Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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FEGANS JEAN, MARIE-ANGE JEAN and MARIE-ANGE LALANNE, Plaintiffs,	Motion Date June 15, 2010
-against-	Motion Cal. No. 18
ANN LABIN-NATOCHENNY, Defendant.	Motion Sequence No. 7

	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 defendant for summary judgment dismissing the complaint of plaintiff, Marie Ange-Jean, 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 June 30, 2005. 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, an affirmed report from an independent examining orthopedist 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, Alan J. Zimmerman, M.D., indicates that an examination conducted on October 28, 2009 revealed a diagnosis of: status post sprain cervical spine and lumbar spine. He opines that the claimant no longer needs any treatment including physical therapy, and there is no permanency. Dr. Spataro concludes that the claimant is not orthopedically disabled and is able to do her normal job without restrictions.

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 was not confined to bed or home 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 fails to raise a triable issue of fact

In opposition to the motion, plaintiff submitted: an attorney's affirmation, plaintiff's own affidavit, an affirmation of plaintiff's radiologist, John T. Rigney, M.D., two affirmed reports of plaintiff's neurologist, Paul Lerner, M.D., an affirmation of plaintiff's physician, Jean-Marie L. Francois, M.D., sworn narrative reports of plaintiff's physician, Jean-Marie L. Francois, M.D., and an unsworn narrative report.

Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (see, Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]; McLoyrd v. Pennypacker, 178 AD2d 227 [1st Dept 1991]). Therefore, unsworn reports of plaintiffs' examining doctors will not be sufficient to defeat a motion for summary judgment (see, Grasso v. Angerami, 79 NY2d 813 [1991]).

Plaintiff submitted no proof of objective findings contemporaneous with the accident. Plaintiff failed to submit any medical proof that was contemporaneous with the accident showing any bulges, herniations, or range of motion limitations (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). The only evidence plaintiff submits that causally relates the injuries to the accident are two narrative reports of Paul Lerner, M.D. dated December 23, 2008 and March 10, 2008. Said reports are not sufficiently contemporaneous with the accident to establish causality. Courts have held that an examination 6-months after the accident is not contemporaneous with the accident (Ortiz v. Ash Leasing, Inc., 873 NYS2d 513 [Sup Ct, Bronx County 2008], citing Toulson v. Young Han Pae, 13 AD3d 317 [1st Dept 2004]). Plaintiff has failed to establish a causal connection between the accident and the injuries. 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]).

There also exists an unexplained gap or cessation in treatment. Plaintiff stopped receiving treatment from Dr. Francois in January 2006 and did not return to a provider until December 2008, when she went to Paul Lerner, M.D. for evaluation. The Court of Appeals held in Pommells v. Perez, 4 NY3d 566 (2005), that a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so. Courts applying the Pommels standard have consistently held that in order for the explanation to be considered reasonable it must be

"concrete and substantiated by the record." (Gomez v. Ford Motor Credit Co., 10 Misc 3d 900 [Sup Ct, Bronx County 2005]). In the instant case, Dr. Francois affirms that plaintiff stopped treating with her facility because her no-fault benefits cut off and she could not afford to pay for treatment out of her own pockets. Plaintiff herself states in her affidavit that she stopped receiving treatment when she learned that her no-fault insurance benefits were no longer going to pay for the treatment. However, she has provided no substantiation or corroboration of this explanation to the Court (see, Gomez, supra). There is no evidence of any letter from the insurance carrier as to when and why the carrier discontinued coverage. (Id.). "Absent such substantiation, the reason proffered by plaintiff for discontinuing treatment remains conclusory and non-probative." (*Id.* at 903). Moreover, plaintiff 's self-serving affidavit concerning her cessation in medical treatment without medical authorization is entitled to little weight and is insufficient to raise an issue of fact (see, Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]; Zoldas v. Louise Cab Corp., 108 AD2d 378, 383 [1st Dept 1985]).

Also, 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]). 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 her usual activities to a great extent, rather than some slight curtailment (see, Gaddy v. Eyler, 79 NY2d 955; Licari v. Elliott, 57 NY2d 230 [1982]; Berk v. Lopez, 278 AD2d 156 [1st Dept 2000], lv denied 96 NY2d 708 [2001]). Plaintiff fails to include experts' reports or affirmations which render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident. As such, plaintiff's submissions were insufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed her from performing her usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claim that her injuries prevented her from performing substantially all of the material

acts constituting her customary daily activities during at least 90 of the first 180 days following the accident is insufficient to raise a triable issue of fact (see, Graham v. Shuttle Bay, 281 AD2d 372 [1st Dept 2001]; Hernandez v. Cerda, 271 AD2d 569 [2d Dept 2000]; Ocasio v. Henry, 276 AD2d 611 [2d Dept 2000]).

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 (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendant's motion for summary is granted in its entirety and the plaintiff's Complaint is dismissed as to all categories.

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 14, 2010

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Howard G. Lane, J.S.C.