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

PRESENT: HON. PAUL WOOTEN PART 22
Justice

SHU CHI LAM,

INDEX NO. 103695/06

Plaintiff,

- v -

MOTION DATE

MOTION SEQ. NO. 001

WANG DONG and CHENG GUO,

MOTION CAL. NO. 67

Defendants.

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
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3, 4

Cross-Motion: [ ] Yes [■] No

On April 5, 2005, plaintiff Shu Chi Lam, a pedestrian, was struck by a motor vehicle owned by defendant Cheng Guo and operated by defendant Wang Dong. The accident occurred at the intersection of Eldridge Street and Broome Street, in New York County. Plaintiff commenced this action 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. Defendants now 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 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 loss"]; permanent consequential limitation of use of a body organ or member ["permanent consequential limitation"]; significant limitation of use of a body function or system ["significant limitation"]; 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 ["90/180"].

The Court must determine whether, as a matter of law, plaintiff has sustained a "serious injury" under at least one of the claimed categories.

"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, the 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.*).

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]*).*

A defendant may 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 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 may also 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 may 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 may 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). 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]).

In order to rebut 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). In addition, 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]).

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 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]).

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]). 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])

"[A] n 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]). 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]).

Further, a plaintiff who claims a serious injury based on the "permanent loss" category has to establish that the injury caused a "total loss of use" of the affected body part (*see Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 299 [2001]).

The "permanent consequential limitation" category requires a plaintiff to establish that the injury is "permanent," and that the limitation is "significant" rather than slight (*see Altman v Gassman*, 202 AD2d 265, 265 [1st Dept 1994]). Whether an injury is "permanent" is a medical determination, requiring an objective basis for the medical conclusion of permanency (*see Dufel*, 84 NY2d at 798). Mere repetition of the word "permanent" in the physician's affirmation or affidavit is insufficient. (*See Lopez*, 65 NY2d at 1019.)

The "significant limitation" category requires a plaintiff to demonstrate that the injury has limited the use of the afflicted area in a "significant" way rather than a "minor, mild or slight limitation of use" (*Licari*, 57 NY2d at 236). In evaluating both "permanent

consequential limitation" and "significant limitation," "[w]hether a limitation of use or function is 'significant' or 'consequential' . . . 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" (*Dufel*, 84 NY2d at 798). Moreover, a "'permanent consequential limitation' requires a greater degree of proof than a 'significant limitation,' as only the former requires proof of permanency" (*Altman*, 202 AD2d at 651).

The 90/180 category requires a demonstration that plaintiff has been unable to perform substantially all of his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury *(see Licari*, 57 NY2d at 236). The words "substantially all" mean that the person has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*id.)*. A physician's statement that is too general and non-specific does not support a 90/180 claim (*see e.g. Morris v Ilya Cab Corp.*, 61 AD3d 434, 435 [1st Dept 2009]; *Gorden v Tibulcio*, 50 AD3d 460, 463 [1st Dept 2008]).

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].) To raise an issue of fact, the explanation must be proffered by physicians within medical reports or affidavits (*see Farozes v Kamran*, 22 AD3d 458,

458 [2d Dept 2005]; *Ali v Vasquez*, 19 AD3d 520, 521 [2d Dept 2005]; *Hernandez v Taub*, 19 AD3d 368, 369 [2d Dept 2005]). Alternatively, when the explanation for the gap is proffered by plaintiff, it must be supported by corroborative proof to substantiate plaintiff's bare allegations (*see Paul v Allstar Rentals, Inc.*, 22 AD3d 476, 477 [2d Dept 2005]).

DISCUSSION

In support of their summary judgment motion, defendants submit, *inter alia*, the pleadings, plaintiff's deposition testimony and the affirmed medical reports of Dr. Robert S. April, a neurologist, Dr. Robert Israel, an orthopedist, Dr. Melissa Sapan Cohn, a radiologist and Dr. Steven L. Mendelshon, a radiologist.

Dr. Israel examined plaintiff on January 28, 2008. Dr. Israel determined that plaintiff sustained sprains of the cervical spine, lumbar spine, left knee, left wrist and bilateral hips, which were all resolved. Dr. Israel concluded that plaintiff was not disabled, as a result of the subject accident.

Dr. April examined plaintiff on January 25, 2005. Dr. April concluded that his examination showed no evidence of a neurological injury.

Dr. Sapan Cohn reviewed MRI films of plaintiff's brain, dated May 19, 2005. In her medical report, Dr. Cohn indicated that plaintiff's MRI film revealed evidence of an "old infarct stroke of the brain" and that "infarcts are not usually related to trauma"(Dr. Cohn's medical report, Exhibit J). Dr. Cohn also indicated that plaintiff's MRI film did not reveal any evidence of an acute trauma-related injury. Dr. Cohn conlcuded that plaintiff suffered from osteoarthritis of the knee, "consistent with a long standing disease" and she found "no evidence to suggest an acute trauma-related injury" (Dr.

Cohn's medical report, Exhibit J).

Dr. Mendelshon reviewed MRI films of plaintiff's right shoulder, dated May 23, 2005. Dr. Mendelshon concluded that plaintiff's MRI films revealed moderate degenerative changes and "an otherwise normal MRI of the right shoulder" (Dr. Mendelshon's medical report, Exhibit K).

According to plaintiff's bill of particulars, plaintiff suffered, *inter alia*, partial tears of the A.C. ligament and medial meniscus, in this left knee, as a result of the subject accident. Defendants claim that plaintiff's injuries are not the results of the subject accident, but due to pre-existing conditions and prior accidents. In addition, plaintiff testified, at his deposition, that ten years ago, he injured his knee when he fell in China (exhibit D, page 46).

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 (*see Gaddy*, 79 NY2d at 957).

In opposition to summary judgment, plaintiff submits, *inter alia*, the affirmed medical report of Dr. Jerry Lubliner, plaintiff's treating physician and the certified MRI reports of Dr. Ayoob Khodadadi, a radiologist. Dr. Lubliner concluded that plaintiff's injuries were a result of the subject accident. However, Dr. Lubliner failed to rebut defendants' doctors' conclusions as to the causation of plaintiff's injuries and to objectively link plaintiff's injuries to the accident (*Pommells v Perez*, 4 NYS2d 380 [2005]; *Rodriguez v Abdallah* 858 NYS2d 169 [1 Dept 2008]).

In addition, the plaintiff has not submitted any evidence in order to "establish a

medically substantiated, non-permanent impairment satisfying the 90-out-of-180-day category" (*Rodriguez v. Abdallah* 858 NYS2d 169 [1 Dept 2008]. *Cruz v Calabiza*, 641 NYS2d 255 [1 Dept 1996]).

Accordingly, the evidence provided by plaintiff fails to demonstrate the existence of a material issue of fact as to whether or not he sustained a "serious injury", pursuant to Insurance Law § 5102 (d), as a result of the subject accident.

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

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

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further,

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

This constitutes the Decision and Order of the Court.

Dated: September 30, 2009

SEP 30 2009

Paul Wooten J.S.C.

Paul Wooten J.S.C.

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

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