Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

JI SUK CHOI,

Plaintiff,

-against-

PHILIP E. ANDERER,

Defendant.

Index No. 5750/09

Motion
Date June 8, 2010

Motion
Cal. No. 5

Motion
Sequence No. 1

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
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Upon the foregoing papers it is ordered that this motion by defendant for summary judgment dismissing the complaint of plaintiff, Ji Suk Choi, 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 March 29, 2008. Defendant has submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. The defendant submitted inter alia, affirmed reports from two independent examining and/or evaluating physicians (an orthopedist and a radiologist) and plaintiff's own examination before trial transcript testimony.

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. Defendant established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d), for all categories.

The affirmed report of defendant's independent examining orthopedist, Robert Israel M.D., indicates that an examination conducted on January 27, 2010 revealed a diagnosis of: resolved cervical spine, lumbar spine, right shoulder, and right knee sprains. He concludes that the plaintiff has no disability as a result of the accident.

The affirmed report of defendant's evaluating radiologist, Alan B. Greenfield, M.D., indicates that an MRI of the Cervical Spine dated April 30, 2008 indicates an impression of normal cervical lordosis with degenerartive disc bulging.

The affirmed report of defendant's evaluating radiologist, Alan B. Greenfield, M.D., indicates that an MRI of the Right Knee taken on April 16, 2008 revealed no findings attributable to the accident. He opines "[t]here are no meniscal, ligament or tendon tears."

The affirmed report of defendant's evaluating radiologist, Alan B. Greenfield, M.D., indicates that an MRI of the Right Shoulder taken on April 23, 2008 revealed no significant abnormalities. He opines there is no evidence "of impingement syndrome, encroachment or abnormal fluid collection and there is no rotator cuff tear." Dr. Greenfield concludes that there are

no findings which can be attributed to the accident in question.

The affirmed report of defendant's evaluating radiologist, Alan B. Greenfield, M.D., indicates that an MRI of the Lumbar Spine taken on April 30, 2008 revealed normal lordosis with degenerative disc disease and other degenerative findings.

Additionally, defendant established a prima facie case for the category of "90/180 days." The plaintiff's examination before trial transcript testimony indicates: that she only missed one week from work as a result of the accident. Such evidence shows that the plaintiff was not curtailed from nearly all activities for the bare minimum of 90/180, required by the statute.

The aforementioned evidence amply satisfied defendant's initial burden of demonstrating that plaintiff did not sustain a "serious injury." 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 (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 for all categories except for the category of "90/180 days."

In opposition to the motion, plaintiff submitted: an attorney's affirmation, an affidavit of plaintiff's osteopath, Marc J. Rosenblatt, D.O., an affirmation and affirmed MRI report of plaintiff's cervical spine by plaintiff's physician, Mark Shapiro, M.D., an affirmation and affirmed MRI report of plaintiff's lumbar spine by plaintiff's physician, Mark Shapiro, M.D., an affirmation and affirmed MRI report of plaintiff's left shoulder by physician, Ayoob Khodadadi, M.D., an affirmation and affirmed MRI report of plaintiff's right knee by physician, Ayoob Khodadadi, M.D., and plaintiff's own affidavit.

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 bulges, herniations, and 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 osteopath, Marc J. Rosenblatt, D.O. sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident (April 9, 2008) to support his conclusion that the plaintiff suffered from significant injuries, to wit: severely restricted range of motion in the cervical spine, severely restricted range of motion in the lumbar spine, severely restricted range of motion in the right shoulder, and severely restricted range of motion in the right knee. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of March 29, 2008. Additionally, plaintiff's radiologist, Mark Shapiro, M.D., interpreted MRI films of plaintiff's cervical and lumbar spines taken on April 30, 2008 and found disc herniations of the cervical and lumbar spines. Furthermore, plaintiff has provided a recent medical examination detailing the status of her injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Rosenblatt provides that a recent examination by Dr. Rosenblatt on April 7, 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: "Straightening of the cervical lordosis and a focal central herniation at C5-6 creating impingement on the neural canal; Loss of signal and a central herniation at L5-S1, creating impingement on the neural canal; Intrasubstance tear of the supraspinatus tendon with encroachment syndrome, a subacromial effusion, and a partial tear of the subscapularis tendon; Joint effusion, a tear to the posterior horn of the lateral meniscus, a tear to the anterior horn of the medial meniscus, and a tear to the body of the medial meniscus." He further opines that the injuries are permanent in nature, significant, causally related to the motor vehicle accident of March 9, 2005, are not from degenerative diseases, 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]).

The plaintiff has failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiff sustained a medically-determined injury which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 of the 180 days immediately following the underlying accident (Savatarre v. Barnathan, 280 AD2d 537 [2d Dept 2001]).

The record must contain objective or credible evidence to support the plaintiff's claim that the injury prevented plaintiff from performing substantially all of her customary activities (Watt v. Eastern Investigative Bureau, Inc., 273 AD2d 226 [2d Dept 2000]). In plaintiff's own deposition testimony, she admits that she only missed one week of work as a result of the accident.

Furthermore, plaintiff's attorney's affirmation is not admissible probative evidence on medical issues, as plaintiff's attorney has failed to demonstrate personal knowledge of the plaintiff's injuries (Sloan v. Schoen, 251 AD2d 319 [2d Dept 1998]).

Moreover, plaintiff's self-serving affidavit is "entitled to little weight" and are insufficient to raise triable issues of fact (see, Zoldas v Louise Cab Corp., 108 AD2d 378, 383 [1st Dept 1985]; Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact on the claim of "90/180 days." (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendant's motion for summary is denied as to all categories except for the category of "90/180 days."

The clerk is directed to enter judgment accordingly.

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: July 13, 2010

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Howard G. Lane, J.S.C.