Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

MALCOLM M. RUSSELL,

Plaintiff,

-against-

THERESA C. ASBURY and JULIAN CINCINNATOS,

Defendants.

Index No. 1885/09

Motion Date April 6, 2010

Motion Cal. No. 29

Motion Sequence No. 1

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
Opposition.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that this motion by defendants for summary judgment dismissing the complaint of plaintiff, Malcolm M. Russell, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d)is decided as follows:

This action arises out of an automobile accident that occurred on May 22, 2007. Defendants have submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury except for the category of "90/180 days". The defendants submitted inter alia, affirmed reports from an independent examining orthopedist.

APPLICABLE LAW

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (Licari v. Elliot, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v. New York Univ. Medical Center, 64 NY2d 851 [1985]). In the

present action, the burden rests on defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." (Lowe v. Bennett, 122 AD2d 728 [1st Dept 1986], affd, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (Licari v. Elliot, supra; Lopez v. Senatore, 65 NY2d 1017 [1985]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]). Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (Grasso v. Angerami, 79 NY2d 813 [1991]). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (O'Sullivan v. Atrium Bus Co., 246 AD2d 418 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (Gonzalez v. Vasquez, 301 AD2d 438 [1st Dept 2003]; Ayzen v. Melendez, 749 NYS2d 445 [2d Dept 2002]). However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (see, CPLR 2106; Pichardo v. Blum, 267 AD2d 441 [2d Dept 1999]; Feintuch v. Grella, 209 AD2d 377 [2d Dept 2003]).

In any event, the findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law § 5102(d) (Marquez v. New York City Transit Authority, 259 AD2d 261 [1st Dept 1999]; Tompkins v. Budnick, 236 AD2d 708 [3d Dept 1997]; Parker v. DeFontaine, 231 AD2d 412 [1st Dept 1996]; DiLeo v. Blumberg, 250 AD2d 364 [1st Dept 1998]). For example, in Parker, supra, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitations were objectively measured and observed by the physician, was

sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations." Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]).

DISCUSSION

A. Defendants established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d), for all categories except for the category of "90/180 days".

The affirmed report of defendants' independent examining orthopedist, Alan J. Zimmerman, M.D., indicates that an examination conducted on November 10, 2009 revealed a diagnosis of: resolved cervical, lumbar, and thoracic sprain. He opines that the claimant has no disability. Dr. Zimmerman concludes that: "[t]he MRI findings of the cervical spine and of the lumbar spine all indicate that the reported disc herniations are degenerative, pre-existing, and not causally related as evidenced by the multiplicity of levels involved."

Defendants have failed to raise a triable issue of fact as to the 90/180-day claim. 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 (see, Gaddy v. Eyler, 79 NY2d 955, supra; Licari v. Elliott, 57 NY2d 230, supra; Berk v. Lopez, 278 AD2d 156 [2000], lv denied 96 NY2d 708 [2001]). Defendants' expert examined plaintiff more than 2½ years after the date of plaintiff's alleged injury and accident on May 22, 2007. Defendants' expert failed to render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident. The reports of the IME relied upon by defendant fail to discuss this particular category of serious injury and further, the IME took place well beyond the expiration of the 180-day period (Lowell v. Peters, 3 AD3d 778 [3d Dept 2004]). With respect to the 90/180-day serious injury category, defendants have failed to meet their initial burden of proof and, therefore, have not shifted the burden to plaintiff to lay bare its evidence with respect to this claim. As defendants have failed to establish a prima facie case with respect to the ninth category, it is unnecessary to consider whether the plaintiff's papers in opposition to defendants' motion on this issue were sufficient to raise a triable issue of

fact (Manns v. Vaz, 18 AD3d 827 [2d Dept 2005]). Accordingly, defendants are not entitled to summary judgment with respect to the ninth category of serious injury.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiff did not sustain a "serious injury" for all categories except for the category of "90/180 days." Thus, the burden then shifted to plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law for all categories except for the category of "90/180 days." (see, Gaddy v. Eyler, 79 NY2d 955 [1992]). Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint (see, Licari v. Elliott, supra).

B. Plaintiff raises a triable issue of fact

In opposition to the motion, plaintiff submitted: an attorney's affirmation, plaintiff's own affidavit, a sworn affirmation of plaintiff's physician, David Zelefsky, M.D., and affirmations and narrative reports of plaintiff's cervical and lumbar spine by plaintiff's radiologist, Richard J. Rizutti, M.D.

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation of plaintiff, is an acceptable method to provide a doctor's opinion regrading the existence and extent of a plaintiff's serious injury. (O'Sullivan v. Atrium Bus Co., 246 AD2d 418, 688 NYS2d 167 [1st Dept 1980]). The causal connection must ordinarily be established by competent medical proof (see, Kociocek v. Chen, 283 AD2d 554 [2d Dept 2001]; Pommels v. Perez,4 NY3d 566 [2005]). Plaintiff submitted medical proof that was contemporaneous with the accident showing range of motion limitations (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the injuries. The affirmation submitted by plaintiff's treating physician, Dr. David Zelefsky, sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit: "bilateral median nerve neuropathy and bilateral ulnar nerve neuropathy; exacerbated C-4, C5, C5-C6, and C6-C7 herniations abutting the spinal cord; bilateral tibial nerve neuropathy; L2-L3, L3-L4, L4-L5 and L5-S1 disc herniations impinging upon the spinal canal and nerve roots bilaterally; myofascitis. Dr. Zelefsky's affirmation details plaintiff's symptoms, including injuries to his head, neck and back. Dr. Zelefsky further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of May 22, 2007. Additionally, plaintiff's radiologist, Richard J. Rizutti, M.D., interpreted MRI films of plaintiff's cervical and lumbar spines taken on

August 26, 2007 and found disc herniations of the cervical and lumbar spines. Furthermore, plaintiff has provided a recent medical examination detailing the status of his injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Zelefsky provides that a recent examination by Dr. Zelefsky on January 21, 2010 sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: "clinical signs of cervical radiculopathy; bilateral meduian nerve neuropathy and bilateral ulnar nerve neuropathy; exacerbated C4-C5, C5-C6 and C6-C7 herniations abutting the spinal cord; clinical signs of lumbar radiculopathy; bilateral tibial nerve neropathy; L2-L3, L3-L4. L4-L5 and L5-S1 disc herniations impinging upon the spinal canal and nerve roots bilaterally; myofascitis." He further opines that the injuries are permanent in nature, causally related to the motor vehicle accident of May 22, 2007, and result in a permanent limitation in the plaintiff's range of motion. Clearly, the plaintiffs' experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (DiLeo v. Blumber, supra, 250 AD2d 364, 672 NYS2d 319 (1st Dept 1998]).

Therefore, plaintiff's submissions are sufficient to raise a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendants' motion for summary is denied.

Movant shall serve a copy of this order with Notice of Entry upon the other parties of this action and on the clerk. If this order requires the clerk to perform a function, movant is directed to serve a copy upon the appropriate clerk.

The foregoing constitutes the decision and order of this Court.

Dated: April 26, 2010

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Howard G. Lane, J.S.C.