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

PRESENT: HON. PAUL WOOTEN Justice PART 22

LIN DAI,

Plaintiff,

- against -

CAIN TAXI, INC. and ANDRE I. LAKTIOUKHINE,

Defendants.

CAIN TAXI, INC. and ANDRE I. LAKTIOUKHINE,

Third-Party Plaintiffs,

- against -

SILKE HACKING CORP. and MOHAMMAD A. SUKUR,

Third-Party Defendants.

INDEX NO. 103705/2007

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 4, were read on this motion by defendants for summary judgment on the threshold "serious injury" issue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ☐ Yes ■ No

On August 13, 2006, plaintiff Lin Dai ("plaintiff"), while seated as a passenger in a vehicle owned by defendant Cain Taxi, Inc. and operated by defendant Andre I. Laktioukhine (collectively "defendants-third-party plaintiffs"), was involved in a multi-vehicle collision on Eighth Avenue near West 22nd Street in New York County, New York. Plaintiff commenced this action to recover damages for alleged personal injuries suffered as a result of the subject motor vehicle accident. Defendants-third-party plaintiffs commenced a third-party action

against the owner and operator of the other vehicle involved in the collision, Silke Hacking Corp. and Mohammad A. Sukur (collectively "third-party defendants"). The parties completed discovery and a Note of Issue was filed on July 16, 2008. Defendants-third-party plaintiffs and third-party defendants (collectively "defendants") now jointly move for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint against plaintiff 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 Law"), 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 nine categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*see Licari v Elliott*, 57 NY2d 230 [1982]). 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 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 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 a plaintiff's prima facie case (*Licari*, 57 NY2d at 235; Insurance Law § 5104 [a]). The serious injury requirement is in accord with the legislative intent underlying the No-Fault Law, which was enacted to "'weed out frivolous claims and limit recovery to significant injuries'" (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]). As such, to satisfy the statutory threshold, a plaintiff is required to submit competent objective medical proof of his or her injuries (*id.* at 350). Subjective complaints alone are insufficient to establish a

prima facie case of a serious injury (*id.*).

Plaintiff alleges that the motor vehicle accident caused him to sustain a laceration above his right eye, which resulted in stitches, blurred vison, trouble sleeping and a permanent facial scar (*see* defendants-third-party plaintiffs' motion, exhibit E, bill of particulars at ¶ 8). He claims a "serious injury" under the significant disfigurement category only (*see id.* at ¶ 15; affirmation in opposition at ¶¶ 22-30).[1] The Court must determine whether, as a matter of law, plaintiff has sustained a "serious injury" under the significant disfigurement category of Insurance Law § 5102 (d).

SUMMARY JUDGMENT ON SERIOUS INJURY

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the Court, which may be decided on a motion for summary judgment (*see Licari*, 57 NY2d at 237). The moving defendant bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that plaintiff has not suffered a "serious injury" as defined in section 5102 (d) *(see Toure*, 98 NY2d at 352; *Gaddy v Eyler,* 79 NY2d 955, 956-57 [1992]*)*. Once the defendant has made such a showing, the burden shifts to the plaintiff to submit prima facie evidence, in admissible form, rebutting the presumption that there is no issue of fact as to the threshold question (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Rubensccastro v Alfaro*, 29 AD3d 436, 437 [1st Dept 2006]).

A defendant can satisfy the initial burden by relying on the sworn or affirmed statements of their own examining physician, plaintiff's sworn testimony, or plaintiff's unsworn physician's records (*see Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]; *Nelson v Distant*, 308 AD2d

[1]Although plaintiff alleges incapacity from employment for ten months and claims lost wages in the bill of particulars, he does not raise a claim under the 90/180-day category. Therefore, the Court will not address the facts relevant to a 90/180-day claim (*see Ifrach v Neiman*, 306 AD2d 380, 381 [2d Dept 2003]).

338, 339 [1st Dept 2003]; *McGovern v Walls*, 201 AD2d 628, 628 [2d Dept 1994]). Reports by a defendant's own retained physician, however, must be in the form of sworn affidavits or affirmations because a party may not use an unsworn medical report prepared by the party's own physician on a motion for summary judgment (*see Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). Moreover, CPLR 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury.

A defendant can meet the initial burden of establishing a prima facie case of the nonexistence of a serious injury by submitting the affidavits or affirmations of medical experts who examined plaintiff and opined that plaintiff was not suffering from any disability or consequential injury resulting from the accident (*see Gaddy,* 79 NY2d at 956-57*; Brown v Achy*, 9 AD3d 30, 31 [1st Dept 2004]; *see also Junco v Ranzi*, 288 AD2d 440, 440 [2d Dept 2001] [defendant's medical expert must set forth the objective tests performed during the examination]). A defendant can also demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the injuries were not, in any event, causally related to the accident (*see Franchini*, 1 NY3d at 537). A defendant can additionally point to plaintiff's own sworn testimony to establish that, by plaintiff's own account, the injuries were not serious (*see Arjona*, 7 AD3d at 280; *Nelson*, 308 AD2d at 339).

Plaintiff's medical evidence in opposition to summary judgment must be presented by way of sworn affirmations or affidavits (*see Pagano*, 182 AD2d at 270; *Bonsu v Metropolitan Suburban Bus Auth.*, 202 AD2d 538, 539 [2d Dept 1994]). However, a reference to unsworn or unaffirmed medical reports in a defendant's motion is sufficient to permit plaintiff to rely upon the same reports *(see Ayzen v Melendez,* 299 AD2d 381, 381 [2d Dept 2002]). Submissions from a chiropractor must be by affidavit because a chiropractor is not a medical doctor who can affirm pursuant to CPLR 2106 (*see Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]). Moreover, an expert's medical report may not rely upon inadmissible medical evidence, unless

the expert establishes serious injury independent of said report (*see Friedman v U-Haul Truck Rental*, 216 AD2d 266, 267 [2d Dept 1995]; *Rice v Moses*, 300 AD2d 213, 213 [1st Dept 2002]).

In order to rebut a defendant's prima facie case, plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *see also Toure*, 98 NY2d at 350). Plaintiff's subjective complaints "must be sustained by verified objective medical findings" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]). The medical proof must also be based on a recent examination of plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]).

A medical affirmation or affidavit that is based on a physician's personal examination and observation of plaintiff is an acceptable method to provide a physician's opinion regarding the existence and extent of plaintiff's serious injury (*see O'Sullivan v Atrium Bus Co.*, 246 AD2d 418, 419 [1st Dept 1998]). "However, an affidavit or affirmation simply setting forth the observations of the affiant are not sufficient unless supported by objective proof such as X-rays, MRIs, straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on a neurological examination" (*Grossman*, 268 AD2d at 84; *see also Arjona,* 7 AD3d at 280; *Lesser v Smart Cab Corp.*, 283 AD2d 273, 274 [1st Dept 2001]). A physician's conclusory assertions based solely on subjective complaints cannot establish a serious injury (*see Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]).

Plaintiff's medical proof of the extent or degree of a physical limitation may take the form of either an expert's "designation of a numeric percentage of a plaintiff's loss of range of

motion"; or qualitative assessment of a plaintiff's condition, "provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure*, 98 NY2d at 350). The medical submissions must specify when and by whom the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether plaintiff's limitations were significant (*see Milazzo v Gesner*, 33 AD3d 317, 317 [1st Dept 2006]; *Vasquez v Reluzco*, 28 AD3d 365, 366 [1st Dept 2006]).

Finally, "even where there is objective medical proof, when additional contributing factors interrupt the chain of causation between the accident and claimed injury--such as a gap in treatment, an intervening medical problem or a preexisting condition--summary dismissal of the complaint may be appropriate" (*Pommels v Perez*, 4 NY3d 566, 572 [2005]). Accordingly, a plaintiff is required to offer a reasonable explanation for a "gap in treatment" *(id.* at 574; *see also Colon v Kempner*, 20 AD3d 372, 374 [1st Dept 2005]).

DISCUSSION

In support of the summary judgment motion, defendants submit, *inter alia*, affirmed medical reports of plastic surgeon Dr. Howard Cooper, ophthalmologists Dr. Arnold J. Levine and Dr. Jack Greenberg, and neurologist Dr. Daniel J. Feuer. (*See* defendants-third-party plaintiffs' motion, exhibits F, G, H; third-party defendants' affirmation in support, exhibit C).[2]

Dr. Cooper conducted a plastic surgical independent medical examination ("IME") evaluating plaintiff's scar on July 25, 2007. Face examination revealed a roughly circular area of hair loss measuring 0.5 cm by 0.5 cm in the middle of the right eyebrow. The area of hair loss was part of an inverted 2.0 mm wide L-shaped scar. The vertical portion of the scar measured 1.2 cm, and the medial directed portion measured 0.7 cm. The scar was not keloidal or hypertrophic. The scar was difficult to see and blended in well with the surrounding skin. Dr.

[2]The reports of Dr. Cooper, Dr. Levine and Dr. Feuer were submitted by defendants-third-party plaintiffs. Dr. Greenberg's report was submitted by third-party defendants.

Cooper diagnosed a difficult to see scar of the right eyebrow and suprabrow region. He concluded that the suprabrow portion of the scar did not require any form of plastic surgery; and that the portion of the scar within the eyebrow could be improved upon so as to break up the clear area by means of revision to narrow the area of hair loss.

Dr. Levine conducted an ophthalmic IME on August 2, 2007. The best corrected distance vision in the right eye was 20/20 (-.75 sphere 1.00 cylinder 180 axis), and in the left eye was 20/20 (-.50 sphere +.50 cylinder 175 axis). Slit lamp examination of both eyes revealed that the corneas were clear without opacity, the anterior chamber was normal without inflammation and the lenses were clear. Intraocular pressure was 17 mm Hg. in both eyes. Dilated fundoscopy showed normal discs, retinal vessals and macula. The pupils were equal and reactive to light and accommodation. Ocular motility was full in all directions. Dr. Levine concluded that the examination was normal and that there was no significant ocular injury or disability resulting from the accident.

Dr. Greenberg performed an ophthalmic IME on March 25, 2008. Plaintiff's vision without correction was 20/20 in the right eye and 20/20 in the left eye. Best corrected vision was 20/20 (plano-0.50 x 90) right, and 20/15 (plano-0.50 x 90) left. Near vision was 4 point right and left without correction. Eye pressure was 18 mm Hg in both eyes. The cornea, conjunctiva, anterior chamber and lenses were normal in each eye. There were normal optic nerves, macula, vessels, peripheral retina and vitreous. The pupils were equal, round and light reactive without afferent defect. Extraocular movements were normal. There was a small linear horizontal scar just over the temporal aspect of the right eyebrow that was cosmetically acceptable. Dr. Greenberg diagnosed unrelated mild astigmatism, and unrelated eyestrain with computer work. Dr. Greenberg concluded that the only permanency was the residual scar over the right eyebrow; that there was no disability or other residual; and that plaintiff could return to his usual occupation and participate in normal activities of living.

Dr. Feuer performed a neurological IME on August 13, 2006. Head examination revealed a small laceration scar at the right eyebrow. The visual fields were full, fundi benign, pupils equally round and reactive to light, extraocular movements full without nystagmus, and the remainder of the cranial nerves were normal. Motor, reflex and sensory findings were within normal limits. Dr. Feuer opined that the examination was normal. He concluded that plaintiff did not demonstrate any objective neurological disability or permanency that was causally related to the accident, and that plaintiff was neurologically able to engage in full active employment and activities of daily living without restriction.

Based on the foregoing, defendants have established a prima facie case that plaintiff did not suffer a "serious injury" under the significant disfigurement category (*see* Insurance Law § 5102 [d]). Defendants have submitted sufficient objective medical evidence demonstrating that plaintiff's scar does not constitute a significant disfigurement, and that plaintiff suffers from no ophthalmic or neurological disability resulting from the accident (*see Lynch v Iqbal*, 56 AD3d 621, 621 [2d Dept 2008]; *Sirmans v Mannah*, 300 AD2d 465, 466 [2d Dept 2002]; *Gorden*, 50 AD3d at 462-63).

Since the Court finds that defendants have sustained their initial burden of establishing prima facie entitlement to summary judgment, the burden shifts to plaintiff to produce evidentiary proof in admissible form establishing the existence of a genuine issue of fact necessitating a trial (*see Gaddy*, 79 NY2d at 957).

In opposition to summary judgment, plaintiff submits, *inter alia*, certified medical records from Beth Israel Medical Center, plaintiff's December 5, 2008 affidavit and plaintiff's November 14, 2007 deposition. (*See* plaintiff's affidavit in opposition, exhibits C, D.)

The Beth Israel records reflect that plaintiff was examined eight days after the accident on August 21, 2006, for complaints of a cut to the head, headaches and trouble sleeping. It was indicated that he sustained a laceration to the face due to a traffic accident, and that his

right upper lateral eyebrow had four stitches and a healing scar. The stitches were removed and it was noted that he could get a referral to plastic surgery as needed. The diagnosis was: 1. Laceration - not complicated face; 2. Insomnia; and 3. Headache.

In his affidavit, plaintiff asserted that the scar above his right eye is a permanent scar about 0.8" long, 0.4" wide, and runs right through the middle of his right eyebrow. He also has a 0.2" spot of permanent hair loss in his right eyebrow in the same area as the scar, which makes his eyebrow appear to be broken up in half by hairless skin. The scar is made more visible by the spot of hair loss.

At his deposition, plaintiff testified that at the time of the accident he was under contract as an event host at Climax NYC Corp. ("Climax"), and that the accident changed his role at Climax because event hosts were usually photographed in sponsor products and he was not photographed for eleven or twelve months after the accident due to his scar (plaintiff's deposition at 15-18, 49-51, 53). He was emotionally affected by the scar, and was unwilling to go to public places for six to nine months (*id.* at 57).

Considering the evidence in the light most favorable to plaintiff (*see Kesselman v Lever House Restaurant*, 29 AD3d 302, 304 [1st Dept 2006]), the Court concludes that plaintiff has failed to present sufficient objective medical evidence to raise a triable issue of fact sufficient to defeat defendants' summary judgment motion.

The standard for determining "significant disfigurement" within the meaning of the Insurance Law is whether a reasonable person would view the condition as "'unattractive, objectionable, or as the subject of pity or scorn'" (*see Hutchinson v Beth Cab Corp.*, 204 AD2d 151, 151 [1st Dept 1994] [quoting *Landsman v Bunker*, 142 AD2d 986, 986 [4th Dept 1988]]; *Lynch*, 56 AD3d at 622; *Sirmans*, 300 AD2d at 466).

Here, plaintiff has not sustained his burden of proof because he fails to offer any objective medical evidence addressing the severity of his scar (*see Aguilar v Hicks*, 9 AD3d 318, 319 [1st Dept 2004] [plaintiff offered no medical evidence as to severity of scar above his

eye, and, moreover, upon review of photographs he submitted, the scar did not constitute a significant disfigurement within the meaning of the statute]; *Estrella v Marano*, 255 AD2d 358, 359 [2d Dept 1998] [scar under right eye resulting from a laceration caused by the accident was "not described anywhere in the record in terms of length, width, texture, or density, and the plaintiff failed to submit any evidence to otherwise support her claim of significant disfigurement"]; *Jordan v Baine*, 241 AD2d 894, 896 [3d Dept 1997] [plaintiff failed to submit evidence to support his claim of significant disfigurement based on surgical scar]). Plaintiff's self-serving affidavit and deposition testimony asserting that he was unable to be photographed at work due to his scar is insufficient, without more, to sustain his burden of proof (*see Estrella*, 255 AD2d at 358).

Furthermore, plaintiff has not established that a reasonable person would find the scar unattractive, objectionable or the subject of pity or scorn. The record indicates that the scar was difficult to see, and plaintiff alleges that the scar is only about 0.8" long and 0.4" wide with a 0.2" spot of hair loss (*see Hutchinson*, 204 AD2d at 151 [no issue of fact that two-inch healed laceration within an area of depression above right eyebrow was a significant disfigurement]; *Santos v Taveras*, 55 AD3d 405, 406 [1st Dept 2008 [small well-healed scars did not constitute significant disfigurement]; *Sirmans*, 300 AD2d at 466] [lower lip scar 7/8 of an inch in length was not significant disfigurement]; *Lynch*, 56 AD3d at 621-22 [two chin scars were not significant disfigurement]).

The Court recognizes that summary judgment is a drastic remedy since it deprives a litigant of his or her day in court (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The Court nevertheless concludes that defendants are entitled to summary judgment because they established a prima facie case that plaintiff did not sustain a "serious injury," and plaintiff failed to present a triable issue of fact sufficient to preclude summary judgment.

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

ORDERED that defendants' motion for summary judgment is granted; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants, Cain Taxi, Inc., Andre I. Laktioukhine, Silke Hacking Corp. and Mohammad A. Sukur, dismissing plaintiff's complaint in its entirety, with costs and disbursements to defendants as taxed by the Clerk; 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: December 30, 2009

Paul Wooten J.S.C.

Paul Wooten
J.S.C.

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

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