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

PRESENT: HON. PAUL WOOTEN Justice PART 22

RAMONA JAMOUL,

Plaintiffs,

- v -

JOSE LOPEZ, DOMENICK DESIMONTE and SARBJIT AHLUWALIA a/k/a SARBJITS AHLUWALIA,

Defendants.

INDEX NO. 100482/06

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO. 67

The following papers, numbered 1 to 3, were read on this motion by defendants' for summary judgment on the threshold "serious injury" issue.

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

Cross-Motion: Yes No

On May 15, 2005, defendant Jose Lopez was involved in a collision with a vehicle owned by defendant Domenick Desimonte and operated by defendant Ahluwalia. Plaintiff was a passenger in defendant Lopez's vehicle. The accident occurred on near the intersection of East 8th Street and York Avenue in New York County. 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 Desimonte and Ahluwalia now move for an order pursuant to CPLR § 3212, granting summary judgment dismissing the complaint, on the threshold issue of "seri[illegible]injury", pursuant

to Insurance Law § 5102 (d). Defendant Lopez also moves for summary judgment on the issue of "serious injury" and has submitted an affirmation adopting and incorporating defendants Desimonte and Ahluwalia's motion.

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 the motion for summary judgment, defendants proffer, *inter alia*, the

plaintiff's deposition testimony and the affirmed medical reports of Dr.Affirmed Dr. R.C. Kirshna, a neurologist, Dr. Michael Rafiy, an orthopedist, Dr. Raghava R. Polavarapru an orthopedist, Dr. Sheldon Feit, a radiologist.

Dr. Kirshna, Dr. Rafiy, and Dr. Polavarapru concluded that plaintiff demonstrated no evidence a of a neurological or orthopedic disability. Dr. Feit examined an MRI of plaintiff's lumbar spine dated July 9, 2005, seven weeks after the subject accident. Dr. Feit determined that plaintiff's MRI revealed evidence of pre- existing degenerative injuries that " are not causally related" to the subject accident.

Defendants profer that based upon plaintiff's bill of particulars and her deposition testimony, she cannot establish her claim under the category of 90/180-days. Per the plaintiff's bill of particulars she claims she confined to her bed for two weeks and her home four weeks after the subject accident. (See defendants' motion, plaintiff's bill of particulars, exhibit b, paragraph 13-14.) Defendants assert that plaintiff then testified that she was involved in another motor vehicle accident prior to the subject accident and that she only missed two days from work following the subject accident. Defendants further asserts that plaintiff lacks sufficient evidence of medical directives indicating confinement. (See *Gordon v Tibulcio*, 50 AD3d 460, 463 [2008].) Defendants further argue that plaintiff lacks credible evidence of medical directives indicating confinement.

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 medical report of Dr. H. Emre Tuncel, and the unaffirmed medical reports from Kingsbridge Hospital, Dr. Robert D. Solomon a radiologist, Dr. Stuart Remer an orthopedic surgeon and Dr. Carl M. Richie a neurologist. As stated above, unsworn medical reports are inadmissible and will not be considered on this motion (*see Grasso v Angerami*, 79 NY2d 813 [1991]; *Offman v Singh*, 813 NY2d 56 [1 Dept 2006]; *see* CPLR § 2106).

Thus, plaintiff's only admissible evidence is the affirmation of Dr. Tuncel. Dr. Tuncel determined that plaintiff sustained "consequential limitation of function of her muscoskeletal system". However, Dr. Tuncel examined plaintiff on June 30, 2008, over three years after the subject accident. It is well settled that a plaintiff cannot establish objective medical evidence to demonstrate a causal connection between plaintiff's injuries and the accident, by physician, who was not the treating physician, and examined the plaintiff only once and more than 2 years after the accident (*see Atkinson v Oliver*, 36 AD3d 552, 830 N.Y.S.2d 30 [2007]; *see Thompson v. Abbasi, 15 AD3d 95, at 98, 788 NYS2d 48* [1 Dept 2005]). Accordingly, plaintiff has failed to submit admissible evidence to constitute objective medical evidence performed contemporaneously with the occurrence of the accident to substantiate plaintiff's claims

(*Pommells v Perez*, *supra*).

In addition, plaintiff, fails to establish evidence to support her claim under the 90/180-day category. 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]. Thus, plaintiff's deposition testimony, that she only missed two days of work, as a result of her injuries and Dr. Tuncel's affirmation are insufficient to 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; Insurance Law § 5102 [d] [5]).

Accordingly, plaintiff has not met her burden to raise a triable issue of material fact as to whether or not she 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.

FILED
JUL 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 30, 2009
JUN 30 2009

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

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