Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

SUSAN FAHR-STEINHEIMER and ROBERT STEINHEIMER, Plaintiffs,	Index No. 8738/08 Motion Date June 29, 2010
-against-	Motion Cal. No. 23
SALVATORE VISCONTI, ELRAC, INC., SCOTT FLIPKOWSKI, J.D. FLIPKOWSKI, SUH HO SHIN and PENG LI, Defendants.	Motion Sequence No. 3

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
Opposition.....	5-7
Reply.....	8-10

Upon the foregoing papers it is ordered that this motion by defendants, Salvatore Visconti and Elrac, Inc. for summary judgment dismissing the complaint of plaintiff, Susan-Fahr Steinheimer, 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 September 29, 2007. Moving 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." Moving defendants submitted, inter alia, affirmed reports from four independent examining and/or evaluating physicians (two radiologists, an orthopedist and a neurologist).

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' evaluating radiologist, A. Robert Tantleff, M.D., indicates that an MRI of the Cervical Spine dated October 18, 2007 indicates "degeneration and dessication of the visualized intervertebral discs variably throughout the upper thoracic and cervical region" and "longstanding chronic degenerative discogenic disc disease."

The affirmed report of defendants' evaluating radiologist, Jessica F. Berkowitz, M.D., indicates that an MRI of the Right Shoulder performed on October 18, 2007 revealed "overgrowth of the acromioclavicular joint is chronic and degenerative in origin" and there is "no evidence of acute traumatic injury to the right shoulder such as fracture, dislocation, bone marrow edema or musculotendinous junction tears."

The affirmed report of defendants' independent examining orthopedist, Edward A. Toriello, M.D., indicates that an examination conducted on April 29, 2009 revealed a diagnosis of: a resolved cervical hyperextension injury and resolved right shoulder strain. He opines that there is no evidence of disability from an orthopedic injury sustained in the accident.

Dr. Toriello concludes that plaintiff is presently able to perform the duties of her occupation.

The affirmed report of defendants' independent examining neurologist, Daniel Feuer, M.D., indicates that an examination conducted on May 5, 2009 revealed a diagnosis of a normal neurological examination. He opines that he is unable to recommend any further treatment within his medical speciality. Dr. Feuer concludes that there is no neurological disability or permanency related to the accident and the plaintiff is able to engage in full active employment, as well as full activities of daily living without restriction.

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' experts examined plaintiff more than 1½ years after the date of plaintiff's alleged injury and accident on September 29, 2007. Defendants' experts 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's relied upon by defendants fail to discuss this particular category of serious injury and further, the IME's 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 its initial burden of proof and, therefore, has 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 fails to raise a triable issue of fact as to all categories except for "90/180 days."

In opposition to the motion, plaintiff submitted: an attorney's affirmation, a sworn and notarized affidavit of plaintiff's chiropractor, Frederick J. Kiesecker, D.C., sworn narrative report of Frederick J. Kiesecker, D.C., an affirmation of plaintiff's radiologist, Robert Diamond, M.D., an MRI report of Robert Diamond, M.D., and an unsworn narrative report of plaintiff's orthopedist, Robert S. Goldstein, M.D.

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 plaintiff's examining doctors will not be sufficient to defeat a motion for summary judgment (see, Grasso v. Angerami, 79 NY2d 813 [1991]).

Additionally, although defendants' independent examining experts opine in their affirmed reports that there is degeneration, plaintiff's experts failed to indicate their awareness that plaintiff was suffering from such condition and failed to address the effect of these findings on plaintiff's claimed accident injuries (Francis v. Christopher, 302 AD2d 425 [2d Dept 2003]; Monette v. Keller, 281 AD2d 523 [2d Dept 2001]; Ifrach v. Neiman, 306 AD2d 380 [2d Dept 2003]). Hence, plaintiff failed to rebut defendants' claim sufficiently to raise a triable issue of fact with regard to the cervical spine (Pommels v. Perez, 4 NY3d 566, 2005 WL 975859 [2005]).

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]).

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

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

That branch of the motion by defendants, Salvatore Visconti and Elrac, Inc. for summary judgment pursuant to CPLR 3212 dismissing plaintiffs' claims against Elrac, Inc. based upon 49 USC 30106 is hereby granted.

Pursuant to the Complaint, "On September 29, 2007 . . .the motor vehicle then and there being owned by defendant, ELRAC, INC., and operated by defendant SALVATORE VISCONTI, came into violent contact with the said motor vehicle owned and operated by plaintiff SUSAN FAHR-STEINHEIMER, thereby causing plaintiff SUSAN FAHR-STEINHEIMER, to sustain serious and permanent personal injuries."

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v. Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk Co. v. Klein, 24 AD2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4th Dept 2000]).

Section 49 USC 30106, states in relevant part:

(a) In general. An owner of a motor vehicle

> that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of

being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if--
(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

Moving defendants established a prima facie case that there are no triable issues of fact. In support of the motion, moving defendants submit, inter alia, an affidavit of Kiana Watson, wherein she avers that: she is employed with Elrac, Inc., as Loss Control Administrator in the company's loss control department; that Elrac, Inc. is engaged in the business of renting motor vehicles to the general public; that Elrac, Inc. rented a motor vehicle, of which vehicle it was the registered and titled owner of, bearing State of New York registration RKG61P to Stephanie Visconti; that while plaintiff alleges they were involved in a motor vehicle accident with the Elrac vehicle, the plaintiff identifies the vehicle as bearing State of New Jersey Plate No. RAG61P, rather than New Jersey plate No. RKG61P; that while the Complaint alleges the Elrac vehicle was being operated by a person named Salvatore Visconti, neither Salvatore Visconti nor Stephanie Visconti were employees of Elrac, Inc. on either the date the plaintiffs claim to have been involved in the accident with the Elrac vehicle or on the date the vehicle was rented; a search of the maintenance record of the Elrac vehicle revealed that it had no maintenance or repairs performed prior to the accident; that Elrac viewed the rental vehicle between rentals for damages, and none existed for the Elrac vehicle when it was rented prior to this accident; and that no complaints were registered by any prior renters of the vehicle regarding any maintenance or performance problems with the vehicle.

In opposition, plaintiffs fail to raise a material issue of fact. Plaintiffs have failed to adduce proof in admissible form sufficient to support the relief requested, having submitted no affidavit by anyone with personal knowledge of the facts (see, CPLR 3212). The herein allegations of fact, by an attorney who does not aver such knowledge, amounts to mere unsubstantiated hearsay (Sloan v. Schoen, 251 AD2d 319 [2d Dept 1998]). It is well settled that an affirmation from a party's attorney who lacks personal knowledge of the facts, is of no probative value

(see, Zuckerman v. City of New York, 49 NY2d 557 [1980]; Wisnieski v. Kraft, 242 AD2d 290 [2d Dept 1997]; Lupinsky v. Windham Constr. Corp., 293 AD2d 317 [1st Dept 2002]). An attorney's affirmation consisting of unsubstantiated hypothesis and suppositions, is legally insufficient to support the relief sought by plaintiffs in this motion.

Accordingly, the motion by defendants, Salvatore Visconti and Elrac, Inc. for summary judgment is hereby granted.

The clerk is directed to enter judgment accordingly.

Movants 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, movants are directed to serve a copy upon the appropriate clerk.

This constitutes the decision and order of the Court.

Dated: August 18, 2010

.....
Howard G. Lane, J.S.C.