Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

HERBY FLEURISMA,

Plaintiff,

-against-

MEI JUAN REN, et al.,

Defendants.

Index No. 7200/08

Motion Date July 13, 2010

Motion Cal. No. 7, 8, 9

Motion Sequence No. 2, 4, 3

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Upon the foregoing papers it is ordered that these motions by defendants Mei Juan Ren, Jian Bo Yang, and Karl Pericles for summary judgment dismissing the complaint of plaintiff, Herby Fleurisma, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d)are decided as follows:

This action arises out of an automobile accident that occurred on July 5, 2007. Moving defendants have submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. The moving defendants submitted inter alia, affirmed reports from five independent examining and/or evaluating physicians (two neurologists, an orthopedist and two radiologists).

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.*

The affirmed report of defendants' independent examining neurologist, Ravi Tikoo, M.D., indicates that an examination conducted on March 18, 2009 revealed a diagnosis of: history of lumbosacral strain and history of soft tissue injuries of the right knee. He opines that the neurological exam was essentially normal, with no objective findings to substantiate his subjective complaints and he opines that plaintiff does not need any further treatment or diagnostic testing. Dr. Tikoo concludes that plaintiff is able to work in his normal capacity and he is not disabled from a neurological basis.

The affirmed report of defendants' independent examining neurologist, Monette Basson, M.D., indicates that an examination conducted on March 19, 2009 revealed a diagnosis of an entirely normal neurological examination. She opines that plaintiff "presumable sustained cervical and lumbar sprains more than a year and a half ago from which [she] feel[s] he has long since

fully recovered". Dr. Basson concludes that there is no physical evidence of neurologic disability or need for tests or treatment.

The affirmed report of defendants' independent examining orthopedist, Robert J. Orlandi, M.D., indicates that an examination conducted on March 17, 2009 revealed "previouscy resolved spinal complaints with a normal examination of the neck and low back" and "no clinical residuals post arthroscopy right knee (11/29/07). He opines that the examination of all areas is unremarkable. He opines that plaintiff's right knee reveals no effusion or quadriceps atrophy. Dr. Orlandi concludes that there is no presence of permanent residuals or a musculoskeletal disability and the prognosis for plaintiff is excellent.

The affirmed report of defendants' evaluating radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the right knee dated August 13, 2007 indicates a tear in the body and posterior horn of the medial meniscus. She opines that this is the most common location in the population for degenerative changes to occur. Dr. Eisenstadt concludes that no osseous, ligamentous, or tendinous abnormality is located and the changes appear degenerative in origin and likely predate the accident of 7/5/07.

The affirmed report of defendants' evaluating radiologist, Steven L. Mendelsohn, M.D., indicates that an MRI of the right knee performed on August 13, 2007 revealed a normal MRI of the right knee.

The affirmed report of defendants' evaluating radiologist, Steven L. Mendelsohn, M.D., indicates that an MRI of the cervical spine performed on July 17, 2007 revealed "minimal multilevel age related cervical degenerative changes." He concludes that there is no evidence of focal disc herniation or any abnormality causally related to trauma of 7-4-07.

The affirmed report of defendants' evaluating radiologist, Steven L. Mendelsohn, M.D., indicates that an MRI of the Lumbar Spine performed on August 6, 2007 revealed "minimal age related lumbar degenerative changes." He concludes that there is no evidence of focal disc herniation or any abnormality causally related to trauma of 7-4-07.

Additionally, defendants established a prima facie case for the category of "90/180 days." The plaintiff states to Dr. Tikoo that he only missed two months from work and the plaintiff stated to Dr. Basson that he was out of work for six to eight weeks. 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, an unsworn narrative report of Eric Senat, M.D., an unsworn operative report of Eric Senat, M.D., a sworn affirmation of plaintiff's physician, Eric Senat, M.D., an unsworn medical report of Arco Medical NY, PC.

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]).

The only admissible and competent submission is the sworn affirmation of plaintiff's physician, Eric Senat, M.D.

Although defendants' independent examining experts opine in their affirmed reports that the examination of plaintiff revealed degeneration, plaintiff's expert failed to indicate his 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 trial issue of fact (see, Pommels v. Perez, 4 NY3d 566, 2005 WL 975859 [2005]).

Furthermore, in his narrative report, Dr. Senat states that he reviewed the MRI's, however, no MRI reports have been submitted to the court in competent and admissible form. The probative value of Dr. Senat's affirmation is reduced by the doctor's reliance on MRI's that are not in the record before the court. Since Dr. Senat's conclusions improperly rested on

another expert's work product, it is insufficient to raise a material triable factual issue (see, Constantinou v. Surinder, 8 AD3d 323 [2d Dept 2004]; Claude v. Clements, 301 AD2d 432 [2d Dept 2003]; Dominguez-Gionta v. Smith, 306 AD2d 432 [2d Dept 2003]; Codrington v. Ahmad, 40 AD3d 799 [2d Dept 2007]).

There also exists an unexplained gap or cessation in treatment. Plaintiff stopped receiving treatment from Dr. Senat in September 2007 and did not return to the this provider for re-evaluation until March 2010. 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]). The affirmed reports submitted by Dr. Senat does not provide any information concerning an explanation for the 2½ year gap between plaintiffs' medical treatment in September 2007 and plaintiff's re-evaluation by Dr. Senat in March 2010 (Medina v. Zalmen Reis & Assocs., 239 AD2d 394 [2d Dept 1997]; Wang v. Harget Cab Corp., 47 Ad3d 777 [2d Dept 2008]; Delgado v. Bernard, 23 Misc3d 1131A [Sup Ct, Bronx County 2009]; Peter v. Palencia, 2008 NY Slip Op 32862U [Sup Ct, Nassau County 2008]). Here, plaintiff's doctors provide no explanation as to why plaintiff failed to pursue any treatment during the period from September 2007 – March 2010.

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 him from performing substantially all of the material acts which constituted his 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 his 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 his 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 him from performing her usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claim that his injuries prevented him 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 is 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 defendants' 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: September 7, 2010

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Howard G. Lane, J.S.C.