[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

GINA MOTA-LUTHY and THOMAS MOTA-LUTHY,

Plaintiff(s),

-against-

NELAM U. PATEL,

Defendant(s).

ORIGINAL RETURN DATE:01/08/10
SUBMISSION DATES: 04/14/10 (#1,#2)
04/20/10 (#3)
INDEX No.: 8414/08

MOTION SEQUENCE #1,2,3

The following papers read on this motion:

Notice of Motion.....	1
Cross-Motion.....	2
Order to Show Cause.....	3
Answering Papers.....	4,5
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Plaintiffs' unopposed motion, brought by Order to Show Cause dated April 5, 2010 (Phelan, J.), for an order allowing and permitting plaintiff Gina Mota-Luthy to submit her physician's sworn affidavit in opposition to defendant's motion for summary judgment is granted. Although CPLR 2106 authorizes an affirmation by a physician "authorized by law to practice in the state," Jon J. Wilson, D.O. is licensed to practice in the State of North Carolina. The notarized affirmation of Dr. Wilson was notarized in North Carolina and is not accompanied by a certificate of conformity required under CPLR 2309(c). This is not "a fatal defect but rather a mere defect in form" (citations omitted) (*MBNA Am. Bank, N.A. v. Stehly*, 19 Misc.3d 12 [Sup.Ct. App.Term 2008]). Accordingly, in the absence of an objection by defendant, the defect will be disregarded (*Joseph v. Joseph*, 24 Misc. 3d 141(A) [Sup.Ct., App.Term 2009]).

Defendant's motion for an order awarding her summary judgment dismissing plaintiffs' complaint on the grounds that Gina Mota-Luthy's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) is granted.

Plaintiff, Gina Mota-Luthy, cross-moves for an order, pursuant to CPLR 3212, granting her summary judgment on the issue of liability. The cross motion is denied as academic (*Licari v. Elliott*, 57 NY2d 230 [1982]; *Cf. Zecca v Riccardelli*, 293 AD2d 31 [2d Dept. 2002]).

This personal injury action arises out of an accident that occurred on May 9, 2005. Plaintiff, Gina Mota-Luthy ("Gina"), was stopped for a traffic light when defendant struck her vehicle in the rear, forcing plaintiff to, in turn, impact a non-party vehicle.

At the time of the accident, Gina was five months pregnant. Following the impacts, plaintiff was taken via ambulance to the Emergency Room at Winthrop University Hospital, where she presented with complaints to her abdomen. She was then sent to prenatal care and discharged the same day. Gina testified that as a result of the accident, she had lower back pain, numbness in her right thigh and weakness in her legs.

As a result of plaintiff's pregnancy, her first MRI was taken five months after the date of her accident. Plaintiff testified that she is not currently employed; she is a stay-at-home mom. Plaintiff testified that as a result of the accident, she has a hard time doing household chores and taking care of her son. She has numbness in her right thigh and experiences stiffness when she sits, stands or walks. She states that she can no longer exercise, dance, ride horses or go on long road trips (*Mota-Luthy Tr.*, pp. 47-50).

Plaintiff claims that as a result of the subject accident, she sustained, cervical and lumbar spine radiculitis (*Motion*, Ex. C [Verified Bill of Particulars] ¶7). Plaintiff has failed to identify the specific categories of the serious injury statute into which her injuries fall. Based upon a plain reading of the papers submitted herein, it is obvious that plaintiff is not claiming that her injuries fall within the first six categories of "serious injury:" to wit, death; dismemberment; significant disfigurement; a fracture; loss of a fetus; or permanent loss of use of a body organ, member, function or system.

Thus, this Court will restrict its analysis to the remaining three categories of the serious injury statute; to wit, 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.

In moving for summary judgment, defendant must make a prima facie case showing that plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to plaintiff to come forward with evidence to overcome defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*see Pommels v. Perez*, 4 NY3d 566 [2005]; *see also Grossman v. Wright*, 268 AD2d 79, 84 [2d Dept. 2000]).

Defendant is not required to disprove any category of serious injury which has not been properly pled by plaintiff (*Melino v. Lauster*, 82 NY2d 828 [1993]). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including plaintiff's own testimony and their submitted exhibits (*Michaelides v. Martone*, 186 AD2d 544 [2d Dept. 1992]; *Covington v. Cinnirella*, 146 AD2d 565, 566 [2d Dept. 1989]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of defendant's examining physician or the unsworn reports of plaintiff's examining physician (*see Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]). However, unlike movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]).Whether plaintiff can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519 [1st Dept. 2002]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems, 98 NY2d 345,* stated that plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, 98 NY2d at 353). However, the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of plaintiff (*see Toure v. Avis Rent A Car Systems,* supra). In addition, unsworn MRI reports are not competent evidence unless both sides rely on those reports (*see Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept. 2003].

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommels v. Perez, supra*, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, 4 NY3d 566).

To meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Licari v. Elliot*, 57 NY2d 230 [1982]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, supra; *see also Grossman v. Wright*, 268 AD2d 79, 83 [2d Dept. 2000]).

When a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order

to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*see Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*see id*).

To prevail under the 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, a plaintiff must again provide competent, objective medical proof of an injury or impairment which would have caused the alleged limitations on plaintiff's daily activities (*Monk v. Dupuis*, 287 AD2d 187, 191 [3d Dept. 2001]). Furthermore, plaintiff must demonstrate that she has been "curtailed from performing [her] usual activities to a great extent rather than some slight curtailment" (*Licari v. Elliott*, supra at 236; *see also Sands v. Stark*, 299 AD2d 642 [2d Dept. 2002]).

Unlike a claim of serious injury under "significant limitation of use of a body function or system" category, a gap or cessation in treatment is irrelevant as to whether plaintiff satisfied the 90/180 definition of serious injury (*Gomes v. Ford Motor Credit Co.*, 10 Misc. 3d 900, 904 [Sup. Ct. Bronx Co. 2005]).

With these guidelines in mind, this Court will now turn to the merits of defendant's motion at hand. In support of her instant motion, defendant submits, *inter alia*, the sworn, affirmed report, dated July 1, 2009, of Dr. Clifford Beinart, M.D., Diplomate in Radiology, who performed an independent radiological review of plaintiff's MRI of her lumbar spine dated October 4, 2005; and the sworn, affirmed report of Dr. Harold Kozinn, M.D., Diplomate, American Board of Orthopedic Surgery, dated June 29, 2009, who performed an independent orthopedic evaluation of plaintiff on June 29, 2009.

It is noted at the outset that Dr. Beinart, having reviewed the *actual* MRI films of plaintiff's lumbar spine dated October 4, 2005, albeit more than three and a half years later on July 1, 2009, constitutes admissible medical evidence in support of defendant's motion for summary judgment herein (*Beyel v. Console,* 25 AD3d 636 [2d Dept. 2006]). Dr. Beinart's impression of the MRI film is as follows:

> Normal MRI of the lumbar spine.
>
> No post traumatic changes are identified to indicate a correlation to the accident.
>
> In light of the above discussion, I find no correlation between findings on the MRI dated 10/4/05 and the accident of 5/9/05.

In addition, Dr. Kozinn's independent orthopedic examination of plaintiff discloses that after extensive objective testing including Lasegue, Patrick's test, range of motion testing and Babinski, there is no disability. Specifically Dr. Kozinn concludes as follows:

> IMPRESSION:
> Lumbar sprain. There is no disability. There is no need for further treatment.

Based on this evidence and taking into consideration plaintiff's deposition testimony, this Court finds that defendant has submitted ample proof in admissible form that plaintiff, Gina Moto-Luthy, did not sustain a serious injury within the meaning of the statute as a result of the subject accident.

In opposition to defendant's motion, plaintiff submits, *inter alia*, the affirmation of Dr. Jon J. Wilson, D.O.; the unsworn, unaffirmed medical reports of Drs. Leon and Langan; the unsworn, unaffirmed hospital records from Winthrop University Hospital; the unsworn, unaffirmed records from Physical Solutions with whom plaintiff sought physical therapy treatments; the unsworn, unaffirmed records from North Raleigh Primary Care; the unsworn, unaffirmed reports and records of Dr. Jon J. Wilson, D.O.; and, the unsworn, unaffirmed records of Raleigh Orthopedic Clinic, P.A.

As stated above, while defendant is permitted to rely upon the unsworn reports of plaintiff's examining physician in support of her motion herein, the unsworn reports of plaintiff's examining doctors are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, supra). Therefore, the only admissible proof submitted by plaintiff is the notarized affirmation of Dr. Jon J. Wilson, D.O.

However, Dr. Wilson's report, though affirmed, is similarly inadmissible because it relies upon unsworn medical records. A plaintiff's treating physician may not rely upon his review of an unsworn medical report prepared by another doctor, where a sworn copy of such report has not been attached to the treating physician's affidavit or affirmation (*Friedman v. U-Haul Truck Rental*, 216 AD2d 266, 267 [2d Dept. 1995]; *Merisca v. Alford*, 243 AD2d 613, 614 [2d Dept. 1997]). This is because just like plaintiff, who cannot rely on unsworn medical evidence to establish a serious injury, neither can her doctors.

Moreover, Dr. Wilson states in his affirmation that he first examined plaintiff on March 19, 2007, twenty-two months after the date of plaintiff's accident. Generally, the medical proof required should be contemporaneous with the accident, showing qualitative evidence of what restrictions, if any, plaintiff was afflicted with (*Nemchyonok v. Ying*, 2 AD3d 421 [2d Dept. 2003]); *Pajda v. Pedone*, 303 AD2d 729 [2d Dept. 2003]). In fact, a failure to submit medical evidence contemporaneous with the injury, as in this case, requires summary judgment in defendant's favor (*Nemchyonok v. Ying*, supra).

Therefore, in the absence of any admissible evidence to the contrary, defendant's motion for summary dismissal of plaintiff's complaint is granted. Accordingly, plaintiff's cross motion for

an order granting her summary judgment on the issue of liability is denied as academic (*Licari v. Elliott*, supra).

This decision constitutes the order of the court.

Dated: 5-13-10

HON THOMAS P. PHELAN

J.S.C.

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