhibit b, paragraph 20)

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*).

DISCUSSION

In support of their motion, defendants proffer, *inter alia*, the plaintiff's deposition testimony and the affirmed medical reports of Dr. Charles Bagley, a neurologist and Dr.

Michael Rafiy, an orthopedic surgeon and Dr. Alan Rothpearl, a radiologist. After medical examinations on January 29, 2008 and January 24, 2008, respectively, both Dr. Bagley and Dr. Rafiy concluded, without reviewing plaintiff's medical records,, that plaintiff was able to "perform all of his normal daily activities without restrictions" and exhibited no signs of "permanency or residuals" injuries as a result of the subject accident. (See defendants' motion, Dr. Bagley's Medical Report, exhibit c, p 4, para. 2 and 3, and Dr. Rafiy's Medical Report, exhibit d, p 4, para 2.).

On September 14, 2005, Dr. Rothpearl, performed an "independent radiological review" of the MRI's plaintiff's cervical spine, dated November 3[1], 2004 and his lumber spine, dated November 30, 2004. Dr. Rothpearl review of the lumbar spine diagnosed plaintiff with marked disc degeneration at L4-L5 and L5-S1 with disc bulges, and no evidence of disc herniation. His review of the cervical spine found multi-level disc degeneration, mostly at C5-C6, but found no evidence of soft disc herniation.

The defendants' proffer that they meet their burden of proof on the plaintiff"s 90/180-day claim, based upon the plaintiff's bill of particulars (see plaintiff's motion, bill of particulars, exhibit c, paragraph 13), supported by his deposition testimony, which indicate that plaintiff was confined to his home for five days and unable to work for approximately two weeks. Defendants' also proffer that Dr. Rothpearl's medical review and conclusions are sufficient medical evidence to substantiate their 90/180-day argument.

Based on the foregoing, defendants have submitted evidence in legally admissible form to meet their *prima facie* burden, entitling them to summary judgment

[1]Dr. Rothpearl claims to have reviewed plaintiff's MRI report dated November 4, 2005, however, the date on the MRI report is November 3, 2005 (See plaintiff's exhibit g)

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*, various affirmed medical reports of Dr. Gautam Khakhar, an affirmed Brainstem Auditory Potential examination report by Dr. Eric Hausknecht dated December 3, 2004 and a subsequent medical report dated January 7, 2007, an uncertified MRI reports from Dr. Robert Diamond and various other uncertified medical reports.

As mentioned above, unaffirmed or uncertified medical reports and records are 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, 749 NYS2d 445 [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. Diamonds' MRI medical reports regarding the scans of plaintiff's cervical and lumbar spine, dated November 3, and November 30, 2005, were properly referenced by defendant's medical expert, Dr. Rothpearl in his affirmation. Thus, such records are admissible. However, Dr. Diamonds uncertified medical report dated December 6, 2005, regarding the scan of plaintiff's brain, and plaintiff's other uncertified medical records are not admissible.

Dr. Diamond conducted plaintiff's MRI's within four weeks after the subject accident. Dr. Diamond's reports reveal, *inter alia*, disc bulges at L1-L2, L2-L3, and disc herniations at L4-L5, L5-S1, and disc herniations at C3-C4, C4-C5, C5-C6 and C6-C7. However, this proofs "without additional objective medical evidence establishing that the accident resulted in significant physical limitations causally related to the accident, is not alone sufficient to establish a serious injury" (*Pommels v Perez*, *supra*; *Park v Champagne*, 824 NYS2d 84, 86 [1 Dept 2006]).

Dr. Khakhar's medical reports dated November 29, 2004, December 23, 2004, April 15, 2005, and May 19, 2005 and Dr. Hausknecht's medical report dated January 7, 2005, are devoid of any details as to what objective tests were utilized, if any and therefore are not valid to establish "serious injury" pursuant to the Insurance Law § 5102 (d). (*Bent v Jackson*, 788 NYS2d 56 [2005]; *Toure v Avis Rent a Car System*, 98 NY2d 345 at 350 [2002]); *Vasquez v Reluzco*, 814 NYS2d 117 [1 Dept 2006]). The Court does note the Dr. Khakhar's October 28, 2004 medical report does indicates range of motion tests to the cervical and lumbar spine as objective tests, however, the tests do not indicate the normal range of motion for each test. Such an omission is

fatal. "In order to prove the extent or degree of physical limitation, an expert may designate a numeric percentage of a plaintiff's loss of range of motion or may make a qualitative assessment of plaintiff's condition, provided that the latter evaluation has an objective basis and compares the plaintiff's limitations to the normal use of the affected body system or function" (*Shinn v. Catanzaro*, 767 NY2d 88 [1 Dept 2003]; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]; *Dufel v Green*, 84 NY2d 795, 798 [1995]).

Finally, Dr. Khakhar's NCV/EMG L test performed on January 14, 2005 (within 90-days of the subject accident) indicates "evidence of bilaterial L5 radiculopathies." and Dr. Eric Hausknecht's Brainstem Auditory Evoked Potential examination dated December 3, 2004 (within 90-days of the subject accident) which indicates "evidence of conduction delay", when taken with Dr. Diamond MRI's of the lumbar and cervical spine (within four weeks after the subject), 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].) *may* be admissible evidence of a *contemporaneous* examination to indicate limitations or injuries. (*Thompson v Abbasi*, 788 NYS2d 48 [1 Dept 2005]; *Bent v Jackson*, *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).

However, plaintiff has failed to submit sufficient admissible evidence of a *recent* evaluation in order to establish that his alleged limitations still exists to establish serious

injury pursuant to the Insurance Law § 5102 (d). (*Thompson v Abbasi*, *supra*; *Bent v Jackson*, *supra*.)

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 deposition testimony and bill of particulars fail to demonstrate that plaintiff suffered an injury which limited "substantially all" of his daily activities for 90 of the 180 days immediately after the subject 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]). Moreover, plaintiff's medical evidence is not specific enough regarding any limits to his activity and condition to support such a claim. (See *Gorden v Tibulcio*, 50 AD3d 460, 463 [2008]; *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].)

Accordingly, plaintiff has not met 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).

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

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

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

This constitutes the Decision and Order of the Court.

Dated: May 14, 2009
MAY 14 2009

Paul Wooten J.S.C.
Paul Wooten J.S.C.

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